THE

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CASES ARGUED AND DETERMINED

IN THE

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

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JUDGES

OF THE

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

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[2] Appointed to succeed Nathan Webb.
[3] Appointed District Judge March 23, 1902.
[4] Appointed additional Circuit Judge, June 3, 1902.

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[5] Died January 26, 1902.

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CASES

ARGUED AND DETERMINED

IN THE

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

In re OSBORNE.

(Circuit Court of Appeals, First Circuit. April 23, 1902.)

No. 418.

1. BANKRUPTS—DISCHARGE—OBJECTIONS—TIME FOR FILING—AMENDMENTS.
   The district court has discretion to permit substitute specifications to be filed by a creditor objecting to a bankrupt's discharge, after the 10 days allowed by law, where they are merely enlargements of specifications already filed.
2. JUDICIAL KNOWLEDGE—RECORDS OF COURT—DUTY TO TAKE.
   Though it is well settled that a federal court can take judicial knowledge of its own records, it is not clear that it is always required to do so, and the better way of proceeding with respect thereto is for the party to set them out by plea and proof.
3. BANKRUPTS—DISCHARGE—DEFECTIVE SPECIFICATIONS OF OBJECTING CREDITOR—WAIVER OF DEFECT.
   Objection by a bankrupt that the specifications of a creditor, objecting to a bankrupt's discharge on the ground that he had concealed his assets, were defective because not averring that he acted knowingly and fraudulently, was waived where not taken in the court below, and where, notwithstanding the defective specification, the issue as to fraud was fully heard.
4. SAME—PETITION FOR REVIEW.
   Quære, whether this proceeding should have been by a petition for revision under the bankruptcy act, or a petition in the nature of a bill of review, according to the general equity practice.

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

James Hamilton, for petitioner.

J. Arthur Wainwright, for respondent Justin B. Perkins.

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

PUTNAM, Circuit Judge. This petition relates to the refusal of the district court for the district of Massachusetts to grant a discharge in bankruptcy to the petitioner. The matter came before us on appeal in Osborne v. Perkins, in which, on November 11, 1901 (50 C. C. A.

158, 112 Fed. 127), we passed down an opinion, and entered a decree affirming the proceedings of the district court in refusing Osborne a discharge.

The present matter is a petition under the bankruptcy act of July 1, 1898, asking us to revise in matter of law the proceedings of the district court, because the specification of the objecting creditor in opposition to Osborne's petition for a discharge was defective, in that it did not allege that the acts of the petitioner were knowingly and fraudulently done with reference to the matters charged.

There is also one other ground on which the present petition is based, to the effect that additional specifications were filed by the objecting creditor after the expiration of the 10 days allowed for the filing thereof, and after one set of specifications had been filed within that period. Even if there were any matter before us of which we could take cognizance, this last proposition would not avail, because an examination of the additional specifications shows that they were merely enlargements of what had already been filed, and purely amendatory thereof; so that, therefore, it was clearly within the discretion of the district court to allow them.

The present petition contains many propositions, but what we have stated covers the substance of the whole of them. The pith of the answer to the petition is a denial of any error in the proceedings of the district court, and also, as put at bar by the respondent, that the petitioner has already been fully heard on the appeal, and cannot now come here on a petition. It is to be regretted that the respondent did not make the case more full in the latter particular by filing from the records of the district court and from the proceedings in this court on appeal enough to show what were the issues tried, and what was there under adjudication. While it is well settled that we can take judicial knowledge of our own records, it is not at all clear that we are always required to do so. Machine Co. v. Goddard, 37 C. C. A. 221, 95 Fed. 664, 666. The proper and safe way of proceeding, even with reference to the tribunal in which the prior record remains, is by plea and proof. Nevertheless, as the practice with reference to a petition of the character now before us is not yet fully understood, even if it may be said to be thoroughly settled, we will avail ourselves of the right which we have to take judicial knowledge of our own proceedings.

Doing this, and turning to the appeal before us in Osborne v. Perkins, we find it appeared there that the discharge was refused by the district court on the ground, among other things, that the bankrupt, Osborne, "had knowingly and fraudulently concealed his property." That case was brought before us on that question of fact, and we determined that the record was quite conclusive against the bankrupt on the issue of fraud. Thus the issue which would have been clearly presented by the objecting creditor if his specification had been perfect in the respects to which they are now said to be imperfect was fully tried in both courts.

We should add that it appeared on that appeal that no question as to the form of the specification was presented to the district court, nor by the assignment of errors. Yet the record on the appeal did show that the issue of fact as to fraud was raised on the evidence in the dis-

trict court, and the parties were fully heard thereon in that court. Consequently, the present petitioner stands in the position of one whose case has been tried on the merits, although the pleadings were defective, and without any objection to their insufficiency. Under such circumstances, except in extraordinary instances,—as in some felonies or in some civil cases where it is evident injustice would follow,—the modern rules of practice hold that the party who failed to raise the question of the insufficiency of pleadings waived his rights in that respect, and that, therefore, he can in no way take any advantage therefrom in any appellate tribunal on any form of appeal. This is in harmony with the statutes of jeofails, especially as they apply after verdict, and with section 954 of the Revised Statutes.

Of course, we do not overlook the fact that, inasmuch as the statute of July 1, 1898, provides a special remedy by appeal in case of a refusal of a discharge, there is doubt whether a petition for revision, like this at bar, will lie in reference to that branch of the proceedings in bankruptcy in the district court. Nevertheless, inasmuch as the time limited for appeal is very brief, and inasmuch, also, as there may be proceedings in the district court, sitting in bankruptcy, for which appeals are provided, grievously erroneous on their face, and erroneous under such circumstances that their very errors may have deprived the party prejudiced thereby from the opportunity of an appeal, we are not disposed, until required to do so, to hold that, under peculiar contingencies, there may not lie a petition for revision with reference thereto after the time for appealing has expired. Perhaps, under such circumstances, the proceedings should commence by a petition to the district court in the nature of a bill of review or of a petition for a rehearing, as suggested by us in Re Worcester Co., 42 C. C. A. 637, 102 Fed. 808, 810. In the present case, however, all that we need say is that while, as decided by us in Smith v. Keegan, 49 C. C. A. 282, 111 Fed. 157, it was necessary, in order to defeat his discharge, that the acts of the bankrupt should have been knowingly and fraudulently done, yet, inasmuch as there was a full hearing on the merits in the district court when his application for a discharge came up to be there disposed of, and inasmuch as we must hold that he then knew the state of the record, and yet he made no objection on account of the pleadings, he must be held to have waived all such objections; so that, therefore, he can now have no remedy in reference thereto on any form of appeal.

The petition is denied, with costs for the respondent.

ALLEN v. UNITED STATES.

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

No. 737.

1. CRIMINAL LAW—TRIAL—PREJUDICIAL REMARKS OF COURT AND COUNSEL.
Defendant in a criminal case filed a motion for continuance on the ground of the absence of a witness, supported by the affidavits of himself and his counsel setting out the facts to which the witness would testify if present. The district attorney refused to admit that the wit-

ness would so testify on the ground that the wife of the witness had told him that defendant's attorney had tried to get her husband to give such testimony, but that the same was not true. This statement by the district attorney was corroborated by the presiding judge as a matter of personal knowledge, the remarks of both being made in open court in the presence of the jurors, and the continuance was denied. Subsequently the court refused to permit defendant's counsel to renew his motion, or to read an affidavit made by the wife of the absent witness in which she denied having made the statement attributed to her, and deposed that her husband had told her that the facts were as set out in the affidavits of defendant and his counsel. *Held*, that the remarks of the attorney and court, reflecting, as they did, upon both defendant and his attorney, and going to the jurors unchallenged, were calculated to unduly prejudice them against defendant, and to prevent him from having a fair and impartial trial, and constituted reversible error.

2. SAME—REVIEW ON APPEAL—EXCEPTIONS.
The failure of a defendant to except to prejudicial remarks made by court or counsel will not preclude him from having the same reviewed on appeal, where they were the basis of a subsequent offer of evidence tending to cure their effect, the refusal to receive which was duly excepted to.

3. SAME—REMARKS MADE BEFORE IMPANELING OF JURY.
The prejudicial effect of remarks made by court or counsel, and heard by the jurors who tried the case, is not lessened nor affected by the fact that the jury had not then been impaneled.

4. SAME—EVIDENCE—PREVIOUS GENERAL CHARACTER AND CONDUCT OF DEFENDANT.
On the cross-examination of a defendant charged with robbery the district attorney was permitted to question him at great length as to his conduct during his whole life at various places; his habits; the amounts of money he had received; from whom he received it, and how he spent it; whether he did not hang around saloons and gambling houses, etc. The questions were not asked for purposes of impeachment, his testimony being uncontradicted, but were admitted, as stated by the court, for the purpose of showing the habits and character of the defendant prior to the time of the alleged offense. *Held*, that such examination was irrelevant, unfair, and clearly prejudicial and erroneous, its only purpose and effect being to degrade defendant in the eyes of the jury.

5. ROBBERY—INDICTMENT—VARIANCE.
There is no substantial variance between an indictment for robbery which describes the property taken as "pieces of paper money of the dominion of Canada" of stated denominations and value, and evidence showing that the bills taken were issued either by the dominion of Canada or by banks chartered by the Canadian government circulating as money in the dominion.

In Error to the District Court of the United States for the District of Alaska, Second Division.

In order to fully understand the conditions as to the trial of this case, which are presented in the bill of exceptions, it will be necessary to make a lengthy statement of the facts.

The plaintiff in error is a young man of the age of 21 years. On January 22, 1901, he was indicted in the district court for the district of Alaska, division No. 2, of the crime of robbery, committed as follows: "The said George Allen * * * on the 21st day of December, nineteen hundred, in the district aforesaid, did wrongfully, unlawfully, and feloniously take, steal, and carry away from the person of R. J. Embleton, and against his will, and by force and violence to his person, the following described personal property, namely: One piece of paper money of the dominion of Canada, of the denomination and value of one hundred dollars; two pieces of paper money of the dominion of Canada, each of the denomination and valuation of fifty

dollars; four pieces of paper money of the dominion of Canada, each of the denomination and value of twenty dollars; one piece of paper money of the dominion of Canada, of the denomination and value of ten dollars,—a more particular description of each or any of said pieces of paper money aforesaid being to the grand jury unknown; also one gold watch, of the value of seventy-five dollars," etc.

The case was called for trial February 11th. The clerk first called the roll of trial jurors. The district attorney then announced that the United States was ready for trial. Mr. Fink, counsel for the defendant, said: "If the court please, we move for the continuance of the case of the United States v. Allen on the ground of the absence of a material and important witness, Thomas Noyes, who is commissioner for the Fair Haven mining district, and we support the motion by an affidavit of Mr. Allen, and an affidavit by myself to the effect that Mr. Noyes stated to me just before he left that he expected to be back in about three weeks; that since his departure the defendant has been indicted, arraigned, and his case set for trial; that it is impossible, owing to the condition that prevails in this country, to reach him; and that he is expected back in about a week, if the travel will permit him. We set up in the affidavits facts to which Mr. Noyes will testify if present, and would say, in conclusion, that we don't want to postpone the case except for that reason, and if those facts won't become material on the trial of the case we would be perfectly willing to proceed to-day. The facts are that he gave Mr. Allen about one hundred dollars on the morning of the 21st of December to play faro with, and that he would so testify if present. If the district attorney would admit that Mr. Noyes, if present, would testify as set out in the affidavit, we would be perfectly willing to proceed with the trial; otherwise not."

Counsel then read in support of his motion for continuance the affidavits of George Allen and Mr. Fink, setting forth the facts substantially as stated in the remarks of counsel to the court.

The proceedings which were had at that time, as set forth in the record, are as follows: "The trial jurors being in attendance, the jury not yet being impaneled, Mr. J. K. Wood, district attorney, stated: 'If the court please, I deem it is my duty to the court when called upon to admit a statement of that kind, and I say this officially, what has come to my knowledge from a source that is almost indisputable in its nature, and that is this: that Mrs. Noyes, the wife of Tom Noyes, stated that the counsel for the defense wanted Tom Noyes to swear that he * * * gave George Allen money to play faro, but that he didn't do it. Now, those matters have come to my knowledge officially, in a way that can't be disputed, and under those circumstances and conditions, so far as admitting it is concerned, I wouldn't be doing my duty if I did. It is simply upon that proposition as to whether they are entitled under the affidavit or not, even if that were undisputed. Why, of course, when that proposition of the case comes up, I am willing to discuss it." Mr. Fink then said: "I don't care about getting into a discussion of that kind with the district attorney at this time; that the district attorney is misinformed. I don't know what his source of information is. The Court: It happened that the statement was made in the presence of Mrs. Noyes and myself by Mrs. Noyes. Mr. Fink: I expect the court misunderstood Mrs. Noyes, because, from a conversation that I had with Mrs. Noyes on the street the other day, Mrs. Noyes stated to me that Tom Noyes didn't want to testify to these facts, not because they didn't happen, but because he didn't want it known that he was playing faro. The Court: We will go on with the case. If it becomes material on the trial at a later time, it will not be so far beyond the power of the court to rectify it, and will not put this defendant in jeopardy at all. * * * Mr. Fink: Our motion is then overruled? The Court: Overruled. Mr. Fink: Exception."

The examination of the trial jurors was then commenced, and the jury partially completed during the morning hour. Upon the court convening at 2 p. m., counsel for the defendant addressed the court as follows: "Mr. Fink: If the court please, I am sorry that the district attorney saw fit to level an accusation at me this morning in open court, especially so when I find that there was absolutely no basis for the accusation at all. Now, we

offer to the court at this time, in refutation of the statement made by the district attorney this morning, the affidavit of Mrs. Tom Noyes, which is as follows: (Mr. Fink thereupon commenced to read the said affidavit.) Mr. Wood, District Attorney (interrupting): It has no place in this court at this time. The Court: That is the order of this court. * * * You may file your affidavit, and when the time comes, if there is any occasion for your using it, you can use it then. Mr. Fink: We except to the ruling of the court, and we now ask to renew the motion for a continuance on the ground alleged in the affidavits this morning and on this additional affidavit. The Court: Denied. Mr. Fink: Exception."

The affidavit of Mrs. Tom Noyes, referred to by counsel, reads as follows: "Mrs. Thomas Noyes, being first duly sworn, deposes and says: That she was told by her husband, Thomas Noyes, that on the morning that R. J. Embleton was held up or robbed he had given to one George Allen a certain amount of money, the exact amount of which affiant does not remember, with which to play cards. Affiant further says that she did not state to the district attorney, Joseph K. Woods, or to any other person at any time, that Mr. Albert Fink, counsel for George Allen, had approached the said Tom Noyes with view of procuring the said Thomas Noyes to testify to a state of facts which were not true, nor did she say anything from which such an inference might be drawn; but affiant further avers that she did say in the presence of said Joseph K. Woods, district attorney, that said Albert Fink had asked her husband, the said Thomas Noyes, to testify in the case of the United States v. George Allen, and that the said Thomas Noyes had agreed to testify that he had given the said George Allen some money to play cards with, as aforesaid, that being the truth. [Signed] Mrs. Thomas Noyes."

During the trial Mr. Embleton testified, among other things, that on the 21st day of December, between 2 and 3 o'clock, he was assaulted and robbed of everything; that he probably had nearly $300. "I know of one lot I had of two hundred and eighty-one dollars and fifty cents that was separate. There was one hundred dollar bill, two fifties, four twenties, and a ten. * * * It was all Canadian money. I also had a gold watch and chain. I have that with me now. * * * It had a chain on it. Lost the chain there somewhere. The watch was in my pocket, and the chain fastened to the button-holes. * * * I know absolutely nothing of what happened on that Friday night, and I didn't realize or remember the shock of the blow until Monday or Tuesday of the next week." He then described how he was knocked senseless, and the effect of the blows that he had received. On his cross-examination he testified, among other things, as follows: "Q. by Mr. Fink: * * * This one hundred dollar bill, was that on the Canadian Bank of Commerce, if you remember? A. Well, I couldn't say. I know that it was all Canadian money. Q. All you know is that it was on some of the Canadian banks? A. Yes, sir. Q. Do you remember whether or not it had 'Yukon' stamped in big red letters down the face? A. I don't remember. Q. The two fifty-dollar bills, do you remember on what Canadian bank they were drawn? A. Oh, I didn't make any note of the bills. Q. The two twenty dollar bills and the ten dollar bills, do you remember on what Canadian bank they were drawn? A. No. I do not; I simply know the Canadian money from its appearance. * * * Q. So, then, the money that was taken from your person was a one hundred dollar bill, two fifty dollar bills, four twenties, and two ten dollar bills? A. Yes, sir; I can describe that, because I only recollect the kinds of money, but not the denominations of it. * * * Q. And these bills were all bills purporting to be drawn on some Canadian banks, the names of which you don't remember? A. From their general appearance they were drawn— They were Canadian money,—Canadian bills. Q. Canadian bank bills? A. Yes, sir." This witness further stated that the money taken from him was money he had collected as agent of the N. A. T. & T. Co., and designated the parties from whom he had received it. During the cross-examination the following proceedings were had: "Q. by Mr. Fink: I want to ask you, Mr. Embleton, if it is not a fact that you sometimes become so intoxicated that you remember absolutely nothing of what transpired before the time— Mr. Wood: Objected to as incompetent, irrelevant, and immaterial, and serving no purpose

in this case except the purpose of endeavoring to prejudice the minds of the jury against the witness. Mr. Fink: I will say right here, if the court please, that we have no desire or intention whatever of endeavoring to prejudice the minds of the jury against Mr. Embleton. * * * The Court: The question is the condition he was in that night. Mr. Fink: The condition that he was in on that night and as to his habits bearing on that condition. The Court: Objection sustained. Mr. Fink: Exception."

R. E. Trengrove, a witness produced on behalf of the defendant, testified that he was an assayer, and had been employed in the Bank of Cape Nome, and that during the time he had worked in the bank he had handled bank notes. The following testimony was then given: "You know a Canadian bank note when you see it? A. Yes, sir. Q. Do you know the paper money issued by the dominion of Canada when you see it? A. Yes, sir. Q. Is there any difference or distinction between those two kinds of money? A. Well, the money issued by the dominion of Canada is issued by the government, and the other bills are issued by the banks,—the provincial banks. Q. Is there any difference in the reading of the notes or pieces of paper? A. Well, one reads 'Dominion of Canada,' and the other reads by the bank it is issued by. Q. What are the provincial banks whose notes circulate in this country? A. There is the Bank of British North America, Canadian Bank of Commerce, I believe are about the principal banks. Q. I will ask if you have with you any notes of the Canadian Bank of Commerce or the Bank of British North America? A. Yes, sir. Q. Just produce them, please. (Witness handed bank notes to Mr. Orton, counsel for defendant.) Q. by Mr. Orton: Have you any notes,—have you any paper money issued by the dominion of Canada? A. Yes, sir. Q. Just show those to the district attorney. (Witness hands bank notes and paper money to the district attorney, Joseph K. Wood.) Q. Now, if your honor please, would show them to the court (handing same to the court). Q. We offer in evidence these four notes,—four pieces of paper money,—and the two pieces of paper of Canadian money, and the two bank notes. Mr. McGinn, of Prosecution: That is objected to as incompetent, irrelevant, and immaterial. * * * The indictment charges that it is paper money of the dominion of Canada. We contend as a matter of law it don't make any difference whether they are issued by the dominion of Canada or any of the banks of the dominion of Canada, just so long as they are lawful money of the dominion of Canada, and it is current money of the dominion of Canada. It can be considered pieces of paper,—paper money of the dominion of Canada. It is wholly immaterial. (Mr. Orton thereupon read the indictment to the court.) The Court: I won't take up the time of the court, because it doesn't make any difference— Mr. Orton, of Defendant's Counsel: I wanted to read your honor an authority— The Court (interrupting): You may take a ruling. You will have an exception if I am wrong. Less description required in an indictment describing money than any other kind of property taken. Mr. Fink: We have the supreme court of the United States to the contrary. The Court: All right; you will have the benefit of it. Mr. Fink then offered them in evidence. The Court: Denied. Mr. Orton: Exception. Mr. Orton: * * * Now, if the court please, permit an interruption just at this time. This evidence being denied, I will also move that your honor now strike from the record all the evidence given by Mr. Embleton with reference to the Canadian bank bills taken from his person, upon the ground that there is a variance between that testimony and the allegations of the indictment. The Court: Motion denied. Mr. Fink: Exception."

Upon his cross-examination defendant was compelled, against the objection of his counsel, to answer questions in relation to his conduct during his whole life at various places, his habits at Nome, to give the amount of money he had received, from whom he had obtained it, for what purpose he had used it, etc. This character of testimony was admitted for the purpose, as stated by the court, of showing the habits and character of the defendant prior to the time of the alleged offense specified in the indictment. The cross-examination on these points covers 30 pages of the printed record. Among other things, he was called on to answer whether or not,

in the year 1897, he had any trouble in Skaguay, and whether his mother did not come to Skaguay because of some trouble he had had, and came there for the purpose of taking him home. For the purpose of showing the general character of many of the questions we quote from the record: "Q. What work have you done since you came to Alaska? Mr. Fink: Objected to as privileged, * * * and not proper cross-examination. The Court: He may answer this question, but I am not going to allow you to go into minute details of everything this man has done since he came to Alaska. Mr. Wood: It is what he has not done, your honor. Mr. Fink: I take exception to counsel's remarks. The Court: Proceed with the question. * * * A. I have not done much of any work. * * * Mr. Wood: You have been gambling, as a matter of fact, have you not? A. * * * I have played few dollars now and then, but I don't really consider that that is gambling, in the sense you mean. Q. Well, how have you earned your living since you have been here? A. I have not earned my living. * * * Q. How did you get your living, if you didn't earn it, then? A. I got it from home. Q. How much money did you get from home? A. * * * What I have had from home * * * amounted to something like three hundred dollars. Q. When did you get this money? A. * * * Part of it I got in October, and part of it in November. * * * Q. How much did you get in October? A. * * * There was about $150 I got from the bank here, but I could not tell you now whether it was in October or November that I got it. * * * Q. Well, now, did you get any from any person else besides the bank? A. I got seventy-five dollars returned to me at the close of navigation, the price of a first-class ticket, when I got left on the lighter out here in the bay. * * * Q. Where did you get that from? * * * Mr. Fink: We object, if the court please, to this examination. It is burdening the record. He says it was the money that was returned for a first-class ticket. I don't see what difference it makes where it came from. The Court: Overruled. Mr. Fink: Exception. * * * Q. What did you do with that money? A. I used it. Mr. Fink: Objected to as * * * immaterial to any issue here. The Court: Overruled. What is your answer? A. I used it. Q. How did you use it? A. * * * I used it to live on,—paid my board and room rent. * * * Q. Did you use it all to live with? Mr. Fink: Objected to for the same reasons, * * * and not cross-examination. The Court: Objection overruled. You may have your objection and exception to all this line of examination, but the witness will be allowed to testify to what money he has had, and what he has done with it since he has been in Nome, as tending to show his habits and character in Nome here during the summer. One objection and exception to it all will avail you the same as a dozen, and you may take that now. Mr. Orton: We take exception. * * * Q. Do you remember the boat that carried out some vagrants last fall? A. Yes, sir. Q. Did you have any money on your person at that time? A. I did. * * * Q. How much? A. I don't know. * * * Q. Do you know where the rest of the money went? * * * Gambled it, didn't you? A. I may have gambled some of it, yes; but not all of it. * * * Q. Well, you were broke at the time the boats went out,—from the time the boats went out until the 1st of January,—were you not? * * * A. I might not have had any money on my person, but I have always had some money where I could go and get it if I did not have any with me. * * * Q. Is it not a fact that you have spent the most of your time since fall and since you have been here hanging around saloons and gambling layouts? Mr. Orton: Defendant objects on the ground that it is immaterial, irrelevant, and incompetent, and does not affect the issues in this case. Counsel for defendant argued that evidence showing general bad character of the defendant was inadmissible; that he could only be impeached by showing that he had previously been convicted of a felony, or, having offered himself as a witness, by showing that his general reputation for truth and veracity was bad. The Court: Objection overruled. Mr. Orton: Exception. * * * A. I don't think I have done any particular hanging around. I have been in the gambling houses and saloons a good many times, but I would not begin to say that I had spent most of my time; no."

W. H. Metson, John B. Allen, Albert Fink, and Ira D. Orton, for plaintiff in error.

Jos. K. Wood and Marshall B. Woodworth, U. S. Attys.

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

HAWLEY, District Judge, after stating the facts as above, delivered the opinion of the court.

We are of opinion that the facts of this case are of such a character as to render it unnecessary to notice specifically each assignment of error under separate heads. The material ones can be grouped together and considered under one general question, did the defendant have a fair and impartial trial, free from bias or undue prejudice?

At the very threshold of this case we are called upon to review the action of the court as set forth in the statement of facts in refusing to grant the continuance. The question is not whether the court erred in refusing to grant the continuance, but the point involved relates to the remarks made by the United States attorney and by the court in the morning, and the refusal of the court to allow the affidavit of Mrs. Noyes to be read in the afternoon. The remarks were well calculated, if not intended, to cast an imputation, not only upon the defendant, but also upon his counsel. The inference to be drawn therefrom was that both of them had attempted to procure a witness to testify to a falsehood, and that they had each subscribed to an affidavit that they knew was untrue.

The error in the remarks might, perhaps, have been cured if the court had permitted the counsel, in the presence of the jury, to read the affidavit of Mrs. Noyes. This would, to some extent at least, have removed the poison of prejudice from the minds of the jury. This refusal left the sting in full force, and placed Allen and his counsel under suspicion at the very outset of the trial. The remarks of the defendant's counsel in the forenoon were respectful in tone, and, with the affidavits, prima facie presented the question of continuance in a favorable light for the careful consideration of the court. The remarks of the United States attorney were calculated to cast reflection upon defendant and his counsel, and the remarks of the court emphasized this reflection.

It is, however, claimed that the defendant is not in a position to raise this question, because the record shows that no exception was taken to the remarks. The answer to this is that the remarks constituted the subject-matter of the proceedings had in the afternoon, and were the basis of the renewal of the motion for the continuance and to the ruling of the court. To this ruling counsel did duly except. This exception, under the circumstances, must be deemed sufficient to warrant a review of all the proceedings had in this matter.

But it is said that the remarks were made before the jury was impaneled. This makes no difference. They were made in the presence of all the jurors. It matters not, therefore, whether they were in the jury box or outside the railing of the court room. There is no pretense that the jurors present did not hear the remarks. The

chair or bench upon which they were seated does not control the question. The remarks of the court, if erroneous, had the same effect as an erroneous instruction given to the jury regularly impaneled. People v. Bonds, 1 Nev. 33, 36; Sullivan v. People, 31 Mich. 1, 5; State v. Philpot, 97 Iowa, 366, 371, 66 N. W. 730; State v. Stowell, 60 Iowa, 535, 15 N. W. 417; 21 Enc. Pl. & Prac. 995, and authorities there cited.

In State v. Stowell, supra, the court overruled, in the presence of the jury, objections of defendant's counsel as to the admissibility of certain evidence, and gave an expression as to his opinion of the evidence. The court in reviewing this matter said:

"We are not prepared to admit the court, under the guise of determining some question which is legitimately before it, can make remarks in the presence and hearing of the jury which would constitute error if contained in an instruction, but because they are not it must be held the defendant is not prejudiced."

That the action of the court was erroneous is to our minds plain, and is well settled by authority based on sound and substantial reasons.

In Bowman v. State, 19 Neb. 523, 526, 28 N. W. 1, 2, 56 Am. Rep. 750, which was an application for a continuance made before the trial, where the jurors were present in court who afterwards sat upon the case, the presiding judge remarked that "said affidavit was false; that defendant's father had told him that he would have nothing to do with him, the defendant; that the defendant had committed perjury; and that a grand jury would be called to investigate the same on the 22d day of the following month." There the jurors upon their voir dire each stated that they were present, heard and still remembered the remarks of the court or presiding judge, but each denied any knowledge of the guilt or innocence of the accused, having formed or expressed any opinion of his guilt or innocence, or having any bias or prejudice for or against him. The court, among other things, said:

"The sole object for which men are selected and called to serve on juries is that the truth may be ascertained and declared upon the points in dispute between the parties. This truth must be ascertained, not from the previous knowledge or wisdom of the jurymen, but from the testimony of sworn witnesses. * * * For this purpose it is of the first importance that each juryman should enter the box as near as possible free of previously acquired knowledge, or of that which he believes to be, but which may or may not be, knowledge of the facts of the case. Also as free as possible of either knowledge or opinions of collateral facts calculated to either stimulate or retard the mind in the reception of either evidence or argument favorable to one party or the other to the controversy. * * * It may be granted that such declaration or expression of the court did not cause the future juror to form or express an opinion as to the guilt or innocence of the accused, but it did prevent him entering the box with his mind a tabula rasa so far as the guilt or innocence of the prisoner was concerned. * * * I come to the conclusion, therefore, that it was error on the part of the court to make in the presence of jurors of the regular panel the declarations and statements in regard to the defendant which he is shown to have made. The judgment of the district court is therefore reversed."

In People v. Moyer, 77 Mich. 571, 43 N. W. 928, there was a long and rambling cross-examination upon irrelevant matters having no other apparent purpose except to injuriously assail defendant's general

history. At the opening of the trial the prosecuting attorney said to the jury:

"One reason why I am more prejudiced against this man is because he has committed perjury in the recorder's court for the purpose of assisting one of his fellow prisoners."

Upon objection made by the defendant's counsel, the court, instead of rebuking the prosecuting attorney, said:

"I must say that considerable of that has come under my own notice. I don't see how you are going to deny that."

The appellate court, commenting on these remarks, said:

"The assertions of the prosecutor and their indorsement by the court are too plainly illegal to need comment. We have had occasion altogether too often to condemn the failure of justice brought about by the reckless conduct of officers whose sworn duty it is to conduct prosecutions legally and in conformity with settled principles. In some cases there is some apparent palliation in the excitement of a contested trial, although that does not obviate the mischief. But here the wrong was done in making the opening, and before any testimony was in, and when the prosecutor knew, or should have known, in advance what his case was to be, as he presented it. Nothing can bring more contempt and suspicion on the administration of justice than the failure of its ministers to respect justice."

See, also, People v. Willard, 92 Cal. 482, 490, 28 Pac. 585; People v. Wood, 126 N. Y. 249, 269, 27 N. E. 362.

From the cross-examination of the defendant, referred to in the statement of facts, it is apparent that the object of the prosecution was not solely for the purpose of bringing out facts that had any specific relation to the offense alleged against him. It was evidently not for the purpose of impeaching or discrediting him. No evidence was introduced for that purpose. No witness was called in rebuttal to deny the truth as to the answers given by the defendant, nor to support the insinuations contained in several of the questions. Of course, if the examination had been confined to these or like purposes, it would have been the duty of the court to have allowed great latitude in the cross-examination of this witness, and the questions allowed would have been largely within the reasonable discretion of the court. But the examination was not kept within these bounds. What was the object of these improper questions? What was the motive? Was it not for the purpose of degrading the defendant before the jury? Such was evidently the effect, whether so intended or not. What had the trouble at Skaguay, if any occurred, to do with the offense alleged at Nome for which the defendant was being tried? It was not even claimed that the "trouble" at Skaguay, if any, was of the same or similar kind or nature to the offense for which he was being tried. What would be the effect of calling upon the defendant to answer whether his mother went to Skaguay, on account of some trouble, to take him home? Its tendency was simply to degrade the witness in the eye of the jury. Such an examination was irrelevant, unjust, unfair, and clearly prejudicial. Take the character of his examination about money that he had received and expended, as well as of his habits, and bear in mind the fact that no attempt was made to show that the defendant had any amount of money immediately after the robbery, and the further fact that the court in refusing a continu-

ance had virtually deprived him of the opportunity of proving that he had been given $100 by Thomas Noyes with which to gamble, just previous to the alleged robbery, and add to this the further fact, which the record clearly shows, that the fact of the robbery and identity of the defendant depended alone upon the testimony of one witness, which was, to say the least, highly improbable, and in many respects unreasonable, and of such a peculiar character as to cast suspicion and raise a doubt as to its truth; do not the questions indicate the purpose for which they were asked as closely as the needle points to the pole? That it was for the purpose of showing that his habits were bad, and that he was a vagrant and a bad man, hanging around gambling resorts, and to endeavor to secure his conviction upon general principles, independent of the testimony offered as to his guilt or innocence, weak or strong as it might be.

All men stand equal before the law, and have the same constitutional rights and privileges. The high and the low, the poor and the rich, the criminal and the law abiding, when indicted and accused of crime, are entitled, under the law, to a fair and impartial trial. This is a sacred boon guarantied to every person, and of which no one should ever be deprived. The law, in its extended reach, power, and influence, is as tender of the rights of the man who is supposed to be bad as it is of the liberties and rights of the man who is believed to be good. The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with the power and charged with the duty of administering the law in such a manner as to reach the ends of justice and of right.

As was said by Whitman, J., in State v. Pierce, 8 Nev. 291, 304:

"No technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right. If * * * such rule confers in this special case a benefit on one unworthy, the answer is: The law knows no person; it is not made for the individual man, but for men. As the dew of heaven falls, so it bears alike upon the just and unjust."

Mr. Lawson, in his work on Presumptive Evidence (at page 481), declares the law in relation to the question we are discussing by propounding a question and answering it, as follows:

"Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort,—does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive. The law is otherwise. It is the law that the prisoner shall be presumed innocent until his guilt is proved. This rule is said by Mr. Stephen (Steph. Dig. Ev. note 6, p. 195) to be one of the most characteristic and distinctive features of the English criminal law, preventing, as it does, a man charged with a particular offense from having either to submit to imputations which, in many cases, would be fatal to him, or else to defend every action of his own life in order to explain his conduct on the particular occasion when the act was committed with which he is charged. It is this rule which, perhaps, more than any other rule of our criminal law, distinguishes the American and English modes of conducting a criminal trial from the continental."

In U. S. v. Kenneally, 5 Biss. 122, Fed. Cas. No. 15,522, the court said:

"It is not competent for the prosecution to show, as a make-weight in the case,—as a part of the evidence for the prosecution in making out a prima facie case,—that the accused is a person of bad character."

In State v. Lapage, 57 N. H. 245, 289, 24 Am. Rep. 69, the court said:

"It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless."

See, also, State v. Rainsbarger, 31 N. W. 865; People v. Ah Len, 92 Cal. 282, 284, 28 Pac. 286, 27 Am. St. Rep. 103; Same v. Devine, 95 Cal. 227, 232, 30 Pac. 378; Same v. Wells, 100 Cal. 459, 463, 465, 34 Pac. 1078.

Having reached the conclusion that the defendant did not have a fair and impartial trial, and for that reason that the judgment must be reversed, it is unnecessary to discuss the other assignments of error, which are not liable to again arise upon another trial. It is, however, proper to state that we are of opinion that there was no substantial variance between the description of the property in the indictment and the proofs submitted at the trial.

The judgment of district court is reversed, and the cause remanded.

THE MERMAID.

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

No. 676.

1. SEAMEN—SHIPPING ARTICLES—VALIDITY UNDER STATUTE.
   Under Rev. St. § 4511, which requires shipping articles to state "the nature, and so far as practicable the duration, of the intended voyage or engagement, and the port or country at which the voyage is to terminate," articles for service on a brig from a port in the state of Washington "to ports in the district of Alaska, within the Behring Sea and Arctic Ocean, and also other ports and places in any part of the world, as the master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding six calendar months," are not so indefinite in describing the nature of the voyage as to render them void, in view of the character of the vessel, the length of time required to make the voyage to an Alaskan port and return, and the limit on the term of service.
2. SAME—FORFEITURE OF WAGES—DESERTION AT SEA.
   Libelant, a seaman who has signed for a voyage to an Alaskan port and return to a port of the United States, before reaching the port of destination, and while at sea, went on board another vessel without leave, where he became intoxicated and refused to return when ordered, and did not thereafter return or offer to return to his service. *Held*, that his intoxication was no excuse, and that by his desertion he forfeited his wages earned.

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

For opinion, see 104 Fed. 301.

William Hardy, the appellee, libeled the brig Mermaid for wages claimed to have been earned by him as a sailor. On April 2, 1900, he shipped on board the Mermaid, at Port Blakely, in the state of Washington, for ports in Behring Sea. When the brig was within four days' sailing of Cape Nome she ran into the ice, and anchored to an iceberg, in four fathoms of water. Two other schooners were tied up to the same iceberg, and were lashed to the Mermaid for a period of about six hours. On July 20th the appellee, without permission, went from the Mermaid to one of the other schooners, and while there became intoxicated in the forecastle. The iceberg began to kedge, and, the Mermaid being in a dangerous position, all hands were ordered aboard, and all hands obeyed the order except the appellee. The captain of the Mermaid, seeing the appellee on the deck of one of the other schooners, ordered him aboard the Mermaid; whereupon the appellee, in abusive language, refused to come aboard, but remained where he was, and sailed on the schooner to Nome, where he arrived in advance of the Mermaid. The Mermaid reached Nome on July 23d. As soon as she arrived the appellee went out to her where she lay at anchor, and took his clothes away. He testified that he had never intended to desert the brig, that he intended all the time to return to her as a sailor, and that he had that intention when he went to the vessel at Nome, but that before he had time to get up the gangway the mate said to him: "You have done a fine thing. All you can do is to take your clothes out of the ship and go ashore." He does not claim, nor is there any evidence to show, that he then or at any time expressed to any one his intention or desire to go back upon the ship as a sailor.

Richard Saxe Jones, for appellants.

Root, Palmer & Brown, 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 district court held that the conduct of the appellee was not desertion, for the reason that he had not bound himself by signing lawful shipping articles; but the court expressed the opinion that, but for defects in the shipping articles rendering them void, it would not hesitate to declare a forfeiture of the appellee's wages for desertion. We agree with the district court that drunkenness was no excuse for the conduct of the appellee, and that his action in leaving the vessel as he did was desertion. We are unable, however, to concur in the conclusion that the shipping articles are so defective under the law as to be void. They describe the voyage in the following words: "To ports in the district of Alaska within the Behring Sea and Arctic Ocean, and also other ports and places in any part of the world, as the master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding six calendar months." The statute (section 4511, Rev. St.) requires that the shipping articles shall state "the nature, and so far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate." The articles in question undoubtedly comply with the second and third of these three statutory requisites. They state the duration of the intended voyage, and the country at which it was to terminate. These are obviously the most important features of the contract, so far as it concerned the seaman. They informed him of the length of time of his engagement, and, in a general way, of the

place of his discharge. In describing the nature of the voyage, the terms used in the articles are, it may be conceded, somewhat indefinite, but not so indefinite, we think, as to render the articles void. They state in general terms that the voyage is from Port Blakely, the port whence the vessel cleared, "to ports in the district of Alaska within the Behring Sea and Arctic Ocean," and "back to a final port of discharge in the United States." It is true that there is inserted in the description, in addition to the specified ports of destination, "also other ports and places in any part of the world, as the master may direct," but it was evident to a seaman shipping on a brig from Port Blakely to ports in the district of Alaska in Behring Sea and "back to a port in the United States" that there could not be, within the limit of the specified six months, any very extensive deviation from that voyage. We think the articles gave the seaman the essential information he was entitled to have. It advised him that the vessel was to go to ports in the district of Alaska in the Behring Sea, which could only mean Nome or St. Michaels or some other port within reasonable distance therefrom, and thence to make a return voyage back to some port in the country whence she sailed. We do not think it was the intention of congress in enacting the statute to require owners of sailing vessels engaged in the coastwise trade to specify at the inception of each voyage all the ports at which the vessel might touch, or to deprive the master of the power to exercise a reasonable discretion in touching at other convenient ports, and availing himself of the opportunities afforded by the exigencies of trade. If such had been the intention of the statute, it would undoubtedly have been expressed in terms. All that is exacted is that the nature of the intended voyage be described. We think that the nature of the voyage in this instance was made reasonably clear. The desertion was a desertion at sea. To declare forfeited the deserter's wages is but a light punishment for his act.

The decree will be reversed, and the case remanded, with instructions to dismiss the libel.

HASTINGS LUMBER CO. v. GARLAND.

(Circuit Court of Appeals, First Circuit. April 29, 1902.)

No. 395.

1. INJURY TO EMPLOYE—DECLARATIONS—ADMISSIBILITY IN EVIDENCE.
   The boiler of a locomotive engine owned by defendant exploded, causing the death of plaintiff's decedent, the engineer. It appeared that the engine had been purchased from another corporation, which had sent it away to be repaired. The repairs were made under the inspection of one S., an engineer employed by the seller, and who continued as such in the service of defendant. It did not appear that S. had any duties in the way of superintendence. *Held*, that reports made to S., while he was the seller's engineer, by the men repairing the engine, as to the condition of the stay bolts (the giving way of which presumably caused the explosion), were inadmissible, where not shown to have been communicated by S. to defendant.

2. ACTIONS FOR WRONGFUL DEATH—ELEMENTS OF DAMAGE—PHYSICAL SUFFERING—EVIDENCE OF—SUFFICIENCY.
   Pub. St. N. H. c. 191, § 8, provides that actions of tort for physical injuries to the person shall survive to the extent set forth in the follow-

ing sections. Section 12 declares that if decedent's administrator is plaintiff, and the death of the party was caused by the injury complained of in the action, the mental and physical pain suffered by him in consequence of the injury, etc., may be considered as an element of damage. In an action for an injury by a locomotive explosion, causing the death of the locomotive engineer, it merely appeared that the explosion had occurred, and that decedent's body was found on the snow about 200 feet away, with life extinct and showing no signs of mangling, with blood escaping from the mouth, nose, and ears. *Held* error to submit to the jury the issue of physical suffering as an element of damages.

8. SAME—PHYSICAL SUFFERING—EVIDENCE.
The New Hampshire decisions on the question of the sufficiency of proof of physical suffering examined.

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

Robert N. Chamberlin (George F. Rich, on the brief), for plaintiff in error.

Crawford D. Hening (Irving W. Drew, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. This is a statutory suit, brought in the district of New Hampshire, in behalf of the administrator of the estate of Harry Belmont, who was a locomotive engineer in the employment of the Hastings Lumber Company, the defendant below. It was tried to a jury, and the verdict was for the plaintiff below, and the defendant below sued out this writ of error. It will be convenient in this opinion to describe the plaintiff in error as the defendant, and the defendant in error as the plaintiff. The declaration alleges substantially that it was the duty of the defendant to furnish the plaintiff's intestate a safe locomotive, that the defendant negligently omitted so to do, and that the locomotive furnished was dangerous, unsafe, and unfit for use, so that the boiler exploded and caused his death. The suit was based on sections 8–13, c. 191, Pub. St. N. H., as amended by section 5, c. 67, Laws 1893. We need repeat only sections 8 and 12 of chapter 191, as follows:

"Sec. 8. Actions of tort for physical injuries to the person, although inflicted by a person while committing a felony, and the causes of such actions, shall survive to the extent, and subject to the limitations, set forth in the five following sections, and not otherwise."

"Sec. 12. If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money may be considered as elements of damage, in connection with other elements allowed by law."

The first question before us arises with reference to the refusal of the court to admit certain evidence, the record as to which is substantially as follows: It appeared that the railroad, on which the locomotive which exploded was operated, was used for lumbering purposes, and was purchased, with the locomotive, from another

corporation, by which the locomotive had been sent to Portland for repairs. The repairs were made under the inspection of one Sawyer, who testified as a witness for the defendant. Sawyer had been a locomotive engineer for the corporation from which the property was purchased, and continued as such in the service of the defendant. There was a suggestion at bar that he had some duties in the way of superintendence, but the record fails to show any facts to that effect. It appears that the workmen who made the repairs at Portland reported in reference thereto to Sawyer. In his examination, the defendant, after proving the facts stated, put to Sawyer this question: "What was the report they [that is, the repairers] made with respect to the condition of the stay bolts?" Presumably the giving away of the stay bolts resulted in the explosion which caused Belmont's death. The court inquired whether the defendant proposed to show that this report was made known to it, to which it replied in the negative. Thereupon, the court observed that what the repairers reported to Sawyer would be evidence if he repeated it to the defendant, but that it was not competent unless it was thus connected. Thereupon the evidence was excluded. The record does not show that the defendant communicated to the court any special grounds for the admission of the evidence, or any reason why it was admissible unless the information derived from the repair men was made known to the defendant. We cannot assume that it was offered on any proposition, except the allegation in the plaintiff's declaration that the defendant "negligently" failed to furnish a proper locomotive; that is to say, as bearing on the question of reasonable care on the defendant's part. Inasmuch as it does not appear that the witness stood in the place of the corporation with reference to the care of its locomotives, we are unable to perceive how any information given him, but not so communicated, can bear on that question. We are compelled to hold, therefore, that this ruling was correct.

The remaining question relates to that portion of the statute which, in a suit of this character, permits the consideration, as an element of damages, of physical pain suffered by the deceased. On this point the defendant submitted the following request for an instruction to the jury:

"In the determination of this question the jury should entirely exclude any damages by reason of any supposed physical pain or suffering, and also any expense to their estates for funeral or burial, as there is no evidence which would justify any allowance upon these grounds."

Inasmuch as this request combines two separate matters, it would, under some circumstances, be ineffectual; but, as it is plain that the particular topic which we are asked to consider was brought to the attention of the court below, so that it properly understood it and understandingly ruled on it, the question fairly comes before us. With reference to that part of the request which concerns the intestate's supposed physical pain, the court submitted the issue to the jury, and expressly authorized them to consider whether the intestate suffered either physical or mental pain, and directed them that, if he did, they should estimate the same according to their best

judgment, so far as they could place a money value upon it, or as nearly as they could compensate therefor. The court added, however, that, if the jury were satisfied that death was instantaneous, or that, if the intestate hardly knew, if he knew at all, what killed him, they would "probably lay that feature of the case away, without giving it very serious consideration." It is to be noted, however, that, even in that event, the court did not direct the jury to wholly disregard this element. It is claimed by the defendant, as stated in the request, that there were no facts to support any allowance for physical suffering. Of course, on the ordinary rules of law, if there were none, the court was not justified in submitting the issue to the jury, and should have ruled that they could not make any compensation in that behalf. The facts, so far as we can discover, show that the explosion was of such a character as to support no theory from which any hypothesis, based upon evidence, can be sustained with reference to any supposed physical suffering of the deceased. All that is known is that there was an explosion, and that the body of the deceased was found on the snow about 200 feet away, with life extinct, and showing no signs of mangling, with blood escaping from the mouth and nose and ears.

Although the ordinary rules of law throw on the plaintiff the burden of maintaining every part of his case, including all the elements of damages, by a preponderance thereof, he calls our attention to no proofs whatever from which it can be properly inferred that the deceased suffered any physical pain. In a word, while possibly one may indulge in an hypothesis on the question of suffering of some kind for a period of time so short that it is not appreciable to human reason, yet there is in this case no basis for any conclusion either way in reference thereto. Therefore, as the jury rendered a verdict for the plaintiff in one gross sum, so that it is impossible to determine whether they included therein any compensation in this behalf, or, if yes, how much, the plaintiff must bear the consequences of a ruling which involved so much probability of a result injurious to the defendant. The plaintiff hardly contests these propositions so far as we have stated them. He apparently maintains that the instructions of the court to the jury were justified by the practice of the supreme judicial court of New Hampshire, the statutes and laws of which state control this suit. He relies on Clark v. City of Manchester, 62 N. H. 577, Corliss v. Railroad, 63 N. H. 404, and Clark v. City of Manchester, 64 N. H. 471, 13 Atl. 867. Of course, any line of decisions, in order to be invoked successfully to parry such fundamental rules as those which we have stated, must be close to the point, and positive, decisive, and steadily maintained.

Clark v. City of Manchester, 62 N. H. 577, does not touch the question we have before us. It was based on Act July 18, 1879, c. 35, § 1, as follows:

"When the death of a person is caused by a wrongful act or neglect of another which, if death had not ensued, would have entitled the person injured to recover damages therefore, then, on the death of such person, his administrator or executor may, by suit brought within two years of such death, recover damages for the injury; and one-half of such damages shall go to the widow or widower, and if no widow or widower, to the

heirs of the deceased, according to the law regulating the distribution of intestate estates."

Unlike the statute upon which the present suit is based, this act omitted to enumerate any elements of damage. In the eyes of the statute, although the damages were given to the family of the deceased, yet the action for the survival of which it provided was strictly one in his behalf; and it left the court to determine what were the proper elements of damages without any guide. Under such a statute, it might well have been held, in some views of it, that there was a basis for substantial damages, even if death followed immediately the unlawful violence or neglect. Bearing on this is the statement in the opinion, at page 584, that "practically and in substance, though the intervening time might be very brief, an injury causing death, or resulting in death, must precede death in point of time." This cannot be denied, and it leads directly to the only proposition which the case determined. The question whether the jury might take into consideration compensation for "mental and physical pain," in the absence of any proof that mental or physical pain was suffered, did not arise. The case is easily disposed of on the hypothesis that it may have proceeded on the view of the law that the mere fact of death, caused by something which necessarily preceded it, damaged the deceased, at least to the extent of the financial surplus which he might have gained if he had lived, within the construction given to like statutes in Kelley v. Railroad Co. (C. C.) 48 Fed. 663, Railroad Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422, and Suth. Dam. (2d Ed.) 277.

The next case is Corliss v. Railroad, 63 N. H. 404, where, under the same statute of 1879, the trial court ruled that only nominal damages could be recovered. This might well have been held erroneous for the reasons we have already stated. It was, perhaps, also erroneous because the plaintiff's intestate was killed by being run over by a locomotive while he was driving along the highway and crossing a railroad track. The jury might, perhaps, have been justified in presuming that the deceased had some apprehension of the approaching locomotive before the collision, and that, therefore, there was a very appreciable space of time in which he might have suffered mentally from that apprehension; but the circumstances in this respect are not fully reported. The opinion merely states the ordinary grounds of damages to be considered by the jury, without specifically passing on the question whether the case afforded any evidence which would have justified the consideration of any particular element thereof.

In Clark v. City of Manchester, 64 N. H. 471, 13 Atl. 867, where, after a verdict, the facts involved in Id., 62 N. H. 577, came fully before the court, it appeared that the deceased lost his life by drowning. The point decided was that the fact that the death was caused by drowning in "stagnant, muddy, and slimy water" must be regarded as affording competent evidence from which a jury might infer, not only that the death was not instantaneous, but that it was attended by both physical and mental suffering. This involved no proposition that a jury might proceed without any probative circumstances. It expressed the view of the court as to what might be assumed to be known to common experience, in which the court differed from the

opinion in The Corsair, 145 U. S. 335, 348, 12 Sup. Ct. 949, 36 L. Ed. 727, to the effect that the fright of a drowning person for a few minutes is too unsubstantial a basis for a separate estimate of damages. In Clark v. City of Manchester, the opinion pronounced that the death "was not instantaneous," meaning, of course, in the common meaning of the expression; and it can be accepted only as expressing the views of the court with reference to what facts were sufficient, in that particular case, to go to the jury, and not at all as maintaining the proposition that compensation for either mental or physical suffering can be awarded where there are no probative circumstances.

On the whole, while there may well be doubt as to the full effect of these decisions, it seems to us that they are not of the character which we have said is necessary to overrule the principles of evidence ordinarily applicable under the circumstances of this suit. Although the cases are not exactly parallel, because not based on statutes constructed on the lines of that now before us, yet we are supported in our conclusions by the expressions in The Corsair, ubi supra, and by the assessment of damages which we made in The Robert Graham Dun, 17 C. C. A. 90, 70 Fed. 270, 272.

The judgment of the circuit court is reversed, the verdict set aside, and the case is remanded to that court for further proceedings in accordance with law; and the plaintiff in error recovers the costs of appeal.

WEBB, District Judge, concurs in the result.

WASHINGTON IRR. CO. v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al.

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

No. 663.

1. FORECLOSURE SALE—PROPERTY PASSING—CONSTRUCTION OF DECREE.
   A decree foreclosing a mortgage on the property of a corporation, and directing its sale, although its language describing the property to be sold is broad and comprehensive, expressly including all property, of every name and nature, belonging to or possessed by the corporation or the receiver in the suit, cannot be construed to include money in the hands of the receiver, and such money will not pass by the sale unless the decree expressly so states.

2. SAME—EARNINGS OF RECEIVERSHIP AFTER CONFIRMATION—ESTOPPEL OF PURCHASER.
   The purchaser of the property of a corporation at foreclosure sale receipted to the receiver for, "all and singular, the property in his control and possession as such receiver, as the same appears by his final account and report." Such report, which showed the net earnings of the property after confirmation of the sale, as belonging to the purchaser, was confirmed without objection, and distribution made in accordance with the receiver's account. *Held*, that the purchaser, by its action, and failure to object to such account, confirmed its correctness, and could not thereafter claim a larger amount as net earnings.

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

This is an appeal from an order and judgment distributing moneys in the hands of a receiver, and from various orders in the procedure connected therewith. It appears that on the 15th day of June, 1893, the Yakima Investment Company executed and delivered to the California Safe Deposit & Trust Company, as trustee, a certain mortgage or deed of trust upon all the property of the first-named company, consisting of a large irrigating ditch and irrigating plant and system, including lands, privileges, and franchises, in Yakima county, in the state of Washington. The purpose of the mortgage was to secure the payment of certain bonds, to the amount of $700,000, executed by the Yakima Investment Company, and delivered to the California Safe Deposit & Trust Company as trustee. Bonds amounting to $450,000, after having been authenticated and certified by the trustee, were delivered to the Yakima Investment Company. The remaining bonds, amounting to $250,000, were never issued. Of the bonds that were issued, $26,000 were deposited with the California Safe Deposit & Trust Company as part of a sinking fund provided for and required to be created by the terms of the mortgage; and the remainder of the issued bonds, amounting to $424,000, were sold to divers persons. Of these last bonds $162,000 were subsequently exchanged for receivers' certificates, known and designated as "Collins Certificates." These certificates, for which bonds were exchanged, amounted to $185,867.94. The bonds left outstanding after this exchange amounted to $262,000, which, together with interest unpaid on May 8, 1899, made the total indebtedness on account of such bonds $363,027.20 at this date. The Yakima Investment Company defaulted in the performance of the covenants, conditions, and agreements contained in the mortgage; and thereupon an action was commenced on January 2, 1895, by the California Safe Deposit & Trust Company against the Yakima Investment Company, in the circuit court of the United States for the district of Washington, Southern division, for the foreclosure of the mortgage. Upon the filing of the bill of complaint the court appointed Paul Schulze, George Donald, and Joseph H. Allen receivers of the mortgaged property. On April 18, 1895, Paul Schulze having died, an order was made and entered continuing George Donald and Joseph H. Allen receivers. On July 17, 1898, an order was made and entered discharging the receiver George Donald, and continuing Joseph H. Allen as sole receiver. During the receivership the court found it necessary, in order to preserve the property and protect the interests of all concerned, to direct the receivers to issue receivers' certificates to meet the obligations of the company and keep the plant a going concern. These certificates were made liens upon the property, and were all given priority of lien over the mortgage, and in the rank and order among themselves as set forth and described in the decree of foreclosure and sale made and entered by the court on May 8, 1899, as follows:

Expense receivers' certificates	$ 60,514 53
Purchase-money receivers' certificates	62,082 00
Collins receivers' certificates	188,766 45
	$311,362 98

The decree of foreclosure and sale required that the Yakima Investment Company should pay or cause to be paid to the California Safe Deposit & Trust Company before the 3d day of June, 1899, a sum sufficient for the payment of costs and disbursements in the suit, and the expenses incurred by, and compensation of, the trustee, and the fees and compensation of complainant's solicitors and counsel in the suit, and the expenses of the receivership of the mortgaged property, including the compensation of the receivers and their solicitors and counsel, and the payment of the receivers' certificates and outstanding bonds and coupons in the order of their priority. It was further provided in the decree that in default of the payment by the defendant, or any one claiming under it or for its account, of the sum of money and interest mentioned and directed to be paid by the decree within the time therein provided, the lands, franchises, water rights, irrigating canals and ditches, and all the property mentioned and described in the decree, should be sold as an entirety, and in one lot and parcel, absolutely and without redemption, and subject only to confirmation by the court.

A master in chancery was appointed by the court to make and conduct the sale, and to execute and deliver the deed of conveyance and transfer of the property upon an order confirming the sale, and upon payment or settlement of the purchase price. The court having determined that it could not authorize a sale of the property for a price less than a sum sufficient to pay in full all costs and expenses of the litigation, and all the obligations of the receivers incurred by authority of the court, including the principal and interest of all receivers' certificates so issued, and it being represented to the court by the parties interested that the sum of $335,000 would be sufficient and ample to pay all costs, expenses, and obligations incurred by order of the court, it was provided in the decree that the master in chancery should not receive, entertain, or accept any bid for the property less than the sum of $335,000; and, unless said sum should be bid for the property, the master in chancery was directed to adjourn the sale, and apply to the court for further instructions. It was further provided by the decree that the funds arising from the sale of the property should be applied: (1) To the payment of the costs and disbursements of the suit, and of all proper expenses attendant upon such sale or sales, including compensation of the master in chancery, and the payment of all charges, compensation, fees, allowances, and disbursements of said complainant, and the compensation, fees, expenses, and disbursements of its solicitors and counsel, and of the receivers, and their solicitors and counsel, and also all other proper allowances, compensation, and disbursements to the parties or their counsel; all such payments, however, to be thereafter allowed and taxed by the court. (2) The balance of the funds realized from said sale to be applied to the payment (a) of the principal and interest of said expense receivers' certificate in full; and any balance then remaining to be applied (b) to the payment of the principal and interest of said purchase-money receivers' certificates in full; and any balance then remaining to be applied (c) to the payment of the principal and interest of said Collins receivers' certificate in full; and any balance then remaining to be applied (d) to the payment of the principal and matured coupons of the 524 bonds issued and then outstanding under said mortgage or deed of trust, in full. It was further provided that if the proceeds of said sale should not be sufficient to pay all of the said receivers' certificates, bonds, and coupons in full, then and in that case so much of the proceeds of said sale as should be applicable to the payment of any one of said classes of said securities should be distributed among the holders of all of the receivers' certificates of that class, or the holders of the bonds and coupons, as the case might be, pro rata, according to the amounts of such receivers' certificates or bonds and coupons held by them.

After a detailed description of the property directed to be sold, the decree contained the following explanation of the purpose of the decree: "It is the intention and meaning to describe and embrace herein, and that there shall be sold and conveyed pursuant to this decree, all of the property, of every name and nature, belonging to or possessed by said the Yakima Investment Company and the receivers and receiver in this suit, including all of the water appropriations and water rights, and all of the canals, laterals, branches, and ditches, including the headworks thereof, and all of the rights of way, franchises, licenses, privileges, and easements, and all of the books, accounts, records, tools, implements, instruments, and apparatus, and all of the land-sale contracts, and all of the water contracts, and all moneys due and unpaid and to become due for the sale of lands or the sale of water or the furnishing of water to other persons, and all moneys due and unpaid and to become due by virtue of any deed or contract heretofore made by said the Yakima Investment Company, or its predecessors in interest, or said receivers or receiver, and all lands belonging to or acquired by said the Yakima Investment Company, or said receivers or receiver, all of which property shall be affected by this decree and pass to the purchaser or purchasers under this decree, and pass by and be construed to be included within, the conveyance or conveyances made pursuant to this decree, in all respects as though the same, and each item, portion, and parcel thereof, had been particularly and specifically enumerated and

set forth in this decree, notwithstanding any mistakes, omissions, or inaccuracies in the particular description of any thereof in this decree; and no words of particular description contained in this decree shall be construed to in any wise limit these words of general description."

The Yakima Investment Company failed to pay the sum decreed during the time provided in the decree, and thereafter an order was entered for the sale of said property, and the same was sold by the master in chancery on the 5th day of March, 1900. At the master's sale J. Dalzell Brown purchased the property for the sum of $335,000. On the 4th day of May, 1900, an order was entered by the court confirming the sale of the property to J. Dalzell Brown. On the 12th day of May, 1900, the purchaser having paid $35,000 in cash on account of the purchase price, it was ordered by the court that, the balance of said purchase price being payable at such time or times and in such manner as the court should direct, the purchaser was required on or before the 23d day of May, 1900, to pay and make good the unpaid balance of $300,000 of the purchase price of the property, by paying to the clerk of the court, or by depositing to the credit of, and subject to the orders of, the court, in the National Bank of Commerce of Tacoma, at Tacoma, Wash., a sum of money equal to the difference between $300,000 and the amount of principal and interest to the 23d day of March, 1900, of the receivers' certificates paid in and deposited by the purchaser. Under this order the purchaser deposited in the registry of the court the sum of $74,277.20 in cash, in addition to the $35,000 deposited in the registry of the court on March 6, 1900, on account of the purchase price, making the total cash payment $109,277.20; leaving $225,722.80 as the amount deposited by the purchaser in receivers' certificates. On the 19th day of May, 1900, the court entered an order reciting that J. Dalzell Brown having, pursuant to the requirements of the order made on the 12th day of May, 1900, paid into the court the balance of the purchase price of the property, and that the funds arising from the sale being ready for distribution, the court proceeded to make, and did make, a partial distribution of the funds in the registry of the court as follows: To the master in chancery, in full for his services, $4,000; to the complainant, on account of its services and expenses in the discharge of the trust, $2,500; to one of complainant's solicitors for expenses, $2,500; to the vice president of the defendant company for his services in the execution of deeds, $500, and for his services as solicitor and counsel, $500; to other counsel and solicitors, for services performed in relation to the trust, sums aggregating $2,000. The order reserved for further consideration and future determination the settlement, allowance, and payment of fees and compensation of the solicitors and counsel for the complainant in the suit, and the question of making further allowance to the complainant for its services and disbursements in discharge of the trust, and the settlement, allowance, and payment of the compensation of the receiver; and the order appropriated and set apart for the purpose of paying the compensation to be allowed to the solicitor and counsel for the complainant and to the receiver, and any additional allowance to the complainant as trustee, such money and funds as should remain in the hands of the receiver after the settlement of the trust and the payment of the receivers' bills; and the receiver was ordered and directed to pay to the clerk of the court, subject to the order of the court, all moneys remaining in his hands in the settlement of his trust after the payment of his bills. The receiver was further ordered to proceed forthwith to make and file his final account as soon as practicable, and to deliver to the purchaser or his assigns, upon demand, the possession of all property then held by him, subject to all settlements and adjustments which the receiver ought to make in respect thereto, and subject to any contracts which he had made with respect thereto pursuant to the order of the court.

On the 25th day of June, 1900, J. Dalzell Brown conveyed to the Washington Irrigation Company the property purchased by him at the foreclosure sale. On the 26th day of July, 1900, the receiver delivered to the Washington Irrigation Company all the property purchased by Brown at the foreclosure sale, taking the following receipt:

"North Yakima, July 26, 1900.

"Received this day from Joseph H. Allen, receiver of the Yakima Investment Company, all and singular, the property in his control and possession as such receiver, as the same appears by his final account and report, of even date herewith, and papers attached thereto.

"Washington Irrigation Co.,
"By J. R. Walthew, Cashier.,
"Successors in Interest to J. Dalzell Brown, Purchaser at the Master's Sale of the Property of the Yakima Investment Company Made March 5, 1900."

In the final account of the receiver filed with the clerk of the court on July 27, 1900, and referred to in the receipt of the Washington Irrigation Company, is a statement of account, showing a balance in his hands of $11,506.70, which was thereupon paid to the clerk of the court; the latter giving to the receiver his receipt therefor. This final account contains a statement showing that the receiver had kept a separate account of his management of the property from May 4, 1900, the date when the sale was confirmed by the court, to July 27, 1900, when the property was transferred to the Washington Irrigation Company. This statement shows that there was due the Washington Irrigation Company, as the net earnings of the property during this period, the sum of $1,067.63, and that this amount was included in the balance of $11,506.70 on hand when the receiver closed his accounts.

On the 22d day of August, 1900, the Washington Irrigation Company filed in court a petition for an order directing the receiver of the property and the clerk of the court, or such parties as might have possession of a certain described fund, to pay to the petitioner the sum of $14,600.76; basing its petition upon the following alleged facts: That at the time of said foreclosure sale there was in the hands of the receiver of said property the sum of $8,834.11; that at the time of said sale, and prior to the time that the property was struck down to said J. Dalzell Brown, said Brown, by E. F. Blaine, attorney, inquired of the master in chancery whether he was selling all the cash then in the hands of the receiver, and said master stated that he was selling everything in the hands of said receiver, including the cash; that after said sale the receiver continued to operate the property, and received cash upon contracts then outstanding, which contracts were sold to said Brown; and that said receiver made other sales of land, which was sold to said Brown at said sale, receiving from said sources between the date of the sale of the property to said Brown, namely, March 5, 1900, and the date of the confirmation of said sale, namely, June 18, 1900, the sum of $9,156.62; that between said dates the receiver disbursed, as cash upon pay rolls and cash disbursements on account of vouchers, the sum of $4,704.52; that in said sum was included salary to said receiver and his personal expenses. The petitioner claimed that, by virtue of the transfer from said Brown to it, said Washington Irrigation Company was entitled to receive from said receiver, or the clerk of the court, the amount in the hands of the receiver at the time of said sale, and the net amount received from all sources between date of sale and confirmation of sale, to wit, $14,600.76. To this petition the receiver filed an answer, in which he admitted that there was in his hands a certain sum of money which he had set forth in his final account, but alleged that in making up his final account he did not separate the amount in hand at the time of the sale from the other amount which was received at that time, and he was unable to determine said amount with certainty. He admitted that he continued to operate the property, but he averred that he did so under the order and direction of the court, and that he kept an account of the sales, receipts, and disbursements, and that the same was contained in his final account. He denied that the petitioner was entitled to receive the sum of $5,826.65, or any sum of money other than the sum of $1,067.63, and alleged that the said sum of $1,067.63 embraced all the money from all sources received by said receiver to which the petitioner was entitled; and he denied each and every allegation in said petition contained, except as stated in the answer to said petition. He denied that the Washington Irrigation Company

was entitled to receive from the receiver or from the clerk of the court all the moneys or cash in the hands of the receiver at the date of the sale, but he averred that the same were taken into account in the matter of cash, and accounted for in the final account. The receiver, for a further answer, referred to and set out the proceedings in court on the 19th day of May, 1900, when the proceeds of the sale were distributed by the court, and further allowances and payments reserved for further consideration. This answer was duly verified by the oath of the receiver. The petition and answer were brought to the attention of the court on September 11, 1900, when the court refused to hear said petition, or proof in support thereof, or argument of counsel upon the same, because the matters involved therein had been previously adjudicated by the court. It was accordingly adjudged and decreed that the petition should be denied and dismissed. Counsel for petitioner thereupon excepted to the ruling of the court, and the exception was allowed. On the same day the application of the receiver for the approval, settlement, and allowance of his final account was heard by the court; and it appearing that no exceptions or objections had been filed to said report, and the time for filing exceptions and making objections having expired, the court examined the final account of the receiver, and found and adjudged that the same was true, and accordingly approved the same, and by order discharged the receiver. Counsel for the Washington Irrigation Company thereupon appealed to this court from the order confirming the sale of the property, dated May 4, 1900, which impaired, affected, or denied the right of the purchaser to receive all the net proceeds of the property over and above the purchase price paid by the purchaser which came into the hands of the receiver after March 5, 1900; from the order of the court directing the purchaser to complete the payment of the purchase money of said property sold at the receiver's sale dated May 12, 1900, which impaired, affected, or denied the right of the purchaser or his grantee to all the funds in the receiver's hands on the date of said sale, or which came into his hands after said sale, as proceeds of the operation of the property or purchase money of items and parcels of the property sold by the receiver before and after the sale; from the order dated May 19, 1900, directing the distribution of the funds in the registry of the court arising from the sale of the property; and from the orders dated September 11, 1900, distributing the funds remaining in the hands of the clerk, except that portion thereof which ordered payment of a certain sum to the appellant. No objection was made to the final account of the receiver, and no appeal was taken from the order of the court approving the account and discharging the receiver.

Charles E. Shephard and E. F. Blaine, for appellant.

John B. Allen and Joseph S. Allen, for appellee Joseph S. Allen.

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

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

The appellant assigns as error the action of the court below in (1) denying to the Washington Irrigation Company, appellant herein, the moneys in the hands of the receiver at the date of sale; (2) denying to the appellant the moneys collected by the receiver from all sources between the date of sale and the date of confirmation of sale, less the operating expenses.

The language of the decree of foreclosure and sale was necessarily broad and comprehensive to include all the property to be sold. The property was a going concern. The canals and ditches were in full operation, distributing water for irrigation purposes under continuing contracts, that were to be transferred, with the other prop-

erty, to the purchaser. The purpose of the decree was to sell all this property in the hands of the receiver, but not to sell funds in the possession of the court. As said by the court in Strang v. Railroad Co., 23 Fed. Cas. 219 (No. 13,523):

"The surplus earnings of a railroad in the hands of a receiver are not the property of the railroad company, and are not included in a general description of its property. The possession of the money is in the court, and the equitable title to it is in the creditors of the railroad company."

This doctrine is equally applicable to property of the character involved in this case. Moreover, the primary object of a judicial sale of mortgaged property is to convert all the property into money for distribution among the creditors. The income and surplus earnings of the property need not be sold. They are already in shape for distribution, and are properly applied to the payment of the expenses of operating the property, and to defray the expenses incident to the foreclosure proceedings. These expenses are always to be paid first, whether the funds for this purpose are derived from income, or from the proceeds of the sale of the property. To sell the money in the hands of a receiver would, under such circumstances, be an absurd procedure. "A court should not be presumed to order so futile a thing as the selling of money, unless its decree to that effect is clear and specific." Strang v. Railroad Co., supra.

Appellant, then, must show its right to receive the money in the hands of the receiver at the date of the sale upon other grounds than that such money passed to it by reason of the sale, as part of the proceeds of the sale. The decree must provide for it in express language. No mere inference drawn from general terms can justify such a claim, and no declaration of a master in chancery can enlarge the terms of the decree. The circuit court was therefore right in denying the petition of the Washington Irrigation Company for the moneys in the hands of the receiver at the date of the sale.

With respect to the moneys collected by the receiver after the date of the confirmation of the sale by the court, no controversy as to the right of the appellant to the net earnings of the property is presented by the record. The only question is as to the amount, and perhaps as to the date when the purchaser's right accrued. The appellant claims that the amount is $5,826.65, while the final account of the receiver states the amount to be $1,067.63. This controversy has been foreclosed by the fact that when the Washington Irrigation Company, on July 26, 1900, receipted to the receiver for the property purchased by its grantor at the master's sale, it described the property as, "all and singular, the property in his [receiver's] control and possession as such receiver, as the same appears by his final account and report." The receiver's final account showed the amount due to the Washington Irrigation Company to be the sum of $1,067.63. The appellant received the property thus described without objection, and, by the terms of its receipt, confirmed the correctness of the account in all respects. The receiver's final account was filed with the court on July 27, 1900; and on August 8, 1900, the court entered an order that the parties to the proceedings

should have 20 days in which to file exceptions to the account, or to enter objections thereto. No exceptions or objections to the account were ever filed or noted, and on September 11, 1900, the account was approved and the receiver discharged. The order distributing the funds remaining in the hands of the clerk was based upon the final account, and, if erroneous, could only be corrected by a correction of that account. The effect of accepting the property without objection, under these circumstances, extended to all the previous orders, and renders appellant's objections thereto unavailing.

The orders of the circuit court are therefore affirmed.

W. W. MONTAGUE & CO. et al. v. LOWRY et al.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1902.)

No. 697.

MONOPOLIES—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.

The Tile, Mantel & Grate Association of California was organized by defendants, who were dealers in tiles and similar articles, for the declared purpose of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. The articles prescribed that other local dealers who had an established business and carried a stock of a stated value, and who were "acceptable," might, on motion of a member, be permitted to join, and that all manufacturers of tiles in the United States might become members by signing the constitution and paying an entrance fee. The local members were bound by the articles not to buy goods from any manufacturer who was not a member, nor to sell goods to other dealers not members, at less than list price, which was about double the market price, and the manufacturing members were bound not to sell to any dealer within the prescribed territory who was not a member. *Held*, that such association was a combination in restraint of trade among the states, illegal under section 1 of the anti-trust act of July 2, 1890 (26 Stat. 209), and also an attempt to monopolize a part of the trade and commerce among the states, within the prohibition of section 2, by shutting out from such trade all local dealers who were not members, and that defendants were liable in damages, under section 7 of the act, to such a dealer to whom a manufacturer in another state refused to sell tiles, as it had previously done, on the sole ground that such dealer was not a member of the association.

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

See 106 Fed. 38.

The writ of error in this case is brought to review the judgment of the circuit court rendered in an action which the defendants in error brought against the plaintiffs in error under the act of congress of July 2, 1890 (26 Stat. 209), commonly known as the "Sherman Anti-Trust Act." The complaint alleged that the plaintiffs therein had been injured in their business by reason of the illegal combination between the defendants therein made under the name of the Tile, Mantel & Grate Association of California. The substantial facts alleged in the complaint and proved on the trial were that for a number of years prior to the year 1898 the defendants in error had been engaged in the business of buying and selling and setting tiles, mantels,

and grates in the city of San Francisco, and that the tile which they used in their business was purchased from some of the various tile manufacturers in the states of Ohio, Indiana, Kentucky, New Jersey, and Pennsylvania, who subsequently entered into the association, there being no manufactures of tiles in the state of California; that by industry and attention thereto the defendants in error had established a profitable business; that in the year 1898 the plaintiffs in error formed the association, the object of which, as declared in its articles, was "to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and by frequent interchange of ideas advance and promote the mutual welfare of its members." As to membership, it provided that any individual, corporation, or firm engaged in the tile, mantel, and grate business in San Francisco, or within a radius of 200 miles therefrom, having an established business, and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, and having signed the constitution and by-laws, and paid an entrance fee of $10, might become a member. It was also provided that all manufacturers of tiles and fireplace fixtures throughout the United States might become nonresident members upon the payment of an entrance fee and signing the constitution and by-laws. Section 7 of the by-laws forbade members of the association to purchase goods from any manufacturer unless the latter were a member of the association, and forbade them to "sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association." It provided, further, that any manufacturer selling goods to others than members of the association should forfeit membership. It was shown that the list price referred to in section 7 was a nominal catalogue price of goods fixed by the manufacturers for convenience, but that in selling to members of the association, and, prior to forming the association, in selling to the trade generally, the manufacturers had allowed large discounts from the list prices amounting to something more than 50 per cent. thereof. The defendants in error alleged in their complaint that it required the unanimous consent of the association to become a member thereof, and that by reason of certain business difficulties there were members of the association who were antagonistic to them, and who would not have permitted them to join if they had applied, and that they were not eligible to join the association for the further reason that they did not carry at all times stock of the value of $3,000. They also alleged that the association constituted a trust and conspiracy in restraint of interstate trade and commerce, and a monopoly of the grate, tile, and mantel trade between the parties engaged therein. The jury found damages for the defendants in error in the sum of $500, and for that amount judgment was rendered in their favor, and for the further sum of $750 for an attorney's fee, which was allowed by the court.

P. F. Dunn and Linforth & Whitaker, for plaintiffs in error.

J. C. Campbell, W. H. Metson, and R. W. Campbell, for defendants 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.

Two questions are presented upon the writ of error—First, did the association constitute a combination which was within the prohibition of the act of July 2, 1890? And, second, was the amount of the attorney's fee allowed by the court excessive? In answering the first question, we must first take into the account the declared purpose of the association. It was formed to unite all acceptable dealers engaged in the tile, grate, and mantel business in San Fran-

cisco, and within a radius of 200 miles therefrom, and all American manufacturers of tiles. In its scope it included upon the one hand every manufacturer of tiles wherever situate in the United States, and upon the other the six firms of local dealers who joined the association at its formation, together with those who might be permitted thereafter to become members. The defendants in error were not invited to enter into the combination. The rules prescribed that others in the same line of business, who had an established business and carried stock of the value of $3,000, and who were "acceptable," might upon the proposition of one who was already a member, and upon the vote of the association, be permitted to join the combination. The evidence shows that the defendants in error after the formation of the association made efforts to purchase tile from manufacturers in Indiana with whom they had before been doing business, and that their orders were declined, and they were notified that they could not purchase goods from the manufacturers unless they became members of the association. They could not obtain tile from the local dealers in San Francisco unless they paid the "list" price, which was more than double the price which members of the association were required to pay.

We think that, in the light of these facts, the association clearly comes within the prohibition of the act of congress. It has a direct tendency to restrain trade between the different states and to create a monopoly. In principle it would be the same if it were an association between all the manufacturers of the United States in that line of goods and a single dealer in California, whereby all other resident dealers were shut out and all competition between local dealers extinguished. Section 1 of the act of July 2, 1890, provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal;" and it proceeds to denounce a penalty against any one who shall make any such contract or engage in any such combination or conspiracy. Interstate commerce "includes the purchase, sale and exchange of commodities" (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203, 5 Sup. Ct. 828, 29 L. Ed. 158); and every agreement which has the tendency to restrain the purchase, sale, and exchange of commodities is brought within the prohibition of the statute (Addyston Pipe & Steel Co. v. U. S., 175 U. S. 238, 20 Sup. Ct. 96, 44 L. Ed. 136). The combination in the case before the court evidently tended to restrain trade. The defendants in error who had been regular purchasers of goods from the manufacturers were shut out from dealing with them from the time when the association was formed. Their orders to the manufacturers for goods were rejected for the express reason and for no other reason than that they were not members of the association.

The tendency of the combination was also to create a monopoly in the hands of the local members thereof. Section 2 of the act includes within its prohibition "every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of trade or commerce among the several states or with foreign nations." The combination in the case before the court

was not one such as might lawfully have been made between the residents of a single state for the purpose of regulating the methods of conducting their business or fixing the prices of goods or for other legitimate purposes, such as was sustained by the court in U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where it was held that an agreement between manufacturers in a state bore no distinct relation to commerce between the states or with foreign nations, but it is one that brings within its scope not only local dealers, but all the wholesale dealers in the same kind of goods in all the states. Said the court in U. S. v. E. C. Knight Co., 156 U. S. 16, 15 Sup. Ct. 255, 39 L. Ed. 325: "It is not essential that the result of the combination be a complete monopoly. It is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from competition." The local members were bound by the articles of the association not to sell goods to nonmembers except at prices which were more than double the prices which the members paid and which all dealers had paid before the association was formed, and the manufacturers were bound not to sell to nonmembers at any price or under any conditions. The testimony indicated that the defendants in error had been in constant competition with the San Francisco firms which entered into the association, and had bid against them on contracts for work. The formation of the association shut off all such competition. The defendants in error were powerless to compete with local firms which possessed such advantages over them. The necessary effect of the combination was to crowd out of business every local dealer who was not a member, and thereby to create a monopoly in the hands of those who were. It is argued that the defendants in error might have joined the association had they chosen to do so, and that thereby they might have availed themselves of the privileges of membership. To this it is sufficient to say that it does not appear that they would have been admitted to membership if they had applied. Under the by-laws they were not eligible, for the reason that they did not at all times carry the requisite amount of stock, and if they had possessed the necessary amount of stock they had no assurance that they were "acceptable" to the members. On the contrary, the fact that they were not invited to enter the combination when it was formed was a distinct intimation to them that they were not acceptable. But it is immaterial whether they would or would not have been admitted into the combination. To protect their business and secure their legal rights they were not obliged to submit an application for membership in such a combination with the possibility of its rejection, or to submit themselves to the rules and exactions of the association. It is clear, also, that the tendency of the combination was to prevent others from engaging in the business. No one could become a member who had not "an established business," and it is too evident to admit of denial that no one could establish a business in competition with the members of the association who possessed such advantage in dealing with the manufacturers.

It is earnestly contended that the case in its principle comes within the doctrine of Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and Anderson v. Same, 171 U. S. 604, 19 Sup. Ct. 50,

43 L. Ed. 300; but we think it is clearly distinguishable from those cases. In the Hopkins Case the association, which was claimed to have been formed in violation of the act, was a local voluntary association of men whose business it was to receive at Kansas City consignments of cattle shipped from owners in various states, and to feed, prepare for market, and sell the same, and pay the owners their portion of the proceeds after deducting charges and expenses. The rules of the association forbade members to buy stock from one who was not a member or to transact business with any person who violated its rules and regulations. The court held that the business of the members of the association was not interstate commerce, and that the agreements or contracts relating to their business were not in restraint of interstate trade, for the reason that trade between the states was not affected by the combination, which was a purely local one, comprising only members of the state in which it was formed. The Anderson Case was similar to the Hopkins Case, with the exception that the members of the association were purchasers of certain classes of live stock instead of agents for the sale thereof. There was no association or combination between such purchasers and the vendors of the stock, and no monopoly was created or was intended to be thereby created. The association itself transacted no business. The court said:

"Those who are members thereof compete among themselves and with others who are not members for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. * * * A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction."

The difference between those cases and the case at bar is apparent. The resident members of the Tile, Mantel & Grate Association, while they may compete with themselves, have no competition with those who are not members, for the latter are practically excluded from doing business within the portion of the state of California which is included in the prescribed area; and instead of being a combination between purchasers only, as was the fact in the Anderson Case, it is a combination between manufacturers and buyers of different states, which brings together on the one hand all the wholesale dealers in the United States in that line of goods, and on the other hand the chosen few who are permitted to obtain goods and supply the local demand.

We find no ground for disturbing the finding of the circuit court concerning the amount of the attorney's fee to be allowed to the defendants in error.

The judgment is affirmed.

WOLFF v. WELLS, FARGO & CO.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1902.)

No. 698.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.
Where, by stipulation, a jury is waived in the circuit court, the facts as found by the court are not subject to review by the appellate court.

2. SALES—CONSTRUCTION OF CONTRACT—EVIDENCE TO EXPLAIN AMBIGUITY.
Where a written offer, which was accepted, for the sale of cement to be used in the construction of a certain building, stated that it named a price "for what you may require, on about 5,000 barrels, more or less," the language was not so clear and unambiguous as to the quantity to be furnished as to render it error for the court to admit evidence of a previous conversation between the parties, which was expressly referred to in such offer.

3. SAME—BUILDING MATERIALS—CONSTRUCTION AS TO QUANTITY.
Defendant submitted to plaintiff a written offer, stating that "we take pleasure in submitting to you our quotation on * * * cement for use in the new * * * building now in course of construction. We will name you a price for what you may require, on about 5,000 barrels, more or less, * * * delivered at the building site * * * in quantities to be designated by you." The offer was accepted. *Held*, that the contract was not one to deliver any particular quantity, but to deliver so much as might be required in the construction of the building; the designation of "about 5,000 barrels, more or less," being merely the estimate of the parties as to the quantity which would be required.

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

The findings of fact and conclusions of law of the circuit judge, referred to in the opinion, are as follows:

"(1) On or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, state of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in said city and county of San Francisco, at the rate of $2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and $^{56}/_{100}$ dollars ($2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the court finds was made with the plaintiff for the sale of said cement. (2) The plaintiff was required and was compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of cement in the construction of said building. (3) The defendant delivered to the plaintiff for use in the construction of said building, at the site of said building, five thousand barrels of Alsen's German Portland Cement, at $2.56 per barrel. The plaintiff required and was compelled to use in the construction of said building 2,925 barrels of cement in addition to the said 5,000 barrels delivered to it by the defendant. The plaintiff requested the defendant to deliver to it the cement which it so required and was compelled to use in excess of said 5,000 barrels at the said rate of $2.56 per barrel, for use in the construction of said building, pursuant to the terms of said contract, but the defendant wholly failed, neglected, and refused to deliver to the plaintiff any more than the said 5,000 barrels under said contract. (4) By reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of

cement to the plaintiff, the plaintiff has been damaged in the sum of $2,876, without interest. (5) With respect to the issues made by the allegations of the first counterclaim set up in the answer of the defendant, the court finds that the allegations of paragraphs 1, 2, and 3 thereof are true. It is not true that on the 24th day of September, 1897, the plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff, at the rate of two and fifty-six one-hundredths dollars ($2.56) per barrel at the site of the said building of the plaintiff in the said city and county of San Francisco, five thousand (5,000) barrels of Alsen's German Portland Cement, but in this behalf the court finds the facts to be as in finding 1 hereof stated. It is true that pursuant to the terms of the contract in finding 1 hereof, stated to have been made between the plaintiff and the defendant, but not otherwise, the defendant sold and delivered, and the plaintiff purchased, five thousand (5,000) barrels of said cement, at the rate of two and 56/100 dollars ($2.56) per barrel, and the plaintiff before the commencement of this action became indebted to the defendant therefor in the sum of $12,800 in United States gold coin. Of said sum of $12,800 no part has been paid saving and excepting the sum of $10,534.40 on account thereof, and there is due and payable to defendant from the plaintiff for said cement so sold and delivered the sum of $2,265.60, without interest. (6) With respect to the issues made by the allegations of the second counterclaim set up in the answer of the defendant, the court finds that the plaintiff is indebted to the defendant in the sum of $2,265.60, as in finding 5 hereof stated, for 885 barrels of Alsen's German Portland Cement sold and delivered by the defendant to the plaintiff, and being a part of the 5,000 barrels in findings 3 and 5 hereof, stated to have been sold and delivered by the defendant to the plaintiff. And from the foregoing facts the court finds the following conclusions of law: That plaintiff is entitled to judgment against the defendant for the sum of $2,876, less the sum of $2,265.60; that is to say, the plaintiff is entitled to judgment against the defendant for the sum of $610.40 and for its costs."

Vogelsang & Brown, for plaintiff in error.

E. S. Pillsbury and Alfred Sutro, for defendant in error.

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

HAWLEY, District Judge. This is an action to recover damages for an alleged breach of contract for the delivery of 5,000 barrels of cement, more or less. The contract is embodied in a letter from the plaintiff in error which reads as follows:

"Alsen's Portland Cement Warehouse, Manufacturers of Portland Cement.
William Wolff & Co., California Agent, 329 Market Street, San Francisco.
"San Francisco, California, September 24, 1897.

"Colonel Geo. E. Gray, 1st Vice President Wells, Fargo & Co., City—Dear Sir: Referring to the conversation the writer, Mr. Baker, had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo Building, now in course of construction. We will name you a price for what you may require, on about 5,000 barrels, more or less, of two dollars and fifty-six cents ($2.56) per barrel, delivered at the building site Second and Mission Sts., in quantities to be designated by you. We will guaranty the Alsen Cement to be of standard quality, and subject to any reasonable tests you may call for.

"Very respectfully, William Wolff & Co.,
"Per Edmund Baker."

Upon receipt of this letter the offer therein made was orally accepted by the defendant in error.

The case was tried before the court without a jury. The findings

of fact and conclusions of law, as found by the court, are set out in the foregoing statement.

There are certain general elementary principles that have been elaborately discussed by counsel which may be briefly disposed of. The rule is well settled by the repeated decisions of the supreme court of the United States and by the circuit court of appeals that in all cases tried by the court without a jury the facts as found by the trial court are not subject to review by the appellate court. Where there are special findings of fact the only question to be considered in this connection is whether the facts found support the judgment. As was said in Lehnen v. Dickson, 148 U. S. 71, 77, 13 Sup. Ct. 481, 37 L. Ed. 373:

"The burden of the statute is not thrown off simply because the witnesses do not contradict each other and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

In Walker v. Miller, 8 C. C. A. 331, 332, 59 Fed. 869, 870, the court said:

"Neither the supreme court nor the court of appeals will undertake to determine in a case like the one at bar whether the special findings are supported by the testimony contained in the bill of exceptions, for to do so would be simply to review the decision of the trial court on questions of fact rather than law. By filing a written stipulation waiving a jury, the parties to the litigation may impose upon the circuit court the duty of making a general or special finding on questions of fact, but they cannot impose upon an appellate court a like duty. The finding of the trial court, whether it be general or special, has the same conclusive effect when the record is removed by writ of error to an appellate tribunal as a similar finding by a jury, and exceptions must be saved and presented in the same manner, either by objections to the introduction or to the exclusion of testimony, or by tendering declarations of law and obtaining a rule thereon. These several propositions are well established by repeated adjudications."

In so far as the assignments of error call for a review of the evidence, they will not, for the reasons stated, be considered. Many of the assignments, however, are based upon the proposition that the court erred in its findings of fact because "there is no evidence to justify the same." The dividing line in the contention of the respective parties as to the construction of the letter is whether, as claimed by the plaintiff, the contract was for a given amount, to wit, 5,000 barrels of cement, more or less, or whether, as claimed by the defendant in error, it was a contract for the delivery of such amount of cement as might be required by Wells, Fargo & Co. for use in the completion of its new building then in course of construction, and that the amount mentioned was a mere estimate of the amount that would be required.

There are 19 assignments of error, which, boiled down, only present for our consideration three questions: (1) Did the court err

in permitting the witness Gray (representing Wells, Fargo & Co.) to testify as to the conversation he had with Mr. Baker (representing the plaintiff in error)? (2) Is the contract, as specified in the letter, clear, plain, and unambiguous? (3) Did the court err in construing it?

The law is well settled that where the contract as written is clear, plain, and unambiguous it is error to admit parol evidence to vary, modify, or change it. The general rule is that the written contract merged all previous negotiations and conversations between the parties, and it is presumed in law to express the final understanding between the parties. On the other hand, it is equally well settled that if there is any uncertainty or ambiguity as to the meaning of the words used in the written contract, where it is based upon or refers to a conversation, parol evidence may be admitted, not to vary the terms of the contract, but to explain the sense in which the language in the writing was used. Such attendant and surrounding circumstances are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the instrument as were possessed by the parties who executed it. The object or tendency of such evidence is not to contradict or vary the terms of the writing, but is for the purpose of enlightening the court so as to enable it to more fully understand the language employed therein. There can be no question on the point that the facts as found by the court sustain the judgment. The specific questions asked of the witness Gray and the answers given, to which objection is urged, are as follows:

"Q. State what your conversation was with Mr. Baker? A. The question Mr. Baker desired was that I would define accurately some number of barrels of cement that we would want. I told him I wanted his proposition for the cement for that building, and I could not give him a positive quantity; that the architect said that under certain conditions he would require about 5,000 barrels. That is what I told Mr. Baker; that if certain other conditions existed it would take a great deal more. On that statement to Mr. Baker he left my office, and went back to the office on Market street, as he said, and came back to me again with a written proposition, which is embodied in this letter, which I recognize, and that letter was received. * * * Q. Before offering that, Colonel Gray, I will ask you what, if anything, you told Mr. Baker, preliminarily, you contemplated doing with reference to a building, and why you were getting these bids? A. I told Mr. Baker my object was to get cement for the building,—the total amount of cement we required."

We are of opinion that the court did not err in admitting this testimony. It is argued that it is impossible to tell upon what particular ground the court rendered its decision, whether upon the oral testimony, the letter, or both. That is wholly immaterial. If the decision is correct, it should not be disturbed. The testimony of the witness Gray supports the findings of fact and conclusion of law reached by the court, and if it added any light as to the intention of the parties the court did not err in admitting it. If the contract, of itself, was susceptible of the construction given to it by the court, the aid thus given should not be ignored. The case should not be reversed unless it affirmatively appears that the contract is not susceptible of any such construction. The rules governing contracts

of this general character are well expressed by Mr. Justice Bradley in Brawley v. U. S., 96 U. S. 168, 171, 24 L. Ed. 622, 623:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. * * * But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight. If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill. And the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith."

We are of opinion that this cause comes within the third rule above stated. The contract was not to deliver any particular quantity of cement, but to deliver such an amount as might be required by Wells, Fargo & Co. for use in its new building then in course of construction. The quantity designated, "about 5,000 barrels, more or less," should be considered merely as an estimate of what the parties supposed might be required for use in the building. The plaintiff in error said, "We will name you a price for what you may require." The defendant in error, after using 5,000 barrels of the cement, notified the plaintiff in error of the additional amount required for use in its building, and the plaintiff in error refused to deliver any further quantity. Wells, Fargo & Co. was compelled to go into the open market and purchase the amount at an advanced price, and has been damaged in the extra sum it was compelled to pay. The views we have expressed are not in opposition to, but are in strict conformity with, the principles announced by the court in Budge v. Refining Co., 43 C. C. A. 665, 104 Fed. 498. That case came within a different rule from the present case, and the distinction between the rules was there explicitly recognized. There "the contract was not one in which the quantity of material to be delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the contracting parties had in mind the construction of a particular work, and the supply of the necessary material therefor," but was one where the work itself furnished "to both parties the ultimate measure of the quantity which the contract contemplated."

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

MATHER v. CITY AND COUNTY OF SAN FRANCISCO.

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

No. 739.

1. MUNICIPAL BONDS—REMEDY FOR ENFORCEMENT—BONDS PAYABLE FROM SPECIAL FUND.
   An act of the legislature of California (St. 1875–76, p. 433) authorized the board of supervisors of the city and county of San Francisco, in its discretion, to pass an order for the widening of Dupont street in the city. It provided that, in case the street should be so widened, all damages, costs, and expenses thereof should be paid by "bonds of the city and county of San Francisco," and that for the payment of the interest and principal of such bonds there should be levied a tax upon the lands found to be benefited by the improvement. It further provided that the city and county should not be liable for the debt so created. Under the law it was the duty of the city and county to make the necessary levies and collections required to provide the fund for the payment of the bonds. *Held*, that the bonds so issued, being nominally the bonds of the city and county, to be paid from a special fund, which it was the duty of such corporation to provide, the holders could maintain an action in a federal court to recover a judgment thereon against the city and county, to be paid from such special fund, and to be enforced by appropriate proceedings to compel it to provide such fund, as required by the act.
2. SAME—ACTION—PARTIES.
   In an action against the city and county on such bonds, the plaintiff is not required to join as defendants the owners of the property upon which the taxes for their payment are required to be levied.
3. SAME—LIMITATION—INTEREST COUPONS.
   Under the statute of limitations of California (Code Civ. Proc. § 337), which requires an action on a written instrument to be brought within four years, an action on interest coupons attached to municipal bonds is barred in four years from the time the coupons respectively matured, although such coupons have not been detached from the bonds.

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

Joseph W. Mather, the plaintiff in error, brought an action against the city and county of San Francisco, the defendant in error, to enforce the payment of certain bonds which were issued and sold under the provisions of an act of the legislature of the state of California. St. 1875–76, p. 433. The complaint alleges: That on January 1, 1877, the defendant in error executed the bonds which are the subject of the action for the sum of $1,000 each, and for each bond 40 coupons for the semiannual payment of the interest thereon, payable on the 1st day of July and the 1st day of January of each year, and that the plaintiff, for a valuable consideration, purchased the bonds in good faith, and now holds the same. That the form of the bonds is as follows:

"United States of America, State of California,
"City and County of San Francisco.

"1,000 1,000.

"Dupont Street Bond.

"The City and County of San Francisco, State of California,
"Will pay to ——, or the holder hereof, the sum of one thousand dollars, gold coin of the United States of America, twenty years from the date hereof, with interest thereon in like gold coin at the rate of seven per cent. per annum, payable half-yearly on the first day of July and the first day of January of each year upon interest coupons hereto attached. Principal and interest payable at the office of the treasurer of said city and county of San Francisco. This bond is issued under the provisions of an act of the legis-

lature of the state of California entitled 'An act to authorize the widening of Dupont street in the city of San Francisco,' approved March 23d, 1876, and is to be paid out of the fund that may be raised by taxation as therein provided, and may be redeemed at any time before its maturity, as is provided in said act. And this bond is further issued and taken by the holder hereof under the conditions expressed in section twenty-two (22) of said act, which is as follows: 'Section 22. The completion of the work described in this act shall be deemed absolute acceptance by the owners of all lands affected by this act and by their successors in interest of the lien created by this act upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt created by the bonds authorized to be issued by this act and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds.'

"In witness whereof, the mayor, the auditor, and the city and county surveyor of said city and county of San Francisco, constituting the board of Dupont street commissioners, have respectively signed these presents, and caused to be affixed hereto the official seal of said city and county of San Francisco as of the first day of January, 1877.

"A. J. Bryant,

"Mayor of the City and County of San Francisco, and President of the Board of Dupont Street Commissioners.

"Geo. F. Maynard,

"Auditor of the City and County of San Francisco, and a Member of Said Board.

"Wm. P. Humphreys,

"City and County Surveyor of the City and County of San Francisco, and a Member of Said Board.

That each of the said coupons thereon, excepting as to the number of the coupon and of the bond and date of payment thereof, was and is in the words and figures following, to wit:

"Thirty Five. Dupont Street Bond. Coupon No.
$35 ——.

"The Treasurer of the City and County of San Francisco will pay bearer at his office thirty five dolls., U. S. gold coin, on Bond No. ——, six months' interest.

A. J. Bryant,

"Mayor of the City and County of San Francisco, and President Board Dupont Street Commissioners."

The complaint alleged that the bonds and the interest coupons thereto attached were executed, issued, and disposed of by said defendant in error under the provisions of and for the purpose required by the act aforesaid, which was an act entitled "An act to authorize the widening of Dupont street, approved March 23, 1876." St. 1875–76, p. 433. That in and by said act provision was made for a sinking fund for the payment of said bonds by means of the collection from certain real property in said city and county, in said act described, of taxes in and by said act required to be assessed and levied thereon and collected therefrom in the manner and time specified by said act; said taxes to constitute a fund in control of the treasurer of the defendant in error for the redemption of said bonds in the manner provided by said act. That the said act further provided that there should be levied, assessed, and collected upon the lands mentioned in the act a tax sufficient to pay the interest on said bonds as the same should mature, which said tax was to be paid to the treasurer of the defendant in error, and constitute a part of the Dupont street fund, and to be paid out by said treasurer in the payment of the coupons attached to the said bonds as they should become due. The complaint further alleged that the plaintiff in error demanded the payment of his bonds and interest coupons from the treasurer of the defendant in error, and that, although the said interest coupons are past due and payable, the treasurer has not paid the same, except the coupons numbered from 1 to 4, inclusive, and that the bonds and the coupons from number 5

to 40 still remain unpaid and unredeemed, and that there never was collected by the defendant in error, or by its officers, or paid to its treasurer, under the provisions of the act or otherwise, a sum sufficient to meet the interest on the full amount of said bonds. The relief prayed for is that plaintiff in error have the amount due him upon his bonds and coupons ascertained and paid, and that he have judgment against the defendant in error therefor, "said judgment to be paid only from the fund and in the manner provided by said act of March 23, 1876, or by the enforcement of the lien, if any, thereby created against the lands referred to in the act, and not from the general funds or other property of the defendant in error." The defendant in error demurred to the complaint upon various grounds, those principally relied upon being that the action is barred by the statute of limitations of the state of California; that there is a defect of parties defendant, in that neither the owners of the land therein referred to as subject to taxation to raise money for the payment of the bonds and coupons nor the tax collector and treasurer of the defendant in error are made parties defendant, and for the reason that it appears affirmatively upon the face of the complaint that the defendant in error is not liable upon the bonds. The circuit court sustained the demurrer upon all of these grounds, and thereupon the complaint was dismissed, and judgment was rendered for the defendant in error for its costs.

Page, McCutchen, Harding & Knight, for plaintiff in error.

Franklin K. Lane and George W. Lane (Naphtaly, Freidenrich & Ackerman and E. F. Preston, of counsel), 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.

The question of the right of the plaintiff in error to prosecute the suit against the defendant in error, as and for the purposes set forth in the bill depends upon the principles involved in the discussion of the cases of Jordan v. Cass Co., 3 Dill. 185, Fed. Cas. No. 7,517; Cass Co. v. Johnston, 95 U. S. 360, 24 L. Ed. 416; and Davenport v. Dodge Co., 105 U. S. 237, 26 L. Ed. 1018. In Jordan v. Cass Co. the bonds had been issued by the county court of the county in the name of the county, but on behalf of a township. Although the suit was brought against the county, it was not contended that the bonds were the proper debt or obligation of the county, or that payment could be enforced against the property of the county or against the taxpayers thereof in the county at large. The bonds recited that they were authorized by a two-thirds vote of the township. The question was whether the bondholder could for any purpose maintain an action on the bonds against the county in whose name the bonds were made. The court said of the bonds:

"It is clear that they imposed no obligation on the county, and equally clear that the real or ultimate liability is on the taxable property within the township. But how, and against whom, is this liability to be enforced and made available?"

The court then referred to the fact that the legislature had provided the mode of raising the means for paying the bonds by the collection of taxes, and that it had enjoined upon the county court the duty of levying such tax, which duty, the court remarked, might be enforced by mandamus; but, since the federal court had no original jurisdiction in mandamus, the plaintiff could have no remedy in

that court unless he was entitled to judgment. The court thereupon reached the conclusion that a holder of the bonds might recover a judgment thereon against the county in whose name they were issued, "to be enforced, if necessary, not by an execution against the county, but by mandamus against the county court to compel it to levy upon the property in the township such taxes as the law has enjoined as a duty upon it." The court said:

"It seems clear when the legislature directed the bonds to issue in the name of the county that it meant to give the bonds additional legal value;" and added, "There must have been a purpose in requiring the bonds to be issued in the name of the county," and said further, "It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued so far as is necessary to give effect to the rights of the holders of the bonds, consistently with the provisions of the constitution."

In Cass Co. v. Johnston, the bonds were issued under the same act as in the case last cited. The supreme court, speaking by Chief Justice Waite, said:

"It is finally objected that, as the bonds are in fact the bonds of the township, no action can be maintained upon them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the state courts, it is sufficient to say that in the courts of the United States, we are entirely satisfied with the conclusions reached by the court below, and that a judgment may be rendered against the county, to be enforced, if necessary, by mandamus against the county court or the judges thereof, to compel a levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued. The reasoning of the learned circuit judge in Jordan v. Cass Co., 3 Dill. 185, Fed. Cas. No. 7,517, is, to our minds, perfectly conclusive upon this subject."

In Davenport v. Dodge Co. the bonds had been issued under an act of the legislature of Nebraska, authorizing counties, cities, towns, and precincts to borrow money on their bonds, or to issue bonds to aid the construction of works of internal improvement in the state. The bonds recited that a certain precinct in the county of Dodge was indebted to the bearer, but they were signed by the county commissioners. The court said:

"When county bonds are issued under the statute in question, it is expressly provided that they shall constitute a debt against the county, to be paid by the levy and collection of taxes on all the taxable property within the county. If aid is voted by a precinct, bonds also are to be issued, differing only from county bonds in that they are to be paid from taxes levied upon property within a precinct."

After referring to the fact that a precinct could not become the obligor of precinct bonds, the court further said:

"We think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation and charged with the debt created thereby. * * * We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county, payable out of a special fund to be raised in a special way."

Turning now to the act under which the bonds in the present suit were issued, entitled "An act to authorize the widening of Dupont

street in the city of San Francisco," we find that it authorizes the board of supervisors of the city and county, if in the judgment of the board it be deemed expedient, "to pass an order or adopt a resolution" deciding to widen the street as permitted in the act. It provides that, if it be so widened, all damages, costs, and expenses thereof shall be paid by "bonds of the city and county of San Francisco." For the payment of the bonds and the interest coupons thereon it declares that there shall be levied, assessed, and collected annually, at the time and in the manner that other taxes are levied, assessed, and collected in said city and county, a tax upon the lands which shall be found to be benefited by the widening of the street. For the payment of the principal it provides for the creation of a sinking fund by a tax levied, assessed, and collected in the same manner, sufficient each year to pay one-twentieth of the principal of said bonds; and it requires that the money so raised by taxation shall be paid to the treasurer of the city and county, to be by him paid out only on said bonds. It provides that the street, when widened, shall be "sewered, graded, sidewalked, and paved" by the municipal authorities in accordance with the provisions of law applicable thereto. In short, the act bestows upon the municipal corporation authority to widen the street if it shall so elect, and directs it to issue its own bonds for the payment of damages, and to pay the bonds and the interest thereon by taxes levied in the same manner and at the same time as other city and county taxes are levied, but requires it to confine the tax to the special property benefited by the widening of the street. The street, when widened, was not widened by the act of the legislature, therefore, but by the act of the city and county, through its board of supervisors. The act of the legislature stood in the place of charter authority. The bonds when issued, were the bonds of the city and county, and payment thereof would undoubtedly have been enforceable as payment of other bonds of the city and county, but for the provision contained in section 22 of the act, absolving the city and county from liability for the debt so created.

The ground upon which the right to bring suit against the county in the three decisions we have referred to was maintained was not that the county was under obligation to pay the bonds, or was in any way liable for the debt which they represented, but upon the ground that the bonds were in form the bonds of the county, and a duty had been imposed upon the county with reference to the payment thereof. Although the debt was in each case primarily the debt of the township, the county stood in such relation to the township and to the bonds as to require the exercise of its official authority in the matter of levying, assessing, and collecting taxes wherewith to pay the bonds. We think the present case comes clearly within the principle of those decisions. The provision in the act of the legislature that the city and county of San Francisco shall not be liable for the debt created by the bonds does not absolve it from responsibility to provide the means for the payment of the bonds in the manner prescribed by the act. The counties which were the defendants in the suits above mentioned were not liable in any way for the payment of the bonds or the debts thereby represented, yet they were under

obligation to provide a fund for the payment. The provision in the act exempting the city and county of San Francisco from liability for the debt means only that the debt is not the debt of the city and county, and is not enforceable against it as such. It does not mean that the city and county has received legislative authority to refrain from doing the very things which the act of the legislature commanded it to do. The legislature certainly did not intend that the bondholders should have no remedy on their bonds. As was said by Judge Dillon in Jordan v. Cass Co., "Undoubtedly the legislature designed there should be a remedy upon these bonds." The means provided by the legislature for the payment of these bonds is plainly pointed out in the statute. Assuming, as we must, upon the demurrer, that the averments of the bill are true, it is clear that the defendant in error has been remiss in the performance of its duty. The bonds have not been paid for the reason that the fund for the payment thereof has not been created as the law required that it should be created. The present suit has no other aim than to compel the defendant in error to do what it ought to do, and what the act required it to do.

It is said that the ruling of the circuit court is supported by the cases of Meath v. Phillips Co., 108 U. S. 553, 2 Sup. Ct. 869, 27 L. Ed. 819, and Liebman v. City and County of San Francisco (C. C.) 24 Fed. 705. In the first of these cases the bonds had been issued under an act of the state of Arkansas providing for the division of certain overflowed lands into levee districts for the purpose of reclaiming the lands, and for the taxation of such lands to pay the expenses incurred in that behalf. The business was to be managed by levee inspectors, and payment was to be made by their drafts on the levee treasurer, appointed by the county court of the county to receive and disburse according to law all funds raised from levee taxes in the county. The county court was to levy a tax upon the property benefited, to be collected like other taxes, and to be paid to the levee treasurer. The court referred to the decisions which we have just discussed, and distinguished the case then pending from those cases upon the ground that in the Case of the County of Cass the law provided in terms for the issue of bonds in the name of the county, and that the court had also held that the same was true in the Case of the County of Davenport; "consequently," said the court, "there were in those cases obligations of the counties payable out of special funds. Here, however, there has been a manifest intention to bind the levee districts by the obligation incurred, and not to make the county in its political capacity responsible for the payment of the debts that were created for levee purposes under these laws." The language so quoted points out the essential distinction between the case at bar and the Phillips Co. Case. The bonds in the present case are the bonds of the city, and are payable out of a special fund to be provided by the city. So, in the Liebman Case, the question at issue was the liability of the city and county of San Francisco on the Montgomery avenue bonds, which were issued under an act of the legislature, the object of which was to open a public street in the city of San Francisco. The

act described the land, and declared that it was taken and dedicated for a street. It provided that the value of the property taken and the damages incidental thereto be assessed upon lands within a certain described district by a board of public works created for that purpose, their decision to be subject to appeal to the county court. The bonds were not to be the bonds of the city and county, but were to be signed by the members of the board, and attested by its seal. The act provided for an annual tax upon the property benefited to create a sinking fund for the payment of the bonds, and it declared that the city and county should not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, and that any person purchasing them or otherwise becoming the owner accepted the same upon that express stipulation and understanding. The bonds contained the recital, "The treasurer of the city and county of San Francisco will pay," etc. The case was heard before Field, Circuit Justice, and Sawyer, Circuit Judge, who held that the bonds were not the bonds of the city and county, and that the municipal corporation could not be sued thereon for any purpose. Mr. Justice Field said:

"The so-called bonds to which the coupons in the controversy were attached are not obligations of the city and county. They are not executed by it, or under its seal, or by its agents or officers, but by certain parties constituting the board of public works. * * * The so-called bonds, which are in fact only orders or promises of the board of public works that the treasurer will pay to the holder of the amounts designated, cannot be the foundation of any liability of the city and county."

Referring to the Cases of County of Cass and County of Dodge, the learned justice remarked:

"In all of them the bonds were issued in the name, or were in law the obligations, of the municipality against which the judgment was prayed, though in some of them the funds for the payment of the judgment were to be collected by a special tax upon the property of a particular district."

The concurring opinion of Sawyer, Circuit Judge, was based on the following considerations: That the act was not an amendment of the city charter, and conferred no authority whatever upon the corporation to do any act in its corporate capacity; that it imposed no duty upon the municipality relating to the opening of the street, or to the collection or the payment of the cost of the improvement; and that the bonds were not the bonds of the city and county. Of the County of Cass and County of Dodge Cases Judge Sawyer said:

"The bonds in the former case were issued by the county in the name of the county by express direction of the statute. In the latter case the bonds were issued by the county commissioners, the governing body of the county, in pursuance of an express provision of the statute for a precinct indebtedness. * * * These cases are therefore entirely different from the case under consideration."

The learned judge proceeded to remark that the city and county in its corporate capacity "has no relation to those bonds, and no duties to perform in connection therewith." The duties to be performed, whatever they may be in connection with the bonds and coupons in suits by parties who are also officers of the city and county, are, in my judgment, to be performed by them, under the

provisions of the statute, as agencies and instruments of the state, and not as agents or officers of the city." The very language in which the two distinguished jurists who decided that case expressed their views distinguishes the principles involved therein from those in the case at bar. They denied the right of the bondholder to sue the city upon the ground that the bonds were not the bonds of the city, and that the city was not empowered to, and was under no obligation to, perform any act in connection therewith, either in the opening of the street, the issuance of the bonds, or the payment thereof.

The demurrer of the defendant in error raises the point that the suit cannot be maintained against the city and county alone, but that the owners of the real estate which would be subject to taxation to raise funds to pay the bonds and coupons must be joined as codefendants. We do not think the complainant in such a bill is required to bring into the suit any other defendant than the obligor on the bonds. The cause of suit is against the maker of the instrument on which the suit is brought, not against the taxpayers whose property may be taxed to pay the same. In a suit against a municipal corporation the inhabitants are not parties, and cannot be made parties, although their property may be taken to satisfy the judgment against the corporation. Lane v. Fourth School Dist., 10 Metc. 462; Chandler v. Railroad Com'rs, 141 Mass. 208, 5 N. E. 509.

The demurrer raises the further objection that the cause of action upon all but two of the coupons is barred by the statute of limitations. Section 9 of the act provides that the bonds shall be payable in 20 years, and that coupons for the semiannual interest shall be attached to each bond. The bonds bear date January 1, 1877. The present suit was commenced June 22, 1900. By the statute of limitations of California (section 337, Code Civ. Proc.) actions on such written instruments are barred after four years. All the coupons matured more than four years prior to the commencement of this suit, except the last two, which became due, respectively, July 1, 1896, and January 1, 1897. In Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261, it was said:

"The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of the several states, and give them the same construction and effect which are given by the local tribunals."

That doctrine has been affirmed in Green v. Neal's Lessee, 6 Pet. 291, 8 L. Ed. 402; Harpending v. Dutch Church, 16 Pet. 455, 10 L. Ed. 1029; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; and Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228. In the case last cited it was also held that the statute of limitations of the state of Iowa begins to run against coupon interest warrants from the time when they respectively mature, although they remain attached to the bond which represents the principal debt. In reaching that conclusion the court proceeded upon principles which apply generally to all cases of actions upon coupons, except where the question is controlled by some peculiar statutory provision or decision of a

state court establishing a different rule. Those principles undoubtedly apply to the case at bar, and require us to hold that the statute of limitations has run as to all coupons except the last two, unless a different construction has been placed upon the statute of California by the decision of the supreme court of that state in Meyer v. Porter, 65 Cal. 67, 2 Pac. 884, in which it was said: "And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute." It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not so understand the decision, although it is impossible, from the meager statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted it was intended only to affirm the well-settled rule that in the application of the statute of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty, the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties. City of Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809. But if, indeed, it be conceded that the decision in Meyer v. Porter decides all that is contended for it by the plaintiff in error, it is still not a decision which controls us in the present case. It is true that the federal courts follow the latest decisions of the highest courts of the state on questions of the construction of the constitution or statutes of the state, and that after a state statute receives settled construction by a state court of last resort such construction becomes as much a part of the statute as the text itself. Douglass v. Pike Co., 101 U. S. 687, 25 L. Ed. 968. But the federal courts are not bound to follow such a decision of a state court unless it was made prior to the time when rights were acquired under the instrument which is in controversy in the action, and they will decline to follow it if such subsequent decision of the state court is contrary to its own previous ruling or to the previous decisions of the supreme court of the United States. Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517. The bonds in controversy in the present suit were issued long prior to the decision of the supreme court of California in Meyer v. Porter. The law of that case formed no part of the law of the contract. Those who acquired bonds under the act authorizing the widening of Dupont street acquired the same before the state court had placed a construction upon the statute of limitations as applicable thereto. We are not bound, therefore, to follow Meyer v. Porter, even if it announces—which we think it does not—the doctrine contended for by the plaintiff in error, a doctrine contrary to generally accepted authority, and directly the reverse of that which had been announced by the decisions of the supreme court of the United States in City of Kenosha v. Lamson, 9 Wall.

477, 19 L. Ed. 725; City of Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809; Clark v. Iowa City, 20 Wall. 583, 22 L. Ed. 427; and as interpreted in Amy v. City of Dubuque, 98 U. S. 470, 25 L. Ed. 228. We find no error in the judgment of the circuit court sustaining the demurrer as to all the coupons save the last two, but as to the other grounds we think the demurrer should have been overruled.

The decree will be reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

LINDSLEY v. UNION SILVER STAR MIN. CO.

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

No. 723.

RES JUDICATA—JUDGMENT ON DEMURRER.

A judgment dismissing an action on plaintiff's declining to amend after the sustaining of a demurrer to the complaint on the ground that it did not state sufficient facts to constitute a cause of action is one on the merits, and may be pleaded in bar of a second action between the same parties on the same cause of action.

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

This was an action brought by the plaintiff in error against the defendant in error to recover possession of the mining ground and premises described in the complaint. The defendant pleaded in bar a judgment in its favor upon a demurrer to the complaint in a suit brought by the same plaintiff against the defendant upon the same cause of action in a district court of the state of Idaho. This plea alleged the commencement of an action in the state court by plaintiff against the defendant, for the purpose of determining the title of the plaintiff as against the adverse claim of the defendant to the mining ground and premises in dispute between the parties; the filing of an answer by the defendant to plaintiff's complaint, and also by leave of the court the filing of an amended demurrer to the same complaint; the hearing upon the amended demurrer; the judgment of the court sustaining the demurrer; and, upon the failure of the plaintiff to amend the complaint, the final judgment of the court dismissing the action. Copies of these pleadings and proceedings in the state court were attached to the plea, and made a part thereof. The plea further alleged that the action in the state court was the same cause of action set forth in the complaint in the present action; that the state court was a court of competent jurisdiction to hear and determine said action; that said court had jurisdiction both of the subject-matter of said action and of the parties plaintiff and defendant therein; that they are the same parties plaintiff and defendant in the present cause of action; that plaintiff was duly represented by counsel at every stage of said action in the state court; that the judgment rendered by the state court in said action remains in full force, and is unreversed, and that no proceedings whatever have been taken by the plaintiff to take or prosecute an appeal therefrom; that the matters and things set forth in the complaint in said action in the state court are the same matters and things as those set forth in the complaint in this action; that the said two complaints disclose the same ground of claim and allege the same facts to sustain the same; and that said judgment in the state court was a final judgment upon the merits in favor of the defendant and against the plaintiff. To this plea the plaintiff interposed a demurrer on the ground that the said plea did not state facts sufficient to constitute a defense to the action. Upon the issue raised by this demurrer to the plea the court entered

a judgment in favor of the defendant, and dismissed the action. 106 Fed. 468. To reverse this judgment the plaintiff prosecutes this writ of error.

Charles P. Lund and Laurence R. Hamblen, for plaintiff in error.
Dorner & Estep, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The only question raised by the demurrer to the plea was whether the plea stated facts sufficient to constitute a defense to the action. A plea of former adjudication is sufficient if it alleges that the former action was between the same parties, and presented the same cause of action, in a court of competent jurisdiction, and that the judgment of the court was upon the merits of the case. 9 Enc. Pl. & Prac. 620, 621; Gould v. Railroad Co., 91 U. S. 526, 529, 23 L. Ed. 416. The plea in this case contained these allegations, supported by copies of the pleadings in the former case. The demurrer to the plea admitted that these allegations were true. But as these allegations were based upon the pleadings in the former case, and copies of these pleadings were attached to the plea, it remained to be determined by the circuit court as a question of law whether, in the former action, the judgment of the state court was upon the merits of the case. A judgment upon demurrer may be a judgment upon the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties, or established by evidence submitted to the court or jury. No subsequent action can be maintained by the plaintiff if the judgment is against him on the same facts stated in the former complaint. If, in such a case, the court errs in sustaining a demurrer and entering a judgment for the defendant thereon when the complaint is insufficient, the judgment is nevertheless on the merits. It is final and conclusive until reversed on appeal. Until then the plaintiff cannot disregard it, and maintain another action. The effect of a judgment still in force is never diminished on account of any state of law on which it is founded. 1 Freem. Judgm. par. 267; 1 Herm. Estop. par. 273. In the former action the plaintiff alleged that since the 27th day of May, 1895, by himself and his predecessors in interest he had been, and was at that time, the owner and in the possession and entitled to the possession of certain mining ground situated in the county of Kootenai, in the state of Idaho, described in the complaint as the "Imperial Lode Mining Claim," situated in Pend d'Oreille mining district, county of Kootenai, state of Idaho, and situated on the east slope of Black Tail Mountain, and about 1,500 feet south of the Black Jack lode mining claim, the claim lying from the discovery 1,475 feet northerly and 25 feet southerly, with boundaries "commencing at the south center end post; thence 300 feet westerly to the northwest corner post; thence 300 feet easterly to the north center end post; thence 300 feet easterly to the southeast corner post; thence 1,500 feet southerly to the southwest corner post; thence 300 feet westerly to the place of beginning." The complaint then charges that "on or about the 1st day of November, 1898, while the plaintiff was so the owner of and in the possession of, and entitled to the possession of, the said Imperial lode mining claim hereinbefore described, the

defendant wrongfully entered into and upon the same and took possession of the said Imperial lode mining claim." Then follows a description of the ground in controversy, as follows: "A strip of ground about 105 feet wide along the apex of the said Imperial lode mining claim, running in a southerly direction along the apex of the said Imperial lode mining claim for a distance of about 800 feet; all of which said strip of ground is within the boundaries of the said Imperial lode mining claim." It is then charged that "defendant has ever since said time remained in possession of said strip of ground as above described, against the protest, and against the will, and without the consent of the said plaintiff, and that since about the 1st day of November, 1898, the said defendant has mined and dug and extracted ores from the said strip of ground, the property of the plaintiff, and has removed and shipped considerable bodies of said ore, and is now engaged in mining, digging, and extracting ores from said strip of ground, and threatens to remove and ship therefrom a large quantity of ore, to wit, of the value of about $1,000, to the great damage of the plaintiff." To this complaint the defendant interposed a demurrer, and for cause of demurrer averred: "(1) That the complaint did not state facts sufficient to constitute a cause of action; (2) that the complaint was ambiguous, unintelligible, and uncertain, in that the description of the alleged Imperial lode claim, so far as the same is alleged to have been trespassed upon by the defendant, was uncertain and defective, and not alleged with sufficient certainty to enable an officer, upon execution, to identify the same, or to enable the court to determine the area alleged to be wrongfully in possession of defendant, or determine the area in conflict as between the parties plaintiff and defendant in its decree." This demurrer was sustained by the court, and, the plaintiff declining to amend the complaint under the permission granted by the court, the court dismissed the case.

If the court was in error in sustaining the demurrer and entering a judgment for the defendant, it was the duty of the plaintiff to correct that error by proper proceedings on appeal in the state court. The error cannot be corrected here. The averments of the complaint to which the general demurrer was directed alleged the plaintiffs possession and ownership of the Imperial lode mining claim, and described its location and boundaries sufficiently to identify it upon the ground and in the locality where it was situated. North Noonday Min. Co. v. Orient Min. Co., 6 Sawy. 299, 310, 1 Fed. 552; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 677; Erhardt v. Boaro, 113 U. S. 527, 533, 5 Sup. Ct. 560, 28 L. Ed. 1113; Hammer v. Mining Co., 130 U. S. 291, 299, 9 Sup. Ct. 548, 32 L. Ed. 964; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455, 458; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361.

The complaint also charges the wrongful entry of the defendant upon the plaintiff's mining claim, and his possession of the same, against the will and without the consent of the plaintiff. These allegations constituted plaintiff's cause of action and his case upon the merits, and, being placed in issue by the demurrer, he is bound by the judgment. The special demurrer was directed to the alleged defective description of that part of plaintiff's claim charged to have

been trespassed upon by the defendant. It must be presumed that the judgment was upon the merits upon this special issue: First, because the plaintiff refused to amend his complaint under the permission granted by the court; and, secondly, because the complaint filed in the circuit court is not more certain or specific in describing the ground which it is alleged the defendant entered upon and at the time of the suit was engaged in mining and developing. In Gould v. Railroad Co., 91 U. S. 526, 23 L. Ed. 416, the action was commenced by the plaintiff in error against the defendant in the circuit court of the United States for the district of Indiana, to recover the amount of a judgment rendered by the supreme court of the state of New York in favor of the plaintiff's testator against the defendant. The defendant pleaded in bar a judgment in its favor on a demurrer to the declaration in a suit brought on the same cause of action in a state court in Indiana. A demurrer to this plea was overruled, whereupon the plaintiff replied, alleging a material difference between the facts stated in the declaration in the case in the United States circuit court and those stated in the declaration in the former case in the state court, claiming that the judgment on demurrer to the declaration in the state court was not a judgment upon the merits. To this replication a demurrer was sustained, and a judgment entered accordingly. The case was thereupon taken to the supreme court of the United States upon a writ of error. A very material difference between that case and the one at bar consists in the fact that in that case the plaintiff not only demurred to the defendant's plea, setting up the judgment in the state court, thus placing in issue the sufficiency of the plea as a legal defense to the cause of action, but, after the demurrer to the plea had been sustained, the plaintiff replied to the plea, alleging material differences in the facts stated in the two causes of action. In the case at bar the plaintiff has been content to stand upon the demurrer to the defendant's plea, thus placing in issue merely the sufficiency of the defendant's plea as a legal defense. But, notwithstanding the broader issues of the case in the supreme court, the law there stated as to the effect of a judgment upon a demurrer in a former case is applicable to the present case. The court there said:

"Special pleading is still allowed in certain jurisdictions; and, if the plaintiff and defendant in such a forum elect to submit their controversy in that form of pleading, the losing party must be content to abide the consequences of his own election. Due service of process compels the defendant to appear or to submit to a default; but, if he appears, he may, in most jurisdictions, elect to plead or demur, subject to the condition that, if he pleads to the declaration, the plaintiff may reply to his plea or demur; and the rule is, in case of a demurrer by the defendant to the declaration, or of a demurrer by the plaintiff to the plea of the defendant, if the other party joins in demurrer, it becomes the duty of the court to determine the question presented for decision, and if it involves the merits of the controversy, and is determined in favor of the party demurring, and the other party for any cause does not amend, the judgment is in chief."

The defendant had appeared in the action and demurred to the complaint, and the court sustained the demurrer, giving leave to amend. The court further said:

"But the record shows that the plaintiff in that case declined to amend his declaration, and that the court rendered judgment for the defendants. An appeal was prayed by the plaintiff, but it does not appear that the appeal, if it was allowed, was ever prosecuted; and the present defendants aver in their plea in bar that the matters and things set forth in the declaration in that case are the same matters and things as those set forth in the declaration in the present suit; that the plaintiff impleaded the defendants in that suit in a court of competent jurisdiction, upon the same cause of action, disclosing the same ground of claim, and alleging the same facts to sustain the same as are described and alleged in the present declaration; that the court had jurisdiction of the parties and of the subject-matter, and rendered a final judgment upon the merits in favor of the defendants and against the plaintiff, and that the judgment remains unreversed, and in full force."

The plaintiff, however, demurred to this plea. The court overruled the demurrer, holding that the plea was a good bar to the action. But, as before stated, instead of amending the declaration pursuant to the leave granted by the court, the plaintiff filed a replication to the plea in bar, alleging that the decision of the state court was not a decision and judgment on the merits of the case, but, on the contrary, the judgment of that court only decided that the complaint or declaration did not state facts sufficient to sustain the action. The plaintiff thereupon proceeds in his replication to the plea to refer to certain allegations contained in the declaration in the case then before the court which were not contained in the complaint in the prior case, and which he alleges fully supply all the facts for the want of which the demurrer was sustained to the complaint in the state court. To this replication of the plaintiff the defendant demurred specially on the ground that the replication was insufficient. The supreme court, referring to the issues presented by these pleadings, said:

"Except in special cases, the plea of res judicata applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Tayl. Ev. § 1513; Henderson v. Henderson, 3 Hare, 115; Stafford v. Clark, 2 Bing. 382; Miller v. Covert, 1 Wend. 487; Bagot v. Williams, 3 Barn. & C. 241; Roberts v. Heim, 27 Ala. 678. Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made ore tenus before a jury. Bouchaud v. Dias, 3 Denio, 244; Perkins v. Moore, 16 Ala. 17; Robinson v. Howard, 5 Cal. 428; City of Aurora City v. West, 7 Wall. 99, 19 L. Ed. 42; Goodrich v. City of Chicago, 5 Wall. 573, 18 L. Ed. 511; Morgan v. City of Beloit, 7 Wall. 613, 19 L. Ed. 205. From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1) That a judgment rendered upon demurrer to the declaration or to a material pleading setting forth the facts is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is that facts thus established can never after be contested between the same parties, or those in privity with them. (2) That if judgment is ren-

dered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. Rex v. Kingston, 20 Howell, St. Tr. 588; Hitchin v. Campbell, 2 W. Bl. 831; Clearwater v. Meredith, 1 Wall. 43, 17 L. Ed. 604; Gould, Pl. § 42; Ricardo v. Garcias, 12 Clark & F. 400."

The court finally considers the facts alleged in the reply to the plea in bar, and determines that the defects, if any, in the declaration in the former suit, were not remedied by the new allegations in the later suit; and from this review of the pleadings the court found no error in the record, and affirmed the judgment of the lower court.

This case determines the question at issue in the case at bar. We find no allegation in the complaint filed in the circuit court that remedies the defects, if any there were, in the complaint in the state court; and it follows, as a necessary conclusion, that the judgment in the state court was based upon whatever merits there were in plaintiff's case.

The judgment of the circuit court is affirmed.

HUME v. J. D. SPRECKELS & BROS. CO.

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

No. 681.

1. SALVAGE—SALVAGE OR TOWAGE SERVICE—TOWING LEAKING SCHOONER INTO PORT.

   Where a schooner had sprung a leak by reason of striking a bar at the mouth of a river while being towed out to sea, which made it necessary to resort to the pumps, and, in the judgment of the master, to put into an intermediate port for repairs, but she was unable to reach such port by sail, owing to head winds, the service of a tug in towing her in was a salvage service, and entitled to be compensated as such.[1]

2. SAME—AMOUNT OF AWARD—REVIEW ON APPEAL.

   The amount awarded by the trial court for salvage services will not be reduced by an appellate court, unless for violation of just principles, or for clear and palpable mistake, or gross overallowance.

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

Dolph, Mallory, Simon & Gearin (R. H. Countryman, of counsel), for appellant.

Nathan H. Frank, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. On October 20, 1898, a libel was filed in the district court of the United States for the district of Oregon against the schooner Berwick by J. D. Spreckels & Bros. Co., a Cal-

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

ifornia corporation, for the sum of $850. Upon the trial of the action a decree was entered in favor of the libelant for $500 and costs. From this decree the claimant, R. D. Hume, has appealed.

It is alleged in the libel that the libelant corporation is, and was during the time mentioned, the owner of the steam tug Escort, which tugboat is and has been engaged in the business of towing vessels in and out over the Columbia river bar; that on October 6, 1898, the said tugboat was moored at a wharf in the port of Astoria, Or., and about midnight the employés on the tug saw distress signals being fired at sea; that steam was immediately gotten up on said tugboat, and at 20 minutes after 12 o'clock at night the said tugboat left the port of Astoria, crossed the bar, and went out about 12 miles to sea, where she discovered the schooner Berwick loaded with lumber and in a sinking condition, and in tow of a steamer called the Fulton. It was alleged that the Berwick on the preceding day, October 5, 1898, had struck on the Tillamook bar while going out to sea, had sprung a leak, and begun rapidly to take water; that, arriving near the Columbia river bar, she was taken in tow by the steamer Fulton, but said steamer, not desiring to enter the port of Astoria with said schooner, held her off the bar, and fired signals of distress to attract attention in the port of Astoria, in answer to which the said tugboat went to the assistance of the said schooner; that at the request of the master of the said schooner the said tugboat took the schooner in tow, paid to the steamer Fulton $100, the amount demanded by it for the services it had performed, and thereupon towed the said schooner into the port of Astoria, where it arrived at about 9 a. m. on the morning of October 6, 1898. It was alleged that the services performed by the said tugboat were reasonably worth the sum of $750, and that, in addition thereto, the libelant was entitled to be paid the $100 advanced as aforesaid to the steamer Fulton. The answer of the claimant, R. D. Hume, as owner of the schooner Berwick, denied that the tugboat Escort took the said schooner in tow at the request of the master of said schooner, and averred the facts in relation to the towing of said schooner to be substantially as follows: That on October 4, 1898, the schooner Berwick left the port of Nehalem, Or., in tow of a steamer, having on board a cargo of lumber, and being bound for the port of San Francisco, Cal.; that while being towed over the bar the schooner struck, and shortly afterward the steamer let go its hawser, and the schooner proceeded to sea without said steamer; that about 20 minutes afterwards it was discovered that said schooner had sprung a leak; that the weather was calm, and at 5 o'clock a. m. of October 5th said schooner was outside of the Columbia river bar, where she lay until about 5:30 p. m. of said day, when the steamer Fulton came alongside and offered to tow said schooner to Astoria that evening for the sum of $250; that this offer was refused, the master of the schooner offering to pay $100 for the service, which was in turn refused by the master of the steamer; that the master of the steamer then proposed to leave the compensation to be paid for such towage service to be adjusted between the owners of the respective vessels; that this offer was accepted, and thereupon said steamer passed her hawser to said schooner, and towed said schooner until about 9 p. m. of said

day; that the master of said steamer then ordered the sails of the schooner to be taken down, saying that they would lay by until daylight; that at 4:15 a. m. on the morning of October 6th the tug Escort hove in sight, and came alongside; that the master of the steamer ordered his hawser let go, and the Escort passed her hawser to the schooner, and towed her into port, arriving there at 8 o'clock of that morning. It is averred that the towage service so performed by the tug Escort was so performed at the request and for the benefit of said steamer Fulton, and in pursuance and fulfillment of the towage contract entered into with said steamer Fulton hereinbefore set forth, and not at the instance or request of said schooner Berwick or her owner. It is further averred that at the time when this service was performed the schooner Berwick was not in distress or danger.

The court found, as matters of fact: That about midnight of October 6, 1898, upon being notified that signals of distress were being fired out at sea, the master of the tugboat proceeded out to sea on said tug, and at about a distance of 10 miles off the Columbia river (being about 30 miles from Astoria) he found the Berwick, loaded with about 138,000 feet of lumber, leaking badly, but in tow of the steam schooner Fulton. That said schooner, while in tow of a tug on October 5, 1898, had struck heavily on a bar at the mouth of the Nehalem river. That the leak was not discovered until the tug had let go of the schooner. That a signal of distress was hoisted, which attracted the attention of the Fulton, then on its way to San Francisco. That the Fulton spoke to the schooner, and the master of the schooner asked to be towed into the Columbia river, which the master of the Fulton offered to do for $250, but the master of the schooner declined, and offered $100 for the service. The master of the Fulton declined that offer, but proposed to tow the schooner into the Columbia, and leave the price to be settled by the respective owners of the vessels, and that proposition was accepted. That the Fulton took hold of the schooner, and started in with her, arriving at the mouth of the Columbia after dark; but it was very clear, the moon was shining brightly, and objects could be plainly seen on the water. The Fulton started in with her tow, but the schooner was well filled with water and towed badly; and the Fulton did not have sufficient power to handle her properly, and she drifted out of the channel. That thereupon the master of the Fulton, fearing the tow would go ashore, turned and went out to sea and anchored, where they were found by the tug Escort as aforesaid. That the master of the Fulton proposed to the master of the Escort that he should be paid $100 for the services thus far of the Fulton, and that the Escort should tow the Berwick into Astoria. That the master of the Escort paid the Fulton $100, and took the Berwick in tow, and towed her safely to a dock in Astoria, where her cargo was discharged, and her damages repaired. That said schooner Berwick was of the value of $5,000. That the Berwick was so badly injured that she could not have lived at sea, nor could she have gotten into port without the aid of the Escort, and the services performed by the Escort were salvage services. That the sum of $500 was a reasonable sum to be allowed for the services rendered by the tug Escort to said schooner Berwick.

The evidence in support of the finding of fact that the Berwick was so badly injured that she could not have lived at sea, and could not have gotten into port without the aid of the Escort, was based upon the testimony of two witnesses who testified in the presence of the court. One of these witnesses was Samuel B. Randall, the agent of the libelant at Astoria in charge of its two tugs, the Escort and Rescue. His testimony upon this subject was substantially as follows:

"She was leaking very badly,—so much so that they had to keep all of the pumps at work while she was lying at the wharf, to keep her from sinking; and at the same time they had to discharge cargo. She was loaded with lumber, and they discharged the cargo of lumber and repaired the vessel. The schooner was in such a condition that she could not possibly have lived at sea, nor could she have made any port without the assistance of the tugboat."

The other witness was E. B. Howe, the master of the Escort, who testified that:

"She was leaking very badly, and could not possibly have lived but a very short time at sea; nor could she have sailed into the Columbia river, as the wind was blowing off shore."

It may be said that these witnesses were not disinterested, and that their testimony should be considered with some degree of caution. But there was evidence on the part of the claimant tending to support their testimony. The witness Cornelius Anderson, who was master of the Berwick, testified upon cross-examination as follows:

"Q. I notice in this extended protest that you say you found two heavy streams coming in in the fore peak. Is that the fact? A. Oh, yes; you could see some coming in at both sides. Q. How much water did you have in when you arrived off the Columbia bar? A. I could not say. Q. Did you sound it? A. I could not sound it. Q. Why could you not sound it? A. We have no particular way of sounding it. The only way I could see there would be that, if it had extended above the skin of the vessel, I could have seen it in the fore peak. If the water had been above the skin, I could have discovered it forward. * * * Q. I suppose you kept your men at the pumps all the time, both day and night? A. Mostly all the day. * * * Q. You were not bound for Astoria? A. I was not bound there. I went in there on account of getting the vessel's leaking looked after. I didn't know what might happen on the way down, and I would not take any chances on going down on account of the vessel leaking. I did not know what might take place, so I thought I would go into Astoria, and do what I could do there. Of course, I didn't fancy it would be good policy to go on to San Francisco like that."

The assignments of error cover practically the entire field of the findings of fact by the court below. Considering the matters therein involved in their logical order, the first question that arises is, was the service performed by the tug Escort for the Berwick a salvage service, or a mere towage service? "Salvage service" has been defined as the service rendered in relieving property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render such service. Williamson v. Alphonso, 30 Fed. Cas. 4; The Centurion, 5 Fed. Cas. 369; The M. B. Stetson, 16 Fed. Cas. 1,273; The H. B. Foster, 11 Fed. Cas. 948. "Towage service" has been defined as the service rendered to a vessel that has received no injury or damage. The Reward, 1 W. Rob. Adm. 177. It is the employment of one vessel to ex-

pedite the voyage of another. The Princess Alice, 3 W. Rob. Adm. 138. It is an undisputed fact that the schooner Berwick, while being towed out to sea from the Nehalem river, hit upon the bar, and so strained her timbers that a leak resulted, and it became necessary to resort to the pumps. While in this condition she accepted assistance in a towage service to the port of Astoria. Under the accepted doctrine of the authorities referred to, a case is presented of salvage service; and the next consideration must be, of what order or grade was this service, and what is a sufficient compensation for it?

It appears from the evidence that the schooner Berwick, after having been towed across the spit at the entrance to the Nehalem river, discovered that a leak had been sprung. The master decided to sail for Astoria and make repairs, instead of continuing to San Francisco, the port of discharge. This was about 2 o'clock in the afternoon. There was only a light wind, and they did not reach the Columbia river bar until about 7 o'clock the next morning. By the use of the pumps, the water had not gained any, and the schooner was in condition to sail. But owing to the light winds it was difficult to sail into the river, so a flag was raised to attract the attention of passing vessels, the pumping was continued when necessary, and the schooner lay outside of the harbor until late in the afternoon, when the steamer Fulton came along and asked what was wanted. The master of the schooner first asked the steamer to report the schooner to its owners in San Francisco, telling them its condition, and that it was going in to Astoria. The master of the steamer was indignant at being stopped for such a request, and, after a few remarks to that effect, said, "Don't you want to get towed in to Astoria?" The master of the schooner replied, "Yes; I figure on getting towed if I can't sail." The steamer's master offered to tow the schooner in for $250. The schooner's master said he would give but $100. The steamer's master then said he would take the tow, and leave the bargain to be settled by the respective owners of the vessels in San Francisco. This the schooner's master agreed to, and the tow was entered upon. The steamer continued towing the schooner until about 8 o'clock that evening, and then ordered the schooner to haul down sails; saying they would lay around there until daylight. They remained in this condition, crossing in and out among the buoys, and retaining about the same position, until after 4 o'clock the next morning, when the tugboat Escort came out from Astoria, and went alongside the steamer. The captain of the steamer testifies that the captain of the tugboat came on board the steamer, and talked over with him the matter of taking the tow off his hands; that the captain of the steamer said, as he had already lost about eight hours' time, he would lose a little more, and take the schooner in himself; that the captain of the tugboat asked if any signal lights had been burning, or rockets fired, and, upon learning that there had not, he said he did not like to come out for nothing, and again asked for the tow. The captain of the steamer consulted with his mate, and upon considering that by giving the tow over to the tugboat the steamer

could reach San Francisco in the morning, and save a day's work, he offered to release the tow if the captain of the tugboat would give him $100 for the work already done by the steamer. According to his testimony, the bargain was made as follows:

"I said: 'I expect to get closer to $250 than to $100 for the tow after she is landed in Astoria. If you are willing to take it on those conditions, and give me $100, you can have her.' He hemmed and hawed a little while, and he says: 'Well, rather than go back empty, I will take her.' So he went up into the purser's room with me, and the purser made out a check, and the captain of the tugboat signed it,—a check on Spreckels. Q. For what amount was that check? A. $100. Q. What occurred then? Did he do anything? A. He went aboard his vessel, and bid me 'Good morning,' and went back to the Berwick and asked the Berwick to let go the line. The captain of the Berwick sent his mate forward, and he said, 'Will I let go of the hawser, captain?' Says I, 'Yes; he will tow you in, and everything will be all right.' That is all. After that I proceeded on my way to San Francisco."

He further states that in the conversation the captain of the tugboat said "he thought, if he could get as much out of it as I did, it would pay him for coming out there." The master and mate of the schooner Berwick state that the tugboat, after it had been lying by the steamer Fulton for a while, came up to the schooner, and the captain called out, "Let go the steam schooner's hawser." The master of the Berwick directed the mate to ask the captain of the Fulton about it. This was done, and the captain of the Fulton replied, "Yes; let go my hawser, and take the towboat's." This question and response were made through the speaking trumpets. The schooner then let go of the hawser of the Fulton, and took that of the tugboat, without any further conversation between the parties, other than a query from the captain of the tugboat as to whether the schooner was full of water, to which the master of the Berwick replied, "No." The tugboat then proceeded to tow the schooner into Astoria, arriving there about 8 o'clock in the morning. The captain of the tugboat denies that the captain of the Fulton told him of any contract between himself and the schooner, and says that the captain merely said that he thought his boat should be paid something for the services already rendered, and that $100 was finally agreed upon as a proper sum, and paid. The owners of the Escort demanded $750 for the service, and the repayment of the $100 paid to the Fulton in addition. The owners of the Berwick contended that $250 should be the limit of their liability. The court below awarded the owners of the Escort $500, as compensation for a salvage service.

It follows from the review of the testimony herein made that we find sufficient evidence to support the findings of the court below as to the facts in the case. We are of opinion that the testimony on behalf of the claimant does not discredit the claim that a substantial salvage service was rendered the Berwick, in distress, by the steamer Fulton and the tug Escort, and that, under the circumstances of this case, both these services should be treated as one continuous salvage service. The agreement reached between the masters of the Berwick and the Fulton, that the latter should tow the Berwick into the Columbia river, and leave the compensa-

tion to be settled by the owners of the Fulton and the Berwick, was not limited by the previous offer of the master of the Fulton to perform the service for $250. That offer was rejected, as was the offer of the master of the Berwick to pay $100 for such service. It remained, then, for the owners of these two vessels to agree upon the compensation to be paid for the services rendered the Berwick, or, failing in this, to have the question determined by the court. The question submitted to the court was one with respect to which different minds might reach different conclusions as to the amount of salvage to be decreed. The rule in such a case was stated in The Connemara, 108 U. S. 359, 2 Sup. Ct. 758, 27 L. Ed. 751, as follows:

"In The Sybil, 4 Wheat. 98, 4 L. Ed. 522, Chief Justice Marshall said: 'It is almost impossible that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed, and the mode of distribution.' And by the uniform course of decision in this court, during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the judicial committee of the privy council of England, exercising a like jurisdiction, the amount decreed below was never reduced, unless for some violation of just principles, or for clear and palpable mistake, or gross overallowance. Hobart v. Drogan, 10 Pet. 108, 119, 9 L. Ed. 363; The Comanche, 8 Wall. 448, 479, 19 L. Ed. 397; The Neptune, 12 Moore, P. C. 346; The Carrier Dove, 2 Moore, P. C. (N. S.) 243; Id., Brown. & L. 113; The Fusilier, 3 Moore, P. C. (N. S.) 51; Id., Brown. & L. 341."

We find no such reason for reducing the judgment in the present case. The decree of the district court is therefore affirmed.

SHOOK v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,122.

1. MASTER AND SERVANT—RELEASE FOR INJURIES—FRAUD—EVIDENCE—SUFFICIENCY.

Where an employé, a few months after being injured, executed a release, and afterwards became insane from wounds in his head, and defendant, in an action for injuries, pleaded the release in bar, an averment that plaintiff in his mentally weak condition, by false and misleading statements by defendant's surgeon, was kept in ignorance of his true condition, and by feigned promises of employment was induced to execute the release for an inadequate consideration, is not sustained, in the absence of positive testimony on such issue, where it appears that he was restored to his employment, and at the time the release was signed the injuries to plaintiff's brain from the wounds in his head were not known to the defendant's surgeon.

2. SAME—QUESTIONS FOR JURY—DIRECTING VERDICT.

An employé received wounds in his head, which injured his brain, and subsequently produced insanity. After the accident his mental temperament was changed from that of a kind and considerate man to one of seemingly clouded intellect and irritable disposition. After the injuries he resumed his employment as a locomotive engineer without showing any incapacity for the service, and executed a release to the company for his injuries. The testimony as to his mental condition when he executed the release and as to whether the injury to the brain was in contemplation of the parties was conflicting. The company's physician, who examined him shortly after the accident, did not examine his head,

stating the wounds there were merely scalp wounds. He continuously suffered from pains in his head until he was adjudged insane, about three years after the accident, and continued his employment for over two years, when he was discharged for disobedience of the company's rules. *Held*, that the issues as to such employé's sanity at the time he executed the release, and, if he was mentally sound, whether the injuries to his brain were in the contemplation of the parties, were, under the evidence for the jury, and it was error to direct a verdict for defendant.

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

This action was brought by the plaintiff in error, George A. Shook, a person of unsound mind, by his wife, Mary G. Shook, as guardian and next friend, against the Illinois Central Railroad Company, the defendant in error. The declaration is in the common form. The answer, in addition to the general issue, presented a special plea in confession and avoidance, which, in effect, was a plea of accord and satisfaction, setting up a written release. The release was not attached to the plea, but is shown by the evidence to have been literally as follows:

"The Illinois Central Railroad Company to George A. Shook, Engineer, Dr.

"Address: Water Valley, Miss. (General Voucher. Voucher No. ——. Month of ———, 18—.) Charge to Per. Inj., Miss. Div., 140.00.

"In full payment, satisfaction, and discharge of all claims, demands, and rights of action whatsoever, in any wise connected with or arising out of personal injuries sustained by the said George A. Shook on or about November 22, 1896, at or near Water Valley, Mississippi (Mississippi division), while employed as engineer in service of the Illinois Central Railroad Company he sustained injuries by jumping from engine No. 863 to avoid collision, and in release of all claims for all injuries then and there received, however caused, 140.00. Voucher made Jan. 27th, 1897.

"I certify that I have examined all extensions, additions, and calculations in this account, and that they are correct.

"W. S., 1/29, Clerk.

"I certify that the above account has not been previously paid.

"J. M., 1/29, Clerk.

"Certified correct: A. W. Sullivan, Genl. Supt.

"Correct: L. L. Losey, Chief Claim Agent.

"Audited for $140.00: J. W. Anderson, Auditor of Disbursements.

"Approved for payment: J. C. Welling, Vice President.

"Approved: J. T. Harahan, 2nd Vice President.

"Received of the Illinois Central Railroad Co., Mch. 4, 1897, one hundred and forty $^{00}/_{100}$ dollars in full of above account. G. A. Shook.

"Illinois Central R. R. Company, Southern Division. New Orleans, 12 Febry., 1897. No. 19,946. $140. Canal Bank: Pay to the order of Geo. A. Shook ($140.00) one hundred forty and no/$_{100}$ dollars.

"R. S. Charles, Local Treasurer.

"Indorsed: Geo. A. Shook."

To this plea the plaintiff replied (omitting the formal parts) as follows: "Plaintiff says it is not true that he executed a release from all damages for the injuries sustained by him mentioned in his declaration filed in this cause on the 4th day of March, 1897. It is not true that plaintiff was of sound mind, and capable of executing such release as is by the defendant pleaded, on the 4th day of March, 1897." By a second additional replication the plaintiff averred: "That at the time when said supposed release is alleged to have been executed he was bruised and sick and sore, and mentally and physically weak, and unable to attend to his business as he was accustomed to do, and was unable to appreciate the meaning of his action in the execution of such paper as that pleaded by the defendant, nor was he able to comprehend his condition physically or mentally, nor to understand the full extent of his injuries complained of in his declaration herein filed; and, being in such a condition physically and mentally, he was misled and deceived by the phy-

sician and surgeon of the defendant, who was also its agent and employé, and who was also the only physician who at that time had examined the plaintiff, and who repeatedly stated to him (the plaintiff) that he was not seriously hurt, and that he would soon be well and entirely cured of his wounds, when in truth and fact he (the plaintiff) was seriously and permanently injured, and in such a way as to cause him to become violently insane, all caused by the injuries sustained by him and complained of in his declaration aforesaid, his head being broken and his skull depressed so that it rested on his brain, which fact was unknown to him at the time of the alleged execution of the release pleaded by defendant; wherefore, by the false and misleading statements of the defendant's agent and surgeon, plaintiff, in his mentally weak condition, was kept in ignorance of his rights in the premises and of his true condition, and was, by means of false and feigned promises of employment made to him by the defendant, induced to sign said alleged release for a grossly inadequate consideration, and said release was made broad enough in its terms to cover all damages sustained by this plaintiff, when in truth and in fact the damages to his head and brain were unknown to him, he being kept in ignorance thereof by the repeated statements of defendant's surgeon and employé, as aforesaid, and were not contemplated by him at the time of said alleged release, and were not intended to be and were not included in the settlement then and there made with the said defendant, evidenced by the release pleaded by it in its second plea."

The usual proceedings were had. The case came on for hearing before a jury. When the testimony was all in, counsel for the defendant moved the court to charge the jury peremptorily to return a verdict for the defendant; and, after hearing the argument of the counsel for both sides, the court gave the jury a peremptory instruction to return a verdict for the defendant, to which action of the court the plaintiff duly excepted. In obedience to the instruction there was a verdict for the defendant, on which the judgment was rendered.

J. J. Lynch, John H. Kimmons, and R. F. Kimmons, for plaintiff in error.

Edw. Mayes and J. B. Harris, 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.

Four errors are assigned. We will consider only the second, the substance of which is: The court erred in giving the instruction to the jury to find for the defendant, for the reason that there was a conflict in the testimony in regard to the sanity of Shook when he is said to have executed the release pleaded in bar; and, further, even though the testimony might be convincing that Shook, the plaintiff, was of sound mind at the time of the execution of the release pleaded by the defendant, yet there can be no doubt from all the testimony in the case that the fact that plaintiff's brain was injured was wholly unknown to him at the time he signed the release, and was not contemplated by him or by the defendant in the making of any settlement that may have been entered into by him at that time.

Counsel for the defendant in error submits that the only questions raised by the pleadings in this case were two: (1) The bare fact of the execution of the release; and (2) the sanity of the plaintiff at the time of such execution. Both his oral argument before this court and the printed brief which he filed proceed on that view of the pleadings.

It is to be observed that the language of the original replication

joining issue on the plea is that "it is not true that he (the plaintiff) executed a release from all damages for the injuries sustained by him mentioned in his declaration filed in this cause." And the amended replication, in addition to the charge of fraud, expressly avers that "in truth and in fact the damages to his head and brain were unknown to him, * * * and were not contemplated by him at the time of said alleged release, and were not intended to be and were not included in the settlement then and there made with the said defendant evidenced by the release pleaded by it in its second plea." Counsel for the defendant suggests that we may eliminate all questions of the original liability of the defendant, for that, so far as the issue of negligence is concerned, the case went off without reference to that point, and on the trial the defense relied on was the release executed by Shook in March, 1897. The trial court having given the peremptory instruction, the transcript before us contains all the testimony given in the case.

The counsel for the defendant states the evidence of Mrs. Shook substantially as follows:

"The accident occurred on November 22, 1896. Plaintiff was unconscious about thirty-six hours, then recognized witness. There were two wounds on the top and back of his head,—one a scalp wound, and the other tolerably deep and about two inches long. Shook was then thirty-nine years old. 'Never thought he was right mentally after the accident. First noticed symptoms of insanity in February or March, 1900.' He suffered with his head, and from time to time complained of it, until he lost his mind entirely. He was a religious man, but lost his interest in religious matters after the accident. He was an indulgent husband and father before the accident, but after that got irritable toward his family, and little things seemed great to him, and he got worse, and 'it gradually grew worse,'—'got worse toward the last.' His irritability was by spells. Cannot say when it began,—so far back,—but it was some time after the accident. He threatened the life of his oldest boy, who was about seventeen years of age. He was first able to go down town three or four weeks after the accident on crutches, and was then very weak. He did not rest well at night; sometimes would groan, etc.; and when she would wake him up he would seem like somebody crazy, and maybe it would be several minutes before witness could get him to recognize her. He went back to work in the latter part of December, 1896, or 1st of January, 1897. He remained in the railroad's employment until October 18, 1899, running when called on, and drew his salary regularly. After he was discharged he took a trip to Louisiana, where he stayed 'hardly a month.' Then went to Texas, where he stayed a month or six weeks. He was taken to Dr. Briggs, at Nashville, in May, 1900, and was then insane. Cannot say she knows his physical and mental condition on the 4th of March, 1897."

The Dr. Briggs just referred to was Charles S. Briggs, of Nashville, Tenn., a surgeon. Counsel for the defendant gives the evidence of this witness substantially as follows:

"He only knew Shook about three weeks, from June 2 to June 22, 1900. He was then insane from a chronic irritation of the brain caused by a depression of the skull. Trephined it to remove the depressed bone. His brain was diseased. The operation was not successful, because of the long time which had elapsed since the injury. From the nature of the accident described by counsel's questioning and from the injury to the skull, Shook 'would gradually become crazy, and his mind from the time of the accident would not enable him to appreciate the scope and meaning of his action in making a contract. He could not attend to his duties with any degree of intelligence.'"

On cross-examination Dr. Briggs said he only knew the cause of Shook's insanity by inference. He had never treated any other case of insanity caused by injury. He was asked the following questions, and answered them thus:

"X-Int. 33. Assuming that it is proven in this case that George A. Shook prior to the 22d day of November, 1896, was a competent and trusted engineer of the defendant railroad company, then engaged in operating a locomotive engine and a train of cars, and that on that day he received the injury to his head which you have described; assuming, further, that it is proven that after about one month from the 22d of November he (Shook) again entered the employment of the company, and was placed in charge of an engine and train of cars, and operated it successfully and to the entire satisfaction of his superior officers of the road for the space of two or three years after the injury and before you treated him,—that is, running over the main line of the road on schedule or on telegraphic orders, receiving and receipting for his wages, acting as a committeeman for a secret order to which he belonged, and transacting his business affairs generally in a satisfactory manner,—wouldn't the mind of a man capable of doing successfully and to the satisfaction of his superiors the acts mentioned and assumed in the foregoing enable him to appreciate as well as he ever could the scope and meaning of his action in signing a paper or in making a contract? Ans. I don't think that his mental capacity was ever as good after the injury as before, and I think that he was in no mental condition after the accident to appreciate the value of any document involving his personal interests. X-Int. 34. Would you say that an insane man could run a locomotive as they were operated on the I. C. R. R. for a space of two or three years,—I mean so successfully as to escape the notice of his co-employés and superior officers in daily contact with him? Ans. It depends on how insane he is. X-Int. 35. How often did you see him after he received the injury and before you treated him last? Ans. Not at all."

The record of the adjudication of insanity bears date May 4, 1900.

Emma Massey, a servant in the plaintiff's family at the time of the accident, testified that from that time she noticed a change in Shook's manner of treating his family and in his religious life.

Mr. Hogan, a minister of the gospel, and who was pastor of the church of which Shook was a member, testified that after the accident Shook became negligent for a time in his attendance at church, and became remarkably impatient and harsh in his family. He was allowed to testify, without objection, that Shook had remarked to him that the railroad had proposed to allow him to go back to work on condition that he sign the release. That his condition got worse gradually,—so gradually that the stages were hardly perceptible.

G. D. Able, a banker with whom the plaintiff did business, testified that after the accident his manner changed entirely. He grew to be excitable and disconnected in conversation. Could not with any degree of certainty state from what time these little peculiarities dated. Considered him just unbalanced,—not an insane man, but just in that state you might feel uneasy about him.

G. W. Price, a merchant with whom the plaintiff dealt, testified that he never considered Shook the same man after the accident, and it seemed like he gradually got worse. Children, from having been very fond of him, did not seem to want to be around him; that was the marked change; that he was an insane man after that, and had gradually grown worse. Cannot give the date when he first noticed anything wrong. Could not say it was within six months after the accident.

Tom Shipman, a merchant, testified: Did not regard Shook as a sane man. Bored witness, repeating things over and over, and swore a good deal, after his injury. Did not consider Shook capable of attending to business. Cannot say what his condition was in March, 1897. Shook bought goods from witness. Witness regarded him as having sense enough to trade with.

R. H. Ramsey, a machinist, testified: Right after the accident noticed something wrong with Shook, but did not think he was insane. He now considers that he was mentally unbalanced. Noticed a change in his mentality. He became very nervous and excitable. Did not consider that he was capable of conducting his business with the same good judgment and in the same manner as he did before.

T. P. Coleman, a physician (the wound being described by counsel), testified that he thought it would cause some mental derangement. Could not say what would be the effect on his mental capacity when it comes to reasoning and the making of contracts. If, as a fact, he was capable of running his train satisfactorily for three years after, it looks as if he was capable of understanding a contract like the release. Thinks it would require a sane man to do such work.

P. W. Rowland, a physician, testified: An injury to the skull producing pressure on the brain will cause mental disease, etc. Several questions were asked of this witness by counsel and answered, and then his honor, the judge, interposed and asked a couple of questions, as follows:

"By Court: Let me put a question. Suppose the proof to show that George A. Shook received an injury in a railroad accident in the fall of 1896, which caused a depression in his skull, and was insane when carried off after the accident, and so continued for a time, and was troubled continuously at frequent intervals with a pain in his head up to the time when he was pronounced a lunatic by the court; and suppose, further, that his whole mental temperaments after the accident were changed, as manifested in his treatment of his family and in his intercourse with his friends and acquaintances, from that of a man once clear-headed, cool, just, firm, kind, and considerate to that of a man of seemingly clouded intellect, changeable, and irritable to such an extent that he himself called the attention of his friends to the fact, and was conscious of it, but was unable to alter or control it. Now looking at all of these supposed proven facts, would you say that George A. Shook was a sane or insane man, and that he could successfully operate a train and engine on his road on schedule time, for a period of two years and ten months? A. In answer to that question, I will have to give you my knowledge gained from several accounts of injuries of that character,—the course they usually take. I can do that in a very few words. The cases are on record, and a great many of them, where an injury has been done to the brain, and where the skull presses on the brain under similar circumstances, a man who has been cheerful and gentle in disposition becomes, in the main, nervous and irritable and cross, and still carries on his business, but in a manner unsatisfactory to himself and to his friends. It frequently happens that a man goes on for some time, and there are even instances where they have gone on for years, but finally the result was insanity and death. Q. Do you think it reasonable and probable that he could operate a railroad locomotive for two years and ten months under those circumstances? A. I do not think he would be apt to do it."

Earl Brewer, an attorney at law, testified: Saw Shook once a week or once a month after he got out from his accident until he went to the asylum, and from his appearance witness never thought Shook was sane. Shook talked the accident over and over, and would curse

and swear and talk about the master mechanic. He consulted witness about suing the company, and discussed with him about making the settlement, and then told him he had settled. . He would say he did not know he was hurt badly when he signed the release, and that he thought he could get around it. In the conversation witness had with Shook, when witness would first commence talking with him he would seem to be perfectly sane, and he would talk with you for some time that way until he would become irritated, and would begin cursing, and then you could notice that he was not exactly right.

Joe Baker, a conductor, one of the defendant's witnesses, testified: Shook was one of his regular engineers for three or four years after the injury. Witness saw no difference in his manner of conversation and conduct before and after the accident. Shook was finally discharged for violating a rule of the company up in Tennessee.

The defendant's counsel asks the court to note that the company not only took Shook back to work, but that he remained at work from the time of the signature of the release, March 4, 1897, until he was discharged for breach of rules, on the 18th of October, 1899, drawing large compensation all of the time.

In the foregoing recital we have adopted substantially, as far as we have quoted the evidence, the statement of it which we find in the brief of counsel for the defendant. The witnesses named went much more largely into detail, and both they, and other witnesses not named, on direct and cross-examination (with the usual difference in answers so drawn out, respectively), gave testimony tending to support the contention of the plaintiff on the issue of sanity, and made admissions or gave answers to cross interrogatories tending to qualify their direct testimony, and to an extent to support the defendant's contention on the issue of sanity.

There was evidence that Dr. Shoffner, the railroad surgeon at Water Valley, was called in to see the plaintiff immediately after he was injured, and had charge of his case during his confinement, and that when the plaintiff's wife called this physician's attention to the wounds on Shook's head the doctor said they did not amount to anything; that they were just scalp wounds. He never examined his head at all. He told Mrs. Shook that Mr. Shook was not hurt very seriously; that he would soon be all right. This he said after she had called his attention to the scalp wounds.

Mrs. Mary Howard, an employed nurse, testified that she was present in the family at the time the plaintiff was brought home injured, and helped to nurse him, and that the doctor gave him calomel and fever powder.

We conclude, therefore, that there was no evidence offered to support the plaintiff's charge in his second replication, that by the false and misleading statements of the defendant's agent and surgeon the plaintiff, in his mentally weak condition, was kept in ignorance of his rights in the premises and of his true condition, and was, by means of false and feigned promises of employment made to him by the said defendant, induced to sign the alleged release for a grossly inadequate consideration. Nearly the whole of the proof

drawn out by the defendant's cross interrogatories, or embraced in the testimony of the witnesses whom the defendant called to meet the issue of insanity submitted by the plaintiff, tends to show that at the date of the signing of the release it was not in the contemplation of the plaintiff nor of the defendant that the plaintiff had received any injury to his brain by reason of the wounds appearing on his head, and that it could not have been intended by either of the parties that any injury to the brain of the plaintiff was to be included, or was included, in the settlement made on March 4, 1897, referred to in the defendant's second plea as a release, which it sets up in bar.

It appears to have seemed incredible to the trial judge that the plaintiff should have been on March 4, 1897, mentally disordered to such an extent that he could not bind himself by a written release, when in fact at that time, and for 2 years and 10 months thereafter, he was engaged in the service of the defendant as a locomotive engineer in pulling its freight trains on schedule and telegraphic orders, without showing any incapacity for that service. Assuming that the view of the trial judge on this subject is correct, it seems equally incredible that the defendant should have employed the plaintiff for that service if its representative agents knew or believed or suspected that his brain had been materially injured by the wounds appearing on his head. The amount received in the settlement was substantially equal to the wages of the plaintiff for one month's service, which was approximately the time he was out of employment,—from the 22d of November, 1896, the day on which the accident occurred, until his return to service, the latter part of the following December. It is hardly credible that if the plaintiff knew or believed, or had adequate reason to suspect, that his skull was fractured, and resting on his brain, and causing him to experience the pain in his head of which he at times complained, he would have consented, for so inconsiderable a sum, to release the defendant from all claims for damage on that account. There is, moreover, proof that when, some time after the settlement with the defendant, it was suggested to him that his mind was affected, he scouted the suggestion as preposterous, and resented it as offensive.

There having been offered on the trial material evidence, pro and con, on the issue of the plaintiff's sanity on the 4th of March, 1897, and bearing also on the issue of whether the injury to the plaintiff's brain was in fact in the contemplation of the parties and included in the settlement, the case was one for the jury. Railroad Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003.

For the error of the court in withdrawing the case from the consideration of the jury, the judgment of the circuit court is reversed, and the cause is remanded, with direction to award the plaintiff a new trial.

THE GEORG DUMOIS.

(Circuit Court of Appeals, Second Circuit. February 28, 1902.)

No. 51.

SHIPPING—CHARTER PARTY—MEASURE OF DAMAGES FOR BREACH.

Under the rule that damages for breach of contract must be confined to those which naturally and directly result from such breach, or may be fairly presumed to have been within the contemplation of the parties when the contract was made, where the owner of a steamer, under a time charter to convey cargoes of bananas from Port Limon to New York, under which a number of voyages had been made, had knowledge of and acquiesced in a custom of the charterer to have a cargo cut and ready to load in anticipation of each arrival of the steamer, and on one outward voyage the vessel was delayed by reason of unseaworthiness, for which such owner was responsible, until on her arrival the cargo was unfit to ship with safety, the charterer is entitled to recover the value at Port Limon of the cargo so lost, and such other loss as directly resulted from the delay; but the charterer was not entitled to load the cargo with knowledge of its condition, and ship the same to New York, and recover as damages the loss by deterioration on the voyage, and in addition a sum which it would have earned as freight for the voyage, under a contract with the third party, if the cargo had been delivered in good condition.

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

J. Langdon Ward, for appellant.

Lawrence Kneeland, for appellee.

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

TOWNSEND, District Judge. The facts which are material upon the question of liability herein are not disputed, and are accurately stated as follows in the opinion of the judge who heard the cause in the court below (88 Fed. 537):

"On the 20th day of July, 1895, the libelants, as copartners, under the firm name of Ellinger Bros., entered into a charter party for the charter of the steamship Georg Dumois for six months or more, in case of a renewal, at a price named per month. It was stipulated that the vessel, with her full complement of officers, seamen, engineers, and firemen, should be delivered at Port Limon, 'ready to receive cargo, and being tight, staunch, strong, and in every way fitted for the service,' which was the carriage of merchandise and passengers between ports in North America and ports in the West Indies, Central America, and South America. The charter party further provided: '(1) That the owners shall provide and pay for all provisions, wages, and consular shipping and discharging fees of captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel; also for all engine room and deck stores; and maintain her in a thoroughly efficient state, in hull and machinery, for and during the services, guarantying to maintain the boilers in a condition to bear the working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term of this charter. * * *' '(4) * * * That the captain shall prosecute his voyages with the utmost dispatch. * * *' '(7) That, in the event of loss of time from deficiency of men and stores, break-down of machinery, or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service; * * * also if any loss of time from crew or stores

not being on board in time, or from repairs to hull and machinery, which are for owners' account, not being complete after cargo and coals are on board and hour of sailing has been fixed by charterers, and notice given to captain, the time lost is for the steamer's account. (8) * * * The act of God, the enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation throughout this charter party always excepted.' '(12) * * * That, on account of the perishable nature of the cargoes that this steamer is intended to carry, she is not allowed to stop to pick up any wreck, or in any way assist or tow any vessel, especially when by so doing she is liable to be detained only in order to save human life.' The charter party also provided as follows: 'It is understood [that the] steamer is built for banana trade, has steam pipes, side ports, large ventilators, holds lined with charcoal, fruit decks, saloon on deck amidships,' etc. Previous to the voyage involved in this action, the vessel had made ten trips under the charter party between New York and Port Limon, according to a practice whereby she left the former port on Wednesday, arrived at the latter port on Friday of the following week, leaving on her return trip on Saturday, and arriving at New York on Monday or Tuesday morning of the second week following. On Wednesday, July 15, 1896, the vessel left New York. On July 21st, two stay bolts, extending between the combustion chamber and the back of the boiler, and intended to prevent a collapse of either, were leaking so that the water came out into the fireroom."

Thereupon the steamer proceeded on her voyage. The opinion then states as follows:

"The vessel remained at Barracoa until 5 o'clock on the morning of Friday, July 24th, making necessary repairs, and then sailed, arriving at Port Limon at noon on the following Monday, July 27th. While at Port Limon one or two of the stay bolts, one of them not of those repaired at Barracoa, began to leak, but such bolts were reported, and the vessel was loaded and ready for sea at 1 o'clock on Tuesday afternoon, July 28th, but was detained by libelants' agent waiting to ascertain whether the cargo could be carried to New Orleans, which it could not be on account of the quarantine. But on Wednesday, July 29th, at 10 a. m., the vessel sailed for New York. Some of the stay bolts leaked on the way to New York, but her passage in point of time was somewhat better than the outward time. The length of the voyage from New York to Port Limon was two days and thirteen hours longer than the longest voyage, and three days and fifteen hours longer than the shortest voyage, the vessel had previously made between these ports. The period of variation between her longest and shortest voyage was one day two and a quarter hours. To economize time, the charterers had been in the habit of telegraphing to Port Limon the date of the probable arrival of the steamer there, and thereupon the shippers of bananas would have the green bananas cut and carried down to the wharf so as to be there on the arrival of the vessel, it being necessary that the bananas should be shipped green to prevent their ripening too much on the voyage to New York. That course was pursued in this case, and on the arrival of the vessel the bananas, which had been on the pier awaiting her arrival for three days, were not fit to be sent to New York, and would not stand the trip, of which the libelants were advised by telegraph, and the captain protested that he could not be accountable for them. The libelants increased the delay, as above stated, by some hours, in an effort to ascertain whether the ship could not go to New Orleans, but was finally ordered to New York. Upon the arrival at such port it was found that a very large part of the bananas was unmarketable. It is for the loss of these bananas and deterioration in price of the others that this libel is brought."

We concur in the opinion of the district judge that the inspection was insufficient, and that the vessel was unseaworthy at the commencement of said voyage, and that the owners were liable for damages resulting therefrom. But we are unable to assent to the view

taken as to the measure of damages which resulted in holding the owners liable for the loss occasioned by the deterioration in the bananas on the homeward voyage, and for the charge of $2,000 freight for said voyage under a contract with a third party. Damages in such a case must be confined to those which naturally and directly result from the breach of the contract, or may fairly be presumed to have been within the contemplation of the parties when the contract was made. Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Baldwin v. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165; Murdock v. Railroad Co., 133 Mass. 15, 43 Am. Rep. 480; Pennypacker v. Jones, 106 Pa. 237; Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147.

In the case at bar it may be assumed that the claimants, by reason of their knowledge of, and acquiescence in, the custom inaugurated subsequent to the making of the contract, of cutting bananas in anticipation of each arrival, were chargeable for the loss, through unseaworthiness of the steamer, of bananas so cut. But on Monday, before the steamer reached Port Limon, libelants' agent there had cabled them that the bananas would be lost if the steamer remained out any longer, and after her arrival he cabled again that "the bananas were not fit any more to be sent to New York; they would not stand the trip;" and asked "whether we would send the bananas to New Orleans." Thereafter, on Tuesday, the libelants cabled their agents to wait till they had telegraphed to New Orleans, but, finding that the steamer could not go there on account of quarantine, they finally cabled their agents to send the bananas to New York. Acting under these instructions, libelants' agents loaded the fruit on board the steamer. The captain filed a written protest with the American consul against the loading of the fruit or damages on account of its condition.

That the steamer was delayed by leakage on her homeward voyage is immaterial, because, inter alia, such delay did not affect the time of unloading the cargo. Nor is it material that on the day before the vessel arrived the cargo was found to be in comparatively good condition. The duration of the return voyage was not in excess of the average, and was only 10 hours longer than the quickest voyage made, and the court has found that during this voyage no act was done, no omission suffered, no defect existed, that caused the injury. The vessel arrived at quarantine at about quarter past 2 on the morning of August 7th, and it is admitted that it would have made no difference if she had arrived on the preceding afternoon.

The single question presented is as to the rights and obligations of the parties in view of the situation and events during the time the steamer was at Port Limon. Upon its arrival on Monday the bananas were confessedly unfit for shipment. The libelants, however, insisted on loading the bananas on board on Tuesday. The master of the steamer reported that he was ready to sail at 4 o'clock on said afternoon, but libelants' agent refused to allow him to depart before he (the agent) heard where the steamer was going to, and, finally, at 9 o'clock on Wednesday morning, said agent ordered

him to sail for New York. It is not clear why this delay of 18 hours was not in fact the direct cause of the damages for which this suit is brought. But libelants should not be held responsible therefor, because said delay was due to an attempt on their part to minimize the damages which had already resulted from the unseaworthiness of the vessel. Failing, however, in this attempt, what was the further duty of the libelants, forty-eight hours after the ripe bananas had become unfit for shipment? It was not their duty or within their rights to insist upon the bananas being carried to New York, to arrive there a putrid mass, only in order that they (the libelants) might claim the contract compensation of $2,000 for a worthless freight, and damages by reason of further deterioration on said unjustifiable voyage. The libelants, whose claim to the $2,000 rests only on their contract with a third party, could not by such unauthorized shipment burden this cargo with a charge of $2,000 imposed by their wrongful act. Nor could they thereby acquire a greater interest in said cargo. It is clear that a party in fault cannot be thus subjected to increased liability for damages by such an unwarranted act. It was the duty of libelants to make such further efforts as may have been practicable to make the damages as light as possible.

What was, then, the measure of libelants' damages? Under the familiar rule, it was the value of the property lost at the time of the breach, and such other loss as has directly resulted to the party injured by reason of said breach. In the case at bar this would be the value of the bananas cut at Port Limon, which is shown to be $2,726.50, and such damage, if properly pleaded, as might accrue to libelants by the loss of the use of the vessel during the period in which libelants were engaged in securing a new cargo of bananas. What the amount of such damage resulting from delay might have been does not appear, and no such damages are alleged or claimed under the libel or its amendment. The only damages claimed were for the deterioration in said cargo of bananas. It nowhere appears that the claimants had any knowledge as to the stipulation with a third party for the payment to libelants of $2,000 per voyage, nor is there any allegation of loss of freight, by reason of the terms of said contract, for $2,000.

After the decision of the question of liability and reference to a commissioner, the libelants amended their libel as owners of the cargo so as to claim as consignees for the owner, the Compania de Bananera, to whom the libelants had made advances on the value of the cargo. It appeared on the hearing before the commissioner that there was a written agreement between said Compania de Bananera and another company, La Tropical, who were shippers, that fruit should only be loaded on Fridays or Saturdays, and upon 15 days' notice to La Tropical. This contract, however, is nowhere referred to in the evidence, and appears, from the record and from a letter written by one of the libelants to his counsel, to have been introduced merely to refresh the recollection of the witness, and correct his testimony as to the cost of bananas and freight by railroad. It is not shown that the provisions referred to had ever been

communicated to claimants, or had ever been in force, or that any attempt was made by libelants to ascertain whether any arrangements could have been made for securing a new cargo, nor how much time would have been gained or expense involved in so doing. There is no evidence to show whether a new cargo could have been procured in 3 days, or whether the charterer would have been obliged to wait 15 days for such new cargo. It is manifest that the libelants suffered loss in addition to that occasioned by the deterioration in the value of the bananas. But, inasmuch as there was no evidence from which the amount of said additional loss could be ascertained, no damages can be awarded therefor in this action.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for libelants in the sum of $2,726.50, with interest from July 28, 1896, and for claimants for the costs of this appeal.

UNION CENT. LIFE INS. CO. et al. v. SKIPPER.

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

No. 1,565.

1. LIFE INSURANCE—ACTION ON POLICY—QUESTIONS FOR JURY.
Where both parties, without objection, called witnesses to express their opinions as experts, based on the facts shown, upon the question whether an insured committed suicide or was murdered, which opinions were conflicting, such testimony necessarily required the submission of the issue to the jury, and its finding thereon is conclusive.

2. SAME—BOND TO SECURE PAYMENT OF LOSSES—ARKANSAS STATUTE.
The statute of Arkansas (Sand. & H. Dig. § 4124) requires all fire, life, and accident insurance companies doing business in the state to give a bond to the state, to be renewed annually, "conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond by virtue of any policy issued by any such company." *Held*, that the words "arising" and "accruing," as used in such statute, mean the same thing; the one being explanatory of the other, and the intent being to say that the obligors in such bonds shall be liable to pay all losses that "arise or accrue" by reason of a loss, death, or injury which occurs during the term of the bond; and the fact that the loss did not become payable, under the terms of a life policy, until after the term of the bond in force when the death occurred had expired, did not relieve the obligors from such liability.

3. SAME—ACTION ON STATUTORY BOND—LIMITATION.
A provision of a life insurance policy that "no suit to recover under this policy shall be brought after one year from the death of the insured" applies only to an action on the policy itself, and cannot be extended to limit the time within which an action must be brought on a bond which the state, in the exercise of its undoubted powers, has required the company to give to secure the payment of claims under its policies as a condition to its doing business in the state, but an action on such bond is governed by the general statute of limitations of the state.

4. SAME—LIMITATION OF ACTION ON POLICY—ARKANSAS STATUTE.
Under the statute of Arkansas (Sand. & H. Dig. § 4144) providing that, in all actions against insurance companies on policies, "if the plaintiff shall suffer a nonsuit, * * * such plaintiff may commence a new action from time to time within one year after nonsuit, * * * and no stipulation contained in any policy of insurance shall avail to deprive

the plaintiff in such action of any of the benefits of this section," giving it a liberal construction in harmony with that given another similar statute by the supreme court of the state, a plaintiff who commenced two successive suits on a life insurance policy, and who suffered a nonsuit or dismissal in each case for reasons not conclusive of the merits, may commence a new action within one year after the termination of the last, notwithstanding any limitation clause in the policy.

5. TRIAL—INSTRUCTIONS.
An instruction that circumstantial evidence, "if complete," may be as conclusive and convincing as direct or positive evidence of eyewitnesses, is not so far erroneous or misleading, as against the party relying upon such evidence, as to warrant a reversal of the judgment.

6. SAME — REFUSAL OF REQUESTS — CAUTIONING JURY AGAINST NEWSPAPER PUBLICATION.
A trial judge is not required, on request of a party, to call attention in his charge to a newspaper article published during the trial, and containing statements calculated to influence the jury, and to caution the jury to disregard the same, unless advised in some authentic manner that the article had been seen or read by some member of the jury, but in the absence of such showing he may properly, in his discretion, reserve the question for future determination on a motion for new trial.

7. APPEAL—REVIEW—HARMLESS ERROR.
The exclusion of a question asked of a witness on cross-examination, if erroneous, is error without prejudice, where the party asking the question was afterwards permitted to examine the witness fully as to the facts to which the question had reference.

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

This case comes on a writ of error from the circuit court of the United States for the Eastern district of Arkansas. The laws of that state provide (Sand. & H. Dig. Ark. § 4124) that all fire, life, and accident insurance companies doing business in the state shall annually give a bond to the state, with sureties to be approved by the auditor of the state, in the sum of $20,000, "conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond, by virtue of any policy issued by any such company, * * * upon the life or person of any citizen of the state or upon any property situated in this state, and such bond shall be annually renewed." On June 3, 1895, the Union Central Life Insurance Company, the plaintiff in error, an Ohio corporation, executed a bond, under the provisions of this statute, with a view of doing business within the state of Arkansas, which bond was duly filed and approved in the proper office. On August 23, 1895, William F. Skipper took out two policies of insurance on his life in the Union Central Life Insurance Company, each in the sum of $5,000, which by their terms were payable to Malissa F. Skipper, the wife of said William F. Skipper, the defendant in error, which policies, by their terms, were payable within 60 days after the death of the insured, and proof made thereof to the insurer. On May 13, 1896, during the period covered by the aforesaid bond, William F. Skipper was either murdered or committed suicide in Drew county, Ark., where he resided. On August 20, 1898, the present action was instituted in Drew county, Ark. The declaration thus filed counted upon the aforesaid bond which had been executed by the defendant company on June 3, 1895, and alleged, as a breach of the condition of said bond, that the company had failed to pay the claims arising and accruing under the aforesaid policies. The case was removed to the federal circuit court for the Eastern district of Arkansas, where a trial took place, which resulted in a verdict against the defendant company. It seems that, before the present action was instituted on the bond, two other actions had been commenced against the defendant company to recover on the policies, one of which was commenced on December 2, 1896, and dismissed on February 19, 1897, and the other of which actions was begun on February 20, 1897, and was dis-

missed on August 16, 1898, four days before the present action was instituted.

J. W. House and Lawrence Maxwell, Jr., for plaintiffs in error.

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

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The principal issue of fact which was litigated in the lower court was whether William F. Skipper was murdered or committed suicide; it being conceded that, by the terms of the policy, there could be no recovery if he died by his own hand. This issue of fact was submitted to the jury, who decided it adversely to the contention of the defendant company, finding that the deceased was murdered. In this court an elaborate brief has been filed with a view of showing that the case should have been withdrawn from the jury on the ground, among others, that, when the evidence is fully considered, but one conclusion can be drawn therefrom, and that is that the deceased committed suicide. The record shows, however, that by consent, or at least without objection on either side, both parties called witnesses and asked them to express their opinions, as experts, whether, in view of all the circumstances surrounding the death of the deceased and the finding of his remains, he took his own life or was murdered. Opinions were expressed both ways on this question by witnesses for the respective parties, and the issue was decided by the jury on the strength of such testimony, for which reason it cannot be successfully contended here that the verdict is unsupported by the evidence. In making this statement, we would not be understood as admitting that, but for the expert testimony, there would have been no evidence tending to show that the deceased was murdered. We express no opinion on that point. It is sufficient to say that upon this record the issue whether death was occasioned by suicide was necessarily submitted to the jury, and the finding upon that issue by the jury is conclusive.

It is argued that the case should have been taken from the jury for the further reason that the claim sued upon is not within the terms of the bond on which the action is based. The bond employs the language of the statute, which is quoted above in the statement, and bound the obligors to pay "claims arising and accruing" during the year commencing June 3, 1895, and ending June 3, 1896. It is said that as Skipper died on May 13, 1896, and the loss was not payable until proof of his death was submitted, and as such proofs were not submitted until after June 3, 1896, the loss did not both arise and accrue within the lifetime of the bond, and the obligors are not liable. We think that this proposition is not tenable. If the words "arising and accruing," as used in this bond, are construed as meaning something different,—for example, if the word "arising" means when death occurs, and the word "accruing" means when the loss, by the terms of the policy, becomes payable,—and if it be true that a loss must both arise and accrue within the lifetime of the bond, to render

the obligors therein liable, then it is obvious that it would often happen that losses would occur under policies which would not be within the terms of any bond, because they would not both arise and accrue while it was in force. This would happen as respects all losses which occur during the last 60 days before bonds expire, as nearly all policies of insurance contain provisions giving the insurer 60 days within which to pay losses after proofs have been furnished. The legislature cannot be presumed to have intended such a result, and this is a sufficient reason for rejecting the construction contended for, and seeking for some other which is more reasonable and more in harmony with the presumed intention of the lawmaker. We may either assume that the word "and" is used in the statute, as it frequently is, in a disjunctive sense, and that the legislature intended to make the obligors in such bonds as the one sued upon liable for any loss where either the death occurs, or the loss becomes payable, by the terms of the policy, during the lifetime of the bond. Or we may assume that the words "arising and accruing" mean the same thing; one word being used as explanatory of the other; the intent being to say that the obligors in such bonds shall be liable to pay all losses that "arise or accrue" by reason of deaths which occur during the period covered by the bond. We incline to the opinion that the latter is the correct interpretation of the statute, and that the time when a death occurs fixes the liability on this class of bonds. We cannot assent to the view that these words refer to different events,—the one to the death of the insured, and the other to the time the loss is payable by the terms of the policy,—and that both of these events must occur during the life of a bond, to render the obligors therein liable. The lawmaker, in our judgment, had no such purpose in view when the statute was framed.

It is also argued that the case should have been taken from the jury because the policies which were issued on the life of Skipper contain this provision, "No suit to recover under this policy shall be brought after one year from the death of the insured." As the present action was brought on August 20, 1898, and as Skipper died on May 13, 1896, it is urged that the action is barred by the aforesaid provision found in the policies; and in support of this proposition our attention is particularly directed to the decision in Riddlesbarger v. Insurance Co., 7 Wall. 386, 19 L. Ed. 257, and other kindred cases, wherein the validity of such provisions, limiting the right to sue on policies of insurance, have been upheld. This agreement between the parties as to the time within which suits should be brought relates, in our opinion, to actions on the policies, and to such actions only. The phrase "no suit to recover under this policy" means the same, in our judgment, as "no suit to recover on this policy." The parties were contracting with reference to actions on the policies themselves, and not with reference to actions which might be brought on an independent obligation like the bond in suit, which the state, in the exercise of an undoubted power to determine on what conditions it would permit foreign insurance companies to engage in business within the state (Paul v. Virginia, 8 Wall. 182, 19 L. Ed. 357; Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct.

281, 43 L. Ed. 552), saw fit to exact from foreign insurance companies doing business in the state, to compel them to promptly settle losses which might become due at any time to citizens of the state. When the state, in the exercise of such a power, compelled the defendant company, as a condition precedent to engaging in business in the state, to give a bond to the state, conditioned that it would promptly pay such losses as it might sustain within the state, it did not limit the time within which parties entitled to sue on the bond so executed should bring their actions, but left that matter to be regulated by the general statutes of limitations then in force applicable to such instruments. The bond in suit is a writing under seal, and, by virtue of the statutes of the state, actions on such instruments may be brought within five years after the cause of action accrues. Sand. & H. Dig. Ark. § 4828. The suit at bar is obviously an action on the bond for a breach thereof, and the reference made to the policies is only made to them as instruments of evidence for the purpose of showing that a breach of the bond has occurred. Association v. Farmer, 23 C. C. A. 574, 77 Fed. 929, 931. Under these circumstances, we are of opinion that the agreement contained in the policies limiting the right to sue thereon to one year cannot be so extended as to embrace an action on the bond which the defendant company was compelled to give to the state, and with respect to which kind of instruments the legislature has prescribed the time within which suits thereon may be brought. It was the province of the state to determine within what time an action might be brought on a bond given to itself as obligee, and it has so determined.

But if it should be conceded that the views last expressed are unsound, and if a scope should be given to the provision in the policies that would make it embrace an action on the bond as well as on the policies, the contention of the defendant company that the present action is barred would have to be overruled for another reason: In the year 1893 an act was passed in the state of Arkansas (Sand. & H. Dig. Ark. § 4144) which declares that:

"In all actions against insurance companies upon policies of insurance issued by them, if the plaintiff shall suffer a non-suit or if after a verdict for him, the judgment shall be arrested, or if after judgment for him the same shall be reversed on appeal or writ of error, such plaintiff may commence a new action from time to time within one year after non-suit suffered or judgment arrested or reversed; and no stipulation contained in any policy of insurance shall avail to deprive the plaintiff in such action of any of the benefits of this section, but the same shall apply to the limitation of the time of suing stipulated for in the policy of insurance."

The obvious purpose of this statute was to avoid the effect of provisions in policies of insurance fixing a short time within which suits must be brought to enforce the collection of sums claimed to be due thereunder, that had become quite common after the decision in Riddlesbarger v. Insurance Co., 7 Wall. 386, 19 L. Ed. 257, since the concluding clause of the statute is very emphatic; declaring, in substance, that no such stipulation shall avail to deprive a plaintiff of any of the benefits intended to be conferred by the statute. The legislature manifestly intended to save the right

of one claiming under a policy of insurance, if, after having brought an action, and for any reason suffered a nonsuit or dismissal, which was not conclusive of the merits of the controversy, he brought another action within a year. The supreme court of the state of Arkansas has invariably construed another statute of that state, of the same character as the one quoted above, which has been in force in that state for many years, with great liberality, with a view of effectuating its true purpose, and saving a right of action when by misadventure a plaintiff is compelled to dismiss an action once brought, or take a nonsuit. Under the former statute of that state, which provided, in substance, that, if a plaintiff suffer a nonsuit, he may renew his action within a year, it was held that the statute applied, and saved the right to sue again, although the record showed that the former action had been dismissed by the court without a final determination of the merits of the controversy; the court refusing to place a narrow or technical construction on the word "nonsuit," which was the only term employed in the statute. Bank v. Magness, 11 Ark. 343, 346. The same statute was also held to apply, and save the right of the plaintiff to sue again, although the first suit was brought by different plaintiffs, who could not maintain the action, and had therefore suffered a nonsuit. Biscoe v. Madden, 17 Ark. 533, 542. It has also been held that the statute applies although the first action is brought in a court which has no jurisdiction of the controversy, and for that reason fails. Railway Co. v. Manees, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45. The statute also applies, and saves the right to sue, even when the first suit is at law and the second is in chancery, and the former action was not dismissed until after the second action had been commenced. Walker v. Peay, 22 Ark. 103. See, also, James v. Biscoe, 10 Ark. 184; Bank v. Sherril, 11 Ark. 334; Bank v. Roddy, 12 Ark. 766; Crow v. State, 23 Ark. 684.

Although the act of 1893, above quoted, only applies to insurance companies, and has never been construed by the supreme court of the state, yet, as it is a statute of the same kind as the one to which the foregoing decisions relate, and was inspired by the same purpose, we entertain no doubt, after an examination of the course of decision under the earlier statute, that it would be held by the courts of the state that the act of 1893, in any event, saved the right of the plaintiff below to maintain the present action, inasmuch as it was commenced within four days after the second action on the policies was dismissed, and that action on the very next day after the first action was abandoned, so that the litigation to enforce the claim has been practically continuous. In view of repeated declarations by the supreme court of the state that a statute of that nature should be liberally construed, so as to save a right of action on a demand, provided the right of recovery thereon has not been adjudicated on the merits, we are fully persuaded that the act of 1893 would be held to save the present action, and avoid the provision in the policies on which the defendant company relies, and against which the statute of 1893 was aimed, inasmuch as all of the suits were brought and prosecuted for the purpose of enforcing substantially the same demand.

Turning to other errors that have been assigned, we observe that the instructions given by the lower court are criticised because in one place, while commenting on the weight to be given to circumstantial evidence, the trial judge remarked:

"Circumstantial evidence, if complete, may be as conclusive and convincing as direct or positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should consider it fairly, neither enlarging nor belittling its force."

What the court meant, evidently, and must be understood as having said, was that, if the chain of circumstances relied upon to establish the defense of suicide was unbroken, it would be as conclusive and convincing as positive or direct evidence. Circumstantial evidence is often referred to by the courts as a chain of circumstances which, to have the greatest probative force, must be complete or unbroken, in the sense that each fact or circumstance relied upon must be consistent with all others, and that all must point in the same direction, and lead to the same conclusion. This, we have no doubt, was what the court meant when it remarked that such evidence, "if complete," is as conclusive as direct evidence. The instruction in question was not so far erroneous or misleading as to warrant a reversal of the judgment.

Another error complained of arose out of the following facts: While the case was on trial at the city of Little Rock, Ark., and four or five days before a verdict was rendered, a daily newspaper published in that city gave an account of an interview with a nephew of the deceased. The article was sensational in its character, and entitled:

"Noted Skipper Case—Insurance Phase Now on Trial in the United States Court—History of the Case Reviewed—Two Negroes were Lynched for Murdering Skipper—Insurance Company Claims Suicide."

Among other things, the article contained a statement that W. F. Skipper was foully murdered by James Redd, Alex. Johnson, Sam Lusk, and John Bradford, near his mill. When the case was finally submitted to the jury, the court was asked to instruct the jury, in substance, that the court's attention had been called to this article, and that, if any one of the jurors had read it, they should not regard it, or any statement contained in the article, in making up their verdict, or be influenced thereby in any way whatever. The trial judge declined to so advise the jury, and, in its charge, made no allusion whatever to the article in question. After the verdict had been rendered, the publication of this newspaper article was made one of the grounds of a motion for a new trial; and upon the hearing of this motion an affidavit was submitted, which was signed and sworn to by 11 of the jurors, wherein they stated that they did not read the article in question until after the rendition of the verdict, nor did they hear any discussion of the facts stated therein until after the verdict was rendered. The lower court, after hearing arguments upon the motion for a new trial, and the affidavits that were produced in support of the motion and in opposition thereto, overruled it.

It goes without saying that the action of the lower court in overruling the motion for a new trial is not subject to review by this court; and, as the newspaper article in question formed no part of the testimony which was offered during the progress of the trial, the only question that this court can consider is whether the trial judge should have taken judicial notice of the publication, and assumed that the jurors, or some of them, had read it, and, on that assumption, should have instructed the jurors to disregard it. We are of opinion that no obligation rested upon the trial judge to take notice of this publication in his charge, unless he was advised in some authentic manner that the article in question had been seen and read by the jurors, or some of them. If they were ignorant of its publication and of the contents of the article, as they each afterwards testified that they were, any allusion to the subject by the court in its charge would doubtless have done more harm than good. It is not claimed that the court was advised that the article had been seen and read by any of the jurors; and, in view of that fact, we conclude that it committed no error in reserving for future determination, on a motion for a new trial, where the matter could be carefully investigated, the question whether the contents of the article were known to the jurors, or any of them, and had prejudicially affected the verdict. The action of the lower court on the instruction in question, under the circumstances above stated, should be regarded, in any event, as largely discretionary, since it was much better acquainted with the environment than this court can be. We may remark, however, that the trial judge should have set the verdict aside if he had any reasonable ground to believe that the verdict had been influenced by the publication.

In conclusion, we only deem it necessary to notice specially one of the exceptions to the exclusion of testimony which were taken at the trial by the defendant company. On the cross-examination by counsel for the defendant company of a witness for the plaintiff below, who appears to have been one of the men who served on the coroner's jury which investigated the cause of Skipper's death immediately after his dead body was found, the witness was asked this question: If it was not a fact that on a former occasion, when he was testifying in the case, he had not stated, in substance that at the conclusion of the coroner's inquest he and the other jurors agreed at first upon a verdict of suicide, until a man by the name of Singleton suggested that if such a verdict was rendered it would affect the insurance on Skipper's life, whereupon the verdict was made to read "that he came to his death by a knife wound in his throat." The question was excluded, apparently, upon the ground that it was an indirect way of introducing in evidence the verdict of the coroner's jury. An exception was accordingly taken. The record discloses, however, that immediately after this ruling counsel for the defendant company was permitted to ask this witness substantially the same question as to what had in fact occurred at the inquest, and the witness answered it by saying, in substance, that the statement contained in the question propounded to him as to what had occurred at the inquest was in part true, and in part

untrue; that he did not know who made the suggestion about the insurance; that it was a consensus of opinion that the jury did not know what occasioned Skipper's death; and that they did not have any evidence at the time of the sitting of the coroner's jury. He further said that it was a five-minute jury, that the jury did not make any investigation at the time, that facts which afterwards developed gave them a better understanding of the case, and that they were all practically agreed that he must have been murdered. He also remarked in the same connection, and in explanation of the incident, that a man has a right to change his mind after an investigation. If the question that was propounded to this witness on his cross-examination and excluded was a proper question for any purpose,—as to which we express no opinion,—we conclude that the action which was immediately taken by the court, in permitting the witness to detail in full what did in fact occur at the coroner's inquest, cures whatever error was at first committed, and deprives the exception of any merit.

What has been said covers the material questions that have been presented for our consideration which deserve special notice.

Finding no error in the record that would warrant a reversal, the judgment of the lower court is affirmed.

SANBORN, Circuit Judge. I concur in the result in this case but I do not assent to the proposition that this action on the statutory bond is in any way affected by the act of 1893 (Sand. & H. Dig. Ark. § 4144), because, in my opinion, this is not an action on a policy of insurance.

CARROLLTON FURNITURE MFG. CO. v. AMERICAN CREDIT INDEMNITY CO. OF NEW YORK.

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

No. 134.

1. INSURANCE—CONTRACT—WHAT LAW GOVERNS.
   A contract of insurance in a New York company was governed by the laws of Kentucky, where the policy was delivered and the premiums paid by the insured in that state; and therefore under the Kentucky statute insured's answers in the application were representations, and not warranties, though the application warranted the answers to be true.

2. SAME—MISREPRESENTATIONS—MATERIALITY—WHEN QUESTION FOR JURY.
   Defendant company insured plaintiff against losses on sales to debtors having a rating as to capital and credit in the last published report of R. G. Dun & Co. The application, which was made part of the contract of insurance, contained the question, "What have been your gross sales and gross losses each year during the last five years?" and it appeared that plaintiff's actual losses had been greatly in excess of the amounts stated in the answer. *Held* a material misrepresentation, as matter of law.

3. SAME—EFFECT ON POLICY.
   A material misrepresentation will avoid an insurance policy, though made by mistake, and not with fraudulent intent.[1]

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[1] See Insurance, vol. 28, Cent. Dig. § 540.

4. SAME—ESTOPPEL.

Defendant company insured plaintiff against losses on sales to debtors having a rating as to capital and credit in the last published book of R. G. Dun & Co. The application contained a question as to the gross amount of plaintiff's losses each year for the five years last past, and the actual amount of plaintiff's losses greatly exceeded the amounts stated in the answer. There was evidence that defendant's agent told plaintiff the question only called for information as to losses on sales to debtors having the mercantile agency rating, and that the answer correctly stated the amounts of such losses. *Held* that, if the incorrect answer was induced by the agent's misconstruction of the question, the company was estopped to claim that it avoided the policy.

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

Wm. H. Russell, for plaintiff in error.

Albert Stickney, for defendant in error.

Before WALLACE and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The trial judge directed a verdict for the defendant upon the ground that the evidence established the defense of a material misrepresentation in the application for insurance upon which the policy in suit had been issued. The policy insured the plaintiff for one year against losses on sales of merchandise to debtors having a rating "as to capital and credit in the last published book of the R. G. Dun & Company Mercantile Agency"; recited that it was issued in consideration of the application, "which is hereby made part of the contract"; and the application warranted the answers to the questions contained in it to be true.

Among the questions was this: "What have been your gross sales and gross losses each year during the last five years?" The answer stated the amount of the gross sales and gross losses for three years only,—the years 1891, 1892, and 1893; the gross sales as about $100,000 yearly, and the gross losses as $498.90 for 1891, $1,041.26 for 1892, and $818.22 for 1893. The uncontradicted evidence upon the trial showed that the gross losses of the plaintiff in 1891, and also in 1892, were nearly double the amount stated in the answer, and those in 1893 were about 50 per cent. in excess of the amount stated. Testimony was given on the trial tending to show that the amounts stated in the answers were the correct amount of the plaintiff's losses during the respective years in sales to debtors having the mercantile agency rating; that the books of the plaintiff were examined to ascertain the amount of their losses by the agent of the defendant, and the amounts were inserted in the application by the agent; and that the plaintiff signed the application, relying upon the representation of the agent that the question called for information only as to those losses, and not for information for losses sustained on sales to other debtors.

We agree with the trial judge that the contract was a Kentucky contract,—the policy having been delivered and the premiums paid at the residence of the plaintiff, in that state,—and that, because the Kentucky statute is the law of the contract, the answers were representations, and not warranties. The statute provides as follows:

"All statements or descriptions in an application for, or policy of, insurance shall be deemed and held representations, and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy."

In construing this statute it was held by the highest court of Kentucky in Insurance Co. v. Curry, 13 Bush, 312, 26 Am. Rep. 194, that it was not its meaning that a representation could not be made a warranty by the express contract of the parties, and where this had been done the statute did not reach the case; but this decision was disapproved and distinctly overruled subsequently by the same court in Insurance Co. v. Rudwig, 80 Ky. 223, and that decision has been followed in all the later decisions of the court of last resort. Insurance Co. v. Kearnan, 83 Ky. 468; Insurance Co. v. Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; Insurance Co. v. Daviess' Ex'rs, 87 Ky. 547, 9 S. W. 812.

Adopting, as we must, the construction placed upon this statute by the highest courts of the state, the first questions that arise are whether the misrepresentation as to the gross losses for the three years was a material one, or one the materiality of which should have been left to the jury. That it was untrue, and departed so widely from the truth as to constitute a substantial deviation, was so clearly proved that a verdict to the contrary could not be permitted to stand. It is unimportant whether a misrepresentation has been made with a fraudulent intent, or by inadvertence or mistake, if it has been one which induced the insurer to enter into the contract. An immaterial misrepresentation, unless in reply to a specific inquiry, or made with a fraudulent intent, and influencing the other party, will not impair the contract. But if the risk is greater than it would have been if the representation had been true, according to the weight of authority, if untrue it avoids the policy, even though it was honestly made. Phil. Ins. §§ 537–542. In Carpenter v. Insurance Co., 1 Story, 57, Fed. Cas. No. 2,428, it was said by Judge Story:

"A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design."

Where a doubt exists as to the materiality of the representation, it is a question of fact for the jury. But in this case, having been made in reply to a specific inquiry, and warranted to be true, and having been in respect to a fact which certainly had an important bearing in estimating the probabilities of loss arising from the risk, we entertain no doubt that it was material, and that the court below did not err in holding it to be material, as a matter of law, and, being untrue, a defense to the action, whether intentionally so or not. Armour v. Insurance Co., 90 N. Y. 450; Burritt v. Insurance Co., 5 Hill, 188, 40 Am. Dec. 345; Gates v. Insurance Co., 2 N. Y. 49.

The defendant, by its question, sought for information of the ratio which the plaintiff's yearly losses bore to its yearly sales,—a fact indicating, to some extent, at least, the measure of prudence and good judgment exercised by the plaintiff in extending credit to its customers, and calculated to influence the amount of the premiums

to be demanded; and the value of this information was not impaired because the defendant contemplated insuring only the credits rated on the books of a particular mercantile agency, and not all the credits of the plaintiff.

The remaining question in the case is whether, because the agent of the defendant was in part responsible for the misrepresentation, and the plaintiff signed the application under a misapprehension induced by the erroneous construction placed by the agent upon the meaning of the inquiry answered, the defendant was estopped from availing itself of the defense. If these facts effect an estoppel, the case should have been submitted to the jury, as there was evidence which would have authorized them to find for the plaintiff upon this issue.

There was no provision in the policy making the agent effecting the insurance the agent of the insured, and the single inquiry is whether the plaintiff was responsible for accepting the construction placed upon the question and answered by the defendant's agent, or whether the responsibility for the agent's act in this regard rests upon the defendant. This question has been distinctly passed upon in decisions the authority of which are controlling upon this court. In Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, where the agent of the insurer had inserted an erroneous answer to a certain question in the application, and the insured signed the application relying upon the judgment of the agent, and in ignorance of the fact stated, the court held that the insurer was estopped from a defense of breach of warranty, saying, "For the insurer to insist that the policy is void because it contains this statement would be an act of bad faith, and of the grossest injustice and dishonesty." In Insurance Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341, it was held that when the agent of an insurance company fills up the application, or makes misrepresentations or gives advice as to the character of the answer to be given by the applicant, his acts in these respects are the acts of the insurer, and are not to be attributed to the insured. In that case one of the questions propounded in the application was: "Has the applicant any other insurance on his life; if so, what, and for what amounts?" The answer was: "No other." The answer was written by the insurer's agent, and the agent, in answer to inquiries by the applicant, told him that insurance in co-operative societies was not considered insurance, and that the question was properly answered; and thereupon the insured signed the application. The insured had other insurance in co-operative societies, and the insurer set up the misrepresentation as a defense to an action on the policy. Upon the trial the court charged the jury that if they found, upon the evidence, that the applicant fully and fairly stated the facts in regard to the insurance in co-operative companies to the agent, and the agent, knowing all these facts, wrote the answer in the application as it was contained therein, the defendant was estopped from making a defense by reason of the fact that the insured did have insurance in co-operative companies. This instruction was approved by the supreme court, and the court held that the insurer was bound by the construction placed

upon the question by its agent, and was "estopped by every principle of justice from saying that its question embraced insurance in co-operative associations."

In McMaster v. Insurance Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. ——, the policy for life insurance was dated December 18, 1893, and recited that its consideration was the payment in advance of the first annual premium, and the payment of a like sum "on the 12th day of December" in every year thereafter during the continuance of the policy, and allowed a grace of one month for the payment of the premiums subsequent to the first. The policy was delivered to the insured by the agent December 26, 1893, and the insured then asked the agent if the policy would insure him for the period of 13 months. The agent replied that it did so insure him, and thereupon the insured paid the agent the first premium in full. The insured died January 18, 1895, not having paid any further premiums; and the company defended an action on the policy upon the ground that the policy expired January 12, 1895,—being 12 months from December 12, 1893, with the month of grace added. The court held that the insured had the right to rely upon the agent's assurance that the policy would be in force for 13 months, that his omission to read the policy did not affect the operation of the estoppel, and that, as he died before the expiration of the 13 months, the insurer was liable.

It is impossible to distinguish the present case from Insurance Co. v. Chamberlain. The plaintiff may well have supposed that the inquiry about the gross losses referred to those of the class which were to be insured. If plaintiff was led to this belief by the defendant's agent, and signed the application upon that understanding, the defendant ought not to be permitted to assert a different meaning to the inquiry. We conclude that the court should have submitted to the jury the facts of which the estoppel is predicated.

The judgment is reversed.

MOHRSTADT v. MUTUAL LIFE INS. CO. OF NEW YORK.

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

No. 1,594.

LIFE INSURANCE—CONTRACT OF INSURANCE—CONSTRUCTION OF RECEIPT.

An application was given to a local agent of defendant, a life insurance company, for a policy of insurance on a certain plan. The applicant also delivered his note to the agent for the amount of the first annual premium on such policy, and was given a receipt on a form prescribed by defendant, which contained the following provision: "Said policy of insurance to take effect and be in force from and after the date hereof, provided the said application shall be accepted by the said company; but, should the same be declined or rejected by said company, then the full amount hereby paid shall be returned to applicant upon the delivery of this receipt." Defendant declined to issue the policy applied for, but issued one on a different plan, and forwarded it to be submitted to the applicant; but he died before it had been submitted, and without having been notified of defendant's action. *Held*, that the receipt did not con-

stitute a contract for temporary insurance, to remain in force until such time as defendant should act on the application, but was merely a qualified acceptance of the risk,—the insurance to become effective only if the application was approved by defendant,—and that the same having been, in effect, rejected, there was no contract of insurance by which defendant was bound.

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

M. R. Smith (William S. Anthony, on the brief), for plaintiff in error.

James A. Seddon (James L. Blair and George T. Weitzel, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The facts on which the decision of this case hinges are these:

On December 16, 1897, Simon Lederer, a local agent of the Mutual Life Insurance Company of New York, the defendant in error, whose office was at Poplar Bluff, Mo., solicited Thomas A. Thompson to take out a policy of life insurance in his company, with such effect that on that day the deceased, at Dexter, Mo., signed an application for a policy. The application which was so signed described the kind of policy that was applied for, and the amount thereof, as follows:

"I hereby apply for insurance on my life on the life plan; (———) years' payments; twenty-year distribution. Amount, $5,000."

The annual premium on such a policy as was described in the application, according to the company's table of rates, amounted to $102.50. Contemporaneously with the signing of the application, the deceased executed and delivered to the agent his note for $102.50, representing the amount of the first annual premium; and a receipt was delivered to the deceased by the agent, which was in the following form:

"The Mutual Life Insurance Company of New York. Baker Brothers, General Agents, No. 421 Olive St., St. Louis, Mo.

"Am't Premium, $102.50. Insurance, $5,000.

"No. 5,260. Dexter, Dec. 16, 1897.

"Received from Thomas A. Thompson one hundred and two and $^{50}/_{100}$ dollars, for the first annual premium on his application for a policy of insurance in the Mutual Life Insurance Company of New York, for five thousand dollars, on the life of Thomas A. Thompson. Said policy of insurance to take effect and be in force from and after the date hereof, provided the said application shall be accepted by the said company; but, should the same be declined or rejected by said company, then the full amount hereby paid will be returned to applicant upon the delivery of this receipt. This receipt will be void when applicant is notified that a policy has not been issued, and shall not be valid for any other consideration than cash actually paid.

"Baker Brothers, Gen'l Agents,
"By Simon Lederer."

Across the face of this receipt was the following indorsement:

"Countersigned at Dexter, Mo., by Simon Lederer. This receipt is void if issued after January 31, 1898."

The application so signed by the deceased was forwarded, together with the medical examination, to the general agents of the company at St. Louis, Mo., and thence to the home office, in New York, for

acceptance or rejection by the company, according to the usual course of business. The application and medical examination were received at the home office December 20, 1897. The company declined to issue such a policy as was described in the application (that is to say, a policy "on the life plan; twenty-year distribution"); but it did make out a policy on what is termed the "endowment," as distinguished from the "life," plan, the premium whereon was greater, amounting to $243.50 annually. This policy was mailed to the company's agents in Missouri, to be submitted to the deceased; but, when it reached the local agent at Poplar Bluff, it seems to have been accompanied with no letter of explanation, and as it was not the kind of policy applied for, and called for a higher rate of premium, the local agent wrote to the company for an explanation, and was advised that it was the best the company could offer; the company declining to issue a policy on the life plan at the lower rate, because of the early death of some of the decedent's ancestors. Before the endowment policy was tendered to the deceased for his acceptance or rejection, and before he was aware that such a policy had been mailed to the local agent, he died, or committed suicide; his death taking place about January 13, 1898. The endowment policy was thereupon returned to the company and canceled, but it seems that after Thompson's death his widow tendered the amount of the premium on the endowment policy, to wit, the sum of $243.50, and demanded the delivery of that policy, but the tender of the money was rejected. On this state of facts, concerning which there was no dispute, the trial court directed a verdict for the defendant. The question to be determined by this court is whether such a direction was proper.

We are of opinion that the execution of a policy on the endowment plan by the defendant company, and the mailing of such a policy, to be submitted to the deceased, cannot be construed as an acceptance by the defendant company of the application or proposition for insurance which was submitted in the first instance by the deceased, but that it was, in legal effect, a rejection of such proposal, even if it had been rejected in no other way. The deceased offered to enter into a contract of insurance of a special kind; that is to say, to take a policy on which premiums in the sum of $102.50 should be paid annually during his lifetime, such dividends as accrued thereon to be paid or distributed at the expiration of 20-year periods. The company, on its part, by the execution of the endowment policy, proposed to enter into a contract of a widely different character,—one in which the policy was to be fully paid up in 20 years; each annual premium being $243.50, or more than twice the amount of the annual premium which the deceased had proposed to pay. The contract evidenced by the endowment policy could not become binding upon either party until it was submitted to the deceased, and accepted by him as a substitute for the contract which he had proposed to enter into. In other words, it was a counter proposition for a different kind of insurance; and as it did not reach the deceased in his lifetime, and was not accepted by him, and could not be accepted by any one in his behalf after his death, the minds of the parties never met upon such a contract as the company proposed. Travis v. Insurance Co., 43 C. C. A. 653, 104 Fed.

486, and cases there cited; Insurance Co. v. Young's Adm'r, 90 U. S. 85, 23 L. Ed. 152.

Such difficulty as we have encountered in the case arises over the interpretation of the foregoing receipt, dated December 16, 1897, sometimes termed a "binding receipt." If the true construction of that receipt be that Thompson was to be regarded as insured in the sum of $5,000, at an annual premium of $102.50, until such time as the company had considered his application, and announced its determination to accept or reject the risk, then, in our opinion, the company could not terminate the temporary risk so assumed by the receipt otherwise than by a notice, brought home to the insured in his lifetime, that his proposition was rejected. In that view of the case, the duty of giving such a notice would rest upon the company, and the risk would continue until the duty was discharged. On the other hand, if the true construction of the receipt be that the risk was to commence on December 16, 1897, if the application for insurance on the terms proposed was accepted at the home office, and that in no event was the deceased to be regarded as insured until the application was scrutinized and accepted, then no right of recovery was shown, according to our view of the testimony, because it is clear that the company did reject the application for insurance on the terms proposed, and took the proper steps to advise the deceased of the fact with reasonable diligence. The receipt, as it will be observed, contains the stipulation, "said policy of insurance to take effect and be in force from and after the date hereof, provided the said application shall be accepted by said company." The natural interpretation of this clause would seem to be that the word "provided" was used, as it generally is, in the sense of "if," and that the risk was to take effect as of the date specified "if" the application, on examination and approval at the home office, was accepted, and only in that event. When that was done the company was willing that the risk should commence as of the date of the receipt, although the execution of the policy, embodying all of the terms of the contract, might be delayed for a considerable period. The opposite construction of the receipt, above suggested, not only runs counter to the usual meaning of the words employed to express the agreement of the parties, but it in fact arms local agents with a power not usually intrusted to them,—to saddle the company with large liabilities for temporary insurance before the chief medical officers of the company have had any opportunity to examine and approve such risks. A receipt identical in form with the one now under consideration, and issued by the same company, was before the supreme court of the United States for construction in a case heretofore cited (Insurance Co. v. Young's Adm'r, 90 U. S. 85, 106, 23 L. Ed. 152); and the court held, as we construe the opinion, that a receipt in such a form is not an absolute assumption of a risk temporarily (that is to say, until such time as the application is accepted or rejected), but that it is a qualified acceptance; the risk taking effect only in the event that the application is accepted, and that the company elects, after examining it, to issue such a policy as is applied for. The language of the court in that behalf was as follows:

"The receipt of the 5th of June was the initial step of the parties. It reserved the absolute right to the company to accept or reject the proposition which it contained. There was a necessary implication that, if it were accepted, the response and acceptance were to be by a policy in conformity with the terms specified in the receipt, as far as they extended, and, beyond that, in the usual form of such instruments as issued by the company. But it was clearly within the power of the company, under the condition expressed, wholly to reject the application, without giving any reason, or to accept the proposition with such modifications of the terms specified, and of the usual conditions of such policies, as it might see fit to prescribe. The entire subject was both affirmatively and negatively within its choice and discretion. The acceptance was a qualified one, and there was none other."

Learned counsel for the plaintiff in error says that the chief question in the case is whether it was not the duty of the defendant company to notify Thompson that his application for insurance had been refused. With reference to this proposition, it may be said that we have already intimated our opinion that it would have been necessary to notify the deceased of the rejection of his application, provided it had entered into a contract with him for temporary insurance until his application was acted upon; but, as no such agreement for temporary insurance was made or intended, it follows that the company took all of the necessary steps to notify the deceased of the rejection of his proposition and the fact that he died before receiving such notice is immaterial. In the case entitled Commercial Union Assur. Co. v. State, 113 Ind. 341, 15 N. E. 518, there was a complete oral contract of insurance, and notice to the insured was held to be necessary to terminate the contract. And in the case of Halle v. Insurance Co. (Ky.) 58 S. W. 822, the court found that there was a complete oral agreement for temporary insurance and that this contract continued in force pending a proposition by the company to make a different contract than the one applied for, or, in other words, until there had been a final termination of the pending negotiations. The case at bar rests entirely upon the construction of what is termed the "Binding Receipt," and is distinguishable from the cases last referred to for the reason that by the terms of the receipt—from which any contract of insurance existing between the parties must arise—the defendant did not agree to assume any risk on the life of the deceased until it had accepted his application, which application it never did accept.

Finding no error in the record, the judgment of the lower court is affirmed.

McLOUGHLIN v. RAPHAEL TUCK & SONS CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1902.)

No. 8.

1. PENALTIES—FALSE NOTICE OF COPYRIGHT—EXTRATERRITORIAL EFFECT OF STATUTE.

Rev. St. U. S. § 4963, provides that "every person who shall insert or impress" a false notice of copyright "in or upon any book * * * for which he has not obtained a copyright in the United States" shall be liable to a penalty. Defendant imported from Germany and sold in the United States books bearing a false copyright notice, which had

been impressed on them by the publisher in Germany by defendant's authorization. *Held*, that defendant was not liable to the penalty, the statute having no extraterritorial effect.

2. SAME.

Act March 3, 1897, amending Rev. St. § 4963, subjects to the penalty, in addition, every person "who shall knowingly issue or sell any article" bearing such false notice of copyright, "provided, that this act shall not apply to any importation of or sale of such goods brought into the United States prior to the passage hereof." The books in question were imported prior to the passage of the act, but part of them were sold in the United States after its passage. *Held*, that such sale did not make defendant liable to the penalty.

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

See 99 Fed. 562.

A. Bell Malcomson, for plaintiff in error.

Louis C. Raegener, for defendant in error.

Before WALLACE, SHIPMAN, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant upon a verdict rendered by the direction of the court. The action was brought to recover penalties because of the sale by the defendant of certain books upon which were impressed a false notice of copyright. The complaint sets forth 83 causes of action. Of these the first 72 allege that the defendant published and issued in August, 1896, at the city of New York, a book or booklet, and in or upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted. The remaining 11 causes of action allege that the defendant in April, 1897, at the city of New York, did knowingly issue and sell a certain book or booklet bearing a false and fictitious copyright notice.

The first 72 causes of action are founded upon the statute as it read before the amendment of March 3, 1897. The 11 remaining causes of action are founded upon the amended statute.

Prior to the amendment of March 3, 1897, the statute (Rev. St. § 4963) subjected "every person who shall insert or impress such notice, or words of the same purport, in or upon any book * * * for which he has not obtained a copyright in the United States," to a penalty of $100, recoverable one-half for the person who shall sue for such penalty and one-half for the use of the United States. By the amendment of 1897 the statute was extended so as to subject to the penalty not only every person who inserts or impresses such false notice of copyright upon any book, but also every person "who shall knowingly issue or sell any article" bearing such a false notice, "provided, that this act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof."

Upon the trial of the action it appeared that the defendant imported in 1896, from a foreign country, the books described in the several counts of the complaint; that these books bore a false copy-

right notice; that this notice was impressed upon them in Germany by the publisher, by the authorization of the defendant; and that in 1896 the defendant sold in this country the books described in the first 72 counts of the complaint, and subsequent to March 3, 1897, sold in this country the books described in the 11 remaining counts.

We are of the opinion that the court below correctly ruled that upon the facts shown the defendant was not liable. Treating the insertion of the copyright notice in Germany as the act of the defendant, the act was not within the purview of the statute. The penal laws of one state or sovereignty can have no operation in another. As said in Flash v. Conn, 109 U. S. 376, 3 Sup. Ct. 263, 27 L. Ed. 966, "They are strictly local, and affect nothing more than they can reach." In Charles v. People, 1 N. Y. 180, the court said: "Our legislature has no extraterritorial jurisdiction; and when it forbids, in unqualified terms, the doing of an act, it must always be understood that the thing is only forbidden within this state." Until the amendment of 1897 the importation or the sale of an imported book having a copyright notice known to be false impressed upon it was not prohibited, and the defendant, in bringing the books here and selling them here, was within its legal right, however reprehensible its conduct may have been. The defendant did not violate the statute by impressing the false notice upon the books in Germany, nor by selling the books in this country knowing the false notice to have been impressed upon them. It committed an act in Germany, which, if it had been done here, would have been penal; but nothing which was done by it here was prohibited in the statute in force in 1896, nor did it by doing both of these things alter the statutory character of either act. The statute did not reach the case, and is not to be extended by interpretation to a transaction outside its scope. It was doubtless in recognition of the defect in the statute, and of the facility with which it could be evaded by unscrupulous book dealers, that the amendments of 1897 were passed. The sale of the books by the defendant subsequent to the amendment would probably have subjected the defendant to the penalty had not the proviso industriously excluded such a sale from the operation of the amendment.

The judgment is affirmed.

In re GARCEWICH.

(Circuit Court of Appeals, Second Circuit. April 22, 1902.)

No. 125.

BANKRUPTCY—CONDITIONAL SALE—TITLE VESTING IN TRUSTEE.

Under Bankr. Act, § 70, providing that the title of the bankrupt shall vest in the trustee to "all property, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him," where goods were sold to the bankrupt on credit, and with the understanding that the title to such of them as should not be sold by him should remain

in the vendor until the payment of the purchase price, the title thereto vests in the trustee.

Petition to Review an Order of the District Court of the United States for the Southern District of New York.

Leo Levy, for petitioner.

H. Linley Johnson, opposed.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a petition for the review of an order of the district court as a court of bankruptcy directing the trustee to return to the United Shirt & Collar Company certain goods, wares, and merchandise claimed by that company to belong to it, and claimed by the trustee to be a part of the bankrupt's estate. The goods were sold to the bankrupt by the United Shirt & Collar Company upon credit, and upon the understanding that the title to such of them as should not be sold by the bankrupt should remain in the vendor until the payment of the purchase price. The court below adopted the conclusion of the referee in bankruptcy, and an excerpt from the opinion of the referee will sufficiently disclose the facts and the legal theory upon which the order was based, and is as follows:

"I understand that a trustee in bankruptcy can maintain an action to set aside a fraudulent transfer of property whether a judgment has been previously recovered by a creditor or not. But the case of an ordinary conditional sale, or an ordinary chattel mortgage, which is without fraud, but is claimed to be void for noncompliance with the act requiring such instruments to be filed, stands obviously upon a different footing. In the case at bar there is nothing to indicate any fraud in the transaction between the United Shirt & Collar Company and the bankrupt, and the question simply is whether the trustee has a better title to the consigned goods than the bankrupt had. There is no evidence that there are any judgments against the bankrupt, and the schedules and proofs of claims tend to show that there are none. Under these circumstances I think that the case In re New York Economical Printing Co., 49 C. C. A. 133, 110 Fed. 514, is decisive."

In Re New York Economical Printing Company this court held that a chattel mortgage executed in good faith, and valid as between mortgagor and mortgagee, did not become void as against a trustee in bankruptcy by the failure of the mortgagee to refile the mortgage in compliance with the provisions of the state statute; and that in such case the trustee took no better title to the property than the bankrupt had at the time of the filing of the petition, unless there were creditors or a creditor at the time who were entitled to attack the mortgage as fraudulent, and in that event it was void as against the trustee only to the extent of the claims of such creditors. That decision proceeded upon the theory that, upon the construction of the statute placed upon it by the highest court of the state, such a mortgage was valid as to all the world except as to purchasers without notice and creditors who were in a position by attachment or execution to seize the property. In Southard v. Benner, 72 N. Y. 424, the court, speaking of this statute, said:

"The noncompliance with the statute merely imposing a new condition to the validity of chattel mortgages for the protection of the particular classes mentioned, and not involving the question of fraud or fraudulent

intent, may well be restricted in its operation to the individuals for whose immediate protection it was passed."

These considerations can have no just application to a mortgage or other transfer of personal property, which, at its inception, was intended by the parties, or presumed by law to be intended, as a fraud upon creditors or purchasers.

It is the settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer. Luddon v. Hazen, 31 Barb. 650; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Bonesteel v. Flack, 41 Barb. 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose.

We think that the court below erred in viewing the case as one in which there had been a valid conditional sale good as against creditors. If the sale had been of that character, we think the decision would have been correct; but, being a fraudulent one, it was void as to the trustee. Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. Winsor v. McLellan, 2 Story, 492, Fed. Cas. No. 17,887; Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Donaldson v. Farwell, 93 U. S. 631, 634, 23 L. Ed. 993; Yeatman v. Institution, 95 U. S. 764, 24 L. Ed. 589; Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207; Norton v. Hood, 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 364; Chattanooga

Nat. Bank v. Rome Iron Co. (C. C.) 102 Fed. 755. It is not the meaning of the present act that the institution of proceedings in bankruptcy should secure immunity to the title of fraudulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceeding, they could have satisfied their claims. Section 70 declares in express terms that the title of the bankrupt shall vest in the trustee to "all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another.

The order is reversed, with costs.

CITY OF KEARNEY v. WOODRUFF.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,616.

1. MUNICIPAL BONDS—BONA FIDE PURCHASER—PUBLIC IMPROVEMENTS—PUBLIC AID.

Where bonds were issued by a municipality "for the purpose of aiding the K. Canal & Water Supply Co. in the construction of a canal for irrigation and water power purposes," under Comp. St. Neb. § 5491, declaring that canals and other works for irrigation and water power purposes should be works of internal improvement, and under section 3506, authorizing municipal corporations to aid in works of internal improvements by the issuance of bonds not exceeding 10 per cent. of the assessed value of their taxable property, a bona fide purchaser of such bonds in the open market was only bound to ascertain whether the issue was in excess of the 10 per cent. limit, beyond which he was entitled to rely on the recitals of the bonds that all antecedent steps necessary to validate the securities had been taken.

2. SAME—STATUTES—CONSTRUCTION.

Comp. St. Neb. § 5491, declares that "canals and other works constructed for irrigation and water power purposes or both, are hereby declared to be works of internal improvement"; and section 3506 authorizes the issuance of bonds by municipal corporations to aid in the construction of any railroad or other work of internal improvement, etc. *Held*, that that part of the statute declaring the construction of canals for water power purposes to be a public improvement was not invalid on the ground that a canal constructed for such purpose might be devoted primarily to private uses, since the act did not authorize the extension of public aid to the creation of a water power used for private gain alone, but should be construed only to authorize such aid to the construction of waterworks devoted to public uses, and other incidental objects not prejudicial to the public interest.

3. SAME—POPULAR VOTE—SUBMISSION OF QUESTION.

Where bonds issued to aid in the construction of an irrigation ditch recited that they were issued after submission to popular vote of a proposition to issue them for the purpose of aiding in the construction of a canal for irrigation and water power purposes, it was no defense to an action by a bona fide purchaser, based thereon, that the proposition submitted was not the same as that recited in the bonds.

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

This is an action on coupons clipped from certain municipal bonds which were issued by the city of Kearney, in the state of Nebraska; said bonds being in the following form:

"No. ———. $1,000.00.

"United States of America,

"State of Nebraska, County of Buffalo,

"City of [cut] Kearney.

"Bond.

"The city of Kearney, in the county of Buffalo, state of Nebraska, acknowledges itself indebted to the bearer in the sum of one thousand dollars, which said city promises to pay to the holder hereof, at the office of the treasurer of the city of Kearney aforesaid, on the first day of May, 1914, and also interest thereon at the rate of five per cent. per annum, payable semiannually, on the first days of May and November of each year after the date hereof, until said principal sum shall be paid, on presentation of the annexed interest coupons at the office of the treasurer of said city. This bond is one of a series of sixty of like tenor issued to bearer for the purpose of aiding the Kearney Canal and Water Supply Company in the construction of a canal for irrigation and water power purposes. The question of issuing this bond, and others of said series, amounting in the aggregate to sixty thousand dollars, was submitted by the mayor and council of said city of Kearney to a vote of the legal voters of the city aforesaid at an election duly ordered and held on the 3rd day of April, A. D. 1894, at which said election more than two-thirds of the votes cast were in favor of the proposition to issue said bonds, which fact, and all other facts necessary to the legal issue of the bonds, the mayor and council of said city, upon a canvass of the votes cast at such election, found to be the case. All the requirements of the constitution and laws of the state of Nebraska necessary to authorize the issue and delivery of the said bonds have been in all respects complied with, and they were issued and delivered by the proper authorities of said city, upon an order of the mayor and council thereof, duly passed and entered accordingly.

"In witness whereof, the said city of Kearney has caused this bond to be signed on its behalf by the mayor of said city of Kearney, attested by the clerk and the seal of said city affixed at the office of the clerk of said city, this first day of May, 1894.

"C. A. Prescott, Philip Brady,

"City Clerk. Mayor."

The entire issue of bonds to the amount of $60,000, with the coupons attached, were sold by the city of Kearney on September 26, 1894, to E. D. Shepherd & Co., of New York City, for 90 cents on the dollar of their par value, and the money therefor, amounting to $54,000, was received by the city. A number of the bonds from which the coupons in suit were detached were subsequently purchased in the open market by Samuel D. Woodruff, the defendant in error, who was the plaintiff below. Previous to the issue of these bonds the legislature of the state of Nebraska had passed an act (vide section 5491, Comp. St. Neb. 1899) declaring that "canals and other works constructed for irrigation or water power purposes or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works." This statute appears to have been enacted originally in the year 1877. At the same time another statute was in force in that state, which appears to have been enacted as early as the year 1869 (vide section 3506, Comp. St. Neb. 1899), which declared "that any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city: provided, the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the

manner provided by chapter 9 of the Revised Statutes of the State of Nebraska, for submitting to the people of a county the question of borrowing money."

The case was tried below without the intervention of a jury, and resulted in a judgment for the plaintiff. The city of Kearney brought the case to this court on a writ of error.

Edwin E. Squires, for plaintiff in error.
Edward F. Pettis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The trial court found specially, among other things, that the plaintiff below was the owner in good faith of the bonds from which the coupons in suit were detached; having purchased them in the open market for value, and before maturity. The bonds, on their face, contained, as will be seen, an express recital that they had been issued "for the purpose of aiding the Kearney Canal and Water Supply Company in the construction of a canal for irrigation and water power purposes"; also a recital, in substance, that the issuance of the bonds had been authorized by more than two-thirds of the electors of the city at an election duly ordered and held on April 3, 1894; that all the requirements of the constitution and laws of the state necessary to validate the bonds had been complied with; and that they had been so issued and delivered by the proper authorities. Moreover, at the time the bonds were issued, the legislature, as above stated, had enacted a law conferring, or at least attempting to confer, upon counties and cities of the state, authority to issue bonds "for irrigation or water power purposes or both," and had declared that these were works of internal improvement. Inasmuch, therefore, as the bonds were negotiable in form, it follows, from repeated decisions of this and other courts, that the plaintiff was entitled to recover on the bonds, unless they showed on their face that they were issued in violation of law, or unless it be true that the act from which the city derived its authority to issue the bonds was itself, for some reason, invalid. A purchaser of these bonds for value, in the open market, was bound, as a matter of course, to take notice of any fact of which the bonds themselves would advise him. He was required to ascertain whether an issue of bonds to the amount of $60,000 was in excess of 10 per centum of the assessed value of all taxable property in said city, and whether a valid law had been enacted, empowering the city to issue the bonds. Beyond this point an intending purchaser was not required to prosecute inquiries relative to the validity of the bonds, but was entitled to rely on the recitals therein contained that all antecedent steps necessary to render the securities valid had been taken. National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 10 C. C. A. 637, 62 Fed. 778; E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 26 C. C. A. 91, 98, 80 Fed. 692; City of Evansville v. Dennett, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; Gunnison Co. Com'rs v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 45, 86 Fed. 272;

City of South St. Paul v. Lamprecht Bros., 31 C. C. A. 585, 589, 88 Fed. 449.

We make these general observations because it appears that among the special findings which were made by the trial court concerning the issuance of the bonds in suit there are some findings of fact which cannot affect the plaintiff's right to recover, and are therefore immaterial, since the facts so found were unknown to him, and were not disclosed by the contents of the bonds. For example, the plaintiff is not chargeable with knowledge of the provisions of the city ordinance under which the bonds were issued (City of Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760); nor with the fact that the water company, in whose behalf the bonds were voted, had been operating a canal for some years before they were issued, for the purpose of furnishing water power for hire for private enterprises; nor is the plaintiff chargeable with knowledge that the canal, as previously constructed, was narrow and deep, and that the water therein was below the surface of the surrounding country. Although these facts are stated in the special findings, yet there is no finding that the plaintiff was cognizant thereof, while there is a finding that he was a purchaser before maturity, in good faith and for value, which implies, of course, that he had no knowledge of any facts tending in any wise to impair the validity of the bonds, save such as was conveyed by the bonds themselves, and the act from which the power to issue them had been derived.

The principal argument which has been advanced in opposition to the judgment below is that the bonds recite that they were issued to aid in the construction of a canal for "irrigation and water power purposes." Counsel concede that a canal constructed for "irrigation purposes" is a work of a public character, to which public aid may lawfully be extended, and such is the view that is entertained by the supreme court of the state of Nebraska. Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411. See, also, the opinion of this court in Perkins Co. v. Graff (decided at the present term) 114 Fed. 441. It is claimed, however, that a canal constructed for water power purposes is not a work of a public character, in aid of which the taxing power can be exercised; that, because the legislature of Nebraska authorized counties and cities to extend aid in the construction of canals both for irrigation and water power purposes, the act conferring such power was invalid; and that as the bonds in suit show on their face that the canal, in aid of which they were issued, was designed to supply water, to some extent, for other uses than irrigation, a purchaser thereof in the open market was affected with knowledge that they were void. This argument, as applied to the case at bar, assumes that, if the water in a canal is used to generate power to be employed for any purpose (that is to say, either to operate railroads, produce electric light, or run a gristmill), such a canal is not a work of a public character. It further assumes that, even if the water of a canal is used principally for the purposes of irrigation, yet, if any part thereof is used to generate power, the canal loses its character as a work of public utility, and that the taxing power cannot be exercised in aid of its construction. We are not able to assent to either of the foregoing propositions, and be-

lieve them to be untenable. The general proposition may be conceded that a canal is not a work of a public character if the chief purpose of its construction is to create a water power to operate manufacturing plants which are in turn operated wholly for private gain, and in which the public is only incidentally or indirectly interested. Dodge v. Mission Tp., 46 C. C. A. 661, 107 Fed. 827, 54 L. R. A. 242, and cases there cited. We conceive, however, that a water power may be devoted to a public use, as where it is employed to develop electric energy to propel cars or produce light for the public benefit. Possibly the creation of a water power, by means of a dam and canal, to operate a gristmill, would, in certain localities and under some conditions, be esteemed a work of such great public utility as to justify an exercise of the power of local taxation in aid of the enterprise. Burlington Tp. v. Beasley, 94 U. S. 310, 24 L. Ed. 161; Guernsey v. Burlington Tp., 4 Dill. 372, Fed. Cas. No. 5,855; Commissioners v. Miller, 7 Kan. 479, 523, 12 Am. Rep. 425. And it surely cannot be maintained, in those arid regions where water must be transported for long distances, not only for the purpose of irrigation, but to render the region habitable, by supplying other public wants, and dams and canals are constructed at great expense for that purpose, that such works lose their public character because a part of the water which they supply is used to generate power for any of the purposes to which power may be lawfully applied. When such works of internal improvement as dams and canals are undertaken in the arid regions, the public is interested in having them built of such dimensions as will supply sufficient water to satisfy all the needs of the community. We are of the opinion, therefore, that the act of the legislature of the state of Nebraska cannot be pronounced void upon its face because it declares that a "canal and other works constructed for irrigation or water power purposes or both are * * * works of internal improvement," and authorizes public aid to be extended in the construction of such works. The act does not mean that public aid may be extended to the creation of a water power which is used merely for private gain, and it should not be so construed. It must be understood to mean that counties and cities in the state of Nebraska may aid in the construction of canals, when the waters thereof are to be devoted to irrigation and other incidental objects to which they may be conveniently and profitably applied, without prejudice to the public use. The legislature foresaw that, if canals were constructed for the purpose of irrigation, it would oftentimes be found to be convenient and beneficial to the public to use the water, to some extent, for the purpose of generating power, and it intended to sanction such use.

It follows from what has been said that there was nothing in the statute to which this discussion relates, nor on the face of the bonds, to affect a purchaser with knowledge of their invalidity, even if they were invalid. The statute vested the municipality with a power, if rightfully exercised, to issue such bonds as those in suit profess to be. The bonds contain a recital, in the broadest language, that "all the requirements of the constitution and laws of the state of Nebraska necessary to authorize the issue and delivery of the bonds have been in all respects complied with," and a purchaser thereof was entitled to

rely upon this recital unless he was advised that it was untrue. In other words, if bonds in aid of the construction of a canal for irrigation and water power purposes could be lawfully issued, he was entitled to assume that the bonds in controversy had been so issued, and was under no obligation to institute inquiries with a view of finding out whether the municipality had not abused its powers, and whether, under the guise of aiding in the construction of a canal for irrigation and incidental water power purposes, it had not in reality loaned its credit in aid of an enterprise of a purely private character. E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 26 C. C. A. 91, 98, 80 Fed. 692. If a wrong of this character was in fact committed, it was the municipality, acting in obedience to the expressed will of more than two-thirds of its citizens, who committed it, and it cannot saddle the consequences of the wrong on an innocent purchaser of its securities. National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 10 C. C. A. 637, 651, 62 Fed. 778.

A final contention on the part of the plaintiff in error is that the proposition which was submitted to the electors of the city of Kearney relative to the issuance of the bonds, and in virtue of which they were issued, was unauthorized by law. Counsel for the city analyze the proposition, and argue that it was not a proposition to issue bonds in aid of a work of internal improvement, such as the statute contemplates, but that it was a proposition whereby the city submitted to its inhabitants the question whether it should purchase certain benefits, and pay for them in bonds; and the claim is that no law of the state authorized the submission of such a proposition, and that the bonds, for that reason, must be regarded as having been put in circulation without the sanction of a popular vote. We deem it wholly unnecessary to determine whether this analysis of the proposition is correct or otherwise, since in either event the result is the same. The plaintiff below was an innocent purchaser of the bonds. They recite the submission of a proposition to issue them "for the purpose of aiding * * * in the construction of a canal for irrigation and water power purposes," and such a recital is conclusive in favor of the plaintiff, unless it is proven that he was acquainted with the terms of the proposition which was in fact submitted, and there is no such evidence. Even if no vote had been taken, the authorities are that the recital that a proper election had been held would have been conclusive in favor of an innocent purchaser, because it was the duty of the officials who issued the bonds to ascertain and determine if a proper election had been held. Commissioners v. Beal, 113 U. S. 227, 239, 5 Sup. Ct. 433, 28 L. Ed. 966; Town of Coloma v. Eaves, 92 U. S. 484, 491, 23 L. Ed. 579; Town of Oregon v. Jennings, 119 U. S. 74, 93, 7 Sup. Ct. 124, 30 L. Ed. 323; Town of Pana v. Bowler, 107 U. S. 529, 539, 2 Sup. Ct. 704, 27 L. Ed. 424.

The judgment below was for the right party, on the showing contained in this record, and it is therefore affirmed.

MEMPHIS SAV. BANK et al. v. HOUCHENS.

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

No. 1,430.

1. FEDERAL COURTS—JURISDICTION—DISTRICT IN WHICH SUIT IS BROUGHT.
The inhibition of the federal judiciary act of August 13, 1888 (25 Stat. 433, c. 866), against the bringing of a suit in any district other than one of which either the plaintiff or defendant is an inhabitant, may be waived by a defendant, and is so waived by his removal into a federal court of a suit brought in a court of a state of which neither of the parties is an inhabitant.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY IN ANOTHER STATE—REAL ESTATE.
A state statute regulating general assignments is not applicable to an assignment executed outside of the state merely because it conveys property within the state, and where such an assignment is in a form valid at the common law and by the law of the place where made and where the parties reside, and also in the form prescribed for the conveyance of real estate under the laws of the state, it will be recognized and enforced in such state, under the rule of comity as to real estate there situated, although it does not conform to the requirements of the local law, when no rights of any resident are prejudiced thereby, but the controversy is wholly between nonresident creditors of the assignor, some of whom are attempting to secure a preference by attachment.[1]

3. SAME—TRUST—ESTOPPEL.
A general assignment made by a partnership for the benefit of its creditors conveyed lands situated in another state. Subsequently the firm made a proposition for a composition, by which each creditor was to receive notes to be secured by the assigned property, which was to be held by the assignee as trustee for that purpose. *Held*, that creditors who signed the composition agreement, or who subsequently accepted the notes executed thereunder without objection, were estopped from denying that the lands conveyed by the assignment were held in trust for the common benefit of all creditors, or from attacking the validity of the trustee's title on the ground that the assignment did not conform to the laws of the state where the land was situated.

4. EQUITY JURISDICTION—SUIT TO ADMINISTER TRUST.
A court of equity has jurisdiction of a bill to administer a trust, filed by a beneficiary in behalf of himself and all other beneficiaries, where facts are alleged which show that the trustee, although without fault of his own, has been prevented from executing the trust in the manner contemplated, and that there are obstacles in the way of its proper and economical administration which the court can remove.

5. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—CONTROVERSY.
Where a bill filed in a state court alleges facts which would authorize a court of equity to grant relief, the right to remove the cause, when the requisite diversity of citizenship exists, does not depend upon whether the defendants are actually controverting or disputing the right to such relief.

6. EQUITY JURISDICTION—SUIT TO ADMINISTER TRUST—PROPERTY OUTSIDE OF DISTRICT.
In a suit to administer a trust a court of equity acts in personam; and where it has acquired full jurisdiction of the trustee and all other necessary parties, it may direct the administration of the trust, although a part of the property consists of land not within its territorial jurisdiction.

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[1] See Assignments for Benefit of Creditors, vol. 4, Cent. Dig. § 80 [g, h, l, jj], § 82.

7. FEDERAL COURTS—JURISDICTION ON REMOVAL.
Where a state court in which a bill was filed to administer a trust in lands had jurisdiction to grant the relief as to all of such lands, although some of them were situated in each of the two divisions of the federal district, the federal court, into which the suit was properly removed, has equal jurisdiction as to the lands situated in the other division of the district.

8. SAME—ANCILLARY JURISDICTION—PROCEEDING TO PREVENT INTERFERENCE WITH TRUST PROPERTY.
Where a federal court has acquired jurisdiction of the cause and of all necessary parties in a suit to administer a trust, it may protect such jurisdiction by preventing interference with the trust property through attachments subsequently procured from a state court, whether it has at the time taken actual possession by its receiver or not, and it has ancillary jurisdiction of proceedings for that purpose against those attempting such interference, without regard to their citizenship.[2]

9. SAME—JURISDICTION—EFFECT OF UNAUTHORIZED ACTS OF RECEIVER.
After a federal court had acquired jurisdiction of a suit to administer a trust in lands which had been assigned by a debtor in trust to secure all his creditors, and had appointed a receiver for such lands, certain creditors instituted actions in a state court against the assignor, and obtained attachments, which were levied on some of such lands. The federal receiver, on his own motion, appeared in the attachment suits, and filed motions to quash the attachments, which were overruled on the ground that the levies, being upon lands, in no way affected the receiver's possession, while the granting of the motion would prevent the plaintiffs from perfecting their claims under the attachments. *Held*, that such action of the receiver or of the court did not defeat the prior jurisdiction of the federal court over the lands or the rights of the complainant therein under the trust.

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

On or about March 1, 1892, Nellie Houchens, the appellee, exhibited a bill of complaint against Thomas H. Allen, Thomas H. Allen, Jr., Harry Allen, and Richard H. Allen, Jr., partners under the firm name of Thomas H. Allen & Co., and against Ellen H. Allen, wife of Thomas H. Allen, and against M. B. Trezevant, as assignee of the firm of Thomas H. Allen & Co., in the circuit court of Jefferson county, in the state of Arkansas. The bill contained the following allegations, in substance: That Thomas H. Allen, Thomas H. Allen, Jr., Harry Allen, and Richard H. Allen, Jr., all of whom were citizens of the state of Tennessee, had been copartners in business, and had been doing business at Memphis, Tenn., under the name of Thomas H. Allen & Co., and in the city of New York, under the name of Richard H. Allen & Co.; that on November 24, 1890, said firms, which were composed of the same persons, executed a deed of assignment to the defendant M. B. Trezevant, who was also a citizen of the state of Tennessee, whereby said firms conveyed to him, for the benefit of all their creditors, a large amount of real and personal property; that a part of the real property so conveyed consisted of several large plantations in the counties of Crittenden, Lee, Desha, Jefferson, Perry, Lincoln, Columbia, Nevada, Logan, Mississippi, and Ouachita, in the state of Arkansas; that, besides conveying said lands in the state of Arkansas by deed of assignment, as aforesaid, Thomas H. Allen and wife, in whom the legal title to said lands was vested, also conveyed them, in trust, on the same day to said Trezevant, such conveyance by separate deeds having been made for the purpose of rendering the transfer of the title to said lands to said Trezevant more effectual; that by other deeds, made by said Thomas H. Allen and wife on February 23, 1891, said lands located in the state of Arkansas were again

[2] Supplementary and ancillary proceedings and relief, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

conveyed to said Trezevant, all of which deeds were duly recorded in the respective counties where the lands were situated, and contained a recital that they were executed for the purpose of securing the creditors of the firms of Thomas H. Allen & Co. and Richard H. Allen & Co., and that when the claims of said creditors were paid the trust should be discharged. The bill further averred, in substance, that Trezevant accepted the trust by signing the several conveyances aforesaid; that on December 20, 1890, said firms made a proposition to their creditors to pay their respective claims in full in four equal installments, which were to be evidenced by promissory notes made by the firms, maturing every six months for the period of two years, and bearing interest at the rate of 6 per cent. per annum, and that as security for the payment of said notes the deed of assignment executed in favor of Trezevant should remain in force, said firms reserving to themselves the power to sell said lands in the meantime through the trustee when it could be lawfully done; the proceeds of any such sales, however, to be applied on said notes. The complainant also averred that Thomas H. Allen & Co. was indebted to her in the sum of $6,556.35; that she accepted the aforesaid proposition, and received three notes of said firm, bearing date December 20, 1890, for the sum of $2,145.46 each, due, respectively, December 20, 1891, June 20, 1892, and December 20, 1892; that of said notes the one which fell due December 20, 1891, was unpaid; that the payment thereof was secured by the aforesaid conveyances; that the trustee had no funds on hand with which to pay the complainant; that a large portion of the land so held in trust consisted of plantation property, a large part of which was idle and unproductive; that the taxes on said property were a heavy burden, and that the trustee was without means to pay the same; that the firm of Thomas H. Allen & Co. and Trezevant, the trustee, had been greatly embarrassed by the low price obtained for cotton and by the financial depression that had come upon the country; that the improvements on the property held in trust were in danger of going to waste; that the value of the trust property would be thereby greatly impaired; that the indebtedness of the firm of Thomas H. Allen & Co., which was secured by the aforesaid conveyances, and which was held by creditors who had assented to the composition proposition aforesaid, amounted to $427,000; and that the holders of said indebtedness were very numerous, and that they were scattered throughout the country and resided in many different states. In view of the premises the complainant prayed, in behalf of herself and all the creditors of Thomas H. Allen & Co. who might elect to join in the proceeding, that the court would appoint a receiver to take charge of all of the aforesaid property and administer it for the benefit of the creditors of Thomas H. Allen & Co., and that during the pendency of the litigation, and until such time as the property was disposed of, it would make such orders for the preservation of the trust property as might be deemed necessary, and for all such further relief as was deemed proper.

The defendants to said bill appeared in the circuit court of Jefferson county on April 4, 1892, and obtained an order for the removal of said cause to the circuit court of the United States for the Western division of the Eastern district of Arkansas, which order of removal was based on the ground that the complainant, Nellie Houchens, was a citizen of Louisiana, and that all of the defendants were citizens of the state of Tennessee. The transcript of the record in the state court was filed in the federal circuit court on June 20, 1892, and on July 1, 1892, the latter court made an order appointing M. B. Trezevant receiver of all the Arkansas lands which had been conveyed to him, as aforesaid, in trust to secure the creditors of the firms of Thomas H. Allen & Co. and Richard H. Allen & Co. The receiver duly qualified by giving bond on July 6, 1892. The order of appointment authorized the receiver to sell the lands in controversy subject to the approval of the court, and until they were sold to rent the same and to pay the taxes thereon. On December 21, 1892, the receiver aforesaid filed a petition in the federal circuit court, wherein he represented that the Memphis Savings Bank of Memphis, Tenn., the City National Bank of Cairo, and the Phœnix Insurance Company of Memphis, three of the appellants, and one A. G. Mitchell, of Memphis, had severally commenced actions at law by

attachment in the circuit court of Crittenden county, Ark., against the firm of Thomas H. Allen & Co., and had severally sued out writs of attachment which they had caused to be levied on the lands of said firm theretofore conveyed to the receiver in trust, which were situated in Crittenden, Perry, and Jefferson counties, Ark.; that at the October term, 1892, of said court, judgments had been obtained in said several actions against Thomas H. Allen & Co.; and that an order for the sale of the attached lands had been entered, under which the respective sheriffs of said counties were about to proceed. In view of the premises the receiver prayed for an injunction to restrain the threatened sale, and such an injunction was accordingly granted on December 23, 1892. A similar order of injunction, restraining the sale under said judgments of other attached lands of said firm, which were situated in Lee and Faulkner counties, Ark., appears to have been obtained on January 4, 1894. A motion to dissolve the aforesaid injunctions as respects the lands situated in Lee, Jefferson, and Faulkner counties, so that the sale thereof might proceed, appears to have been made in behalf of the appellants in the federal court, which motion was denied on December 5, 1896. Thereafter, on February 10, 1897, the complainant below filed an amended bill of complaint in pursuance of leave theretofore obtained, by virtue of which amended bill the Memphis Savings Bank, the Phœnix Fire & Marine Insurance Company, the City National Bank of Cairo, Ill., and A. G. Mitchell were made parties to the proceeding. After setting forth the commencement of the several actions at law aforesaid in the circuit court of Crittenden county, Ark., said amended complaint contained allegations showing the dates on which the several writs of attachment therein had been received and levied. According to the averments of the bill and the proof offered in support thereof, it appears that none of said writs of attachment were received prior to July 2, 1892, and that none of said writs were actually levied prior to July 8, 1892. Some of the writs were not levied until August 20, 1892. It was further averred, in substance, in said amended bill, that notice of the removal of the cause from the state to the federal court on June 20, 1892, was served upon the defendants; that notice was likewise served upon them that the complainant would, on June 28, 1892, make application to the federal court for the appointment of a receiver to assume charge, control, and custody of the lands heretofore mentioned; that such a receiver had been duly appointed, who had qualified on July 6, 1892; that the lands of which he had thus been appointed receiver had been previously conveyed to him by the firm of Thomas H. Allen & Co., and by Thomas H. Allen and wife, in the manner heretofore described; that Thomas H. Allen & Co. had made a proposition to their creditors for the composition and settlement of their indebtedness in the manner heretofore stated; that said composition had been accepted by all, or nearly all, of the creditors of Thomas H. Allen & Co.; that the Memphis Savings Bank, the Phœnix Fire & Marine Insurance Company, and A. G. Mitchell, who were named as defendants in said amended bill, had severally signed said composition agreement; that the City National Bank of Cairo had likewise agreed to said composition, and on the maturity of its claim had accepted composition notes which were executed by Thomas H. Allen & Co. in compliance with the composition agreement; and that said composition agreement provided that the lands in controversy theretofore assigned and conveyed to Trezevant, as trustee, should remain vested in him as security for the payment of such notes as were executed in compliance with the provisions of the composition agreement. It was further averred in said amended complaint that the attaching creditors were claiming, as against the other creditors of Thomas H. Allen & Co., that the liens of their several attachments were superior to the liens of the other creditors of said firm; and that the several attachment suits, and the claims made thereunder, operated as a cloud upon the title of the receiver. In view of the premises the complainant prayed that the several attaching creditors might be restrained and enjoined from seeking to sell or dispose of the lands in controversy under the judgments which they had obtained in the circuit court of Crittenden county, and that it might be adjudged that they had acquired no right or interest by virtue of the attempted levy of the several

writs of attachment which was superior to the rights of the other creditors of Thomas H. Allen & Co. Thereafter, on May 3, 1897, the appellants above named, to wit, the Memphis Savings Bank, the Phœnix Fire & Marine Insurance Company, the City National Bank of Cairo, and C. W. Edmunds, another of the appellants who had succeeded to all the rights of A. G. Mitchell, filed a plea to the jurisdiction of the federal court as respects the matters alleged in the amended bill. By said plea it was averred, in substance, that the federal court had no jurisdiction of them, or either of them, for any purpose whatsoever, and that said court had no jurisdiction to enjoin said appellants, or either of them, with respect to the execution of the judgments which they had severally obtained in the circuit court of Crittenden county, Ark. Among the exhibits filed in support of the plea to the jurisdiction was an order made by the circuit court of Crittenden county, state of Arkansas, from which it appeared that prior to November 26, 1892, Trezevant, as receiver, had filed a motion in said court, asking that the levies of the several writs of attachment be quashed and discharged, and that the property levied upon be released to him as receiver, which motion had been overruled by the state court on November 26, 1892, for the reason, as stated in its order, that, inasmuch as the levies were made upon real estate, they in no wise affected the possession of the receiver.

The aforesaid plea to the jurisdiction was overruled by the federal circuit court on June 18, 1897, whereupon, the several appellants united in filing what is termed an answer and demurrer to the amended bill. The pleading so filed contained, first, a plea to the effect that Trezevant, the receiver, had submitted himself to the jurisdiction of the circuit court of Crittenden county, Ark., and was estopped by its judgment, and was not entitled to further question the propriety of the proceedings in that court because he had appeared as receiver in said court, as heretofore explained, and had set forth his title to the attached property, and had moved that the attachments be quashed. They next pleaded that the circuit court of Crittenden county had acquired full jurisdiction of the attachment suits against Thomas H. Allen & Co., and of the lands levied on therein, before the federal court had acquired any jurisdiction of the lands, and before it had appointed a receiver thereof. They further alleged, in substance, that the assignment executed by the firm of Thomas H. Allen & Co. on November 24, 1890, and the deeds executed by Thomas H. Allen and wife for the purpose of effectually vesting the title of the Arkansas lands in Trezevant in trust for the benefit of the creditors of that firm, were void, under the laws of the state of Arkansas, and were insufficient to vest any title whatsoever in him, as against the claims of attaching creditors; that the proposition to compromise the debts of the firm which was made by Thomas H. Allen & Co. on December 20, 1890, had not been accepted by the appellants and by many other creditors of said firm; that it was necessary that all of such creditors should have accepted it to render it binding and effectual; and that said alleged composition agreement had in fact been abrogated and annulled. They also alleged, in substance, that when the suit at bar was commenced in the circuit court of Jefferson county, Ark., no one had denied the validity of the assignment which was executed by Thomas H. Allen & Co.; that no suit for the purpose of contesting the same had been begun; that no one had charged Trezevant, the trustee therein named, with a breach of trust, or with any derelictions of duty; that said action was brought on the equity side of said court, without any good or sufficient cause therefor; that the original bill contained no allegations sufficient to show any ground of equitable jurisdiction in said circuit court of Jefferson county; and that by the removal of said cause to the federal court no such equitable jurisdiction was acquired as entitled the latter court to proceed further therein. The defendants accordingly prayed that the action be dismissed.

The case appears to have been heard below on the foregoing pleadings and the evidence offered in support thereof, whereupon the lower court decreed that the appellants heretofore named acquired no lien upon the lands in controversy, or priority of right thereto, as against the complainant and other creditors of Thomas H. Allen & Co., by virtue of the attachment proceedings instituted by them in the circuit court of Crittenden county;

and in view of that adjudication it was ordered and decreed that the appellants be perpetually enjoined from selling said lands under the judgments obtained in said attachment proceedings, or from asserting any right, lien, or claim to said lands, or any of them, as against the complainant and other creditors of Thomas H. Allen & Co. by virtue of said proceedings in the circuit court of Crittenden county, Ark. The case comes to this court on appeal from that decree.

William M. Randolph (George Randolph and Wassell Randolph, on the brief), for appellants.

J. M. Moore, for appellee.

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

THAYER, Circuit Judge (after stating the case as above). From the foregoing summary of the pleadings and proceedings in the lower court, it is manifest that the original bill, which was filed by Nellie Houchens against Thomas H. Allen et al. in the circuit court for the county of Jefferson, state of Arkansas, was a bill to preserve and protect trust property, and to administer a trust, which, as she claimed, had been created for her benefit as well as for the benefit of all the other creditors of the firm of Thomas H. Allen & Co. The bill was filed upon the theory that the assignment executed by the firm of Thomas H. Allen & Co. at Memphis, Tenn., on November 24, 1890, created a trust in favor of all the creditors of that firm, including the complainant, as respects the Arkansas lands which were described in the bill; that this trust had been recognized and confirmed by the composition agreement that was entered into on December 20, 1890, by and between Thomas H. Allen & Co. and the creditors of said firm; and that unforeseen events had thereafter occurred which had interfered with the execution of the trust in the manner contemplated by the parties, and had so far jeopardized the safety of the trust property as to render an appeal for relief to a court of equity both a proper and necessary step. Upon this theory, the complainant below, who is the appellee here, accordingly exhibited a bill for relief in behalf of herself and all other creditors of the aforesaid firm who might see fit to join in the proceeding and contribute to the expense thereof. The bill was originally filed in Jefferson county, Ark., where a part of the trust property was located, and in a court possessing full common-law and equity jurisdiction. The original defendants to the bill, among whom were the assignors and M. B. Trezevant, the assignee named in the deed of assignment, all of whom were citizens and residents of the state of Tennessee, thereupon appeared in that court and obtained an order removing the cause to the federal circuit court for the Western division of the Eastern district of Arkansas, on the ground that Nellie Houchens, the complainant, was a citizen and resident of the state of Louisiana. This order of removal was properly obtained, and vested the federal circuit court with jurisdiction of the case; for although neither of the parties plaintiff or defendant resided in the Eastern district of Arkansas, yet it is now well settled that a citizen of a state who is sued in the courts of a state of which he is neither a citizen nor a resident, by a nonresident of that state, may remove the case to the federal circuit court of the district wherein the

suit was originally brought. In other words, the inhibition found in the act of August 13, 1888 (25 Stat. 433, c. 866), against bringing suits in the federal court otherwise than in the district of which the plaintiff or the defendant is an inhabitant, when jurisdiction depends upon diversity of citizenship, is a privilege accorded to the defendant, which may be waived, and is waived, by a removal under the circumstances above stated. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C.) 37 Fed. 3; Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; Railway Co. v. McBride, 141 U. S. 127, 132, 11 Sup. Ct. 982, 35 L. Ed. 659. After the litigation to protect the trust property and enforce the trust was thus inaugurated, some of the creditors of the firm of Thomas H. Allen & Co., who were also beneficiaries in the alleged trust, namely, the Memphis Savings Bank, the Phœnix Fire & Marine Ins. Co., the City National Bank of Cairo, and the Hill Shoe Company (which is represented on this appeal by C. W. Edmunds, its assignee), who are the present appellants, did not see fit to come in and avail themselves of the benefits of the action which had been brought by the complainant, but, with a view, apparently, of obtaining a preference over the other creditors of that firm, they instituted suits by attachment in various state courts of the state of Arkansas, and caused the writs of attachment to be levied on a part of the alleged trust property, some months after the complainant's bill had been exhibited, and some time after the defendants to that bill had appeared and removed the case to the federal circuit court, and the latter court had obtained full jurisdiction of the controversy. Such action on the part of the attaching creditors led, in the first instance, to an application by the receiver of the trust property, who had been appointed by the federal court on July 1, 1892, for an injunction to restrain them from selling the attached lands under the writs of attachment. At a later date, as heretofore explained, it also led to the filing by the complainant of a supplemental bill, by virtue of which the attaching creditors were made parties defendant to the litigation, and eventually were perpetually enjoined from asserting any right to the lands composing the trust estate under and by virtue of the levy of said writs of attachment.

The decree of the lower court, from which the appeal was taken, is assailed by learned counsel for the appellants on various grounds, but the fundamental question in the case, from our point of view, is whether the assignment which was executed by the firm of Thomas H. Allen & Co. on November 24, 1890, in favor of all their creditors, and the deeds executed by Thomas H. Allen and wife on the same day and subsequently, whereby they conveyed the Arkansas lands to M. B. Trezevant, the assignee, in furtherance of the purposes of the assignment, had the effect of creating a trust in favor of the creditors of the last-named firm as respects the Arkansas lands, which a court of equity will recognize and enforce. It is said that this assignment was not executed, or rather administered, by the assignee in conformity with the statutes of the state of Arkansas regulating general assignments for the benefit of creditors; that the lands in controversy, which formed a part of the assets of said firm, were all situated in the state of Arkansas; and that for these reasons the deed

of assignment was inoperative, and did not have the effect of creating a trust as respects any of the lands situated in that state. It is doubtless true that this contention would be well grounded if the assignment in question had been a purely domestic assignment, executed within the state of Arkansas by persons there domiciled, inasmuch as the assignee failed to file an inventory and bond in the proper office, as the laws of that state direct, and also failed to comply with the local law in some other respects. Because of such neglect to execute the trust in accordance with the local law, it is insisted that no rights were created by the assignment which any creditor of the firm can enforce. Sand. & H. Dig. Ark. §§ 319–324; Raleigh v. Griffith, 37 Ark. 150; Teah v. Roth, 39 Ark. 66; Collier v. Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758. It is to be observed, however, that we are not dealing, on the present occasion, with a local assignment, but with one which was executed in the city of Memphis, Tenn., where the assignors were domiciled and had transacted business for a long time before the assignment was executed. It was a lawful assignment in the state where it was made and delivered, and operated to convey to Trezevant, as assignee, a large amount of property located in that city and state. It was also a valid assignment when tested by the rules of the common law, and did not conflict with any policy of the state of Arkansas in the matter of granting preferences to favored creditors, since all of the creditors of the assignor were accorded equal rights. Moreover, the deeds that were executed by Thomas H. Allen and wife contemporaneously with the deed of assignment and subsequent thereto operated, without any doubt, to vest the legal title to all of the Arkansas lands in Trezevant, the assignee, since these deeds, as well as the assignment, were executed and acknowledged in the manner prescribed by the local law for the conveyance of real property. Under these circumstances, we are of opinion that the deed of assignment and other conveyances were effective to create a trust, as respects the lands located in the state of Arkansas, in favor of all the creditors of the firm of Thomas H. Allen & Co., which trust a court of equity should recognize and enforce, notwithstanding the fact that the assignee named in the deed of assignment did fail to comply with the provisions of the Arkansas statutes relative to the mode and manner of administering the trust. In the case of Paxson v. Brown, 27 U. S. App. 49, 59, 10 C. C. A. 135, 142, 61 Fed. 874, 880, this court said, with respect to an assignment executed in the state of New York, which operated to convey lands situated in the state of Arkansas, but had not been administered in accordance with the assignment law of the latter state, that "the statutes of Arkansas relative to the filing of the inventory and the bond of the assignee relate to domestic assignments,—to assignments made in that state only,—and have no application to an assignment made in another state in accordance with its laws." In the case of May v. Bank, 122 Ill. 551, 13 N. E. 806, it was ruled that the inhibition contained in the assignment law of the state of Illinois against granting preferences to creditors in deeds of assignment applied only to domestic assignments, and not to assignments executed in other states. In accordance with that view it was decided that an assignment with pref-

erences, made in New York, where preferences were allowed, which conveyed land in Illinois, would be upheld against a nonresident attaching creditor, the assignment having been executed in such a form as to satisfy the statutes of Illinois relative to conveyances of realty. A similar ruling was made in Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671. And in the state of Minnesota (Paige v. Lumber Co., 31 Minn. 136, 16 N. W. 700), it was held that a statute of that state, which declares every assignment to be void unless the assignee therein named is a resident and freeholder of that state, only has reference to domestic assignments, and does not comprehend assignments made in foreign states by persons there domiciled and doing business, although they convey property located in the state of Minnesota. See, also, Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247, and cases there cited.

We perceive no reason, therefore, for holding that the statute of Arkansas relative to general assignments, which is above referred to, is applicable to, an assignment executed, as in the present instance, outside of that state, merely because such assignment conveys some property located within the state. Nor do we believe that the statute was intended to comprehend assignments of that character. The rule of comity which prevails among the states requires that a voluntary general assignment made in one state, and there held to be valid, or which is valid at common law, should be recognized and enforced by the courts of another state as respects property situated within the latter state, when, as in the case at bar, the rights of no citizen of the state are jeopardized, and the controversy is wholly between nonresident creditors of the assignor, some of whom are attempting, by process of attachment, to ignore the assignment and secure for themselves an undue preference over other creditors. As will appear from the foregoing citations, this doctrine obtains, so far as personal property is concerned, and no reason is perceived why it should not be extended to real property, when the title thereto has been vested in the nonresident assignee by a conveyance which is in the form prescribed by the lex rei sitæ for the conveyance of real estate.

But if the views last expressed are erroneous, and if it should be conceded that the Arkansas statute concerning voluntary assignments was intended to embrace assignments made in other states by persons there domiciled, provided they convey any property within the state, still we should be of the opinion that the present appellants are estopped by their conduct from denying that the lands now in controversy are held in trust for the common benefit of all the creditors of the firms of Thomas H. Allen & Co. and Richard H. Allen & Co., both of said firms being composed of the same persons. On December 20, 1890, shortly after the assignment and deeds heretofore mentioned had been executed, Thomas H. Allen & Co. made a written proposition to their creditors to issue a series of notes, running 6, 12, 18, and 24 months, and bearing 8 per cent. interest, for the full amount of the debts of said firms. This proposition contained a clause to the effect that the title to the lands conveyed to Trezevant, as trustee, on November 25, 1890, should remain vested in him as security for the payment of said notes until all of them, including the interest

thereon, were fully paid. The firm reserved the power to sell the lands through the agency of the trustee, on condition, however, that the proceeds of such sales as might be made by the firm should be appropriated exclusively to the payment of said notes. This proposition appears to have been accepted by the creditors of said firms, and notes were executed and delivered in conformity therewith shortly after the agreement was executed. This composition agreement, as the record discloses, was signed by the appellants, the Phœnix Fire & Marine Insurance Company, the Memphis Savings Bank, and the Hill Shoe Company (which is represented on this appeal by C. W. Edmunds, its assignee). The City National Bank of Cairo, Ill., which is also one of the appellants, did not sign the agreement, but it subsequently accepted notes, which were executed in conformity therewith, and fully assented thereto. After the composition agreement was thus entered into and the notes were executed and delivered, the firm of Thomas H. Allen & Co. proceeded in good faith to liquidate its indebtedness in the manner contemplated by the composition agreement, and the validity of that agreement does not seem to have been challenged in any manner or by any creditor of the firm until shortly before the present litigation was instituted. In view of these facts we entertain no doubt that the appellants are estopped from denying that the Arkansas lands which form the subject-matter of the present controversy are held in trust for the benefit of the creditors of the firms of Thomas H. Allen & Co. and Richard H. Allen & Co. The composition agreement expressly provided that the lands should be held as security for the payment of the composition notes, and the appellants voluntarily became parties thereto. Moreover, they do not now pretend that they were induced to sign the agreement by reason of any mistake of law or fact, or by reason of any fraudulent representations which entitle them to disregard it. The case in hand is similar, in most respects, to one recently decided by the supreme court of Arkansas. Martin v. Taylor, 52 Ark. 389, 400, 12 S. W. 1011. In that case it appeared that, after a firm had become insolvent and certain attachments had been levied on its property, the creditors of the firm entered into an agreement among themselves and with the members of the firm, whereby all of the firm property was conveyed to certain assignees, who were vested with the power to sell and dispose of the same and distribute the proceeds among the creditors of the firm, preferences being allowed in favor of certain attaching creditors. Subsequently one of the attaching creditors became discontented, and erased his name from the agreement, and then sought to ignore it, and enforce his attachment lien, on the ground that under the laws of Arkansas the agreement amounted to a general assignment for the benefit of creditors, and was void on its face. It was held, however, that the persons who thus attempted to assail the agreement, being parties thereto, and having assented to it, were estopped from challenging its validity. In the case of Paxson v. Brown, 27 U. S. App. 49, 59, 10 C. C. A. 135, 142, 61 Fed. 874, 880, this court applied the same doctrine, holding, in substance, that after creditors had become parties to a voluntary assignment, executed outside of the state of Arkansas, which was good at common law, and had accepted divi-

dends thereunder which had been paid by the assignee, they could not repudiate the assignment on the ground that the assignment was inoperative, and that acts done thereunder were void, because the assignee had not filed a bond and inventory, as the laws of Arkansas required. It is held very generally, and the authorities on this point may be said to be uniform, that creditors who have confirmed an assignment, which might have been avoided, by receiving benefits under it, or who have voluntarily become parties to it with full knowledge of all the facts attending its execution, are afterwards estopped from impeaching it. They cannot play fast and loose, but must make their election to repudiate it before they have accepted any benefits thereunder or by their acts have become parties to it. Adlum v. Yard, 1 Rawle, 163, 171, 18 Am. Dec. 608; Valentine v. Decker, 43 Mo. 583; Rapalee v. Stewart, 27 N. Y. 311; Glass Co. v. Baldwin, 27 Mo. App. 44; Harrison v. Mock, 10 Ala. 185; Stoller v. Coates, 88 Mo. 514, 521, 522, 523; Burrill, Assignm. (6th Ed.) § 454. This doctrine, without doubt, is applicable to the case in hand, and, even if it be conceded that the appellants might have attached the lands in controversy after the execution of the deed of assignment, yet it is clear that they cannot be conceded any such right after becoming parties to the composition agreement, and after consenting that the lands conveyed to Trezevant, as trustee, might be held as security for the payment of the composition notes. Such consent, voluntarily given, estops them from seeking to appropriate the proceeds of those lands exclusively to the payment of their own claims, without reference to the rights of the other creditors.

In the light of what has already been determined, we proceed to notice some other objections to the decree which have been discussed at considerable length.

In the first place, it is said that the lower court had no jurisdiction, because no controversy existed at the time the suit was commenced in the state court, nor when it was removed to the federal court. We understand that what counsel mean by this statement is that no facts were alleged in the bill which would warrant a court of equity in granting equitable relief,—in other words that the bill was demurrable for want of equity. In no other sense can it be said that the lower court was without jurisdiction; since, if such facts were alleged as entitled a court of equity to grant relief, it matters not whether the defendants were contesting the right to such relief or were consenting thereto. The power of the court in which the bill was filed to entertain it, as involving a controversy, did not depend upon the existence of an actual dispute between the litigants over any question, but upon the inquiry whether the complaint alleged such facts as will ordinarily induce a court of chancery to afford relief of any sort. The bill, as heretofore shown, was one to enforce a trust and to protect and preserve trust property. Courts of equity exercise an undoubted jurisdiction in such cases, it being one of their special duties to afford protection to those whose title to property is equitable, and who, for that reason, have no standing in a court of law to enforce their rights. Turning to the averments of the original and supplemental bills, on which the case was eventually tried and determined, we find all the

allegations which were necessary to show that the lands in controversy were held in trust for the benefit of the complainant and other creditors of the firm of Thomas H. Allen & Co., by virtue of the general assignment which had been executed and the subsequent composition agreement. It was further alleged that the beneficiaries in the trust were very numerous, and resided in many different states; that a large portion of the land which was held in trust consisted of plantation property, a part of which was lying idle and unproductive; that the taxes on the property were a heavy burden, and that the trustee was without funds to discharge the same; that although a faithful attempt had been made to carry out and execute the trust in the manner contemplated by the composition agreement, yet the trustee had been greatly embarrassed in that respect by the low price of cotton; that he and the firm of Thomas H. Allen & Co. had been unable to make such a disposition of the property as was originally intended when the trust was created; and that the improvements upon the trust property were in danger of going to waste, and that the value thereof would be greatly impaired in consequence of the unlooked-for obstacles which had been encountered in administering the trust. Although the fact was not specifically averred in the original complaint, yet in all probability it was known to the complainant at the time she exhibited her original bill that these appellants, and possibly some other creditors of the firm of Thomas H. Allen & Co., intended to institute the various attachment suits which they afterwards brought, with a view of defeating the trust and appropriating the proceeds of the Arkansas lands to their exclusive benefit. In view of these facts, and in view of the further fact that the assignment and composition agreement had been executed in a foreign state, we have no doubt that a court of equity could rightfully undertake the administration of the trust when solicited to do so by one of the beneficiaries therein, and in furtherance of that object could also appoint a receiver of the trust property, as was subsequently done. The fact that a trust had been created as respects a large quantity of land situated in the state; that the beneficiaries of this trust were very numerous; that grave difficulties had been encountered in administering it; that questions concerning its validity were liable to arise; that the trust property was deteriorating in value; and that the rights of those who were beneficiaries in the trust might be injuriously affected by proceedings taken by some of the creditors to obtain a preference,—afforded, as we think, sufficient ground for the appointment of a receiver to hold, manage, and administer the property in controversy, subject to the orders of the court, for the protection of all parties in interest. While courts of equity will not take possession of trust property at the instance of a beneficiary, merely for the purpose of administering it, when there are no obstacles in the way of its proper administration by the trustee, and he has been guilty of no misconduct, yet they may do so when such action is necessary to preserve the trust estate or to protect it from a threatened loss. It is well settled that a court of equity will entertain a bill to administer a trust which is filed by one of the beneficiaries in behalf of himself and all other beneficiaries, when the trustee has failed, for any reason, to execute it, and in such cases,

where the trust is created by a general assignment for the benefit of creditors, the claim of the complainant need not have been reduced to judgment against the assignor. Lawton v. Levy, 2 Edw. Ch. 197; Kerr v. Blodgett, 48 N. Y. 62; Weir v. Tannehill, 2 Yerg. 57; Shyer v. Lockhard, 2 Tenn. Ch. 365; Putnam v. Carpet Co. (C. C.) 79 Fed. 454; Collins v. Serverson, 2 Del. Ch. 324; 2 Perry, Trusts, § 595. There is equal reason, we think, for holding that a court of equity may afford such relief when the trustee, without fault of his own, has been prevented from executing the trust in the manner contemplated, or when he finds unlooked-for obstacles in the way of a proper and economical administration of the trust committed to his hands which a court of equity can remove. We are of the opinion, therefore, that the contention on the part of the appellants that the bill of complaint did not disclose a case of equitable cognizance is untenable, and should be overruled.

Learned counsel for the appellants further contend that the lower court had no jurisdiction over a part of the lands in controversy, and no power to appoint a receiver as respects such lands. With reference to this proposition it may be said that it appears from the record that some of the lands in controversy are situated in two counties within the Eastern division of the Eastern judicial district of Arkansas, but the greater portion thereof appear to be located in the Western division of said district. The suit at bar was originally instituted in Jefferson county, Ark., where a part of the land is situated, which is a county within the Western division of the district, and it was thence removed to the federal circuit court for the Western division of the district, which sits at Little Rock. For this reason it is urged that the court, sitting at Little Rock, acquired no jurisdiction over, or power to appoint a receiver of, the lands in the Eastern division of the district. This contention is evidently based upon the assumption that the action at bar is a strictly local action, like a suit in ejectment, or a suit to partition real property, and that, because of that fact, the lower court could only deal with those lands which were situated within the Western division of the district. This theory, however, is erroneous. The suit at bar is not a local action, but a bill to administer a trust, and in such cases courts of equity always act in personam. It is one of the equitable maxims that they so act. Bisp. Eq. § 47. When a court of equity acquires full jurisdiction of the trustee in whom the legal title to trust property is vested, and other necessary parties are before the court, either in obedience to process or by their voluntary appearance, it can compel the trustee to dispose of the legal title and distribute the proceeds thereof as it may direct, although a part of the trust property may be located outside of the territorial limits of its jurisdiction. Such orders, and decrees and conveyances made in pursuance thereof, when they emanate from a court possessing full chancery powers, which has acquired jurisdiction of the trustee and other necessary parties, are respected everywhere as binding upon the parties to the litigation and their privies, although some of the property thereby affected may not be within the territorial jurisdiction of the court. If such were not the rule applicable to such cases, many trusts could not be successfully, or, at least, eco-

nomically administered. Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; McElrath v. Railroad Co., 55 Pa. 189; Le Breton v. Superior Court, 66 Cal. 27, 29, 4 Pac. 777; Bisp. Eq. § 47, and cases there cited.

Aside from this view of the case, certain decisions of the supreme court of the state of Arkansas demonstrate, we think, that the circuit court of Jefferson county, in which this action was originally instituted, could have afforded the relief sought by the bill and appointed a receiver for all of the lands in controversy, those situated within that county as well as those situated in other counties; and, as the case was lawfully removed to the federal circuit court for the proper division of the district, no reason is perceived why that court was not competent to afford the same relief which was obtainable in the state court. The defendants could not deprive complainant of the relief to which she was entitled, and could have obtained, in the state court, by removing it to the federal court. Railway Co. v. Humble, 38 C. C. A. 502, 504, 97 Fed. 837. The Code of Procedure of the State of Arkansas declares, in substance (Sand. & H. Dig. Ark. § 5684), that actions for the recovery of real property, for the partition of the same, and to foreclose mortgages and other liens, as well as actions for injuries to real property, must be brought in the county in which the land, or some part thereof, is situated. This statute treats one action at least as being local, which, but for the statute, would not be so regarded. Nevertheless, it has been held in that state that a bill to set aside fraudulent settlements made by an administrator, to restate his accounts, and also to subject to the payment of the decree certain realty, the title whereto stood in the name of the administrator's wife, was not a local action, but might be brought in the county where the estate was being administered, although the realty standing in the name of the wife was situated in another district or county. Dyer v. Jacoway, 42 Ark. 186, 197. So it has been held in that state that an action in chancery to enjoin the sale of land, under a fraudulent or satisfied mortgage, for an accounting of the amount due on the mortgage, and to cancel fraudulent conveyances of the land, is not a local action, but may be brought in any county where jurisdiction of the defendants can be obtained by personal service of process upon them. Jones v. Fletcher, 42 Ark. 422. It is obvious, therefore, that an action like the one at bar, to administer a trust by direct action on the trustee, would not be regarded in that state as a local action, but as a proceeding in personam. And as a part of the lands in controversy were situated in Jefferson county, where the complainant brought her suit originally, the courts of that state would doubtless hold that the court in which the action was commenced had full power to exercise control, through the trustee, over any lands within the state which formed a part of the trust property, and, if need be, to appoint a receiver thereof. The court to which the case was removed was entitled, in our judgment, to exercise the same power. This view of the case is strongly confirmed by the fact that section 742 of the Revised Statutes of the United States declares that "any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may

be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it and cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted." But even if this provision was not found in the Revised Statutes, as the action was not of a local character, and as the federal court had acquired jurisdiction over the trustee and other necessary parties, and the case was one of equitable cognizance, we should be of the opinion that it was entitled to proceed and render full and complete relief, and to exercise control, through the trustee, over all the lands forming a part of the trust estate, which were situated either in the Eastern or in the Western division of the district.

It is further urged in behalf of the appellants that, while the original defendants to the action may have waived all objections to the jurisdiction of the lower court by the removal of the case to that forum, yet this is not true of themselves, the attaching creditors, who subsequently became parties to the litigation in the manner heretofore explained. It is said, in substance, that they have never consented to be sued in the Western division of the Eastern district of Arkansas, and are not inhabitants of that district or state, and that their rights cannot be determined by the federal court for that district. It matters not, however, whether they have so consented or where they may reside. They were not originally named as defendants to the bill, nor was it necessary to do so, although, as creditors of the firm of Thomas H. Allen & Co., they had an undoubted right to intervene in that proceeding and make themselves parties thereto for the protection of their own interests. By the removal of the case to the federal court, that court acquired full jurisdiction of the cause, as we have heretofore held. The proceedings which were subsequently taken against the appellants as attaching creditors were rendered necessary by their attempt to seize and appropriate the trust property to the payment of their own claims to the exclusion of other creditors of Thomas H. Allen & Co., and in open violation of the terms of the composition agreement, which they had signed. The proceedings against the appellants, therefore, were of an ancillary character, being incidental to the exercise of a jurisdiction which had been lawfully acquired. They were such proceedings as might have been taken against any one, without reference to his citizenship, who intermeddled with the trust property after a bill to administer and enforce the trust had been filed and jurisdiction for that purpose over the necessary parties had been lawfully acquired. In the case of Zimmermann v. So Relle, 25 C. C. A. 518, 520, 80 Fed. 417, 419, and in Merritt v. Barge Co., 24 C. C. A. 530, 533, 79 Fed. 228, this court held that "when a suit is brought to enforce a lien against specific property, or to marshal assets, or to administer a trust, or to liquidate an insolvent estate, and in all other cases of a similar kind, where, in the progress of the case, the court may find it necessary or convenient to assume control of the property in controversy, the court which first acquires jurisdiction of such a case, by the issuance and service of process, is entitled to retain it to the end, without interference on the part

of any other court of co-ordinate jurisdiction." We held, further, that "a rigid adherence to this rule, both by the federal and state courts, is necessary in order to prevent unseemly conflicts which might otherwise arise" in dealing with that class of cases. To the same effect are the following cases: Chittenden v. Brewster, 2 Wall. 191, 196, 197, 17 L. Ed. 839; Orton v. Smith, 18 How. 263, 265, 15 L. Ed. 393; Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, 24 Fed. Cas. 704; Union Mut. Life Ins. Co. v. University of Chicago (C. C.) 6 Fed. 443; Heidritter v. Oilcloth Co., 112 U. S. 294, 302, 5 Sup. Ct. 135, 28 L. Ed. 729; Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961. The federal circuit court had acquired full jurisdiction of the bill, which was filed by the plaintiff to enforce and administer the trust, before any of the writs of attachment were levied, and although the receiver, who was subsequently appointed, may not have acquired actual possession of some of the lands before the levies were made, yet within the doctrine last stated the land was not subject to seizure under the writs of attachment, it being, potentially at least, in custodia legis. Besides, as we have already held, these appellants, by signing the composition agreement and consenting to a sale and disposition of the lands in controversy for the common benefit of all the creditors of Thomas H. Allen & Co., were thereby estopped from prosecuting actions in the state court, with a view of fixing an exclusive lien on the trust property adverse to the rights of other creditors.

A number of other objections to the decree below have been stated and argued at length by counsel for the appellants, all of which have been fully considered, but in view of what has been already decided we only deem it necessary to notice specially one other contention.

It is said that "the appellee is estopped to deny the right of the appellants to have the lands attached in the suits in the Crittenden county circuit court sold under the orders of sale" made by that court. This proposition is based on the following ground: On November 10, 1892, after M. B. Trezevant, the trustee named in the deed of assignment and in the composition agreement, had been appointed receiver of all the lands in controversy, by order of the federal court, he appears to have filed a motion in the attachment suits that were then pending in the circuit court for Crittenden county, Ark., which had been brought by three of the appellants, namely, the Memphis Savings Bank, the Phœnix Fire & Marine Insurance Company, and the City National Bank of Cairo, Ill., against the firm of Thomas H. Allen & Co., wherein he averred, in substance, that he had been appointed receiver of the attached lands lying in said county as early as July 1, 1892, by the federal court; that the writs of attachment had come to the hands of the sheriff of Crittenden county on July 6th and 8th of that year, and that under these circumstances the levies were unauthorized and illegal. The receiver accordingly prayed that the levies, under the various writs of attachment, might be quashed. The court to whom this motion was addressed overruled it for the reason, as its order recites, that, as "the levies in question were made upon real estate * * *

said levies in no way affected the possession of said receiver, and that the granting of the said motion would prevent plaintiff from perfecting * * * his claim under the attachment." This motion was made by the receiver of his own volition, without any order or direction to that effect, and without the knowledge of the court whose officer he was. Under these circumstances it cannot be successfully claimed that the act of the receiver in making this motion, which was doubtless prompted by a desire to treat the process of the state court with proper respect, had the effect of defeating the jurisdiction of the federal court over the Crittenden county lands which it had theretofore lawfully acquired. The jurisdiction over property which a court has once obtained in a judicial proceeding cannot be defeated by an unauthorized act on the part of its receiver. Moreover, the right of the complainant below in and to these lands cannot be impaired by such unwarranted action on the part of the receiver. Furthermore, the adjudication of the state court, which the appellants invoke to enable them to hold the Crittenden county lands, does not purport to be an adjudication that the levy of the writs of attachment upon the lands gave them a superior lien, and that they were not bound by the composition agreement. The state court did not undertake to decide either of these questions, but was apparently of the opinion that the levies which had been made under its process in no wise interfered with the action of the federal court, but left it at full liberty to decide these questions as it thought proper. For these reasons the position taken by the appellants, as respects the Crittenden county lands, must be regarded as untenable.

In conclusion, it is proper to remark that the decree which was rendered by the lower court will manifestly lead to a result which, from any point of view, is just and equitable. It devotes the proceeds of the Arkansas lands to the payment of all of the debts of the insolvent firm, to which the lands belong, without preferences, as the creditors of that concern, including the appellants, agreed that they might be devoted by the terms of the composition agreement.

After a careful consideration of all the arguments that have been adduced by learned counsel for the appellants to sustain their attachment liens and to secure a priority over other creditors, we are satisfied that the decree below was for the right party and that it should be affirmed. It is so ordered.

MISSOURI BROOM MFG. CO. et al. v. GUYMON.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,609.

1 SALE UNDER FALSE REPRESENTATIONS—RECOVERY OF PROPERTY—FORM OF ACTION.

Where a bill averred that a firm purchased broom corn in controversy with intent not to pay for the same, that the sale was induced by fraud, and that immediately after discovering the fraud complainant elected to rescind the sale and reclaim the property sold, the action must be

considered as an action to recover personal property, and the buyer and his vendees with notice be treated as trustees for the complainant.

2. SAME—BILL—MULTIFARIOUSNESS—RIGHT TO OBJECT.
Where a bill to recover personal property claimed to have been sold and delivered through the buyer's fraud alleged that one of the stockholders of the buyer had not paid for his stock, and had received money from the buyer, which he should refund, such allegations, though improper, where not prejudicial to other defendants, and the bill having been dismissed as to such stockholder, such other defendants could not claim that the bill was multifarious.

3. SAME—JUDGMENT OR LIEN CREDITOR.
In a proceeding to establish a constructive trust of personal property claimed to have been sold and delivered under false representations, and to compel the trustee to restore the trust property or account for its proceeds, it is immaterial that plaintiff is not a judgment or lien creditor, and has not established his demand at law.

4. SAME—REPLEVIN—ADEQUATE REMEDY AT LAW.
In an action to enforce a constructive trust in broom corn claimed by complainant to have been sold and delivered under false representations of the buyer, it was alleged that part of the broom corn, which had not been worked up by the buyer, had been mingled with other corn, and was difficult of identification; that the property had been twice sold, and the rights of the alleged purchaser would be the subject of investigation; and that part of the corn had been manufactured and assigned to third persons, who were acting in collusion with the alleged trustees. *Held*, that plaintiff did not have an adequate remedy at law by an action of replevin, and hence equity was entitled to assume jurisdiction.

5. SAME—BONA FIDE PURCHASERS—CONSIDERATION—EXTENSION OF TIME—PRE-EXISTING DEBT.
Where a fraudulent purchaser of personal property gave a deed of trust to secure pre-existing debts, covering the property purchased which was not paid for, and such deed entitled the mortgagee to take possession of the property at once, and inventory and sell the same at public or private sale, such mortgagee was not entitled to claim, as against the defrauded seller of the goods, that he was a bona fide purchaser on the ground that the mortgage also granted the mortgagor a definite extension for the payment of the debts as a consideration of the mortgage.

6. SAME—DAMAGES.
Where a seller sued in equity to enforce a constructive trust of the goods on the ground that the sale had been made by fraud, and that defendant was chargeable as trustee, and pending the suit the purchasers from the fraudulent vendee were allowed to dispose of the property, and hold the proceeds to await the result, and they sold the same at a larger price by reason of an advance in the market, the plaintiff was entitled to the actual value of the property at the time it was sold by such vendees, and was not limited to the original contract price.

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

E. T. Guymon, the appellee, exhibited an amended bill of complaint, on which this case was eventually tried, against the Missouri Broom Manufacturing Company, David Loewen, the Exchange Bank of Jefferson City, William A. Dallmeyer, William Q. Dallmeyer, H. Clay Ewing, and Arthur M. Hough, the appellants, which contained, in substance, the following allegations: That in June, 1897, the complainant was induced, by certain false and fraudulent representations made by A. Loewen, who was the president of the Missouri Broom Manufacturing Company (hereafter termed the "Broom Company"), to ship and sell to the latter company a large quantity of broom corn of the value of $3,812.21, which the company received not intending to pay for it; that by the terms of the sale one-third of the purchase money was to be paid in cash and the balance in 60 days, but that

the complainant, after the shipment and delivery of the broom corn, was induced, by certain other fraudulent representations, to accept the broom company's notes dated September 4, 1897, one due in 6 days, one in 16 days, and the other on October 2, 1897, for the entire purchase price; that on September 28, 1897, the broom company, which was engaged in the manufacture of brooms in the Missouri penitentiary at Jefferson City, Mo., executed a deed of trust to A. M. Hough, as trustee for the Exchange Bank of Jefferson City, and David Loewen, which deed of trust conveyed all of the broom company's property of every kind and description, and was made to secure the payment of alleged debts of the broom company, specified therein, to the amount of $9,212.25; that a part of the complainant's broom corn had been manufactured into brooms, and mingled with other brooms, prior to September 28, 1897, and that the residue thereof was at the time mingled with other broom corn belonging to the broom company, and was stored in warehouses in Jefferson City, Mo., when the deed of trust was executed, and was covered by that conveyance; that Hough, as trustee, took possession of all of the property of the broom company on the execution of the deed of trust, including the broom corn which belonged to the complainant and was then in warehouses at Jefferson City, and that he did so with full knowledge of all the facts and circumstances under which it had been obtained by the broom company from the complainant. The bill further alleged, in substance, that in pursuance of the powers conferred by the aforesaid deed of trust, Hough, as trustee, on October 7, 1897, sold all of the property thereby conveyed to the defendants H. Clay Ewing, William Q. Dallmeyer, and William A. Dallmeyer, ostensibly for the sum of $3,000; that in said transaction the vendees last named acted merely as agents of the Exchange Bank of Jefferson City, paying nothing for the property which they acquired, and at the time of the purchase were well aware that the complainant had filed his original bill, praying for a restraining order and the appointment of a receiver; that said vendees, on October 9, 1897, sold all of said property to the defendant David Loewen, and agreed to assign to him the debts which were secured by the aforesaid deed of trust, on condition that he pay to the vendees the sum of $6,000, evidenced by six promissory notes, which were executed by David Loewen and I. J. Ringolsky; that in and by said contract of sale said vendees retained the title to the property which they pretended to sell until the purchase money evidenced by said notes had been fully paid; that at the time of said alleged sale to David Loewen and at the time of the execution of the deed of trust to Hough, and long prior thereto, said David Loewen was fully cognizant of the fraud that had been perpetrated on the complainant, and was well aware of his right to rescind the sale; that David Loewen and A. Loewen, the president of the broom company, were copartners in business, and transacted business at the city of St. Louis, Mo., under the name of David Loewen & Son; that said firm had an account with the broom company on its books, the style of which account was, for some unexplained reason, changed about the date of the transactions aforesaid; that in August and September, 1897, the broom company shipped many brooms that had been made out of the material purchased from the complainant to David Loewen & Son at St. Louis, Mo., for the fraudulent purpose of selling them, and defrauding the creditors of the broom company, and that a large part of the receipts of the broom company during said months was turned over to David Loewen & Son by collusion with that firm, to defraud the complainant and other creditors of the broom company. The complainant further alleged in his bill that he discovered the fraud which had been practiced upon him, and that the aforesaid purchase was made with no intent on the part of the broom company of paying him for the commodity purchased, only a week prior to the filing of his original bill herein, which appears to have been exhibited on October 8, 1897; that on discovering the fraud he went immediately from the state of Kansas, where he resided, to Jefferson City, Mo., for the purpose of surrendering the notes which he had received and rescinding the fraudulent sale, but that he was unable to find any officer or agent of the broom company to whom he could make the tender; that he accordingly tendered the notes in court on the filing of his bill; and that by virtue of the facts aforesaid, the complainant

was entitled to recover from the defendants the broom corn which he had sold, and the proceeds of such as had been manufactured into brooms, but that, in view of all the circumstances, he was without an adequate or sufficient remedy at law to fully redress the wrong. He accordingly prayed for the appointment of a receiver of the property which remained in specie; that the part thereof to which he was entitled might be determined; that David Loewen and A. Loewen might be compelled to account for the property, or the proceeds thereof, which they had received from the broom company; and for general relief.

When the original bill was exhibited, and the application for an injunction and the appointment of a receiver was heard, the lower court, in lieu of appointing a receiver, made an order, in substance, directing that the persons then in charge of the property in controversy should continue in charge thereof, with power to sell the same and manufacture it into brooms, rendering accounts to the court at intervals of all their doings in that behalf. Acting under this order, which practically constituted the defendants, or some of them, receivers, the property, as it seems, had been sold before a final decree was reached, and the proceeds were in the custody of the Exchange Bank at Jefferson City, and held by it for distribution, pursuant to the provisions of such decree as might be entered. By the provisions of the decree, from which the defendants below have appealed, the deed of trust of date September 28, 1897, the sale thereunder by Hough, and the sale by his vendees to David Loewen were each set aside and annulled in so far as they undertook to convey the broom corn that was sold by the complainant to the broom company, and the funds in the hands of the Exchange Bank were impressed with a trust in favor of the complainant in the sum of $3,000, that being the ascertained value of the 60 tons of broom corn which were sold by the complainant. The Exchange Bank was further directed to pay to the complainant, out of the funds remaining in its hands, the sum of $402.68, being that portion of the fund which David Loewen would be entitled to receive from it pursuant to the provisions of the aforesaid deed of trust.

Edwin Silver (F. M. Brown, on the brief), for appellants Exchange Bank, H. Clay Ewing, William A. Dallmeyer, William Q. Dallmeyer, and Arthur M. Hough.

I. J. Ringolsky, for appellant David Loewen.

Henry M. Beardsley (Alfred Gregory and Charles H. Kirshner, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

It is manifest, we think, from an inspection of the bill, the substance of which has been stated above, that the proceeding at bar must be characterized as an action to recover personal property and the proceeds thereof, which property the complainant below was induced to sell and ship to the Missouri Broom Manufacturing Company (hereafter termed the "Broom Company") by means of false and fraudulent representations that were made by certain officers of that corporation to induce the sale. The bill distinctly avers that the broom company made the purchase of the broom corn in controversy with no intent to pay for the same; that the sale was induced by statements which were false and misleading; that the complainant was thereby deceived, and induced to part with his broom corn; and that immediately after the discovery of the fraud the complainant elected to rescind the contract of sale and reclaim the property sold, and that

he took the proper steps in that behalf. These allegations and the relief prayed for give an unmistakable character to the proceeding, and stamp it as a proceeding to recover property which was wrongfully obtained from the complainant by fraud, and which, for that reason, must be regarded as having been held originally by the broom company, the fraudulent vendee, in trust for the complainant, if he elected to rescind the contract of sale. It must also be regarded as held in trust by the other defendants, to whom the property was transferred, unless they were innocent purchasers for value. It is true that there are some allegations in the bill, not stated above, showing that one of the stockholders of the broom company (I. J. Ringolsky) has not paid for his stock, and that he has received money from the broom company, which he ought to refund. It is also true that allegations of this sort have no proper place in a proceeding such as we understand the present proceeding to be, and that they might, under some conditions, render the bill multifarious; but as the bill was dismissed as to Ringolsky, and as no attention was paid to these allegations, or relief sought or granted on account thereof, they ought not, at this stage of the case, to be noticed, or to prejudicially affect the decree, if it is right in other respects. The appellants have sustained no injury in consequence of these allegations, and cannot be heard to complain that the bill is multifarious.

Nor is the contention of the appellants entitled to any weight that the decree is erroneous, and that the demurrer to the bill should have been sustained, because the complainant was not, as it is said, "a judgment or lien creditor" of the broom company when he filed his bill. It is a sufficient answer to this contention that the proceeding is in no sense, or from any point of view, a creditors' bill to reach equitable assets of a debtor, to which class of cases the doctrine invoked by the appellants is applicable. This is a proceeding by the complainant, as before stated, to establish a constructive trust, and compel the trustee to restore the trust property to its rightful owner, or to account for the proceeds if the property, or a part thereof, has been sold. In such cases it is no more necessary for a complainant to establish his demand at law before proceeding in equity than when a beneficiary under an express trust seeks relief against his trustee. Lawton v. Levy, 2 Edw. Ch. 197; Kerr v. Blodgett, 48 N. Y. 62; Weir v. Tannehill, 2 Yerg. 57; Bank v. Houchens, 115 Fed. 96 (decided by this court at the present term). Moreover, in the case in hand, the complainant could not have established a demand at law against the broom company, as by suing for the value of the broom corn, without ratifying the sale and relinquishing the very right to the property which he seeks by this proceeding to enforce.

Another contention on the part of the appellants, which is entitled to more consideration, perhaps, than the one last mentioned, is that an action at law by way of replevin would have furnished an adequate remedy for the wrong complained of, since the property involved was personalty; and hence that a court of equity was without jurisdiction. With reference to this contention we observe that, while a vendor of personal property may maintain replevin against a vendee, who, as in this case, bought the property with a preconceived intent not to pay

for the same (Bussing v. Rice, 2 Cush. 48; Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754; Beebe v. Hatfield, 67 Mo. App. 609; Morrow Shoe Mfg. Co. v. New England Shoe Co., 6 C. C. A. 508, 57 Fed. 685), yet it does not follow that in every case a vendor who elects to rescind and reclaim his goods from one who has bought them not intending to pay therefor, must resort to replevin, and cannot have relief in equity. Serious obstacles may stand in the way of obtaining adequate redress at law. Besides, the fact that the fraudulent vendee, when the election to rescind is made, occupies the position of a trustee, should dispose a court of chancery to assume jurisdiction, on the ground of declaring and enforcing the trust, unless the transaction is a very simple one, which can be investigated readily by a court of law and tried to a jury. In the case before us the bill alleged that such part of the broom corn as had not been worked up into brooms had been mingled by the broom company with other broom corn, which, as a matter of course, rendered it difficult of identification. It was also disclosed by the bill that the property had been twice sold, and that the rights of the alleged purchasers would be a subject-matter for careful investigation. It was also charged in the bill that a part of the commodity had been manufactured into brooms, and consigned to third persons, who were acting in collusion with the broom company, and who were chargeable, as fraudulent trustees, with the property, or the proceeds thereof, which they had received. It was obvious, therefore, that the complainant could not obtain complete relief by a single action in replevin, such as he could obtain by the more flexible processes of a court of equity. These considerations were ample, in our judgment, to warrant a court of equity in entertaining the bill for the purpose of investigating the entire transaction, and enabling the complainant to obtain full relief by a single action. The case was one which fell within the province of a court of chancery, because the object was to establish and enforce a trust, and because the legal remedy was inadequate. Refining Co. v. Fancher, 145 N. Y. 552, 556, 557, 40 N. E. 206, 27 L. R. A. 757. See, also, Morse v. Nicholson, 55 N. J. Eq. 705, 38 Atl. 178.

Turning to other phases of the controversy, the appellants claim that they, or at least some of them, are armed with the rights of innocent purchasers for value, notwithstanding the fraud that was perpetrated by the broom company. This claim seems to be based entirely on the fact that the deed of trust which was executed in favor of the Exchange Bank of Jefferson City and David Loewen on September 28, 1897, granted to the broom company a definite extension of time for the payment of the debts which were thereby secured, and the argument is that such extension was a present valuable consideration paid by the beneficiaries in the deed of trust for the conveyance, which will enable them to hold the property as against the complainant, because the beneficiaries were not cognizant of the fraud that had been perpetrated by the broom company. It is conceded that the deed of trust was given to secure antecedent debts, and that the Missouri doctrine, as well as the doctrine of some other states, is that one who takes a mortgage or deed of trust on property simply as security for an antecedent debt, without paying any new or additional consideration, is not

a bona fide purchaser who can hold the property if it transpires that his vendor acquired the same fraudulently. Goodman v. Simonds, 19 Mo. 107; Wine Co. v. Rinehart, 42 Mo. App. 171, and cases there cited; Vogelsang's Adm'r v. Fisher, 128 Mo. 386, 405, 31 S. W. 13; 2 Pom. Eq. Jur. (2d Ed.) § 749. While the deed of trust now in question does contain a clause extending the time of payment of the debts thereby secured for 10 days, yet this clause was immediately followed by another, which authorized the trustee to take possession of the mortgaged property "at once," inventory it, and sell it forthwith, either at public or private sale, in bulk or at retail. The trustee was further empowered to hold the proceeds of the sale until the debts, as extended, matured, and then to apply the proceeds to their payment. We are of opinion that a deed of trust or mortgage containing such provisions as these cannot be regarded as granting a debtor any indulgence, unless we ignore matters of substance, and look merely at the shadow. The debtor was deprived immediately of all of his property and resources of whatsoever character, which were to be sold forthwith at a forced sale; and before such a sale as the one contemplated in the present instance could have been consummated the indebtedness, as extended, would doubtless have become payable. The debtor derived, therefore, no possible advantage from the clause granting an extension, which was merely colorable, and, as we have been forced to conclude, was in fact inserted in the deed of trust for no other purpose than to furnish a pretext for such a claim as has been made, namely, that such extension of the time of payment was a new and additional consideration for the conveyance, such as protects the creditor and arms him with the rights of an innocent purchaser for value. Instead of having the effect intended, it really creates a grave suspicion that the creditor either knew or suspected that the broom company could not transfer a good title to some of the property in its possession which it offered to pledge as security for its debts. Edson v. Hudson, 83 Mich. 450, 47 N. W. 347. See, also, Victoria Paper Mill Co. v. New York & P. Co. (City Ct. N. Y.) 57 N. Y. Supp. 397. The result is that the plea by the appellants that they were innocent purchasers for value was properly overruled, and, as no sufficient reasons are shown for disturbing the finding of the lower court that the broom company bought the broom corn in controversy with no intent to pay for it, it follows that the beneficiaries in the deed of trust have no greater right thereto than the broom company would have, if it was the sole defendant.

Another contention on the part of the appellants—and the only one which we deem it necessary to notice—is that the lower court should have allowed the complainant only $30 per ton for his broom corn, instead of $50 per ton, which was the sum actually awarded. This claim seems to be made upon the theory that the complainant sued the broom company for the purchase price of the commodity sold, or in trover for its conversion; in which event, it is said, the purchase price was the true measure of recovery. But the theory on which this claim is based is erroneous. The complainant sued to recover his property from the fraudulent vendee upon the theory that he was chargeable with it as a trustee. Pending the action, and for convenience, the purchasers from the fraudulent vendee were allowed to sell or dispose

of the property as they deemed best, holding the proceeds to await the outcome of the suit. In the meantime the value of the commodity rose, and it was sold at a large advance above the purchase price. For these reasons we entertain no doubt that the complainant was entitled to recover the value of his broom corn at the time the final decree was entered, and such seems to have been the opinion of the lower court.

Finding no material error in the proceedings below, the decree from which the appeal was taken must be affirmed, and it is so ordered.

H. D. WILLIAMS COOPERAGE CO. v. SCOFIELD et al.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1902.)

No. 1,610.

1. SALES—BREACH OF CONTRACT—DEFENSES—KNOWLEDGE.
   Where defendant agreed to supply plaintiffs with their entire requirements of new barrels for a certain year at specified prices, and defendant refused to fill plaintiffs' order for barrels, it was not necessary, in an action by plaintiffs for breach of contract, in order to entitle defendant to urge as a defense that plaintiffs had ordered barrels for use in the succeeding year, that he should have had knowledge of plaintiffs' breach of contract in so ordering barrels at the time of his refusal to deliver.

2. SAME.
   Where, in an action for breach of a contract to furnish plaintiffs with their entire requirements of barrels for a certain year, there was evidence that plaintiffs had sold barrels to another party, which had been ordered for plaintiffs' use from defendant, such sale was not a defense to the action, if made in good faith, and merely for the purpose of accommodating the person served, and not for speculation.

3. SAME—CONTRACTS—DEPENDENT COVENANT.
   Where defendant contracted to supply plaintiffs with all new barrels needed during a certain year, at specified prices, such contract contained an implied covenant that the plaintiffs were to order only such barrels as were necessary for their business, which was dependent on defendant's covenant to supply; and the breach of the plaintiffs' covenant, by ordering barrels with a view to stocking up for another year, and for sale to other parties, constituted a breach of their contract, which entitled defendant to refuse further delivery and rescind the contract.

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

This is an action for breach of contract. William C. Scofield, Daniel Shurmer, John Teagle, and Charles W. Scofield, the defendants in error, sued the H. D. Williams Cooperage Company, the plaintiff in error, upon a contract whereby the defendant company had agreed to supply the plaintiffs "your entire requirements for new barrels during 1899 at the following points at the following prices"; also to supply "you with all the new barrels you may need at Kansas City for a period of one year from April first next, at 95c. each." The other places specified for the delivery of barrels were St. Louis, Mo.; Des Moines, Iowa; Detroit, Mich.; Zanesville, Ohio; and some other places not necessary to be mentioned. The prices specified in the contract varied somewhat with the places of delivery, and ranged from 92½ cents per barrel, the price at St. Louis, to $1 per barrel, the price at Clinton, Iowa. The contract consisted of a written proposition in the form of a letter, which was mailed by the defendant company at Poplar Bluff, Mo.,

on December 14, 1898, and was addressed to the plaintiffs at their place of business in Cleveland, Ohio, which proposition appears to have been duly accepted. On October 28, 1898, the defendant refused to furnish any more barrels under the contract; having at that time received numerous orders for barrels, which were unfilled. The refusal to ship further barrels was the breach complained of. The defendant, when sued, justified its refusal on the following ground: That the plaintiffs had given orders for barrels, ostensibly to meet the requirements of their business during the year 1899, but in reality to sell the barrels ordered to others at a profit, and had also given orders for barrels for their use during the year succeeding the contract; that is to say, during the year 1900. There was a trial by jury, and a verdict for the plaintiffs in the sum of $2,647.90. The case was brought to this court by the defendant below on a writ of error.

E. S. Robert (D. W. Robert, on the brief), for plaintiff in error.

Nathan Frank (Richard A. Jones and D. W. Voyles, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

No exceptions were saved to the admission or exclusion of evidence which require notice, but several errors are assigned as respects the instructions which were given and refused by the trial court, and concerning which the opinion of this court is invoked. An inspection of the bill of exceptions shows that, at the conclusion of the trial, counsel for the defendant company stated its objections to the charge in the following manner:

"Your honor, my first exception [to the charge] is as follows: * * * That it practically eliminates from the consideration of the jury the testimony of Mr. Carhart that the Paragon Refining Company purchased three lots of new barrels from the plaintiffs during the year 1899. Your honor's charge practically limits it to the one car load." "Another exception is to that part of the charge which tells the jury that if the plaintiffs did order barrels for the year following the contract period, but ostensibly for use during the contract period, that it will not avail us as a defense, unless we knew it and acted on it in rescinding the contract." "There is another exception that I wish to make, and that is that the court charges the jury that the sale of the car load of our barrels to the Paragon Refining Company was not a breach of the contract which justified us in discontinuing shipments."

No other exceptions than the above appear to have been taken to the instructions of the trial court when they were given.

After a careful perusal of the charge, we do not find that the court eliminated from the consideration of the jury any part of Carhart's testimony concerning the sale of barrels at Des Moines. In one place the court did make an allusion to the transactions at Des Moines, but in no such manner as to preclude the jury from finding, if they were so disposed, that on three occasions new barrels were sold by the plaintiffs' agent during the contract period, instead of one load. The jurors were left at full liberty to find on this question as they thought proper. The first exception to the charge is therefore without merit.

The second exception, while it does not embrace the exact language used by the trial judge, is addressed, as we understand, to that part of the charge in which he instructed the jury, in substance, and with reference to the defense that the plaintiffs had given orders for barrels

which they intended to use during the year 1900, that, in order to sustain that defense, it must appear not only that the plaintiffs wrote to their various agents, "telling them to order all the goods in the fall they could for the next year's business," but that it must be further made to appear "that such orders were made, *and that the defendant rescinded the contract, or refused to execute other orders for plaintiffs by reason thereof.*" That part of the instruction which we have placed in italics, and to which the exception appears to have been addressed, is indefensible, in that it clearly implies that acts amounting to a breach of contract by one party do not constitute a breach until they become known to the opposite party. This proposition is untenable. Acts which in law amount to a violation of an express agreement, and are of such a nature as will operate to discharge the opposite party from his liability to further perform, will have that effect, even before they become known to him who has the right to complain; and he may avail himself thereof as a defense whenever he ascertains that such acts have been committed. The legal effect of an act amounting to a breach of contract must be the same whether it is known or unknown to the opposite contracting party. Indeed, when it becomes known to the opposite party, he may in turn do some act that will operate as a waiver of the breach, which he cannot well do until he is aware of the breach. Therefore, if the plaintiffs gave their agents directions to send in orders for more barrels than were needed for use in their business during the year 1899, with a view of stocking up for the succeeding year, and such orders were given, this action on the plaintiffs' part was none the less a defense to their action for a breach of the contract, although the defendant company was not aware that such orders had been given when it declined to furnish further barrels, and although its refusal to furnish barrels was not based on that ground. Even if it be true that the defendant company refused to make and ship any more barrels which were ordered by the plaintiffs because the price of barrels had advanced, yet if, after it was sued, it discovered that the plaintiffs had given orders which amounted to a violation of the contract, and that they had been given before there was any rupture of the agreement on its part, it was entitled to avail itself of that defense. There was some evidence in the case, we think, which tended to show, and from which a jury would be warranted in inferring, that some orders had been given by the plaintiffs ostensibly to meet the requirements of their business for the year 1899, but in reality to obtain a stock of barrels for the succeeding year, owing to an expected further advance in the price of barrels; and, such being the fact, the error in the charge must be regarded as material.

The third and last exception quoted above is based, as we think, upon a misconception of the charge. The trial court did not instruct the jury, unqualifiedly, that the sale of the car load of barrels to the Paragon Refining Company was not such a breach of the contract as justified the defendant company in discontinuing shipments. What it did say on that subject was substantially as follows: That if the plaintiffs "bought some considerable quantity of barrels for the purpose of speculating in them, and * * * that they actually sold them for that purpose," it would be a valid defense to the action. In

the same connection (and it is to this clause that the exception evidently relates) the court did instruct the jury, in effect, that if it appeared that the plaintiffs' agent at Des Moines sold a lot of barrels that had been ordered from the defendant to the Paragon Refining Company, not for the purpose of speculation, but to accommodate a business competitor, and merely as an act of courtesy, such a sale would not operate to discharge the contract, so far as the defendant was concerned. There was some evidence in the case tending to show that the sale complained of had been made under the circumstances supposed by the trial court, and the instruction was evidently intended to enlighten the jury on that phase of the case. We are not prepared to hold that this instruction was materially erroneous. If the plaintiffs gave the defendant company an order for a car load of barrels, doing so in good faith, for the purpose of meeting the supposed requirements of their business at Des Moines during the year 1899, and after the arrival of the barrels sold them to the Paragon Refining Company merely to accommodate that company temporarily, and as an act of courtesy, we do not think that a single sale made under such circumstances would be such a breach of the contract as would absolve the defendant from further obligation to perform. Whether the sale of these barrels was such a breach as operated to discharge the contract depends, in our judgment, upon whether they were originally ordered in good faith by the plaintiffs for their own use, and to meet the supposed requirements of their business during the year 1899, or for such ulterior purpose as was alleged in the defendants' answer. It cannot be, we think, in a case like the one in hand, where by the contract the quantity of goods agreed to be sold and delivered was uncertain, and depended upon the requirements of the plaintiffs' trade, that the plaintiffs could not sell any barrels which they had ordered in good faith for their own use without discharging the opposite party from its agreement. An unexpected decrease in the demand for oil, and other causes, might render it necessary to dispose of a part of a stock of barrels which the plaintiffs had accumulated in good faith with the expectation of using them. It must be presumed that the parties to the contract foresaw that such events might occur, and that it was also understood that the plaintiffs would conduct their business in the usual way, extending such courtesies to rival concerns as were customary in the trade. For these reasons, we think that the court's instruction which is now under consideration embodied the right idea, and was substantially correct, and that the instruction which the defendant requested, which declared, in substance, that this sale of barrels to the Paragon Refining Company in itself operated to discharge the contract, without reference to the motives which inspired it, and without reference to the question whether the barrels so sold were ordered in good faith, was itself erroneous, and was properly refused.

In the brief with which we have been favored by counsel for the defendants in error, the position is taken that, even if the defenses pleaded by the defendant in its answer were true (that is to say, if the plaintiffs did give orders for barrels with a view of stocking up for the year 1900, and also with a view of selling them to others at a

profit), yet that such acts would not operate to discharge the defendant from its obligation to perform, but would merely entitle it to recoup the damages which it has sustained in consequence of such wrongful acts. The learned trial judge took a contrary view, holding that the covenant of the one party to supply barrels to meet the other's requirements, and the implied covenant of the opposite party to order only such barrels as were necessary for that purpose, were dependent, and not independent, covenants, or, in other words, that a breach of the latter covenant by the plaintiffs would discharge the defendant at least from its obligation to make further deliveries. No exception was taken to this ruling, and we refer to it only because the question may arise in the further progress of the case. Moreover, if the contention on the part of the plaintiffs is sound, it might follow that the error above specified was not prejudicial, and would not warrant a reversal. Without going into this question at length, it is sufficient to say that we are entirely satisfied with the conclusion which was reached by the trial court. If the plaintiffs ordered from the defendants barrels which were not needed for use in their business during the year 1899, with intent to stock up for the year 1900, or to sell the barrels so ordered at a profit, they violated a material obligation which was imposed on them by the contract, and did so deliberately. The implied promise to order only such barrels as they needed for the year 1899 was a substantial part of the consideration for the defendant's promise to furnish barrels during that year at the price specified. If the defendant company had been requested to supply barrels to meet the requirements of the plaintiffs' business during a period of two years, or to enable them to sell barrels to third parties at a profit, it might, and very likely would, have charged a higher price for its barrels than the price specified in the contract. The breach of the contract complained of was not one of those unintentional or enforced violations of the provisions of a contract in some minor particular, which will sometimes be excused to the extent that the opposite party will only be allowed to take advantage of the breach by recouping his damages. Vide Ralston, Disch. Cont. pp. 46–48. On the contrary, it was a breach of one of the material provisions of the agreement, which entitled the defendant to say that it would treat the contract as abrogated, so far as future deliveries thereunder were concerned. The plaintiffs, after being guilty of such acts as those charged in the answer, could not insist upon further performance, and compel the defendant company to resort to an action for damages, and to such remedy only. It had the right to say, "As you have already ordered barrels which you impliedly agreed not to order, we will not take the chances of your continuing to do so, but will treat the contract as at an end." The authorities, in our judgment, amply sustain the conclusion which was reached by the trial court,—that the breach complained of, if proven, was one whch operated to discharge the obligation of the defendant to further perform, if it elected to do so. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320; Mining Co. v. Humble, 153 U. S. 540, 551, 552, 14 Sup. Ct. 876, 38 L. Ed. 814; Smith v. Coal Co.,

36 Mo. App. 567; Murphy v. City of St. Louis, 8 Mo. App. 483; St. Louis Paper Box Co. v. J. C. Hubinger Bros. Co., 40 C. C. A. 577, 580, 100 Fed. 595.

For the error heretofore pointed out, we deem it necessary to reverse the judgment and grant a new trial. It is so ordered.

ADGER et al. v. ACKERMAN et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,632.

1. MARRIAGE—CIVIL CONTRACT—NO CEREMONY REQUIRED.
   Marriage is a civil contract. An agreement of one woman and one man, competent to contract, to then become and thereafter be husband and wife during their joint lives, is a valid marriage contract, and no ceremony, civil or religious, is necessary.
2. SAME—MAY BE EXPRESS OR IMPLIED.
   An implied contract of marriage is as binding and effective as one expressed by written or spoken words.
3. SAME—IMPLIED CONTRACT—PROOF OF.
   A marriage may be implied or inferred from cohabitation, general reputation among acquaintances of the parties, their treatment of each other, and their speaking of and addressing each other as husband and wife, the christening of their offspring as their children, the bestowing of the name of the father upon a child of the union, and other acts, sayings, and conduct which have a natural tendency to show the existence of the marriage relation.
4. SAME—LEGAL PRESUMPTION IN CASES OF LEGITIMACY.
   There is a strong legal presumption that a child is the fruit of a lawful, rather than of a meretricious, union, and that there was a timely marriage between the father and the mother before the birth.
5. SAME—COMMON-LAW MARRIAGE—SUBSEQUENT CEREMONIAL MARRIAGE.
   A subsequent ceremonial marriage is not inconsistent with a prior common-law marriage, and does not necessarily overcome the presumption thereof arising from matrimonial cohabitation, repute, the declarations and acts of the parties.
6. SAME—ILLICIT RELATION — PRESUMPTION OF CONTINUANCE EASILY OVERCOME.
   A relation, illicit in its inception, is presumed to continue, in the absence of countervailing evidence. But slight circumstances may be sufficient to establish a change from concubinage to matrimony, and evidence of the time or place of the change is not indispensable to its proof.
7. SAME—PRESUMPTION OF MARRIAGE ARISES WHEN OBSTACLE REMOVED.
   Where parties incompetent to marry enter an illicit relation with a manifest desire to live in a matrimonial union rather than in a state of concubinage, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of a marriage immediately after the obstacle is removed, and will warrant a finding to that effect.
8. LEGITIMACY OF CHILDREN BORN IN WEDLOCK—STRONG PRESUMPTION OF.
   Nothing may impugn the legitimacy of the issue of a lawful marriage less than proof of facts which show it to have been impossible that the husband could have been the father.
9. COMMON-LAW MARRIAGE—FACTS.
   While A. was the husband of one woman he established an illicit relation, in 1889, with B., another woman, and from that time they cohabited and treated each other as husband and wife. They declared themselves to be such, and their general reputation among their joint acquaintances

was that of married persons. In November, 1890, A.'s wife procured a divorce and $25,000 alimony from him without any objection on his part. On September 2, 1892, B. bore him a son. On October 4, 1892, a ceremony of marriage between them was conducted. A. always recognized and treated the boy as his child. From the inception of their relation they manifested a desire and intention for a matrimonial, rather than a meretricious, union. *Held*, there was a common-law marriage between A. and B. immediately after the divorce.

(Syllabus by the Court.)

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

Alfred W. Fleming died intestate in the state of Missouri on January 10, 1898, leaving a widow, Mary Cecilia Fleming, née Quan, and her son Alfred W. Fleming, Jr., who had been born on September 2, 1892. While the deceased was not a practicing physician, he was commonly known as Dr. Fleming, and in this statement, and in the opinion which follows it, he will be designated in this way to distinguish him from his son, who bears the same name. On November 12, 1899, the widow Fleming died, leaving a will by which she bequeathed $1 to her son, and the remainder of her share of her deceased husband's estate to her father, Matthew Quan, who was subsequently appointed executor of her estate and curator of the estate of her son. In February, 1900, Quan filed a motion in the probate court for a distribution to him as such executor and curator of $50,000 of the estate of Dr. Fleming. Thereupon a brother, a sister, the heirs of a deceased sister, and some of the heirs of a deceased brother of Dr. Fleming exhibited their bill in the United States circuit court against Thomas F. Ackerman, the public administrator, Matthew Quan, and Alfred W. Fleming, in which they alleged that Dr. Fleming died without leaving any child or other descendant, and that they were his heirs, and in which they prayed that the public administrator might be enjoined from distributing the personal estate of the deceased to Matthew Quan as executor and curator, and that he might be directed to pay over to them their just shares thereof. The defendants Quan and Fleming answered that the latter was the only child of Dr. Fleming and Mary C. Fleming, his wife; that he was born on September 2, 1892; that between December 1, 1890, and October 1, 1891, Dr. Fleming and Mary C. Fleming contracted a common-law marriage; that from that time until his death they cohabited and lived together as husband and wife, and were reputed so to be; and that after the birth of Alfred W. Fleming a formal marriage ceremony was conducted between them. The usual replications were filed, testimony was taken, there was a final hearing on the merits, and the court dismissed the bill. From that decree the complainants have appealed.

John F. Lee and Robert F. Walker, for appellants.

Daniel Dillon, Joseph S. Laurie, and Thomas J. Rowe, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

This case presents a single issue: Is the defendant Alfred W. Fleming the legitimate son of Dr. Alfred W. Fleming, deceased? There are, however, two other questions, the answers to which may go far toward the determination of this issue. They are: Was there a common-law marriage between Dr. Fleming and Mary C. Quan prior to November, 1891? And, if not, did the ceremony of marriage between them subsequent to the birth of the son raise a conclusive presumption of the legitimacy of the boy, under section 2917 of the Revised Statutes of Missouri?

Marriage is a civil contract. It is the agreement of one man and one woman, competent to contract, to then become and thereafter to be husband and wife as long as they both shall live. It differs from ordinary civil contracts in the fact that it may not be revoked or dissolved by the mutual consent or act of the parties. Like other agreements, however, it may be made without ceremonies, civil or religious, and it may be either express or implied. It may consist of a formal written instrument signed by the parties or of an express parol agreement between them. But neither documents nor spoken words are indispensable to its existence. An implied contract of marriage is as binding and effective as one expressed in words or spread upon parchment, and such a contract comes into being whenever the minds of the parties meet in a common understanding of and consent to the present and future existence of the relation of husband and wife between them.

In cases like that in hand, which involve the legitimacy of children, the legal presumptions are strong and the competent indicia are many from which such a marriage may be inferred. In criminal prosecutions for bigamy, incest, and adultery, and in civil actions for criminal conversation, strict proof of marriage is required. It is not so in suits involving the legitimacy of offspring. In such actions the legal presumption is that every child is the fruit of a lawful, rather than of a meretricious, union, and that there had been a timely and legal marriage between the father and mother before the birth of the child. Orthwein v. Thomas, 127 Ill. 554, 562, 563, 21 N. E. 430, 4 L. R. A. 436, 11 Am. St. Rep. 159. Every intendment is indulged in favor of legitimacy, and it is one of the strongest presumptions of the law,—a presumption not to be overcome by a mere preponderance of testimony or of probabilities,—that a timely marriage preceded cohabitation apparently matrimonial. Piers v. Piers, 2 H. L. Cas. 331; Hynes v. McDermott, 91 N. Y. 451, 458, 43 Am. Rep. 677; Teter v. Teter, 101 Ind. 129, 133, 51 Am. Rep. 742.

This dominant presumption may be strengthened by resort to the acts and conduct of the parties; by proof of cohabitation and general reputation among their acquaintances and friends (Boatman v. Curry, 25 Mo. 433, 438; Inhabitants of Newburyport v. Inhabitants of Boothboy, 9 Mass. 414, 415; Badger v. Badger, 88 N. Y. 547, 552, 42 Am. Rep. 263); of their treatment of each other; of their speaking concerning and addressing each other in the presence of third parties as husband and wife (Maryland v. Baldwin, 112 U. S. 490, 498, 5 Sup. Ct. 278, 28 L. Ed. 822); of the christening of the offspring of their union as their children (Hervey v. Hervey, 2 Wm. Bl. 877; State v. Worthingham, 23 Minn. 528, 536); of the conferring of the name of the father upon the son (Caujolle v. Ferrie, 23 N. Y. 90, 102); of the son's recognition and treatment by both parties as their child (Patterson v. Gaines, 6 How. 550, 589, 12 L. Ed. 553; Starr v. Peck, 1 Hill, 270, 272); and by proof of any and all acts, words, and conduct which have a natural and rational tendency to show the existence of the marriage relation.

These rules and principles of law are indisputable, and must serve as our guide in the consideration and determination of the questions

presented for discussion. In the light of them, let us now turn to the evidence, and ascertain, if possible, whether or not there was a timely common-law marriage between Dr. Fleming and Mary Quan prior to the birth of her son. Dr. Alfred W. Fleming was born on August 19, 1828. He was married to Ann Foster, a widow, about the year 1871, and was divorced from her on November 21, 1890. He was a man of considerable wealth, and the owner of a comfortable and well-furnished house and spacious grounds, where he resided, near Kirkwood, a suburb of the city of St. Louis. He was alert in his bearing, active in his habits, and fond of children, books, flowers, and pictures. He was neat in his person and dress when sober, but addicted to drink, and to offensive habits and practices when intoxicated. From 1879 to 1893 he rented rooms, which he often occupied, at 206 Chestnut street, in a manufacturing district in the city of St. Louis. His relations with his first wife became unpleasant. She sometimes became intoxicated, and in October, 1889, he left her and his residence near Kirkwood, and from that time until the spring of 1893 he spent much of his time with Mary Quan, who became his second wife, at his rooms on Chestnut street. In the spring of 1893 he moved her and her son to his residence near Kirkwood, where they resided until he died. Prior to that time, and on November 21, 1890, his first wife procured from him a divorce and $25,000 alimony. Mary C. Quan, the second wife, went to the rooms on Chestnut street to live with Dr. Fleming permanently in September or October, 1889, and from that time until his death he lived with and supported her. The defendant Alfred W. Fleming was born in these rooms on September 2, 1892. Dr. Fleming was present at the birth, and paid the attending physician. The certificate of the latter gives Alfred W. Fleming as the name of the child, A. W. as the name of the father, and Mamie as the name of the mother. On September 11, 1892, Dr. Fleming took the boy to the cathedral church, had him baptized, and bestowed upon him his own name. The entries in the baptismal registry are to the effect that the boy Alfred William Fleming was born September 2, 1892, of Alfred William Fleming, of 204 Chestnut street, and Mary C. Quan. On the Sunday following this christening the doctor gave a dinner at his rooms on Chestnut street in honor of the child, at which he presided, and where he received congratulations on the birth of his son. From the day of the birth of this child until the doctor died he manifested the greatest affection—the affection of a father—for this boy, and invariably treated him as his son. About a month after his birth, and on October 4, 1892, Dr. Fleming and the mother made an application for a license to be married, in which they stated under oath that they were single and unmarried. A license was issued by the clerk, and a marriage ceremony was conducted between them by a judge of one of the courts of the state of Illinois. After the ceremony they returned to the rooms on Chestnut street, where they continued to live and cohabit together until they moved to Kirkwood, in 1893.

The first wife of the doctor was a widow when he married her. She had borne a child to her former husband, but there was no issue of her marriage with the doctor. Shortly after the death of the doc-

tor Mrs. Fleming caused a large quantity of papers to be burned, and when in 1898 she applied to the probate court to be appointed guardian of her child she stated and insisted that he was born on September 2, 1893, when the fact was that he was born on September 2, 1892. The facts which have now been recited are either conceded or established beyond doubt. In addition to these established facts, there was a large amount of evidence consisting of declarations of the doctor and of his two wives, and of testimony concerning his habits, condition, and practices at various times, which tended to prove that he was incapable of begetting children. There was testimony tending to show that Mary C. Quan was not a chaste woman, and that she indulged in illicit relations with other men than the doctor as late as November or December, 1891. But there was no evidence of any unlawful relation between the doctor and any other woman after he commenced to live with Mary Quan on Chestnut street. One witness testified that Mary Quan told her that she was married to the doctor, but afterwards said that he had another wife, and that this was what was making her unhappy. Another said that Mary told him in June, 1892, that she expected to marry the doctor; and a third testified that between November 12 and December 13, 1891, she overheard a conversation in which Mary said to the doctor, "You agreed that if I became the mother of a child to marry me." He answered, "I will, too." And she replied, "I am satisfied then." But more than a dozen witnesses who associated with and knew these people when they lived on Chestnut street, neighbors, visitors, police officers, indeed all the witnesses who spoke on this subject, save the three whose testimony has been recited, come to say that they knew Dr. Fleming and Mary Quan as husband and wife from 1889 until 1893, that this was their general reputation among their acquaintances on Chestnut street, that they were known as Mr. and Mrs. Fleming, and that they spoke of, introduced, and treated each other as such. This testimony is so clear, so specific, so comprehensive, so voluminous, and persuasive that the facts must be deemed established that from the fall of 1889 until they moved into the doctor's residence near Kirkwood, in 1893, this man and woman lived together and treated each other as husband and wife, and that this was their general reputation among all who became acquainted with them while they lived on Chestnut street.

There are two witnesses who testify that shortly after the birth of the boy the doctor admitted to them that this child was not his son, and there are two more who say that he was practically silent when his paternity was questioned. But, on the other hand, the unvarying testimony of all the other witnesses upon this subject, witnesses so numerous and so credible that their evidence cannot be disbelieved, was that from the birth of the boy until the death of the doctor the latter invariably recognized, claimed, and treated him as his son. There was other testimony at the hearing which has not been recited, but with the exception of a single line of evidence, to which reference will shortly be made, there was no other evidence presented of sufficient importance to vary the conclusion to which that which has already been mentioned must lead.

It is contended that the sworn statement of the doctor and Mary Quan in their application for their marriage license in October, 1892, that they were then single and unmarried, and the conversation in November, 1891, in which he promised to marry her if she became a mother, are very persuasive, if not conclusive, evidence that they had not entered into the marriage relation before the ceremony was performed in 1892. But when all is said, these are but two statements that they were not married, and they are overcome by the many contrary statements which they made to numerous witnesses before and after November, 1891, by their conduct and general repute at Chestnut street, where they lived, and by the probability that when they made the two statements to which attention is so strenuously directed they were thinking not of an actual, but of a ceremonial, marriage only.

It is said that the fact that they conducted a ceremonial marriage after the birth of the child is strong, if not demonstrative, evidence that there was no marriage before. But it may well be that, although there was an actual marriage before, the facts that its proof was not of record, and rested only in matrimonial cohabitation, repute, declarations, and treatment, and that the doctor's estate was large, and his desire that the boy should inherit it earnest, induced them to make and record the ceremonial marriage as indubitable record evidence of their marriage relation and the legal rights of the boy, notwithstanding the fact that they knew there had been an actual marriage which made him their heir. A subsequent ceremonial marriage is not inconsistent with a prior common-law marriage, and it does not necessarily overcome the presumption thereof which arises from matrimonial cohabitation, the declarations and conduct of the parties, and their reputation. Betsinger v. Chapman, 88 N. Y. 488, 496, 499; Starr v. Peck, 1 Hill, 270, 272.

The relation between Dr. Fleming and Mary C. Quan was illicit in its inception. It commenced before the doctor was divorced from his first wife, and it is insisted that the presumption that it continued to be unlawful until the ceremonial marriage was solemnized must prevail, in the absence of evidence of the time and place of a change to the matrimonial relation. A relation of concubinage is presumed to continue in the absence of evidence of a change to matrimony, and there are a few decisions which support the contention of counsel here. Barnum v. Barnum, 42 Md. 251, 296, 297; Cunninghams v. Cunninghams, 2 Dow (House of Lords) 482; Clayton v. Wardell, 4 Comst. 230, 236. But the true rule and the great weight of authority is that inasmuch as the law itself and all its presumptions deprecate illegal, and favor lawful, relations, slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and that proof of its time or place is not indispensable. Badger v. Badger, 88 N. Y. 547, 553, 42 Am. Rep. 263; Caujolle v. Ferrie, 23 N. Y. 90, 106, 110; In re Taylor, 9 Paige, 611, 614; Fenton v. Reed, 4 Johns. 52, 4 Am. Dec. 244; 1 Bish. Mar. & Div. § 965. In this way it appears from a review of this evidence that there is nothing in it which imperatively forbids a finding that there was a valid marriage between these parties subsequent to the divorce and prior to the

month of November in the year 1891, and yet if the case rested here this question might be grave and its answer difficult.

Fortunately there is an established principle of law, and a class of evidence in this record to which it applies, which removes this doubt and difficulty. The principle of law is that where parties who are incompetent to marry enter an illicit relation with a manifest desire and intention to live in a matrimonial union rather than in a state of concubinage, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after the removal of the obstacle, and warrants a finding to that effect. The Breadalbane Case (Campbell v. Campbell) L. R. 1 H. L. Sc. 182, 206, 212; De Thoren v. Attorney General, 1 App. Cas. 686; Fenton v. Reed, 4 Johns. 52, 4 Am. Dec. 244; Hynes v. McDermott, 91 N. Y. 451, 458, 43 Am. Rep. 677; In re Taylor, 9 Paige, 611; Rose v. Clark, 8 Paige, 574; Van Buskirk v. Claw, 18 Johns. 346; Caujolle v. Ferrie, 23 N. Y. 90; Betsinger v. Chapman, 88 N. Y. 487, 499; Starr v. Peck, 1 Hill, 270; Gall v. Gall, 114 N. Y. 109, 118, 21 N. E. 106; Donnelly v. Donnelly, 8 B. Mon. 113; Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; State v. Worthingham, 23 Minn. 528; Dickerson v. Brown, 49 Miss. 357; Floyd v. Calvert, 53 Miss. 37, 45; Jones v. Jones, 45 Md. 155; Yates v. Houston, 3 Tex. 433–450.

In the case at bar the obstacle to the marriage in the inception of the illicit relation was the prior marriage of Dr. Fleming to his first wife, which was still undissolved. That obstacle was removed by the divorce in November, 1890. The facts in the leading case upon this subject, which received great consideration in the house of lords, the Breadalbane Case (Campbell v. Campbell), were in all essential particulars identical with those in the case at bar. James Campbell had eloped with the wife of one Ludlow in the year 1781, and had lived and cohabited with her until his death in 1806. Ludlow had died in 1784. The question was whether Campbell was married to the widow of Ludlow between 1784, when he died, and 1788, when their first child was born. There was a consensus of opinion among the judges that such a marriage should be inferred immediately after the death of Ludlow. Lord Westbury said:

"There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence, at a previous period, of some bar to the interchange of consent. It would be very unfortunate if it were so. * * * There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation, nor any warrant for the appellant's ingenious argument that, as the consent interchanged must be referred to some particular period, which he insisted was at the commencement of the cohabitation, and therefore insufficient, the cohabitation, which continued afterwards without interruption, would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another, and, I think, a sounder, rule and principle of law, namely, that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract. The conclusion, therefore, that I derive, and which, unquestionably, is consistent with the language of the cases which have been referred to, is that the consent between these parties was given, and that the marriage, therefore, in theory of law, took place, at

the time when, by the death of the first husband, they became competent to enter into the contract." L. R. 1 H. L. Sc. p. 212.

Lord Cranworth said:

"I cannot but infer, from all which occurred with respect to the mode in which these persons lived together, not only that they desired to be husband and wife, but also that they believed themselves to be so. In such circumstances we ought to infer, after their deaths, that at some time during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty, viz., enter into an agreement to be or become married persons, and so to acquire for themselves and their children the status which the evidence satisfies me they wished to enjoy." L. R. 1 H. L. Sc. p. 206.

The other authorities which have been cited above demonstrate the fact that the English and American courts have adopted the views and have followed the principle thus announced in the Breadalbane Case, and have permitted these views and this salutary principle of law to control the determination of like cases whenever they have been presented for decision.

Do the facts of this case subject it to the application of this principle? One of the witnesses testified that while Mary Quan was living with Dr. Fleming on Chestnut street she first told her she was married to him, but subsequently said that he had another wife, and that this was what was making her unhappy. This testimony and her continued cohabitation and life with him show clearly enough that she desired the matrimonial relation. Moreover, there is a class of evidence in this record that is free from all suspicion of preparation for the trial of this issue, from all taint of prejudice, interest, or influence, and that is undimmed by the lapse of memory. It portrays the purpose, intentions, and desires of these parties in establishing and maintaining their relation in a way that cannot fail to carry conviction to the mind of every unprejudiced reader. It consists of more than 40 letters written to Mary Quan by Dr. Fleming between April 1, 1887, and June 18, 1897. In the first letter, which is postmarked April 2, 1888, he wrote to her: "You are well aware how I am situated, plenty financially and possessing all the world's goods that ought to make me happy; yet there is lacking the one great thing, love connubially. No respect,—no confidence; nature forces me to look elsewhere. I am of a very loving and amorous disposition. What am I to do?" He wrote her on December 19, 1888: "I am feeling a great deal better, and if I could only be with you would be perfectly well again. I hope the day is not very far off when you and I will be together for good." On December 24, 1888, he wrote: "Perhaps this time next year we will be together for good." On December 26, 1888, he wrote: "This time next year I hope and trust, sweet one, that you and I will be together for good, never to be separated, not even by death." And on January 23, 1889, he wrote: "I am not happy without you, and never will be contented until you and I are united forever, never to be separated either in this world or the next." Here are but a few extracts from the many letters contained in this record. These letters cover a long period of time. They show no change of affection, desire, or purpose, but exhibit from the commencement of the correspondence, in 1887, until its close, in 1897,

the year before the death of the doctor, the same fervid and enduring affection for the woman he made his wife, the same purpose to so unite himself to her that they could not be separated,—a purpose to accomplish which he deserted his first wife, consented to a decree of divorce at her suit, and paid her the sum of $25,000 alimony. These letters and the testimony of the witnesses leave no doubt that it was the purpose and intention of Dr. Fleming and Mary Quan when they commenced living together permanently in the rooms on Chestnut street, in 1889, to become husband and wife as soon as the obstacle of his marriage to his first wife should be removed. The ceremonial marriage is but another proof of this purpose. The doctor's desertion of his first wife, his repeated expression of his desire to be indissolubly united with Mary Quan, his consent to the divorce, his payment of the alimony, his recognition of her as his wife and her child as his son, are consistent with no other theory, and the case falls far within the rule that where this desire and purpose exist continued cohabitation after the removal of the obstacle raises the presumption and warrants the finding of a marriage at the first moment when it could lawfully be made. This principle of law and the clear preference and purpose which these people exhibited to make their union matrimonial, rather than meretricious, forbid the finding that they were not married before November, 1891.

In the absence of countervailing evidence, the testimony of the declarations regarding the impotency and sterility of the doctor, regarding the two or three declarations that he made that the boy was not his son, regarding the few statements of Mary Quan that she was not his wife, regarding her acts of burning papers and of stating the date of the birth of her son a year too late, regarding her lack of chastity and the unnatural practices in which she and the doctor are alleged to have indulged, their oaths that they were single when they applied for their license to marry, and evidence of less importance which points in the same direction, might well overcome the presumption of legitimacy, and lead to the conclusion that these parties were not married until the ceremony of October 4, 1892. But all this evidence is overwhelmed by the persuasive proof that, while the relation between the doctor and Mary Quan was illicit in its inception, it was entered upon and continued with the actual and expressed desire and purpose to make it matrimonial instead of meretricious as soon as the obstacle of the doctor's first marriage should be removed; that upon the removal of this obstacle the cohabitation continued so that the presumptions of the marriage and of the legitimacy of its issue immediately arose when the decree of divorce was rendered in November, 1890; that the doctor and Mary Quan were reputed to be husband and wife among all their acquaintances and friends who knew them at 206 Chestnut street; that they lived and cohabited together as Mr. and Mrs. Fleming; that they declared themselves to be so; that they addressed and introduced each other as husband and wife during all the time from 1889 until the death of the doctor; that from the time when Dr. Fleming deserted his wife, in the fall of 1889, and established his permanent relation with Mary Quan in the rooms on Chestnut street, until his death, in 1898, he supported her, and exhibited an

unchanging affection and care for her; that he was present at the birth of her son; that he took him to the cathedral church for his christening, and caused the entries in the baptismal registry to record himself as his father; that he bestowed upon him his own name, and from the day of his birth until he died recognized him as his son and heir, and manifested for him all the care and affection of a father. The preponderance of the evidence goes hand in hand with the presumptions of the law, and they must prevail. They lead unerringly to the only conclusion consistent with the desire, purpose, conduct, declarations, and reputation of these people from the fall of 1889 until the death of the doctor, the conclusion that there was a common-law marriage between Dr. Fleming and Mary Quan immediately after the divorce of the doctor from his first wife in November, 1890, and that is the finding of this court.

The effect of the conclusion which has now been reached, the conclusion that there was an actual marriage between Dr. Fleming and the mother of the defendant Alfred W. Fleming in November, 1890, is that he was born in lawful wedlock, and that he is presumptively the legitimate son and heir of the doctor. It is still contended by counsel for the complainants, however, that the evidence conclusively shows that Dr. Fleming could not have been the father of this boy, and that his paternity must be attributed to some one of the younger men who visited the apartments of his mother. They insist that the age of the doctor, in 1891, 63 years; his previous habit of intoxication; the fact that he had no children by his first wife, although she had borne one to her first husband; his own declarations and those of his wives to the effect that he was impotent or sterile; the testimony that he suffered from gonorrhea; the fact that he lived with Mary Quan three years before she bore her son; the testimony of the unnatural practices in which they indulged, and of the illicit relations between Mary Quan and other men,—conclusively prove that Dr. Fleming was incapable of begetting a child, and that he could not have been the father of her son. They are met, however, by the indisputable principle of the law that where once a marriage is proved nothing can impugn the legitimacy of the issue short of proof of facts which show it to have been impossible that the husband could have been the father. Patterson v. Gaines, 6 How. 550, 558, 12 L. Ed. 553. Now, the substance of the evidence for the complainants upon this issue, with the exception of the testimony relative to the declarations of the doctor and his wives upon this subject, was submitted to six medical experts, three produced by the complainants and three by the defendants, and the former answered that it was not, and the latter that it was, possible for Dr. Fleming to have been the father of the son of his wife. The testimony of the experts does not persuade us that the strong presumption of legitimacy was overcome thereby.

The court below excluded from the evidence all the testimony of the declarations of Dr. Fleming and of his two wives relative to his impotency and his sterility, and the testimony of one witness relative to a declaration of the doctor that he had suffered from gonorrhea, and these rulings are assigned as error. Objection to the consideration of these specifications of error is made because no exceptions

were taken to the rulings. The conclusion reached by the court has rendered it unnecessary to consider or decide the questions that are thus presented. Conceding, but not deciding, that all this testimony was competent and relevant, it has been patiently read and considered with the other evidence in the case, and yet, in view of the entire record, the court is unanimously of the opinion that the fact that it was impossible for Dr. Fleming to have been the father of this child is not established, nor is it proved beyond a reasonable doubt that he was not his father. Much of the evidence has already been recited, and its effect has been discussed. It is too voluminous for detailed review. One or two of its salient points will be mentioned, and this question will be dismissed. The letters of Dr. Fleming have suffered no change from the interest of parties or the fierceness of this controversy. They were written without thought of this issue. They disclose the character, the disposition, the purpose, and the passion of the writer, and it is extremely difficult to read them and believe that they are the letters of an impotent or a sterile man. The relation with Mary Quan, which he so earnestly sought, and which he established and maintained at so much sacrifice, is equally inconsistent with that belief. He was supporting, caring for, cohabiting with the mother of the defendant, Alfred W. Fleming, and treating her as his wife, for three years before this boy was born. If he was incapable of begetting a child, he knew it, and he knew that this boy was not his son. It is incredible that in such a situation he would attend the mother while she gave birth to the son of another, record himself as the father of this child in the registry of his baptism, bestow upon him his own name, recognize him as his son and his mother as his wife, for six years and until he died. The only theory of this case that squares with the writings, the acts, and the conduct of this man, and with the ordinary course of human action under similar circumstances, is that he believed himself to be, and that he was, the father of this boy. These considerations and a careful review of the entire record have forced our minds to the conclusion that the decision of the court below that the defendant Alfred W. Fleming was the legitimate son of the doctor was right, and that it ought not to be disturbed.

There is another reason for this result. There is a statute in the state of Missouri which reads: "If a man, having by a woman a child or children, shall afterward intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimated." Rev. St. Mo. § 2917. It is contended by counsel for the appellees, on the one hand, that under this statute recognition of the children by the husband is conclusive evidence that he was their father. On the other hand, counsel for the appellants insist that it is only those children which the husband has had by a woman before the marriage that his recognition legitimates, that it does not legitimate children which the woman has had by other men before the marriage, and that the issue whether or not the woman had the child or children in question by the man who subsequently becomes her husband or by another man is always open to proof de hors the recognition of the husband. The majority of the court is of the opinion that the contention of counsel for the appellees is sound and

should prevail, and that if there had been no common-law marriage the ceremonial marriage of October 4, 1892, and the subsequent recognition by Dr. Fleming of the child of his wife as his son, would have legitimated him; but the writer of this opinion does not concur in this view.

The sum of the whole matter is that the defendant Alfred W. Fleming is the legitimate son and heir of Dr. Alfred W. Fleming, deceased, and that the decree of the court below must be affirmed. It is so ordered.

THAYER, Circuit Judge (concurring). The evidence in this case, which I have studied attentively, has not served to convince me of the existence of a common-law marriage between Dr. Fleming and Mary C. Quan, notwithstanding the presumption that is so earnestly invoked in support of the existence of such a marriage contract. I am of opinion that their relations were illicit, and were understood by them to be illicit, until their formal marriage, on October 4, 1892, which was one month after the child Alfred W. Fleming was born. I accordingly dissent from the conclusion reached by my associates as to the existence of a common-law marriage.

I concur, however, in the order affirming the decree below for the following reasons:

The Missouri statute (Rev. St. Mo. 1899, § 2917), quoted in the foregoing opinion, declares that "if a man, having by a woman a child, * * * shall afterward intermarry with her and shall recognize such child * * * to be his," it shall thereby be legitimated. This statute, in my opinion, in effect makes the fact that a man recognizes a child, born out of wedlock, as his offspring, after he has married the mother, persuasive, if not conclusive, evidence that he is the father of such child. The question is pertinent, why did the legislature require recognition unless it was to be taken as evidence of paternity from one who was most liable to know the fact? It cannot be reasonably claimed that the legislature intended that recognition should have no probative force, as respects the question of paternity, and that this latter fact must be established otherwise than by recognition. No legislature would be apt to sanction such a doctrine, and, if it had been the intention of the legislature to formulate that rule, nothing would have been said concerning recognition, but the statute would have simply declared that if a man has by a woman a child, and subsequently marries her, the child shall be deemed legitimate. Besides, the rule which denies that recognition has any probative force or only slight weight, as bearing on the question of paternity, would leave an illegitimate child in practically the same helpless and unfortunate condition which such children occupied before the statute was enacted, since it would frequently be impossible for a child to prove its paternity otherwise than by recognition. The statute in question was inspired by an humane purpose. It was intended primarily for the benefit of those who were so unfortunate as to be born out of wedlock, and who, for that reason, were made outcasts by the common law, and looked upon as having no inheritable blood. As the statute is remedial, and was enacted mainly for the

benefit of illegitimate children, it should be construed liberally so as to afford them the utmost protection. Looking at the statute from any point of view, I am impressed with the idea that the words of the statute, "and shall recognize such child to be his," would have had no place therein unless it had been intended that recognition should be regarded as the very highest evidence of paternity. I am of opinion, therefore, that the legislature intended to give to acts of recognition the effect of evidence of a very decisive character, upon the theory that a man who marries a woman who has an illegitimate child is most interested in knowing and is most liable to know whether the offspring is his, and would not be prone to recognize it as his offspring unless it was his. Statutes of other states have been framed upon the same theory; that is to say, making recognition evidence of paternity. For example, in Michigan, the written acknowledgment by a man that an illegitimate child is his, he having married the mother, in and of itself renders the child legitimate. Comp. Laws Mich. 1897, § 9067. Statutes of a very similar character have been adopted in Iowa, Minnesota, Montana, Alabama, and possibly some other states. Code Iowa 1897, § 3150; Gen. St. Minn. 1891, § 3887; Rev. St. Mont. 1895, § 302; Code Ala. 1896, § 374.

In the present case it is not necessary to adopt the extreme view that recognition of an illegitimate child by a man who has married its mother is conclusive proof of paternity which no evidence can overturn, and hence that the legitimacy of a child born out of wedlock, if it is recognized, by force of the statute is placed on a firmer foundation than the legitimacy of a child born in lawful wedlock, and no decisive opinion need be expressed on that point. I think that it is true, however, that by the recognition of a child born out of wedlock, under the circumstances aforesaid, such a child is placed in the same favorable position as one born during wedlock; that it can only be rendered a bastard, after such recognition, by the same kind of proof which is required to overturn the legitimacy of a child born in the course of wedlock; and that it is entitled to the benefit of the same presumptions.

I fully concur in the views expressed in the foregoing opinion to the effect that the evidence in the case at bar was insufficient to show that Dr. Fleming was not and could not have been the father of Alfred W. Fleming, and also insufficient to overcome the very strong presumption of legitimacy which the law raises for the protection of those who are born in the course of wedlock. It being my view of the case, as above expressed, that because Alfred W. Fleming was recognized by Dr. Fleming as his child, after the formal marriage on October 4, 1892, and continuously until the doctor's death, such recognition placed the child in the same favorable position as if born in the course of wedlock, it follows, as a matter of course, that the evidence in question was likewise insufficient to overcome the presumption of legitimacy which existed in his favor, although there had been no common-law marriage prior to Alfred W. Fleming's birth.

For these reasons, somewhat hastily expressed, I concur in the order affirming the decree of the lower court.

IDE et al. v. TRORLICHT, DUNCKER & RENARD CARPET CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 21, 1902.)

No. 1,646.

1. PATENTS—COMBINATION OF OLD ELEMENTS.
   A new combination of old elements, whereby an old result is attained in a more facile, economical, and efficient way, may be protected by a patent.

2. SAME—INDEPENDENT INVENTIONS PATENTABLE WHERE ADVANCE IN ART GRADUAL.
   Where the advance toward perfection in an art consists of many intermediate steps, and several inventors form different combinations or improvements which score decided advances in the art and accomplish the desired result with varying degrees of success, each is entitled to his own combination, so long as it differs from those of his competitors, and does not include theirs.

3. SAME—ABANDONMENT—EVIDENCE OF INTENTION.
   Clear evidence of an intention to dedicate an improvement to the public is indispensable to establish an abandonment under the patent law.

4. SAME—DATES OF THE FILING OF, AND OF PATENTS UPON, APPLICATIONS OF SAME INVENTOR PENDING AT THE SAME TIME.
   Where each of several applications of the same inventor which subsequently ripen into patents describes the entire machine and the inventions claimed in all the applications, but no one of the applications claims any invention claimed in any of the others, and they are all pending at the same time, the respective dates of the patents and of the filings of the applications therefor are immaterial, and the applications and patents cannot be used to anticipate each other.

5. SAME—SPECIFICATION—DEDICATION OF INVENTIONS NOT CLAIMED.
   A patentee dedicates to the public every combination and improvement apparent on the face of his specification which he does not point out and distinctly claim as his discovery or invention.

6. REISSUE—CLAIMS FOR IMPROVEMENTS DESCRIBED BUT NOT CLAIMED IN THE ORIGINAL PATENT VOID.
   The insertion, in a reissued patent, of claims for inventions which were described, but which the patentee neither claimed nor intended to claim or to protect by the original patent, is unauthorized by the acts of congress, and such claims are void.

7. SAME—CERTAIN CLAIMS VALID, OTHERS VOID.
   Claims 3 and 4 of letters patent No. 397,293 are valid. Claims 3, 4 and 5 of reissued patent No. 11,730 are void.

8. LACHES—GENERAL RULE.
   Under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by it, but will determine the extraordinary case in accordance with the equities which condition it.

9. SAME—SUIT FOR INFRINGEMENT OF PATENT.
   Mere delay in bringing a suit for infringement, unaccompanied by such deceitful acts or silence of the patentee, and by such circumstances, as amount to an equitable estoppel, will not warrant the application of the doctrine of laches to such a suit within the time fixed by statute for the commencement of the analogous action at law.

10. PATENTS—INFRINGEMENT—CHANGES OF FORM OF MECHANICAL ELEMENTS.
    Mere changes in the form of a device, or of some of the mechanical elements of a combination, will not avoid infringement, where the prin-

ciple or mode of operation of the invention is adopted, except in those rare cases in which the form of the improvement or of the element changed is the distinguishing characteristic of the invention.

11. SAME—SUITS FOR INFRINGEMENT—COSTS TO BE EQUITABLY DIVIDED.

Where a suit for infringement is brought upon several patented claims, and the complainants succeed in obtaining relief upon some of the claims, but fail upon others, an equitable division of the costs should be made between the parties, because the defendants are not justly liable for the cost of litigating the claims upon which the complainants were entitled to no relief.

(Syllabus by the Court.)

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

This is an appeal from a decree which dismissed a bill for the infringement of claims 3, 4, and 5 of reissued letters patent No. 11,730, and claims 3 and 4 of letters patent No. 397,293. The former patent was for combinations of devices for the automatic oiling of certain stationary bearings of a horizontal engine, and the latter was for novel combinations of mechanical elements for the automatic lubrication of the bearing of the crosshead wristpin of such an engine. Letters patent No. 397,293 were issued to Albert L. Ide on February 5, 1889. On April 2, 1889, letters patent No. 400,682, the original of the reissued letters patent, were issued to Albert L. Ide for a lubricating device for steam engines. This patent contained three claims. Ide brought suit upon it for an infringement of the second and third claims. He failed because the circuit court of appeals of the Seventh circuit held that the combination described in the second claim was destitute of novelty, and that the third claim was so ambiguous that it was unintelligible. Chuse v. Ide, 89 Fed. 491, 496, 32 C. C. A. 260, 265. Thereupon the executors of the will of the patentee applied for, and obtained, the reissued letters patent No. 11,730, upon which this suit is based. This patent contains the three claims of the original patent and two more. Its second claim is the same as the second claim of the original patent. Its third claim describes the combination which Ide undoubtedly intended, but failed to describe in the third claim of the original patent, and the fourth and fifth claims of the reissued patent cover combinations that were neither claimed nor intended to be claimed by Ide when he procured his orginal patent. The second claim was adjudged void for lack of novelty and invention in Chuse v. Ide, supra. Its terms and legal effect are so similar to those of the third claim, which is here in suit, that it is set forth below with the claims which are to be considered, although the complainants seek no relief for its infringement in this case. The second, third, fourth, and fifth claims of the reissued patent are:

"(2) The combination, with a crank shaft and a crank disk, of an oil tank or basin beneath the disk, the side walls of which rise to a point above the lower edge of the disk, a housing or casing provided with an oil-receiving surface arranged in the same plane with the disk, a trough located within the housing in position to receive from the said oil-receiving surface fluid lubricant cast thereupon by the crank disk, a pipe leading from said trough to a bearing to be lubricated, and a valve in said passage, substantially as described.

"(3) The combination, with an engine crank shaft, a crank disk thereon, an oil tank or basin beneath the disk, a housing provided with an oil-receiving surface, and a bearing for the shaft provided with an oil cup or receptacle, a trough or receptacle located in position to receive from the surface of the housing lubricant cast upon the same by the disk, of a pipe communicating with said trough or receptacle and discharging into the oil cup upon the bearing, said oil cup being provided with an overflow pipe or passage leading into the housing, substantially as described.

"(4) In a self-lubricating steam engine, the combination with an engine crank shaft of a crank disk thereon, an oil tank or basin beneath the disk, a housing provided with an oil-receiving surface, a bearing for the shaft

provided with an oil cup or receptacle, a trough or receptacle located in position to receive from the surface of the housing lubricant cast upon the same by the disk, a pipe or passage communicating with said trough or receptacle and discharging into the oil cup upon the bearing, said oil cup being provided with an overflow pipe or passage leading into the housing, an inclosed or tubular portion communicating with the housing and extending horizontally therefrom, a horizontally traveling crosshead located within the horizontal tubular or inclosed portion, and a connecting rod uniting the crank disk and crosshead, said disk serving to cast oil from the tank or basin beneath the disk into the said tubular or inclosed portion to lubricate working parts of the engine within said tubular or inclosed portion, a passage being provided for returning the oil from the tubular or inclosed portion to the basin beneath the disk, substantially as described.

"(5) In the self-lubricating steam engine, the combination with an engine crank shaft of a crank disk thereon, an oil tank or basin beneath the disk, a housing provided with an oil-receiving surface, a bearing for the shaft provided with an oil cup or receptacle, a trough or receptacle located in position to receive from the surface of the housing lubricant cast upon the same by the disk, a pipe or passage communicating with said trough or receptacle and discharging into the oil cup upon the bearing, said oil cup being provided with an overflow pipe or passage leading into the housing, an inclosed or tubular portion communicating with the housing and extending horizontally therefrom, a horizontally traveling crosshead located within the horizontal tubular or inclosed portion, a wrist pin carried by the crosshead, and a connecting rod uniting the crank disk with the wrist pin, said disk serving to cast oil from the tank or basin beneath the disk into the said tubular or inclosed portion, to lubricate working parts of the engine within said tubular or inclosed portion, a passage being provided in the crosshead for conveying oil cast into the interior of the said tubular portion to the wrist pin, a second passage being provided for returning the oil from the tubular or inclosed portion to the basin beneath the disk, substantially as described."

The third and fourth claims of letters patent No. 397,293 read in this way:

"(3) The combination, with an engine crank shaft, a crank disk, connecting rod, and crosshead, of a casing or housing surrounding the disk, connecting rod, and crosshead, and having an oil tank or basin beneath the disk, a wrist pin in the crosshead engaged with the connecting rod, and an oil cup upon the said connecting rod communicating with the bearing surface of the wrist pin, said oil cup being located in position to receive the lubricant thrown upon the surface of the crosshead by the crank disk, substantially as described.

"(4) The combination, with a crank shaft, crank disk, connecting rod, and crosshead of hollow box form, of a casing or housing surrounding said disk, connecting rod, and crosshead, and having an oil tank or basin located beneath the crank disk, a wrist pin upon the crosshead engaging the connecting rod, and an oil cup upon the connecting rod communicating with the bearing surface of the wrist pin, said hollow crosshead being provided upon its upper wall with a depending projection located over the said oil cup, substantially as described."

The defendants interposed the usual defenses of the invalidity of the patents and of lack of invention, and upon the final hearing the court below dismissed the bill because in its opinion the reissued patent was void on account of the delay of its owner in making application for it, and because the defendants had not infringed the third and fourth claims of patent No. 397,293.

Charles A. Brown (George L. Cragg, A. Miller Belfield, Wilbur F. Boyle, H. S. Priest, and F. W. Lehmann, on the brief), for appellants.

Ephraim Banning (Edward C. Craig, James W. Craig, and Thomas A. Banning, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

In the natural and logical order of consideration of the usual issues presented in a case involving the alleged infringement of patented monopolies, the first question which presents itself is the validity of the patents upon which the suit is based. Both of the patents here in issue are attacked upon the ground that there was no novelty in the devices they described, and that the production of the improvements whose use they secured called for no exercise of the inventive faculty. The reissued patent is also assailed upon the additional grounds that it is not for the same invention as was the original upon which it was founded; that the application for it was too late; and that it was secured by fraud. As a discussion of the novelty and patentability of the devices portrayed by the two patents in suit involves an examination of the state of the art, the objections to their validity for want of novelty and invention will be first considered. The basic claims of the two patents are those numbered 3 in each of them. The other claims in suit are amplifications of these two,—combinations of the devices described in these claims with other mechanical elements,—and they will be laid aside for consideration after the validity of the two claims numbered 3 has been determined.

These two claims relate to improvements in the same art,—the art of automatically lubricating the bearings of operating machinery. They both describe and claim devices for automatically oiling the bearings of horizontal engines by the use of centrifugal force to throw the lubricant from the periphery of a revolving disk upon a higher surface, whence it may be gathered and conducted by the force of gravity to the bearings to be oiled. They have these mechanical elements in common: An engine crank shaft, a crank disk thereon, an oil tank or basin beneath the disk, and a housing surrounding the disk. Here the similarity of their combinations ceases, and in the purposes to which they are applied, and in the other mechanical elements by which they accomplish their ends, they are radically different. The desideratum of the combination of claim 3 of the reissued patent is to lubricate those bearings of a horizontal engine, such as that of the crank shaft, which bear a fixed local relation to the revolving disk. That of the combination of claim 3 of patent No. 397,293 is to oil the constantly reciprocating bearing of the crosshead wrist pin. Hence the former combination embraces a trough or receptacle to receive the oil from the interior surface of the housing above the disk, a pipe to lead the lubricant from this trough through the housing to the bearing to be oiled, an oil cup upon the bearing to receive the lubricant, an overflow pipe or passage to lead the oil back through the housing again to the basin beneath the disk. In the operation of this device the centrifugal force throws the lubricant which adheres to the disk as its periphery revolves through the oil in the basin beneath it upon the interior surface of the housing above it, whence it trickles down this surface into the trough prepared to catch it, and is led by a tube from this trough through the housing to the oil cup on the bearing to be lubricated, and thence by an overflow pipe or passage back within the housing, so that it may return by the force of gravity.

to the oil tank below the disk from whence it came. The combination of claim 3 of patent No. 397,293, on the other hand, embraces a hollow, box-shaped crosshead, the lower surface of whose upper wall is open to receive the lubricant thrown from the disk, a connecting rod and a wrist pin therein, an oil cup on the connecting rod communicating by means of a passage with the bearing surface of the wrist pin, and a casing, or housing surrounding the disk, the connecting rod and the crosshead, so that oil deposited upon its interior surface will flow back into the reservoir beneath the disk. In the operation of this improvement the centrifugal force throws the lubricant which adheres to the disk as its periphery revolves through the oil in the tank beneath it upon the upper interior surface of the constantly reciprocating crosshead, whence it drops into the oil cup on the head of the connecting rod and flows down through the passage therein upon the bearing surface of the wrist pin. A single glance at the two combinations is enough to suggest that the problem of automatically oiling a bearing in a constantly reciprocating crosshead was much more grave, and its solution was much more difficult, than that of lubricating a bearing which constantly has the same local relation to the disk which distributes the oil. Bearing in mind now the difference between the two combinations and between the objects they were contrived to attain, let us examine the devices that are alleged to anticipate them.

Several patents, including No. 299,731 to Peter Brotherhood, dated June 3, 1884, and No. 246,258 to H. Herman Westinghouse, dated June 3, 1884, which shed no light upon the state of this art, and have no relevancy to the issues in this case, have been cited and examined. The latter patent is the only one which discloses any device whatever for the automatic lubrication of the bearing of the crosshead wrist pin in an engine before Ide's invention, and the contrivance which this patent portrays neither uses the mechanical means nor avails itself of the principle of Ide's combination. It is nothing but a tank of oil at the foot of a hollow upright connecting rod or pitman that is provided with a valve. As the rod descends the crank is immersed in the lubricant and the bearing of its lower end is oiled. At the same time oil is forced into it through an opening and held there by the valve. Successive strokes of the rod pump the oil into it in this way until it reaches the upper end of the rod, when it flows out through another hole and lubricates the bearing by which the connecting rod or pitman is attached to the piston. This patent describes no disk, no hollow crosshead, no use of the centrifugal force,—nothing suggestive of Ide's improvement,—and it will receive no farther consideration.

In patent No. 24,914, August 2, 1859, to P. F. Aertz, in No. 78,895, June 7, 1868, to Reynolds & Bachelder, and in English patent 352, March 8, 1855, disks revolving through reservoirs beneath them, and taking lubricants which are gathered from the upper portions of their peripheries by scrapers and conducted by means of troughs, tubes, or their equivalents to bearings which sustain a constant local relation to the disks, and thence back to the tanks, are clearly described.

In English patent No. 852, October 7, 1856, to William Joseph Cur-

tis, there is a description of a disk attached to the axle of a railway carriage or engine revolving through a lubricant in a tank beneath it and throwing the liquid by centrifugal force upon the interior surface of a box above it, whence it is led by suitable troughs to the bearing of the axle to lubricate it.

Letters patent No. 65,328, June 4, 1867, to John Bachelder, shows a shaft, a plate or a disk thereon, a dripping pan or oil tank beneath the disk, a housing or box provided with an oil-receiving surface, a bearing for the shaft with a hanger or oil receptacle above it, a trough beneath the upper interior portion of the housing which both receives from the surface above it the lubricant cast there by the disk and conducts it to the receptacle over the bearing, whence it runs down upon the bearing and through a hole beneath the shaft into the tank beneath the disk. Bachelder describes the operation of this device in this way:

"When the shaft is driven at the requisite speed, the periphery of the plate, running in clean oil placed in the dripping pan, carries it up by centrifugal force above and into the conductor, which delivers it in the cavity in the cap of the hanger. The oil then, after performing its office of lubricating, passes out at the ends of the bearing in the usual way, or may pass through a hole under the shaft into the larger part of the dripping pan."

Here is a clear description of the principle of Ide's combination, of the application of the centrifugal force generated by a revolving disk to the automatic lubrication of bearings which have a fixed local relation to the disk. Here is a perfect word picture of a combination of all the mechanical elements or of their equivalents which Ide claimed to have devised for the operation of his principle. This patent to Bachelder is a complete anticipation of Ide's improvement. It left him no principle to conceive, no improvement to invent, no new combination to form in reaching the device which he described and sought to secure by claim 3 of his reissued patent, and that claim is void for want of novelty and for a lack of the exercise of the inventive faculty in conceiving the combination it describes. It differs in no essential particular from the second claim of the original patent No. 400,682, which met the same fate at the hands of the circuit court of appeals of the Seventh circuit in Chuse v. Ide, 89 Fed. 491, 496, 497, 32 C. C. A. 260, 265, 266.

The improvement described in claim 3 of patent No. 397,293, on the other hand, is of a very different character, and it was conceived to solve a far more difficult problem. It was one thing to copy some of the improvements described in the patents which have been reviewed and to form from them a combination to automatically lubricate bearings which constantly bore a fixed local relation to the revolving disk. It was another and a far more serious undertaking to devise a combination of mechanical elements which would successfully utilize the centrifugal force of the revolving crank disk so as to automatically lubricate the bearing of the crosshead wrist pin while it was subjected to the constantly reciprocating motion of the crosshead, and while its local relation to the revolving disk was changing every instant. The patents that have been considered, the general history of the art to which they relate, and our common knowledge of

the operation of machinery, demonstrate the fact that the automatic lubrication of the bearing of this wrist pin upon the connecting rod while it was in continuous motion must have been an end long sought by mechanics and manufacturers. No one, however, attained it save by the crude and impractical method of plunging the end of the connecting rod or pitman and its bearing in an upright engine into a tank of oil beneath it, described in the patent to Westinghouse,—a method inapplicable to horizontal engines and free from any suggestion of the simple, ingenious, and effective device of Ide. No one before him ever utilized the centrifugal force generated by a disk revolving in a basin of oil to automatically lubricate a bearing whose local relation to the disk was constantly changing. No one before Ide ever attained the end of automatically and continuously oiling the bearing of the crosshead wrist pin of a horizontal engine while it was in operation, and no one before him ever made or used the combination of claim 3 of his patent No. 397,293 for that purpose. The improvement embodied in that combination was novel in the end which it attained, novel in its mode of operation, and novel in the combination of mechanical elements of which it was composed. It marked a perceptible advance in the art to which it relates, and the presumption which the patent raises, the failure of manufacturers and of mechanics skilled in the art for so many years to reach the object which it attained, its obvious utility, its simplicity, and the cleverness of its conception, persuasively urge to the result that to him who devised it the title of inventor ought not to be denied, and such is the conclusion of this court.

While this improvement is by no means a primary invention, it scores one of those intermediate steps in the gradual progress of a useful art towards perfection which are evidenced by the great majority of patented inventions, and it falls within the established rules that a new combination of old elements, by which an old result is attained in a more economical and efficient way, may be protected by a patent (National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544, 557; Seymour v. Osborne, 11 Wall. 516, 542, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 189, 21 L. Ed. 39; Thomson v. Bank, 53 Fed. 250, 252, 3 C. C. A. 518, 520, 10 U. S. App. 500, 509), and that where the advance in the art is gradual, and several inventors make valuable improvements and form different combinations, which accomplish the desired result with varying degrees of success, each is entitled to his own combination, so long as it differs from those of his competitors and does not include theirs (National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 712, 45 C. C. A. 544, 563; Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Stirrat v. Manufacturing Co., 61 Fed. 980, 981, 10 C. C. A. 216, 217, 27 U. S. App. 13, 42; Griswold v. Harker, 62 Fed. 389, 391, 10 C. C. A. 435, 438, 27 U. S. App. 122, 150; Adams Electric Co. v. Lindell Ry. Co., 77 Fed. 432, 440, 23 C. C. A. 223, 231, 40 U. S. App. 482, 498). The combination of claim 3 of patent No. 397,293 was new and it was the product of the intuitive genius of an inventor.

Counsel for the defendants resist the logical effect of this conclusion, and still deny the liability of their clients, on the ground that this patent was anticipated and rendered void by other patents issued to the same inventor, and by the applications upon which these patents were founded. They first cite patent No. 321,726, dated July 7, 1885. But the improvement there described neither anticipates the combination of claim 3 of this patent nor has any relevancy to the issue under consideration. It lacks its principle,—the use of centrifugal force,—and it wants its chief element,—the revolving disk. It contemplates the lubrication of the bearing of the crosshead wrist pin, not by the automatic action of machinery, but by the use of a cup located on the outside of the frame of the engine and supplied by hand with oil which is led through the housing and through the upper wall of the crosshead to an oil cup on the connecting rod over the bearing of the wrist pin.

Counsel next call attention to two applications for patents filed on February 20, 1888, upon which patent No. 396,209 was issued on January 15, 1889, and patent No. 400,682 was issued on April 2, 1889. The specifications of these applications and patents described all the elements of the improvement secured by the claim under consideration. But they did not portray its mode of operation, nor present any claim for it as an invention. Its principle was first described, and the claim to it as an invention was first made, in the application upon which the patent now under consideration was based, which was filed on August 4, 1888, and which ripened into a patent on February 5, 1889. The argument of counsel for the defendants is, however, that this claim and patent are void because the prior applications of February 20, 1888, show that the combination secured by this patent had been invented prior to that date, and because the fact that Ide did not secure this improvement by the patents based upon those applications estopped him from securing it by this patent based upon a later application. But is this contention well founded either in logic or in law? Concede that the applications of February 20, 1888, prove that Ide had invented the improvement here under consideration before those applications were filed. There was no law which required him to apply for a patent upon his invention as soon as he made it. The acts of congress gave him the right to apply for and to obtain a patent upon his combination at any time after he conceived it, provided only that his invention had not been "in public use or on sale for more than two years prior to his application," and that it was not "proved to have been abandoned." Rev. St. § 4886. There was no evidence of any prior use or sale of this improvement. Clear evidence of an intention to dedicate an improvement to the public is indispensable to establish an abandonment. There was no evidence of an abandonment at the hearing of this case, and the patent in suit and the application upon which it is based are persuasive proof that Ide never intended to dedicate, and never did dedicate, the improvement they secure to the public. Mast, Foos & Co. v. Dempster Mill Mfg. Co., 27 C. C. A. 191, 195, 82 Fed. 327, 331; Woolen Co. v. Jordan, 7 Wall. 583, 607, 19 L. Ed. 177; Adams v. Jones, 1 Fed. Cas. 126, 127 (No. 57); Babcock v. Degener, 2 Fed. Cas. 293, 297 (No. 698); Jones v. Sewall, 13 Fed. Cas. 1017, 1027 (No.

7,495); McMillin v. Barclay, 16 Fed. Cas. 302, 306 (No. 8,902); Pitts v. Edmonds, 19 Fed. Cas. 751, 757 (No. 11,191).

If the device had been described, but had not been claimed in applications filed and patents procured eight years before the claim for it was presented to the patent office, as in James v. Campbell, 104 U. S. 356, 379, 382, 26 L. Ed. 786, that fact might have constituted an irrevocable dedication of it to the public, which would have estopped the claimant from successfully pressing it. But the claim for this improvement was presented seven months after it was described in the earlier applications. The application for a patent upon it was pending in the patent office five months before the patents based upon those earlier applications were issued, and the patent upon it was issued within one month after the patent upon one of these earlier applications, and nearly two months before the patent upon the other. In this state of the case, the dates of the applications, the dates when they were filed, and the dates of the patents are immaterial to the determination of the rights of the patentee. Where each of several applications, which subsequently ripen into patents to the same inventor, describes an entire machine and the inventions claimed in all of the applications, but no one of the applications claims any invention claimed in any of the others, and they are all pending at the same time, the respective dates of the applications and of the patents and the dates when the applications were filed are immaterial, and the applications and the patents cannot be used to anticipate each other. Walk. Pat. § 180; Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co. (C. C.) 106 Fed. 724, 726; Suffolk Manufacturing Co. v. Hayden, 3 Wall. 315, 318, 18 L. Ed. 76; Graham v. McCormick (C. C.) 11 Fed. 859; Graham v. Manufacturing Co. (C. C.) 11 Fed. 138, 141. The result is that none of the other applications of or patents to Ide impeach or avoid the patent under consideration, and claim 3 of that patent must be sustained.

Claim 4 of patent No. 397,293 consists of the combination of claim 3 plus a depending projection located over the oil cup on the connecting rod. As the combination of claim 3 was novel and patentable, that combination, together with the depending projection, was so, and claim 4, which is attacked on the same grounds as claim 3, must be sustained for the same reasons which induced us to declare the validity of that claim.

The fact that a single patent (No. 276,047, April 17, 1883, to William R. Jenkins) was cited as an answer to this claim has not been overlooked. It describes an annular oil chamber around the hub of a car wheel, with conical projections from the periphery of this chamber opposite holes through the hub to the axle. Oil is deposited in this chamber, and, as the wheel revolves, it follows these projections to the holes, and thence through them to the axle. This patent is undoubtedly cited because it shows a conical projection, but that is not the improvement protected by the fourth claim of patent No. 397,293. It is the combination of that projection with the revolving disk, the hollow crosshead, the reciprocating wrist pin, and the other elements described in the claim, that Ide secured by this claim. These essential

elements, as well as the mode of operation of Ide's improvement,—the throwing of oil by centrifugal force from the periphery of a revolving disk to a bearing which is constantly changing its local relation to the disk,—are not found in the device of Jenkins, and for this reason this patent has no relevancy to the issue of the validity of the claim it is cited to anticipate, and it is here dismissed.

Claims 4 and 5 of the reissued patent No. 11,730 must fall with claim 3 of that patent,—the foundation claim upon which they rest. Claim 4 describes the combination of claim 3 plus an inclosed or tubular portion of the housing, a crosshead and connecting rod therein, and a passage to lead the oil thrown by the revolving disk upon the interior surface of the housing back into the reservoir beneath the disk. Claim 5 consists of the combination of claim 4 and a passage in the crosshead to conduct the oil from the interior of the tubular portion of the housing to the wrist pin. These claims were not a part of the original patent upon which the reissue is founded. They appeared for the first time in the application for the reissued patent which was filed on December 6, 1898. In so far as they describe the combination of claims 3 and 4 of patent No. 397,293 to automatically lubricate the bearing of the crosshead wrist pin, they are anticipated and rendered void by that patent, which was issued to the same inventor before the original patent on which this reissue is based was granted. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 708–710, 45 C. C. A. 544, 559–562. In so far as these claims disclose any other combination, they are anticipated and avoided by the patents to Bachelder and others reviewed in an earlier part of this opinion, which proved so fatal to claim 3 of this patent.

Moreover, these claims are void because they expand the monopoly which the inventor secured by his original patent, and because there was unreasonable delay in making application for them. A specious argument is presented to sustain them on the ground that they do not expand, but, rather, restrict the monopolies which Ide attempted to protect by claims 2 and 3 of the original patent, because they consist of the combinations of those claims restricted by additional elements, and it is earnestly contended that they should be sustained upon this ground. Crown Cork & Seal Co. of Baltimore City v. Aluminum Stopper Co. of Baltimore City, 108 Fed. 845, 859, 860, 48 C. C. A. 72, 86, 87; Electrical Accumulator Co. v. New York & H. R. Co. (C. C.) 50 Fed. 81; Eames v. Andrews, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064. But this argument is based on the assumption that claims 2 and 3 of the original patent describe patentable inventions,—an assumption, which, as we have seen, is not in accordance with the fact. The improvements which claims 2 and 3 attempt to describe were neither novel nor were they the product of the intuitive genius of the inventor. They secured no invention or discovery, and the result is that claims 4 and 5, which follow them, do not restrict the scope of the monopolies protected by the original patent, because no such monopolies were saved thereby; but they claim combinations no part of which was ever protected by the original patent upon which the reissue which contains them was based. Moreover, the record conclusively shows that when the patentee obtained his original patent he

not only did not claim, but he did not intend to claim, the combinations now described in these new claims of the reissued patent. The acts of congress require an inventor, before he procures his patent, to "point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery" (Rev. St. § 4888), and his specifications and claims constitute a dedication to the public of every invention they disclose but do not claim. Adams Electric Ry. Co. v. Lindell Ry. Co., 23 C. C. A. 223, 241, 242, 77 Fed. 432, 451, 452. Ide, therefore, in so far as he did not secure them by patent No. 397,293, issued about two months before, abandoned these combinations to the public in 1889, when he procured his original patent No. 400,682. On December 6, 1898, more than nine years thereafter, application was first made to secure a monopoly of the use of these improvements by means of this reissued patent. This delay might be excused by the litigation involving the original patent if it appeared that the patentee had intended to secure these improvements by that patent and had failed to do so by reason of a defective or insufficient specification, or by claiming as his invention more than he had a right to claim. Rev. St. § 4916. But the entire record, and especially the specifications and claims of the two patents 397,293 and 400,682, whose applications were pending in the patent office at the same time, leave no doubt that Ide never intended to claim or protect by the latter patent the improvements described in claims 4 and 5 of the reissued patent, and, because these claims describe inventions different from any which the patentee saved or sought to protect by his original patent, their insertion in the reissue was unauthorized by the law, and they are void. The introduction in a reissued patent of claims for inventions which are described, but which the patentee neither claimed nor intended to claim by the original patent, is unauthorized by the acts of congress, and such claims are void. Topliff v. Topliff, 145 U. S. 156, 166–171, 12 Sup. Ct. 825, 36 L. Ed. 658; Hubel v. Dick (C. C.) 28 Fed. 132, 137, 138; Carpenter Straw-Sewing Mach. Co. v. Searle, 60 Fed. 82, 84–86, 8 C. C. A. 476, 478–480.

The sum of the whole matter concerning the validity of these claims is that claims 3, 4, and 5 of reissued patent No. 11,730 are void, and claims 3 and 4 of letters patent No. 397,293 are valid.

The next question for consideration is the measure of the recovery to which the complainants are entitled for the alleged infringement of the two valid claims. Counsel for the defendants insist that no relief can be granted to the complainants, because they have been guilty of laches in prosecuting their suit, and because the defendants are innocent of the charge of infringement. The charge of laches is conditioned by these facts: This patent was issued on February 5, 1889. The defendants in this case include the manufacturers of the engine which is alleged to infringe and a purchaser thereof. On May 23, 1894, Ide notified the manufacturers that they were infringing upon this patent. On July 14, 1899, the executors of Ide's will exhibited this bill. In the meantime a spirited litigation had been conducted between Ide and the manufacturers over the former's claims under other patents. The statute of limitations of the state of Illinois,—the state in which the defendants have committed their alleged trespasses,—

bars the commencement of actions for the recovery of damages for infringement five years after the damages accrue. Hurd's Rev. St. Ill. 1899, p. 1119, § 15.

But there is no rule of law, of equity, or of morals that requires a patentee to sue infringers upon all the patents he owns at the same time, or that deprives him of the equitable relief to which he would otherwise be entitled because he has failed to do so. And while courts of equity usually apply the doctrine of laches by analogy to the statute of limitations of similar actions at law, that rule has no application to this suit, because the trespasses of the defendants for which the complainants now seek relief have been continuous and repeated, and are still continuing, and no bar to a recovery of all the damages which have resulted from them within five years of the commencement of this suit, or to the issue of an injunction to prevent their continuance, has arisen even under the statute of Illinois. The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice. Under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, 21. There are no unusual circumstances or conditions in this case which appeal to a court of equity to stay this suit while a similar suit is not barred by the statutes of Illinois. Unreasonable delay and the deceitful acts or silence of a patentee which induce an infringer to incur expenses or to become liable to losses and damages which he would not otherwise have suffered may sometimes justly induce a court of equity to stay his suit for an infringement or for an accounting before the time fixed by the analogous statute of limitations has expired. But delay, unaccompanied by such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action. It is no answer to an application for an injunction to restrain a defendant from committing waste by cutting trees upon the owner's land that, because the latter has taken no steps to prevent the wrongdoer from cutting one half of the trees, he has thereby acquired a right to cut the other half. Attorney General v. Eastlake, 11 Hare, 205, 228. And it is no defense to a suit for an injunction and an accounting on account of the continuing trespasses of an infringer that the latter has been trespassing on the rights of the patentee for years with impunity. Menendez v. Holt, 128 U. S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526; McLean v. Fleming, 96 U. S. 245, 253, 24 L. Ed. 828; Price v. Steel Co. (C. C.) 46 Fed. 107, 108; New York Grape Sugar Co. v. Buffalo Grape Sugar Co. (C. C.) 18 Fed. 638, 646; Gilmore v. Anderson, 38 Fed. 846, 848; Brush Electric Co. v. Electric Imp. Co. (C. C.) 45 Fed. 241, 243; Taylor v. Spindle Co., 22 C. C. A. 203, 206, 75 Fed. 301, 304; Bragg Mfg. Co. v. City of Hartford (C. C.) 56 Fed. 292, 294.

Finally it is insisted that the engines of the defendants do not infringe upon the third and fourth claims of the patent under consideration. This contention is unworthy of extended consideration. Its only foundation is that the oil cup or receptacle in the upper end of the passage through the connecting head to the crosshead wrist pin bearing is a flaring tunnel-shaped cup, with its spout inserted in the passage, in the patent, while the defendants' substitute for it is a flaring tunnel-shaped mouth to the passage sunk in the connecting rod strap and in the connecting rod, and the "depending protection" of the patent over this oil cup is described as a pointed depending projection, while the substitute for it used by the defendants consists of the depending end of a bolt, with a nut upon it which not only performs the function of Ide's depending projection, but also accomplishes another purpose. These are distinctions without differences. A depressed oil cup used in the same place and accomplishing the same purpose as a raised oil cup,—the purpose of collecting and leading the oil to the same passage,—is the mechanical equivalent of, and the same thing as, the raised oil cup, in the view of the law of patents. And a depending projection consisting of the end of a bolt with a nut upon it used in the same place, and performing the same function, as the depending projection of the patent,—the function of gathering the oil from the surface above it and dropping it into the oil cup beneath it,—is the mechanical equivalent of, and the same thing as, the patented projection, in the eyes of that law. Parties cannot escape infringement by such slight and useless variations in the forms of elements of patented combinations. Mere changes in the form of a device, or of some of the mechanical elements of a combination, will not avoid infringement, where the principle or mode of operation is adopted, except in those rare cases where the form of the improvement or of the element changed is the distinguishing characteristic of the invention. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 711, 45 C. C. A. 544, 562; Watch Co. v. Robbins, 64 Fed. 384, 396, 12 C. C. A. 174, 187; New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859.

The form of the elements which the defendants have changed was not the essence of this invention. Its principle was the application of the centrifugal force generated by a disk on a crank shaft revolving in a tank of oil to the automatic lubrication of the bearing of a crosshead wrist pin of an engine. The means which it secured to make this application consisted of a combination of the revolving disk secured to the crank shaft, the oil tank beneath it, the hollow crosshead, with the lower surface of its upper wall open to receive the lubricant thrown by the revolving disk, the depending projection upon this surface, the oil cup on the connecting rod, and the passage beneath it to lead the lubricant to the bearing of the wrist pin. This mode of operation and every element of the patented combination which Ide invented to utilize it the defendants have boldly appropriated, and they cannot be permitted to escape from the natural and legal effect of their acts.

The net result of this investigation is that the complainants succeed upon claims 3 and 4 of letters patent No. 397,293, and they fail upon

claims 3, 4, and 5 of the reissued patent. Where a suit is brought upon several claims of one or more patents, and the complainants succeed in obtaining relief upon some of the claims, but fail to recover upon others, an equitable division of the costs, proportioned to the expense of litigating the respective claims, should be made, because the defendants are not justly liable for the costs of litigating those claims upon which the complainants were entitled to no relief. Wilcox & Gibbs Sewing Mach. Co. v. Mèrrow Mach. Co., 93 Fed. 206, 35 C. C. A. 269; Thomson-Houston Electric Co. v. Elmira & H. Ry. Co. (C. C.) 71 Fed. 886; Albany Steam Trap Co. v. Felthousen (C. C.) 20 Fed. 633, 640.

The decree below must be reversed, the appellants may recover one-half of their costs in this court, and the case must be remanded to the circuit court, with directions to dismiss the bill as to the three claims of the reissued patent No. 11,730, and to enter the usual decree for an injunction and an accounting upon claims 3 and 4 of letters patent No. 397,293, without costs to either of the parties to the suit up to the time of the entry of the decree; and it is so ordered.

LANYON ZINC CO. v. BROWN et al.

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

No. 1,586.

1. PATENTS—VALIDITY AND INFRINGEMENT—ORE-ROASTING FURNACE.
   The Brown patent, No. 471,264, for an ore-roasting furnace, claim 1, which covers a furnace in which the mechanism for operating the rabbles for stirring the ore is placed in a supplemental chamber for the purpose of protecting it from the action of the heat, dust, and fumes, was not anticipated by the Munroe patent, No. 227,818, and is valid. Such claim is also infringed by a furnace made in accordance with the Ropp patent, No. 523,013.

2. SAME—ASSIGNMENTS—EVIDENCE OF EXECUTION.
   Act March 3, 1897 (29 Stat. 693, c. 391) § 5, which provides that if an assignment of a patent is made before a notary public his certificate of acknowledgment shall be taken as prima facie evidence of its execution, is not limited in its operation to acknowledgments taken after its passage, but declares a rule of evidence applicable to all assignments so acknowledged.

3. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
   A preliminary injunction against the use by defendant of machines which have been previously adjudged to infringe complainant's patent will not be denied on the ground of public policy, because it will result in great loss to defendant and inconvenience to the public, and especially where its operation has been suspended pending an appeal for a sufficient time to have enabled defendant to make such changes in the machines as to avoid infringement, if it had so desired.

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

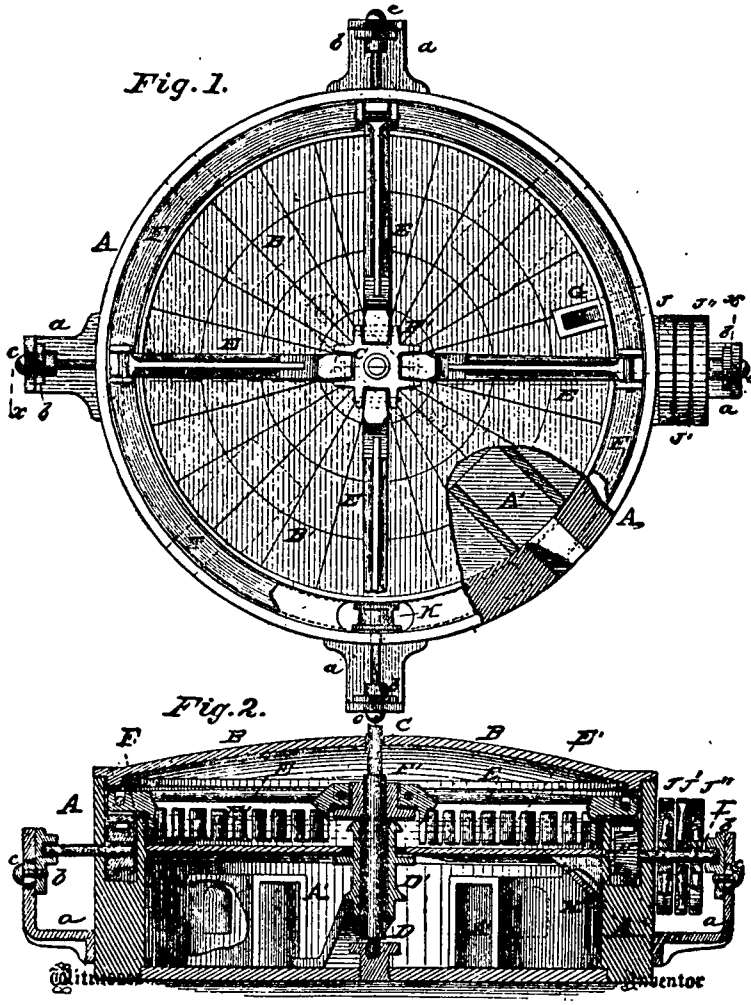
Albert H. Walker (John H. Atwood, on the brief), for appellant.

Philip C. Dyrenforth, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal from an order granting an injunction pendente lite in a patent case. The infringing device, the use of which was restrained, is an ore-roasting furnace, manufactured in full accordance with letters patent No. 523,013, issued to Alfred Ropp in January, 1895. This patent was considered by this court in the case of Extraction Co. v. Brown, 43 C. C. A. 568, 104 Fed. 345, and it was held that an ore-roasting furnace constructed in accordance with the specifications of that patent, with a supplemental chamber designed to protect the rabble operating mechanism from the direct action of flames and dust, and located underneath the hearth of the oven instead of at the side thereof, infringed claim 1 of patent No. 471,264, granted to Horace F. Brown on March 22, 1892. This court held, in substance, for reasons fully stated in its opinion, that claim 1 of the Brown patent should be construed to cover a supplemental chamber placed beneath the main roasting chamber, and designed to protect the rabble operating mechanism from the direct action of the flames, heat, and dust within the oven, because a supplemental chamber so placed was a mechanical equivalent for a supplemental chamber located at the side of the oven and designed for the same purpose. 43 C. C. A. 576, 577, 104 Fed. 353, 354. A motion for a rehearing having been filed after the announcement of our decision in that case, we declined to recede from that construction of the Brown patent, although we did hold that the device covered by claim 4 of the Brown patent, which we had not considered in our original opinion, was anticipated by earlier patents, and that that claim was void. 49 C. C. A. 147, 110 Fed. 665. The present action, which was entitled in the lower court "Horace F. Brown, Selwyn C. Edgar, and Collinsville Zinc Co. v. Lanyon Zinc Co.," was pending in the lower court when the decision in the case of Extraction Co. v. Brown, last referred to, was announced; and as it appeared that the Lanyon Zinc Company, the defendant below and the appellant here, was using the Ropp furnace, and that the use thereof constituted the grievance of which the plaintiffs below complained, the circuit court, very shortly after the announcement of that decision, granted an injunction pendente lite. The injunction, by its terms, was to become effective on May 15, 1901, the order granting the same having been made on April 24, 1901; but before it became effective the operation of the injunction was further suspended by an order duly made and entered of record in the lower court, until the appeal from the order granting the injunction was heard and determined, or until the decision of the case on final hearing by the lower court, whichever event should occur first. This order, deferring the time when the injunction should take effect, was made on condition that the Lanyon Zinc Company should give a bond in the sum of $40,000, which was subsequently executed, conditioned to pay such damages as might be occasioned by the delay. The case has not yet been reached for final hearing in the lower court, although it is said that most of the testimony has been taken, but the appeal from the restraining order was reached in its regular course at the present term of this court, and counsel for the appellees insisted on their right to a hearing and upon the entry of such a decree as they were entitled to upon the record that had been lodged in this court.

The assignment of errors, which was filed in the lower court, specifies four as having been committed. The first and the third errors so assigned are—First, that the lower court erred in holding claim 1 of patent 471,264, being the Brown patent, to be valid; and, third, in adjudging that the doings of the defendant, the Lanyon Zinc Company, although it was confessedly using a Ropp furnace, infringed claim 1 of the Brown patent. Both of these questions were considered and decided in Extraction Co. v. Brown, 43 C. C. A. 568, 104 Fed. 345, as heretofore stated; and, although it is true that the decision was rendered in a case to which the appellant was not a party, yet it disposes of the two errors last mentioned, so far as this court is concerned, unless the appellant has brought upon the record some new facts which are sufficiently potent to overthrow the conclusion that was formerly reached, concerning the Brown patent. We do not find in the record any new facts which, in our judgment, are entitled to such weight. It is true that on the hearing of the motion for an injunction the appellant did introduce in evidence letters patent 227,818, issued on May 18, 1880, to William C. Munroe, which patent was not in evidence in the former case, and it is likewise true that it introduced the affidavits of certain experts which are to the effect that, in view of the Munroe patent, the device covered by claim 1 of the Brown patent was within the reach of ordinary mechanical skill, and hence was not patentable. This is the only additional testimony which was not before us on the former action. We are unable to concur in the opinion so expressed by the appellant's experts concerning the Munroe patent, or in the reasoning upon which it rests. Cuts taken from the Munroe patent will be found on the opposite page, from which it will be seen that his furnace is circular in form; that the heat is applied to the floor of the furnace, by means of the fire boxes, A', and that the flames do not invade the oven where the ore is placed, but that heat is imparted thereto by conduction; that the stirring of the ore within the oven is accomplished by stirrers depending from four radial arms, designated "E" in the drawing, these arms being supported at one end by a vertical shaft in the middle of the oven marked "C," and at the outer end by an annular rack or ring marked "F," and that the movement of these rabble arms forward and backward is effected by the rotation of the annular ring which meshes into a cogwheel, H, that is actuated by a belt passing around band wheels on the outside of the furnace. The annular ring, F, to which the outer ends of the radial arms are attached, revolves, as the patentee says, in a groove on the outer edge of the bed plate or bottom of the furnace, and at four opposite points in this groove rollers are placed for the purpose of supporting the annular ring, one of which is indicated in figure 1 of the cut by the letter "K." On the inner edge of this groove or depression in the floor of the furnace there may be, and probably is, a slight rim to prevent the ore, as it is stirred, from falling into the groove; but there is nothing in the specification of the patent which indicates that this depression in the floor and the rim on the inner side thereof were devised by the patentee for the purpose of protecting the rabble operating mechanism from either heat or dust while the furnace is in operation, since the



fact is that, owing to the manner in which the heat is applied externally to the floor of the furnace, the rabble operating mechanism which is located within the oven is subjected to the same degree of heat as the ore itself. We find in the patent of Munroe no suggestion of the supplemental chamber at the side or bottom of the main roasting oven, and cut off therefrom by a wall or partition, for the purpose of protecting the rabble operating mechanism from heat, fumes, and dust, such as Brown constructed and claimed, nor does it appear that Munroe had any such object in view. The advantages which he suggests and claims for his style of roasting oven are of an entirely different sort, and it is only by the exercise of great ingenuity that a plausible claim can be made that the one furnace was the prototype of or that it suggested the other.

By its second assignment of error the appellant asserts that the injunction against it was erroneously awarded because the complainants below, the appellees here, showed no title to the Brown patent, No. 471,264, which as they claimed was being infringed. The moving papers, which were presented to the lower court, disclose that the Brown patent, No. 471,264, was issued to Mary C. Brown as assignee of Horace F. Brown, pursuant to an assignment duly executed before the patent was issued; that Horace F. Brown and Mary C. Brown, on November 10, 1893, licensed the Collinsville Zinc Company to erect, use, and maintain ore-roasting furnaces, under the aforesaid letters patent, at any works owned or controlled by said licensee; that on August 15, 1894, Mary C. Brown, by an assignment acknowledged before a notary public and recorded in the patent office, sold and transferred to Selwyn C. Edgar all her right, title, and interest in and to letters patent No. 471,264, for, to, and in the states of Missouri, Kansas, Indiana, Arkansas, and Illinois, except as to furnaces then or thereafter used by the Collinsville Zinc Company, under the aforesaid license, reserving to herself, however, the right to license others to use the furnace within said territory for smelting ores other than zinc ore; that on September 18, 1894, Edgar transferred to the Collinsville Zinc Company an undivided half of his interest in the patent; and that afterwards, on October 31, 1896, Mary C. Brown, by an assignment duly acknowledged before a notary public, reassigned to Horace F. Brown all her right, title, and interest in said letters patent. When we say that the moving papers disclose these facts, we mean that the bill, which is duly verified, alleges them, and that the various transfers and assignments, referred to therein, are attached to the bill as exhibits, and appear to have been duly executed, and all of them were either acknowledged before a notary public or they have been accepted and recorded by the commissioner of patents. There is nothing on the face of the papers which creates a suspicion that the title to the patent is not duly vested in the complainants in the manner alleged in the complaint. We cannot sustain the aforesaid contention, which, on the face of it, appears to be highly technical. By section 5 of the act of March 3, 1897, relating to patents (29 Stat. 693, c. 391), it is declared that, if an assignment of a patent is made before a notary public, his certificate of such acknowledgment, under his hand and seal, shall be taken as prima facie evidence of its execution; and while it is true that this act did not take effect until January 1, 1898, yet it will be observed that the act does not say that it shall only be applicable to acknowledgments taken after that date. It is a statute which was intended to declare the evidential effect to be given to acknowledgments before a notary, after a given date, without special reference, however, to the time when the acknowledgment was taken; and in the absence of any specific provision that it should only apply to acknowledgments taken subsequently to January 1, 1898, we perceive no sufficient reason why it should be limited in its operation to acknowledgments so taken. We concur in the views that were expressed on this point by the circuit court of the United States for the district of Vermont in the case of De Laval Separator Co. v. Vermont Farm-Mach. Co., 109 Fed. 813.

By its fourth and last specific assignment of error the appellant says that the lower court erred in not adjudging that public policy forbids the present discontinuance of the use by it of its ore-roasting furnaces; that is to say, furnaces made in accordance with the specification of the Ropp patent. In support of this assignment our attention is directed to the great loss which the appellant will sustain, and to the public inconvenience which, as it is claimed, will be experienced, if the injunction is allowed to go into effect, and we are asked to further suspend its operation at least until the case shall have been finally heard and determined. On the other hand, the appellees urge, with great force, that the laws of the United States give to them, for a limited time, an exclusive right to make, use, and vend their invention in the manner which they deem best; that this court has held, on full consideration and on substantially the same evidence which appears in this record, that the first claim of the Brown patent is valid, and that the use of a furnace made according to the specification of the Ropp patent is an infringement of that claim and an invasion of their property rights. They further urge that the operation of the injunction has already been suspended for nearly one year after it was originally granted; that the appellant has had, in the meantime, abundant opportunity to make such changes in its furnaces as will avoid further infringement, if it intends to do so; that the record on the final hearing of this case cannot be substantially different from the one now before the court; that the appellees have already been put to great expense in the defense of their rights, and should not be compelled to incur the risk of further loss and damage, or be put to the expense of proving the amount of their loss in an accounting for the damages and profits incident to a further unlawful use of their invention. These considerations have had great weight with us, and have influenced us to refuse to further suspend the operation of the injunction. And as sufficient grounds existed for granting the injunction, after the decision of this court in the case of Extraction Co. v. Brown, and as there was no abuse of discretion or other error, so far as we can discover, the order appealed from, made April 24, 1901, will be affirmed in so far as it enjoins the infringement of claim 1 of patent No. 471,264.

UNITED SHOE MACHINERY CO. v. GREENE et al.

(Circuit Court, D. Massachusetts. April 7, 1902.)

No. 1,341.

PATENTS—INVENTION—MOLD FOR BOOT AND SHOE HEELS.

The Coburn patent, No. 364,217, for an improved mold for molding the heels of boots and shoes, covers a meritorious, practical, and useful improvement in the art, which was not anticipated, and discloses patentable invention.

In Equity. Suit for infringement of letters patent No. 364,217, issued to Gilman R. Coburn June 7, 1887, for a mold for molding heels for boots or shoes. On final hearing.

James E. Maynadier and George A. Rockwell, for complainant.
Charles H. Drew, for defendants.

COLT, Circuit Judge. This suit is brought upon the Coburn patent, No. 364,217, dated June 7, 1887, for an improved mold for molding the heels of boots and shoes. The invention is for a lip or raised projection on the front of the mold. By means of this lip, the front part of the heel, when molded in a molding machine, "will be squeezed harder than the body of the heel, and beveled according to the shape of the projection; * * * thus molding the heel and beveling its front portion at one operation, and avoiding the use of a hand knife or machine." To avoid marking or marring the sole in the operation of breasting the heel when placed on the shoe, it is necessary to bevel the front part of the heel, so that it will not bear upon the sole. Before the Coburn invention this was done by hand or by a skiving machine. The Coburn mold, with its raised projection cast in a single piece, accomplishes by one operation what previously had required two operations. His mold produces the beveled edge of a heel blank simultaneously with the molding of the heel by compression. It also makes a firmer and harder heel at the back by its tendency to crowd and push the inner lift of the heel blank backward toward the rear edge of the heel. In the art of manufacturing heels the Coburn device represents a step in advance. It has proved a meritorious, practical, and useful improvement. Nearly all molded heel blanks are now compressed in a molding machine having the Coburn lip. In view of these considerations, I do not think the patent is void for lack of invention. Nor do I find the patent anticipated by anything shown in the prior art. Nothing resembling the Coburn lip is found in prior patents for molding machines which compress the heel blank on all sides, or in the pressing machines of the earlier art, in which only the top and bottom of the heel were pressed together. The only thing in the prior art which calls for notice as an anticipation is the Cobb iron die, used for a short time several years before Coburn applied for his patent. This die has a front raised projection or lip; but its purpose was not the same as the Coburn lip, nor are the two lips identical in form. The Cobb lip was for depressing the front of the heel for the purpose of fitting the shank of the shoe, while the Coburn lip is for the purpose of leaving a space next to the sole, so that the front of the heel may not bear upon the sole. The Cobb die was abandoned. This is not strange when we read how it operated. For instance, in stating the manner in which the heels, after being pressed, were taken out of the die, Cobb says:

"The way we did, we took and put a narrow piece of cloth right across before putting the heel in; then, after it was pressed, we took hold of the ends of the cloth and pulled the heel right out."

The claim of the Coburn patent is for "the mold, B, having the forepart, b, raised, as shown, and for the purpose described." This claim must be read in connection with the specification; and it covers, not simply a die with a lip, but a mold having such a raised projection that, when placed in a molding machine, it effects the purposes set forth in the patent. So construed, the claim covers, in my opinion, a

new and patentable improvement in the art of making heels for boots and shoes.

Decree for complainant.

SCOTT v. TECKTONIUS.

(Circuit Court, E. D. Wisconsin. July 24, 1899.)

PATENTS—INFRINGEMENT—BAND FASTENING.

The Scott patent, No. 391,340, for a band fastening, was not anticipated, is valid, and entitled to a fair, if not liberal, construction, covering not only the precise form of construction of the parts described, but plain equivalents performing the same function in the combination. As so construed, *held* infringed.

In Equity. Suit for infringement of letters patent No. 391,340, for a band fastening, issued to John M. Scott October 16, 1888. On final hearing.

On final hearing, under bill of complaint alleging infringement of letters patent No. 391,340, issued to complainant October 16, 1888, for an improvement in band fastening. The patent states two claims, infringement being alleged of each, as follows: "(1) The herein-described clamp for uniting the ends of hoops or bands or tightening the same, consisting of a pair of heads recessed and apertured, as set forth, and provided with cross-bars, grips loosely mounted therein, and a rod extending through one head into and through the opposite head, having screw-threaded ends with nuts thereon, substantially as described. (2) The herein-described clamp for uniting the ends of hoops or bands or tightening the same, consisting of a pair of heads enlarged at one end and reduced at the other, having apertures and recesses therein, and cross-bars, as set forth, the grips loosely and removably mounted in said heads, and having enlarged outer ends and inner concaved downwardly projecting ends with a smooth-bored aperture passing therethrough, and the threaded rod or bolt passing through said heads and nuts, substantially as described."

Wallace Ingalls, for complainant.

H. G. Underwood, for defendant.

SEAMAN, District Judge. The defendant, by his answer, denies both infringement and the validity of the patent, and sets up prior patents and uses by way of anticipation, and as showing the prior state of the art as well. Infringement is the only issue which requires serious consideration on the view I take of the undisputed testimony; and the inquiry as to infringement depends wholly upon the rule of construction which is applicable to the claims of this patent. The contention on the part of the defendant calls for a narrow rule which would, in effect, limit infringement to the precise construction shown in the drawings and specifications, founding such view upon the terms of reference and limitation found in the claims, and upon the alleged slight advance over the prior art in the invention. If such is the rule which must be applied, it is manifest that the variations in the defendant's device are sufficient to avoid infringement. That there is patentable invention in the device described is not fairly disputable upon this record. It is true that the elements which enter into the combination are not new, when separately considered, and that the use of a pair of

lugs, of a threaded tie-bolt arranged for tightening the band, and of other components of the device, were not novel in their application, in one form or another, to adjusting and fastening hoops or bands. But the novelty and merit of the combination clearly appears both in the ready adjustment by which the bands can be applied without requiring accurate measurement and preparation at the shops, and by which it is fastened by the mechanism of the lugs, without rivets or other means tending to weaken the band. Neither of these important results was accomplished or fairly approached in the prior art, and the accomplishment of both results by the means devised was a distinct advance in that art, and, unless this meritorious character of the invention is lost through terms of restriction in the claims of the patent, the invention is entitled to recognition by fair, if not liberal, construction. Bundy Mfg. Co. v. Detroit Time-Register Co., 36 C. C. A. 375, 94 Fed. 524. In making the application for patent the device and its purpose were well described, but the claims of invention were not stated with desirable clearness and breadth. No limitation was imposed by action in the patent office, and I am not satisfied, under the circumstances shown, that the set phrases of reference to the specifications must be held of such force as to limit the grant to the precise construction of each element as described, thus destroying any value in the patent; but am of opinion that a plain equivalent performing the same function in the combination is covered by the patent. So construed, it is clear that the defendant's device is a mere colorable deviation. Much stress is placed upon an asserted difference in principle,—that one holds the band ends by a "bending grip," whilst the other provides a "friction wedge." It appears to me sufficient that the "bending grip" is produced by each, and necessarily so from the form in which the head is made and used in each, the difference being in degree only. The patents issued to the defendant, and appearing in the record, are not referred to in the argument on behalf of defendant, and I do not regard them as material.

Decree will enter in accordance with the prayer of the bill.

In re COLTON EXPORT & IMPORT CO.

(District Court, S. D. New York. April 10, 1902.)

BANKRUPTCY—PREFERENCES—SURRENDER—NECESSITY.

Bankruptcy Act, § 60a, provides that a preference exists where the effect of the transfer is to enable one of the bankrupt's creditors to obtain a greater percentage of his claim than other creditors of the same class. Section 57g declares that the claims of creditors who have received preferences shall not be allowed unless they are surrendered. A creditor of a corporation, after its insolvency and within four months of the adjudication, loaned it $40,000, and afterwards received payments of some $26,000. During the same period other creditors had put merchandise into the estate, and had received nothing on account. It further appeared that the payments to the creditor in question were made after he had obtained representation on the corporation's board of directors. *Held*, that the creditor had received a preference of $26,000, which would have to be surrendered before he could prove the balance of his claim.

In Bankruptcy.

Sproull, Harmer & Sproull, for creditor Leach.
Merrill & Rogers, for trustee.

ADAMS, District Judge. The question presented here arises on a review of the referee's allowance of a creditor's claim without the surrender of an alleged preference received by him. The trustee of the estate filed petitions with the referee during 1901, praying for the re-examination of certain claims filed by creditors, on the ground that they had received part payments on account of their claims from the bankrupt while insolvent, and within four months of the filing of the petition. Among other claims was one by Arthur B. Leach for $14,428.08. Upon the re-examination it was found that Leach had received a preference of $27,457.98, and his claim was disallowed unless he should surrender the preference. Thereafter Leach moved for a reconsideration on the ground that both the indebtedness of the bankrupt to him and the payments made to him and asserted in the order to be a preference, were made by the bankrupt within four months of the filing of the petition, and that the dealings between the parties resulted in an increase of the indebtedness of the bankrupt to Leach. Upon such reconsideration, the following facts were agreed upon, viz.:

"(1) The facts contained in the recitals of said decree." (These facts appear herein so far as necessary for the present discussion.)

"(2) The Colton Export & Import Company above named, was insolvent on and at all times after the 19th day of October, 1900."

"(3) The petition to adjudge the said company a bankrupt was filed with the clerk of this court on the 29th day of January, 1901."

"(4) Between the said 19th day of October, 1900, and the 29th day of January, 1901, the said company borrowed of and became indebted to said Leach in the sum of $42,027.03."

"(5) After the loans were made as aforesaid, and between the 15th day of November, 1900, and the 15th day of December, 1900, the said company made payments to the said Leach on account of its said indebtedness in the sum of $27,598.05. The following statement shows these transactions:

Loans to the Colton Company:		
Oct. 20, 1900	$10,000 00	
Oct. 30, 1900	2,447 03	
Nov. 9, 1900	1,978 00	
Nov. 13, 1900	10,000 00	
Nov. 13, 1900	7,602 00	
Nov. 22, 1900	10,000 00	
Total		$42,027 03
Payments by the Colton Company:		
Nov. 27, 1900	$14,185 58	
Dec. 5, 1900	2,551 59	
Dec. 10, 1900	10,000 00	
Dec. 10, 1900	690 81	
Dec. 12, 1900	170 07	
		27,598 05
Making a net balance due of		$14,428 98

"(6) The circumstances under which the loans were made by Mr. Arthur B. Leach were as follows: The Colton Company was a corporation engaged in the exporting and importing of merchandise between its principal place of business in New York City and its branches in Japan and Manilla. The Company was also engaged in buying and selling goods itself and taking orders for goods here and sending orders to its representatives in Japan to be filled.

When the goods arrived here the Company had not the funds to take up the drafts and pay the duties. Prior to July 1900 the Bank of Montreal had purchased of the said Company these drafts with bills of lading attached as collateral representing the goods in process of shipment; on or about the 1st of July, 1900, the Bank of Montreal held over Seventy-five thousand ($75,000) dollars of these drafts and refused to purchase more. The United States Mortgage and Trust Company was then applied to by the Company, and at the request of Mr. Leach, who gave his guaranty to the Trust Company to the extent of Seven hundred ($700) dollars, the said Trust Company purchased drafts to the amount of about Six thousand ($6,000) dollars and thereupon refused to purchase more. Between the 1st of July, 1900, and the 19th of October, 1900, the said Arthur B. Leach on his own account purchased of the said Company these drafts with bills of lading attached as aforesaid in the sum of more than Forty thousand ($40,000) dollars. After October 19th, 1900, Mr. Leach purchased no more drafts of the Company but made the unsecured loans hereinbefore stated. The said Leach and Charles W. Colton, the president of the said Colton Company, have testified in this proceeding, which testimony is uncontradicted, that said loans were made upon the oral understanding that as the goods were delivered to and paid for by the party who had ordered them, or if bought for the Company for its own account to sell again, then, when the Company had sold the goods, the proceeds of the sale, less the Company's profit, were to be turned over to Mr. Leach. Mr. Leach and the president of the Company, Charles W. Colton, were personal friends, and the Company was in need of money; consequently no such understanding was adhered to; all or nearly all of the proceeds of the sale were left with the Company, and used by the Company to pay for merchandise and other regular expenses, and in this way the indebtedness accumulated and increased from time to time."

"(7) On March 16, 1901, the creditor, Arthur B. Leach, filed proof of claim with the referee herein in the sum of the balance of his indebtedness, namely, $14,428.98."

"(8) On the 19th day of October, 1900, the said Leach was the owner and holder of One hundred shares of the stock of the Colton corporation and thereafter and on or before the 14th of November, 1900, he transferred said stock without consideration to one Frank C. Darling, a clerk in his employ."

"(9) On November 14th, 1900, two of the three directors constituting the Managing Board of the said corporation resigned, and were succeeded by the said Darling as the representative of said Leach, and one Charles C. Campbell, a brother-in-law of said Leach, who, with Charles W. Colton, the president of the Company, made up the Board of Directors of said Company at all times thereafter."

"(10) At all the times hereinbefore mentioned, i. e. between October 19th, 1900, and January 29th, 1901, there were other unsecured merchandise creditors of said company representing an indebtedness of more than $10,000, who received nothing from said Company on account thereof, but all the money loaned by said Leach, except such as was paid back to him, was used in the regular course of the business, and largely to pay off merchandise creditors of the Company."

"(11) Between the 19th day of October, 1900, and the 29th day of January, 1901, the Colton Export & Import Company purchased merchandise of different persons, who received nothing on account of such indebtedness, and their proofs of claim have been allowed herein."

The referee's opinion is as follows:

"This is a motion for a rehearing or review of an order heretofore made, so far as it affects the claim of A. B. Leach."

"Objections to various claims were heretofore made on the ground that those proving such claims had received preferences. An order, dated February 3rd, 1902, disallowed various claims unless preferences which had been paid should be returned to the trustee. Among other such claims was that of Arthur B. Leach. The claim as proved was for $14,428.98. The order

found that he had received a preference of $27,457.98, and directed that that be repaid before his claim should be allowed. No point was made on the first hearing that Mr. Leach had advanced more money than he had received after the bankrupt became insolvent. The facts stipulated show that within four months prior to the bankruptcy, and while the bankrupt was insolvent, Mr. Leach loaned to the bankrupt $42,027.03, without security, and that he received on account $27,598.05, leaving a net balance due of $14,428.98, which he proved. It appears from these facts that the estate, after its insolvency, gained more than it lost by the total transactions between the bankrupt and Mr. Leach; and I therefore think that there was no preference under the cases of In re Dickson, 7 Am. Bankr. R. 186, 111 Fed. 726; Peterson v. Nash, 7 Am. Bankr. R. 181, 112 Fed. 311; and McKey v. Lee, 5 Am. Bankr. R. 267, 45 C. C. A. 127, 105 Fed. 923."

"The trustee's counsel claims in his brief filed that there are various grounds upon which this case can be distinguished from those cited, but I am not able to see that there is any substantial difference in principle between them."

"I think that the motion should be granted, and an order entered amending the order of February 3rd, by striking out the provision requiring Mr. Leach to repay any amount, and providing that his claim, as filed, should be allowed."

The cases cited by the learned referee are not, I think, strictly in point. In McKey v. Lee certain sales were made subsequent to the receipt of innocent preferences, and set-offs were allowed under paragraph "c," § 60, of the act. In Peterson v. Nash that paragraph was also applied to enable a creditor to offset new credits against preferential payments so as to nullify the latter. The language of those cases, while incidentally touching the controversy here, should be confined in its application to the state of facts then under consideration. In this case, all the payments which are said to constitute the preference were made after the last loan, so that no question of set-off can affect it. In re Dickson was a case where payments for previous purchases were usually made at the end of the month for goods purchased within the month, each of the purchases being paid for by itself. The petition in bankruptcy was filed on December 13, 1899. Going back four months, the last transaction prior thereto was on August 10th, which was a sale of merchandise amounting to $128.20. There had been a sale on August 7, 1899, amounting to $676.01, the total of these sales being $804.21. On the 13th of August, just four months before the petition was filed, the bankrupt owed the creditors only this amount of $804.21. All merchandise sold prior to the 13th of August had been paid for, the last payment having been made on August 8th. There were subsequent transactions, within the four months preceding the filing of the petition, by which notwithstanding the payments during the time increased the indebtedness $1,369.99. Upon these facts it was held that as there was no intention to acquire any unjust preference and the creditors had by the transactions increased the bankrupt estate, they were entitled to prove their claim. The court there says that the Supreme Court in Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, had not in terms passed upon the proposition arising from the fact that no payments had been made during the four months on account of any merchandise the price of which constituted any particular item offered to be proved, and it was not bound to follow a literal interpretation of the act when it would result so unjustly in the case under consideration. It did not appear there,

however, that there were any other creditors of the same class with the one whose claim was allowed.

In this case, it appears that there were other creditors of the same class with Leach. He had after insolvency and during the four months preceding the filing of the petition put more money into the estate than he had received from it but he had received payments on account. Other creditors had put merchandise into the estate during the same period and had received nothing whatever on account. Money and merchandise cannot be legally distinguished in these matters (Pirie v. Trust Co., 182 U. S. 443, 21 Sup. Ct. 906, 45 L. Ed. 1171; McKey v. Lee, 5 Am. Bankr. R. 271, 45 C. C. A. 127, 105 Fed. 923), and I do not see how it is possible here to avoid the unmistakable meaning of section 60a, providing that a preference exists where the effect of the transfer will be to enable any one of a bankrupt's creditors to obtain a greater percentage of his debt than any other of such creditors of the same class, and of the provision of section 57g, that the claims of creditors who have received preferences shall not be allowed unless there is a surrender of the preferences. In this case, Leach loaned the bankrupt, say, $40,000, and received payments of, say, $26,000. If his present claim is allowed, and there should be a dividend of 50 per cent., he would receive $7,000 on the balance, and altogether $^{33}/_{40}$, or about 82 per cent., of his whole claim. The other creditors, participating in the dividend only, would receive 50 per cent. of their whole claim. It is true that certain equitable considerations appear in Leach's claim, from the fact that he paid more into the estate than he received from it, which would seemingly bring it within the general language employed in the cases cited in support of the referee's decision, and which might tend to establish the claim if it should be made manifest that the other creditors had received a benefit from an enlargement of the estate through the loans made by Leach, of which their own contributions to the estate did not form a part, but the other creditors here seem to be in substantially the same position as Leach. Moreover, I think that an intent to prefer Leach can properly be inferred from the circumstances. He appears to have been on the same footing as other creditors until he obtained representation upon the board of directors, and it was after securing control, to some extent at least of the insolvent corporation, that he obtained his payments on account, while the other creditors were getting nothing. I see no reason for attempting to avoid the letter of the act in this case. Equality, within its meaning, will be secured by adhering to it.

The order of the referee allowing the claim is reversed.

In re CHAPLIN.

(District Court, D. Massachusetts. March 20, 1902.)

No. 4,534.

1. COMPOSITION WITH CREDITORS—EFFECT OF SECRET PREFERENCE.

If a debtor entering into a composition with his creditors secretly pays one of them more than contemplated in the composition, the preference so given is fraudulent, not only as against the debtor, but as against the other creditors, and, in the interest of both, is voidable.

If the amount of the preference has not been paid, its payment cannot be enforced; and, if paid, it may be recovered back, even though the payment was voluntary, at least by a trustee in bankruptcy of the debtor, who represents his creditors. The further effect of such a preference is to avoid the composition as to the innocent creditors, who may retain the amount received, and enforce against the debtor the amount remaining due on their original claims, but to leave the composition binding on the preferred creditor, who, after returning the preference, may retain the amount due him under the composition, if received, or enforce the notes given therefor.

2. BANKRUPTCY—PROVABLE DEBTS—SURRENDER OF PREFERENCES.
Where a creditor of a bankrupt in a former composition between the bankrupt and his creditors received a secret preference, which, under the general principles of equity, was fraudulent and voidable, such preference may be recovered by the bankrupt's trustee, although received more than four months prior to the bankruptcy; and the creditor must surrender the same before he can prove his debt, whether it arose out of the composition, or was subsequently contracted.[1]

3. SAME—AMOUNT OF PREFERENCE—NOTE OF THIRD PARTY.
A debtor effecting a compromise with his creditors transferred to one, as a secret preference, a note of a third person, which the creditor applied, at its face value, on his debt; receiving payment on the balance due him at the composition rate. The debtor was afterwards adjudged a bankrupt, and the creditor sought to prove other debts against his estate. *Held* that, in determining the amount of the fraudulent preference received by him in the composition, he must be charged with the note at its face value, regardless of the amount which he actually realized from it.

4. SAME—MANNER OF ENFORCING SURRENDER.
Where a creditor of a bankrupt has received a fraudulent preference, recoverable by the trustee, such preference will not be treated as a set-off, either to reduce the amount of his claim, or against the dividend to be received thereon, but the amount must be surrendered to the trustee before he will be permitted to prove an independent debt.

In Bankruptcy. On review of decision of referee allowing the claim of a creditor.

Jesse C. Ivy, for trustee.
Charles K. Cobb, for creditor.

LOWELL, District Judge. The trustee seeks to review the decision of the referee allowing the claim of the Batchelder & Lincoln Company. That claim is made up of two parts: (1) A note for $5,800; (2) merchandise indebtedness of about $4,500.

1. The following facts are not in dispute: On January 1, 1896, the bankrupt owed the creditor $12,026.94. He had made a voluntary assignment for the benefit of his creditors, and they agreed to take 50 per cent. on their indebtedness. On January 23d the bankrupt delivered to the creditor certain notes made by the former. At the same time he agreed to hold for the creditor's benefit a note of one Stevens, made to the bankrupt, which note was afterwards transferred to the creditor. The creditor advanced money to the bankrupt to pay the composition. The amounts of the several notes and the account of the transaction were as stated in the memorandum copied below, which was made at the time between the bankrupt

[1] See Bankruptcy, vol. 6, Cent. Dig. § 500.

and Mr. Tileston, the treasurer of the creditor. This is not now disputed by the creditor, though it was not admitted at the hearing before the referee, whose attention was not particularly directed to it:

B. & L. claim	$12,026 94
C. H. Stevens note on demand	3,411 28
	2)8,615 66
50% of balance of claim	$ 4,307 83
Loan from B. & L. Co.	10,000 00
Bal. of claim due	4,307 83
	$14,307 83
Paid by check	6,013 47
	$ 8,294 36

In Settlement with the B. & L. Co.

Notes Dated January 23, 1896.

$1,000.00. Int. 1 mo. 3 da	$ 5 50
$1,000.00. Int. 2 mo. 3 da	10 50
$1,000.00. Int. 3 mo. 3 da	15 50
$1,307.83. Int. 4 mo. 3 da	26 51
$3,986.53. Int. 4 mo. 3 da	81 73
	$ 140 04

The creditor now further explains this transaction as follows (and, subject to some further observation, I believe the explanation is correct): The face of the Stevens note was first deducted from the general indebtedness due January 8th. One-half the balance was then figured, to determine the balance to which the creditor was entitled under the composition. The first four notes were given in payment of this balance. Ten thousand dollars was advanced by the creditor to the bankrupt, with which to pay the composition. Inasmuch as the assignee and the other creditors were not to be informed of the transaction between the creditor and the bankrupt, the creditor was paid by the assignee, in cash, 50 per cent. of its original claim, which payment was immediately treated as a repayment of part of the loan of $10,000. The fifth and last note was given for the balance of that loan. In substance, the transaction amounted to this: Instead of 50 per cent. of its claim in cash, the creditor received $4,307.83 in notes of the bankrupt, and the Stevens note for $3,411.28, on which last note some interest was then due. Furthermore, the creditor lent the bankrupt about $4,000, for which a separate note was given. The note of $5,800 represents, by renewals, this last note of about $4,000, and a subsequent and wholly unconnected indebtedness of $1,800. Chaplin was adjudicated bankrupt on an involuntary petition filed April 9, 1901.

Upon the face of the figures the Batchelder & Lincoln Company received more than did the other creditors, but the company's counsel contends that there was no fraud in taking the Stevens note. It may have been worth less than its face value, and he argues that the fair value of the Stevens note and of the notes for $4,307.83 amounted

to no more than 50 per cent. of the creditor's original claim, and so the company took no advantage of the other creditors. But the failure to explain the transaction to the assignee and to the other creditors leaves no doubt in my mind that an improper preference was made and intended. The whole transaction, including the large advance made by the creditor to the bankrupt, was so complicated that neither the creditor nor the bankrupt may have intended any serious wrong, yet a preference, fraudulent in the eye of the law, was given and received. The effect and amount of this preference must now be determined. Conflicting decisions and dicta, and the want of authority binding this court, call for a somewhat extended examination of the law. There are three parties to be considered in dealing with a transaction of this sort,—the debtor, the preferred creditor, and the innocent creditors. The rights and liabilities of one cannot be determined satisfactorily without considering those of all the others. The attempt to deal with one party at a time has led to confusion.

If a debtor, entering into composition with his creditors, secretly pays one of them more than the amount stated in the composition, the preference so given is deemed fraudulent. 1 Story, Eq. Jur. (13th Ed.) 384. This is true even if the preferred creditor provides the money for the payment of the composition offer. Wood v. Barker, L. R. 1 Eq. 139. If the preference consists of a note or other obligation given by the debtor, the debtor has a good defense to a suit by the preferred creditor on the obligation. If the note has been transferred to a bona fide holder for value, and so the debtor is compelled to pay it, he can recover the amount so paid from the preferred creditor. If the preference consists of money or other property, that money or property can be recovered back directly by the debtor from the creditor. The preference thus given is deemed fraudulent and voidable for two reasons: The first, because the transaction is deemed to be an oppression of the debtor by the creditor; the second and more important, because it is deemed to be a fraud committed by both the debtor and the preferred creditor upon the other creditors who are ignorant of the preference. "Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid or given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts there owing to the creditors who signed the deed." Breck v. Cole, 4 Sandf. 79, 83. The wrong done to the innocent creditors is at once less and greater than that done to the debtor himself. On the one hand, they sustain no direct loss. They have compounded their claims for so much, and they receive the amount of the composition. The preference is not taken directly from their pockets, as it is taken from the pocket of the debtor. On the other hand, the creditors are innocent, and are ignorant of the inequality created. The debtor knows it, has consented to it, may have procured it. He may even have induced the favored creditor to enter into the agreement for a preference,

in order to get his assent to a proposed composition, which assent the creditor had a perfect right to withhold. It is for the benefit of the innocent creditors that the debtor should be able to resist the payment of the preference, and to recover back any payment that has been made. A composition is ordinarily assented to by creditors in order that their debtor may continue a business from which they hope to derive a profit. See Cockshott v. Bennett, 2 Term R. 763. This profit will be the greater, and they may deal with him the more safely, the larger are his assets. It is for their interest that these assets should not be lessened by the payment of the preference, and that they should be increased by the debtor's recovery back of a preference once paid. This is a better reason for requiring equality in a composition than is the supposed right of one creditor to have all other creditors suffer equally with himself. Knight v. Hunt, 5 Bing. 432; Ex parte Oliver, 4 De Gex & S. 354; Jackman v. Mitchell, 13 Ves. 581. It may reasonably be surmised that this interest of the innocent creditors in the debtor's estate, even more than a supposed oppression of the debtor, has led the courts to determine that a debtor, though guilty of the fraud, is not in pari delicto with the preferred creditor, and so may recover back the preference. It has been said, indeed, that there can be no recovery by the debtor where the payment was voluntary, but this statement has been greatly modified. See Atkinson v. Denby, 6 Hurl. & N. 778; Id., 7 Hurl. & N. 934; Crossley v. Moore, 40 N. J. Law, 27. At all events, the voluntariness of the payment should not prevent a recovery by the debtor's trustee in bankruptcy. He represents the creditors, and is not in delicto at all. As to them, the preference is none the less a fraud because voluntarily given by the debtor. See Bean v. Brookmire, 2 Dill. 108, Fed. Cas. No. 1,170; Middleton v. Lord Onslow, 1 P. Wms. 768; Eastabrook v. Scott, 3 Ves. 456; Alsager v. Spalding, 4 Bing. N. C. 407.

Thus far the decisions mainly agree. If, however, the only penalty for the preference given and received is a liability to repay it by the creditor preferred, manifestly there is little to deter that creditor from receiving, and nothing to prevent the debtor from giving, the preference. The former can but lose it. In no case will he be worse off than if he had been honest. The latter is provided with an opportunity to play fast and loose with the preferred creditor, as well as with creditors who are innocent. Many courts have declared, accordingly, that the secret preference avoids the composition. Musgat v. Wybro, 33 Wis. 515; Church v. Robbins, *81 Pa. 361; Cobb v. Tirrell, 137 Mass. 143; Manufacturing Co. v. Lockwood, 3 McCrary, 608, 11 Fed. 705; Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; Kahn v. Gumberts, 9 Ind. 430; Bank v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359; Id., 11 Mo. App. 475; Saul v. Buck, 72 Ga. 254; Child v. Danbridge, 2 Vern. 71; Ex parte Milner, 15 Q. B. Div. 605; Dauglish v. Tennent, L. R. 2 Q. B. 49. There are, indeed, some authorities to the contrary. See Bank v. Blake, 142 N. Y. 404, 37 N. E. 519, 27 L. R. A. 33, 40 Am. St. Rep. 607; Pollock, C. B., in Atkinson v. Denby, 6 Hurl. & N. 778; Bartlett v. Blaine, 83 Ill. 25, 25 Am. Rep. 346; Page v. Carter, 16 N. H. 254, 42 Am. Dec.

726; Railroad v. Eastman, 34 N. H. 124, 143. But the great weight of authority is in favor of the proposition just stated. The innocent creditors may sue the debtor for the unpaid balance of their original claims, without returning the dividend received under the composition, and the debtor cannot plead the composition as a release. What, then, is the effect of the composition upon the rights of the preferred creditor? So great has his guilt been deemed by some courts that they have held that he could not recover even the offered composition. Doughty v. Savage, 28 Conn. 146; Frost v. Gage, 3 Allen, 560; Howden v. Haigh, 11 Adol. & E. 1033; Ex parte Phillips, 36 Wkly. Rep. 567. See Baldwin v. Rosenman, 49 Conn. 105; Mallalieu v. Hodgson, 16 Q. B. 689; Higgins v. Pitt, 4 Exch. 312, 323; Ex parte Oliver, 4 De Gex. & S. 354. If the preferred creditor is thus deprived of his rights under the composition, courts must next decide if payments received by the preferred creditor under the composition can be recovered back from him as well as the preference. No court has gone to this length. See Low. Bankr. § 109. And yet if the preference can be recovered, even by the debtor himself, because the transaction is fraudulent, and if this fraud so pervades the whole transaction that the preferred creditor loses his rights under the composition, it is hard to see why the trustee in bankruptcy cannot recover back from the preferred creditor the payments received by the creditor under the composition as well as the preference. To make the rights of the preferred creditor under the composition depend altogether on the payment of the composition in money or in notes, permitting him to retain it in the first case, and not permitting him to collect it in the second, is not in accord with substantial justice. As between the creditor and the debtor, this result can be defended only upon the theory that they are both in pari delicto, and so are to be left where they lie. But it has been determined that they are not in pari delicto. As between the preferred creditor and the innocent creditors, no reason has been suggested for permitting a preferred creditor to retain a composition payment received, while denying him the right to collect it when due.

For the sake of the argument, however, let us consider the theory stated in some of the cases above cited, viz., that the preferred creditor, while retaining the composition payments already made, and having refunded the preference, cannot collect from the debtor or his assignee in bankruptcy the amount still due under the composition. It is possible to test the correctness of this theory by working it out to its final result. One of two things must happen: The original debt of the preferred creditor must (a) revive, or (b) it must not. If (a) it revives (See Howden v. Haigh, 11 Adol. & E. 1033, 1039; Chuck v. Mesritz, Fed. Cas. No. 2,710), the case will stand thus: All debts originally due by the debtor will be owing, as if no composition had been made; and all creditors, including the creditor originally preferred, will stand on an equality. The preferred creditor will thus be left none the worse off for his fraud, while the condition of the debtor who becomes liable on the original debt is left worse than it would have been if the preference and the composition were allowed to stand. This result is so unsatisfactory that it seems that the original

debt of the preferred creditor cannot be permitted to revive. Mallalieu v. Hodgson; Ex parte Oliver; Ex parte Phillips; O'Brien v. Greenebaum, 92 Cal. 104, 28 Pac. 214. It is not necessary to discuss here cases like Elfelt v. Snow, Fed. Cas. No. 4,342, and Armstrong v. Bank, Fed. Cas. No. 545, in which a creditor, though preferred, was permitted to avoid a composition as against a debtor who had procured its execution by a fraud not connected with the preference. See, also, Walker v. Mayo, 143 Mass. 42, 8 N. E. 873, where the composition failed for a reason unconnected with the preference. If, however, (b) the original debt of the preferred creditor does not revive,—if he cannot recover the amount due him under the composition, and loses his original claim as well,—he gets too hard measure. That a debtor who, by giving him a preference, has induced a creditor to assent reluctantly to a composition, should be allowed to recover back from that creditor the preference, while depriving him of all rights arising under the composition, thus in many cases depriving him of his whole claim, cannot be tolerated. A fairly strong argument against the claim of the preferred creditor under the composition can be made upon technical grounds, indeed, but his claim has substantial justice on its side.

We find, then, that the theory which deprives the preferred creditor of his rights under the composition is unsatisfactory, for several reasons: (1) It implies a difference between retaining a payment and collecting an amount due, for which difference no good reason can be given. (2) If the original debt of the preferred creditor is revived, the debtor suffers unduly. (3) If the original debt does not revive, the preferred creditor suffers unduly. The cases which deny the preferred creditor's claim under the composition are inconclusive or unsatisfactory. In Baldwin v. Rosenman the preferred creditor had received payment under the composition, and the expression of opinion regarding the rights he would have if he had not been paid is but a dictum. In Doughty v. Savage the question concerned a recovery, not against the debtor, but against an indorser of the composition notes, who had no knowledge of the fraud. In Ex parte Oliver the creditor had received by way of preference an amount greater than that due under the composition, and seems to have been allowed to retain the former in lieu of the latter. See Knight v. Hunt, 5 Bing. 432; Bradshaw v. Bradshaw, 9 Mees. & W. 29. In Mallalieu v. Hodgson the suit was on the preference notes, and the remark concerning the forfeiture of the composition was obiter dictum. In Frost v. Gage, 3 Allen, 560, the suit was not against the debtor for the amount due under the composition, but against the assignee under the composition. The latter defended upon the extraordinary ground that the plaintiff, himself a creditor, had agreed to give him (the assignee) a secret preference; and the court sustained the defense by holding that the creditor could not recover under a composition agreement which had been obtained by his fraud. In the result, therefore, the preferred creditor, the defendant in the suit, was permitted to retain the sum due him under the composition, the preference (if he had been paid, which does not appear), and the dividend of another debtor, the plaintiff in the suit, whose only offense consisted in the payment of a preference out of his own

pocket to the defendant. This result was certainly not in accordance with justice, and does not furnish a strong argument for the theory asserted in the opinion, viz., that the preferred creditor should be deprived of his rights under the composition. The defendant offered to prove, indeed, that the plaintiff had agreed not to claim under the composition; but the decision was not rested upon this ground. In Howden v. Haigh the preference consisted in an outstanding bill, which might be so negotiated that the debtor would have to pay it. Moreover, it was the hardness of that case which led to the suggestion that the original debt might revive. In Ex parte Phillips the suit was on the original debt, and the remark concerning the forfeiture of the composition was obiter dictum. The creditor there had received money from the debtor, which he seems to have been allowed to retain. That course appears better, therefore, which leaves to the preferred creditor his rights under the composition, both to collect the sums still due thereunder from the debtor, and to retain the sums already received. White v. Kuntz, 107 N. Y. 518, 526, 14 N. E. 423, 1 Am. St. Rep. 886; Bank v. Blake, 142 N. Y. 404, 37 N. E. 519, 27 L. R. A. 33, 40 Am. St. Rep. 607; Fairbanks v. Bank (C. C.) 38 Fed. 630. As to him the composition is held valid, and so he suffers in comparison with the innocent creditors, because he is deprived of that claim against the debtor for the balance of the original debt which the avoidance of the composition has restored to the innocent creditors. O'Brien v. Greenebaum, 92 Cal. 104, 28 Pac. 214. As between the preferred creditor and the debtor, the former is allowed as much as, and not more than, he would have been entitled to had he honestly entered into the composition without seeking a preference. His right to refuse to enter into the composition, which he may have given up for the sake of the preference, is lost. If the composition has not been paid, then, after the fraudulent preference has been returned, the preferred creditor may be permitted to recover the composition due. Where both preference and composition are in money, the preferred creditor may, to avoid circuity of action, be permitted to recover so much of the composition as, added to the preference received, equals the total composition. See Knight v. Hunt, 5 Bing. 432; Bradshaw v. Bradshaw, 9 Mees. & W. 29. But if the composition offered is in notes, and the preference was received in cash, it seems that the whole preference must be returned. Bean v. Amsinck, Fed. Cas. No. 1,167. I hold, then, that the creditor here seeking to prove has received a fraudulent and voidable preference, which can be recovered back by the trustee in bankruptcy, but that the creditor's rights under the composition are not affected by the fraud. The sums received by the creditor in composition cannot be recovered back. As to it the composition is not avoided, and so it cannot prove its original claim against the bankrupt, as can the innocent creditors.

We have, therefore, a creditor who has received a fraudulent and voidable preference upon one debt, and who seeks to prove another. The preference must first be surrendered, even though it be not a statutory preference,—at any rate, if it be such a preference that it can be recovered by the trustee. In re Steers Lumber Co. (C. C. A.) 112 Fed. 406, which holds that a preference received on one debt need not be

surrendered in order to prove another, is contrary to the long-established practice in this district, to the opinion of the circuit court of appeals for this circuit in Dickson v. Wyman, 49 C. C. A. 574, 111 Fed. 726, and to the great weight of authority. See In re Ft. Wayne Electric Corp., 39 C. C. A. 582, 99 Fed. 400; In re Rogers Milling Co. (D. C.) 102 Fed. 687; In re Teslow (D. C.) 104 Fed. 229; In re Gillette (D. C.) 104 Fed. 771; In re Bashline (D. C.) 109 Fed. 965. Some of these cases illustrate the difficulty of distinguishing between independent and connected transactions. The preference here is not one defined by the statute, but is a preference by the ordinary principles of equity. An action for its recovery is not limited by the four-months period. Section 60b; Bean v. Brookmire, 1 Dill. 24, Fed. Cas. No. 1,168. What is the amount of the preference to be surrendered must next be considered.

Under the composition, the creditor should properly have received 50 per cent. of its claim,—$6,013.47. Through the payment of the promissory notes given to it by the bankrupt, it has received $4,307.83, which payment is to be treated as if it had been made in cash at the time the other creditors were paid. There remains $1,705.64 which the creditor was then entitled to receive under the composition offer. The creditor received the Stevens note, which apparently should be treated as a note for $3,513.65. So far as this note paid the balance due under the composition, the creditor was not preferred thereby. It was preferred only to the extent of the excess. The creditor contends that, inasmuch as it actually received on the Stevens note but $5.21 more than the amount due under the composition offer, the fraudulent preference given and received amounted only to $5.21. There is some force in this contention, but, upon the whole, I think that, in calculating the amount of the preference given, the Stevens note must be taken at its face value. The creditor did not seek to enforce collection of it at its maturity, but permitted it to run on for a considerable time. This it may have done for reasons other than impossibility of immediate collection. Considering the improper nature of the whole transaction on the creditor's part, and considering that it is not the bankrupt, but the defrauded creditors, whose rights are now in conflict with its claim, the company cannot complain if the Stevens note is treated by this court as it was treated in the memorandum made at the time of the composition, viz., as a cash payment on account of his original claim. It follows, therefore, that the creditor has been preferred to the amount of $1,808.

The court has next to determine what is the effect of this preference of $1,808. Shall it be (1) treated as a set-off to reduce the creditor's proof of claim (Ex parte Minton, 1 Mont. & A. 440); (2) treated as a set-off against the dividend to be received on the creditor's claim (see Low. Bankr. § 215); (3) surrendered before the creditor can prove an independent debt? The first course does not seem to me permissible. In recovering back the preference, the trustee in bankruptcy does more than recover a debt due the bankrupt. He proceeds in the right of the creditors as well as in that of the bankrupt. Bean v. Brookmire, 2 Dill. 108, Fed. Cas. No.

1,170. As between the second and third courses, the latter is more in accordance with the general policy of the present act, and is therefore adopted.

2. As to the merchandise debt: This cannot be proved so long as there is a fraudulent and voidable preference, held unsurrendered by the creditor. It was also stated in argument, and not disputed, that certain preferential payments had been received thereon by the creditor, in ignorance of the debtor's insolvency. The case of In re Jones (D. C.) 110 Fed. 736, is now treated in this court as overruled by the opinion rendered by the circuit court of appeals in Dickson v. Wyman, 49 C. C. A. 574, 111 Fed. 726, though the decision in the latter case is not absolutely inconsistent with In re Jones. That the bankrupt was insolvent four months before bankruptcy is practically conceded in the brief of counsel for the creditor, and is doubtless the fact. If a preferential payment, within the rule of Dickson v. Wyman, was made to the creditor within four months of bankruptcy, that, also, must be surrendered before proof.

The judgment of the referee allowing the claim is reversed.

AMERICAN WATERWORKS & GUARANTEE CO. v. HOME WATER CO. et al.

(Circuit Court, E. D. Arkansas, W. D. March 26, 1902.)

1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—ACTION BY ASSIGNEE.

A mortgage given by a water company covering rentals accruing to it under a contract with a city is no more than an assignment of a chose in action as to such rentals, and the mortgagee cannot maintain an action against the city to enforce payment of the same in a federal court, where the mortgagor and the city are both corporations of the same state; nor can one claiming the right to enforce the contract by subrogation to the rights of the mortgagee.[1]

2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS—LAWS OF STATE.

Where a city is empowered by the laws of the state to contract for a water supply, and to grant an exclusive franchise to use its streets for such purpose to the person contracted with during the term of the contract, it acts under such power in a legislative, and not an administrative, capacity, and its enactments thereunder are laws of the state, within the meaning of the contract clause of the federal constitution.

3. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit to restrain the enforcement of enactments of a city, passed in the exercise of its delegated legislative powers, on the ground that they attempt to annul a contract made by a prior ordinance without notice to the other party or due process of law, involves a question arising under the constitution of the United States, and is within the jurisdiction of a federal court, where the requisite amount is involved, regardless of the citizenship of the parties.[2]

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[1] Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

[2] See Courts, vol. 13, Cent. Dig. § 821 [c, i, j, k]; 1899B Dig. § 79 [a], 1900B Dig. § 70 [b], 1901A Dig. § 73 [b], 1901B Dig. § 65 [b]; Constitutional Law, 1897 Dig. § 43 [a].

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

4. EQUITY JURISDICTION—ACTION ON CONTRACT—ENFORCEMENT OF LEGAL LIABILITY.

A right of action against a city to recover water rentals claimed to be due under a contract is at law, and a federal court of equity is without jurisdiction to enforce the payment of such rentals, even where it has acquired jurisdiction to determine other matters in controversy between the parties.

5. SAME—SUIT BY GUARANTOR—PRESERVATION OF SECURITY.

A guarantor of the bonds of a water company which has already under its contract paid interest thereon, on the company's default, so that the trustee has no ground for a foreclosure of the mortgage securing the same, is entitled to maintain a suit in equity against the city to prevent the annulment of the company's franchise, where such action will render valueless the mortgaged property, to the security of which the complainant has the right to be subrogated for its indemnity; and the city cannot raise the objection that complainant has not paid the entire debt, where it is not sought to take the property from the mortgagor, and the rights of the city are fully protected by the joinder of the mortgagor and mortgagee as defendants.

In Equity. On demurrer to title.

The complainant, the American Waterworks & Guarantee Company, a corporation organized under the laws of the state of New Jersey, filed its bill against the Home Water Company and Arkansaw Water Company, corporations organized under the laws of the state of Arkansas, and having their principal places of business in the city of Little Rock, in this district, the Farmers' Loan & Trust Company, a corporation organized under the laws of the state of New York, and the city of Little Rock, a municipal corporation organized under the laws of the state of Arkansas, and located in this district, and alleged: That on December 9, 1880, and at divers times thereafter, the city council of the city of Little Rock, under and by virtue of authority conferred upon it by the statutes of the state of Arkansas, adopted various ordinances, granting to the Home Water Company the franchise, right, and privilege of erecting and maintaining a system of waterworks in the city of Little Rock, and fixing the price to be paid by the city for water used by the city; also the pressure to be maintained, the kind of water to be used, etc. The Home Water Company, in the manner provided by law, accepted the said ordinances, and they became contracts between the city and the said water company. The ordinance adopted by the city council on November 3, 1885, provided, among other things, for an extension of the original franchise for the term of 50 years from the date of the passage of said ordinance, instead of 25, as at first provided; and the ordinance of August 1, 1892, fixed the rental price of fire hydrants to be paid by the city at $50 each per annum. That the Home Water Company performed all the provisions contained in the several ordinances and contracts, and expended large sums of money in carrying out said contracts and in improving its plant and facilities for furnishing the city with pure water, all of which was done with the full knowledge and under the direction and requirements of the city council, which possessed full power to enter into the aforesaid contracts. During the time the Home Water Company was engaged in making said improvements the city paid the hydrant rental agreed upon, and in all respects carried out the contracts according to the terms thereof, and insisted upon the due and prompt performance by the said water company of all its undertakings under said contracts. That, in order to enable the Home Water Company at all times to carry out its contracts with the city of Little Rock, the said Home Water Company procured the Arkansaw Water Company to construct the reservoirs and other improvements necessary, and to store for and deliver to the said defendant sufficient water, of suitable quality, to meet all requirements, and in consideration of said undertakings the Home Water Company executed to the Arkansaw Water Company a mortgage of its property, plant, and franchises, and assigned to it all the income and revenues that might accrue from the operation of its water plant. In order to obtain means to make the improvements above re-

ferred to and other improvements and extensions which became necessary, the Arkansaw Water Company executed and negotiated, at different times, 2,000 bonds, aggregating $2,000,000, and to secure the same executed deeds of trust to the Farmers' Loan & Trust Company, as trustee, conveying to said company all its waterworks and property in and near the city of Little Rock, and all revenues, rents, income, and profits, including all revenues and income that may accrue from and under the franchise and contracts granted by the city of Little Rock to the Home Water Company. In order to better secure the bonds and mortgages, the Arkansaw Water Company procured the complainant to guaranty the payment of the principal and interest of said bonds. Of these bonds, $1,150,000 are now outstanding, and $850,000 are held in trust by the trustee to provide for future extensions and improvements in the plant of said company. That, after the execution of the deeds of trust above mentioned, the Home Water Company conveyed to the Farmers' Loan & Trust Company its waterworks in and near the city of Little Rock, together with all land, machinery, outfits, etc., and rents, privileges, and franchises, under ordinances passed by the city of Little Rock, and all rights, rights of action, incomes, revenues, and profits from any source whatsoever, in trust for the uses and purposes, and upon the conditions set forth and contained in the deed of trust executed by the Arkansaw Water Company to the said Farmers' Loan & Trust Company. And the said Arkansaw Water Company executed a deed in fee simple absolute to the Home Water Company, conveying all of its property, rights, and income.

It is further alleged that, during the time of the execution of the mortgages and the issuance of the bonds referred to, the city of Little Rock paid the hydrant rental provided in the contracts, and never at any time questioned the validity of any of said contracts; and the said mortgages and bonds were executed and delivered by the Arkansaw Water Company, the trust accepted by the Farmers' Loan & Trust Company, and the guaranty made by the complainant, in full faith and belief that all of the said contracts were valid and binding; that there was no claim on the part of the city that said contracts were invalid on account of any defect of power or want of authority on the part of the city in executing the same, or that they were subject to change without the consent of the parties thereto. That the city has violated the contracts previously referred to, by asserting the same to be of no force and effect, and by declaring them to be forfeited for pretended noncompliance on the part of the Home Water Company with the terms of said contracts, without any previous notice to the said company, and the city has since refused to carry out said contracts or recognize them as binding, and has refused to make any payments under the contracts since June 30, 1899, thereby depriving the Home Water Company of its property, to wit, the unpaid rentals owing by the city, and the rights, privileges, and franchises enjoyed by said company, without due process of law, in violation of the provisions of section 10, art. 1, of the constitution of the United States, and of the provisions of section 1 of the fourteenth amendment to the constitution of the United States. By such acts and conduct the said city has injured the complainant and the Farmers' Loan & Trust Company by impairing their rights in the property as security and indemnity under the conveyances in trust mentioned previously. The city claims that the contract of November 3, 1885, is not binding upon it, as the city council had no power to enter into a contract that would bind succeeding councils for a term of 50 years, and that the hydrant rental provided in the contract of August 1, 1892, is excessive, and the city claims the right to revise the rates without the consent of the other contracting party, and refuses to pay the hydrant rental or perform its contract in any manner, although the Home Water Company has continued to render the service and supply water according to the terms of the contracts. The city sometimes claims that the Home Water Company has not performed its contract by furnishing pure water, and sometimes that it has not maintained the pressure called for by the contracts, but that such claims are untrue, and were not made in good faith, but are made for the purpose of carrying out the intention of the city to repudiate said contracts, and to force the

Home Water Company to enter into a new contract with the city. Among other things, said city, in further pursuance of its aforesaid design, through the board of public affairs and the fire committee, created by and representing the city council, did on February 26, 1900, cause a notice to be served on the Home Water Company, in words and figures as follows, to wit: "Some days ago the board of public affairs and fire committee of this city, in accordance with the recommendations of Hiram Phillips, hydraulic engineer, requested of you that you at once put in larger mains on Lincoln avenue, and certain parts of Main and Seventh streets. Since this, the city council has, by resolution, signified its desire that the whole question of your contract with the city should be thoroughly looked into, and has authorized the city attorney to employ an assistant for this purpose, if he so desired. In view of this, the board of public affairs desire that you take no further action on its request above referred to, unless upon your own motion, and without our waiving any right to insist upon a forfeiture of your charter and contract. With the present lights before us, the best course to be pursued is that the city is to insist that the contract existing between your company and it is no longer binding and enforceable upon it. We have repeatedly notified you, and do now, that you have not maintained a constant and average pressure as required by your contract; you have not furnished a full and adequate supply of water for the extinguishment of fires; you have not secured nor constantly maintained a supply of pure and wholesome water fit for domestic and manufacturing purposes; you have not maintained your pipe connections and machinery so that direct pressure could be given; your water mains have not been of sufficient capacity to meet the requirements of your contract; you have required the citizens to pay their bills six months in advance, when your charter only requires the bills paid monthly; you have charged consumers exorbitant charges for water meters and have required them to pay charge for reading meters. For these reasons, we hereby demand that your contract and charter be annulled." Afterwards the board of public affairs and the fire committee reported their said action and said notice to a meeting of the city council, and a resolution was adopted by the city council approving and confirming the action of said bodies.

It is also alleged that the acts of the city repudiating its contracts will seriously impair and eventually destroy the value of the property of the Home Water Company, and thus destroy the security of the bondholders, and will obligate complainant to advance the money to pay the interest on said bonds, $88,096.58 of which has already been advanced by complainant under its guaranty; that the Arkansaw Water Company is liable for said sum of money, but it has conveyed all its property to the Home Water Company, and had nothing that can be applied to the satisfaction of complainant's demand; that the complainant is entitled to be subrogated to the rights and lien of the trustee, the Farmers' Loan & Trust Company, in the securities held by it under the mortgages mentioned above, and that it is entitled to subject the income and revenues of the Home Water Company that were assigned by said company to the Arkansaw Water Company to the payment of the advances made by it in payment of the interest on the bonds of the Arkansaw Water Company; and that there is now due the water company from the city $31,500 for two years' water supply, which it refuses to pay; that, under the provisions of the deeds of trust to the Farmers' Loan & Trust Company, the said company cannot, so long as complainant continues to perform its obligation to pay the current interest on said bonds, take steps to subject the securities, or seizing the income and revenues of the Home Water Company and the Arkansaw Water Company, and complainant is remediless at law; that the action of the city in annulling said contracts and refusing to pay or consider the bills of the water company injuriously affects the securities, by casting a cloud upon the franchise and right of the water company to use the streets of the city, and upon the validity of its contracts with the city, and entitles complainant to have said cloud removed and the validity of said securities established by this court.

The prayer of the bill is that a decree be entered declaring that the contracts between the defendant city and the Home Water Company, and

the franchise granted by said city, are valid and binding, that the action of the city in attempting to annul the franchise and contract with the Home Water Company, and in refusing to carry out and perform the said contract, are invalid, and of no effect; and that said city be perpetually enjoined and restrained from doing any act or asserting any claim of invalidity in said contracts and ordinances that would be calculated to cast a cloud upon the legality of said contracts and franchise, or from annulling or declaring said contracts forfeited; that the Arkansaw Water Company be decreed to pay complainant the sums advanced by it under its guaranty, and that complainant be subrogated to all the rights of the trustee in the mortgages referred to, and of the Arkansaw Water Company under the agreements entered into by the Home Water Company; and that the income and revenues of the Home Water Company be subjected and applied to the payment of the sums owing complainant as aforesaid; and to that end that the city of Little Rock be required to pay into court the amount of the hydrant rental owing by it under its contracts. To this bill the city of Little Rock filed a demurrer, challenging the jurisdiction of this court to entertain this suit, and also that the allegations in the bill do not entitle complainant to maintain this action, and that if it is entitled to any relief, which is denied, it has a complete and adequate remedy at law.

J. M. Moore and W. B. Smith, for complainant.

W. J. Terry, W. L. Terry, and Morris M. Cohn, for city of Little Rock.

TRIEBER, District Judge. The bill, as appears from the foregoing statement of facts, seeks to prevent a threatened destruction by the city of Little Rock of the franchise of the water company, and also to remove, as a cloud upon its title, the resolution of the city of Little Rock declaring the franchise of the water company forfeited, which, it is alleged, was done without any just cause, without notice to the water company, and without due process of law, within the meaning of the provisions of the constitution of the United States. It also seeks to recover in the same action a money judgment against the city for money alleged to be due from the city to the water company by virtue of a contract entered into between the city and the water company, and to the rights of the water company complainant claims to be subrogated by virtue of the facts in the bill fully set forth. The contract for the water rentals was between the city and the water company, both of whom are corporations created by and existing under the laws of the state of Arkansas. The complainant's rights, if it has any, are solely based on a mortgage of the water company to the Farmers' Loan & Trust Company, one of the defendants in the case, of all its property, including its rents, profits, and franchises, executed to secure bonds of the water company, the payment of which bonds, and the interest thereon, complainant has guarantied, and in part paid.

Is that part of the bill which claims the right to have collected in this action the money alleged to be due from the city to the water company for hydrant rentals cognizable in the federal court? Whether a mortgage of the rents and profits of such a corporation entitles the mortgagee, or one claiming under the mortgage, to maintain an action for the recovery of such rents before possession is taken by the mortgagee, or before the appointment of a receiver by a court in a foreclosure proceeding, it is unnecessary to determine at present, although the weight of authority seems to be against it. Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144; Dow v. Railroad Co., 124 U. S.

652, 8 Sup. Ct. 673, 31 L. Ed. 565; Sage v. Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; Trust Co. v. Shepherd, 127 U. S. 503, 8 Sup. Ct. 1250, 32 L. Ed. 163; United States Trust Co. v. Wabash W. R. Co., 150 U. S. 308, 14 Sup. Ct. 86, 37 L. Ed. 1085; Veatch v. Trust Co., 28 C. C. A. 384, 84 Fed. 274. It is well settled that a mortgagee of such a claim is merely an assignee of a chose in action, and, unless the requisite diversity of citizenship exists to enable the assignor to maintain such an action on the contract in the federal court, neither the trustee nor the mortgagee, nor anyone claiming under them, can do it. New York Guaranty & Indemnity Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; City of Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 552; on rehearing, 48 C. C. A. 608, 109 Fed. 676. In New York Guaranty & Indemnity Co. v. Memphis Water Co., the court said:

"It was objected in limine, by the demurrer to the bill, that, as the complainant claims under the assignment of the contract made to the trustees, the circuit court had no jurisdiction, because the water company, with which the contract was made, and which made the assignment, is a citizen of Tennessee. This objection is insisted on here, and would seem to be conclusive, if the citizenship of the parties were the only ground of jurisdiction of the circuit court. The act of March 3, 1875 (18 Stat. 470), declares that no circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made. This suit is founded on the contract between the city and the water company. The whole claim of the bondholders to any benefit therefrom depends upon the assignment thereof contained in the mortgage deed; and, although the trustees of the mortgage are the real assignees, the bondholders, as cestuis que trustent, claim under them and stand on no higher plane, as regards the right to sue, than the trustees themselves. The complainants, however, insist that this suit is cognizable by the circuit court by reason of that court's having judicial possession and control of the mortgaged property in the Yardley suit. The bill and cross bills in that suit, it has been seen, were dismissed; but the parties regarded the consent decree entered therein as giving the court authority to keep the property under its control, and to cause it to be sold. Therefore, so far as relates to the waterworks themselves, and all the property comprised in the mortgage which is susceptible of actual possession, the position of the appellants may be correct. But the claim against the city does not lie in possession, but in contract alone. The contract itself may be subject to sale as part of the mortgage assets; but the proceeds of the contract, the money alleged to be due from the city to the water company under it, has never been reduced to possession, and the city of Memphis denies its liability to pay. In order to reduce to possession the money claimed to be due, and subject it to the control of the court, the ordinary mode of enforcing the contract must be resorted to. It may be that the circuit court had the power to direct such a proceeding to be had as ancillary to its administration of the mortgage fund; but it must be a proper proceeding, adapted to the nature of the demand. If a promissory note were included in the mortgage fund, and the parties liable upon it should refuse to pay it, the circuit court might probably order the trustees of the mortgage to bring an action on the note; but a bill in equity would hardly be considered a proper proceeding for enforcing its collection." 107 U. S. 211–212, 2 Sup. Ct. 284, 27 L. Ed. 484.

But it is urged that, as complainant does not claim by privity of contract, but by right of subrogation, this rule does not apply, if the necessary diversity of citizenship between the subrogee and the debtor exists. While it is true that the right of subrogation does not depend upon privity between the parties, but is the creature of courts of equity,

yet the subrogee is merely an equitable assignee, and for jurisdictional purposes can have no greater rights than the assignee of a chose in action. As the water company, the assignor, could not maintain an action in this court on account of diversity of citizenship, neither can its assignees, whether they are such by contract of the parties or by subrogation.

The other ground of jurisdiction upon which complainants rely is that federal questions are involved. If this is true, the citizenship of the parties is immaterial; or if the bill shows that by legislative action of the city council, enacted in pursuance of the powers granted to it by the legislature of the state, the obligation of the contract between the city and the water company has been impaired, or that the water company, to whose rights complainant claims to have been subrogated, has been deprived of its property without due process of law, this court has jurisdiction, as the amount involved exceeds the sum of $2,000, exclusive of interest and costs. City Ry. Co. v. Citizens' St. Ry. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482. Vicksburg Waterworks Co. v. City of Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. ——. The Home Water Company, although an Arkansas corporation, could maintain an action in this court against the city upon these grounds, and it follows, as of course, that its assignee or subrogee can do the same.

Do the allegations of the bill setting out the acts of the defendant city, and which by the demurrer are admitted to be true, sustain complainant's claim that the state, acting through the city's legislative council, is attempting to impair the obligation of a contract, within the meaning of section 10, art. 1, of the constitution of the United States, or deprive the water company of its property without due process of law, within the provision of section 1 of the fourteenth amendment to the constitution? It is claimed that these constitutional provisions only apply to the acts of the state; that the obligation of the contract must have been impaired, or the attempt to deprive the water company of its property without due process of law have been made, by a law of the state itself, in order to bring them within the jurisdiction of a federal court, and that a city is not within the meaning of these constitutional prohibitions, being merely a corporation created by the laws of the state to perform certain functions of a public nature, and therefore not included within these provisions of the federal constitution. A council of a municipal corporation, under the laws of the state of Arkansas, and of those of almost every state of this Union, acts in a dual capacity,—administrative and legislative. Its acts in an administrative capacity, no matter how unlawful, will not be violative of these constitutional provisions, but merely acts of the same nature as those of a private corporation. The refusal of the city in this case to pay the water rentals alleged to be due to the water company under its contract, whether evidenced by an ordinance or resolution of the council, or merely by a failure to make an appropriation of the money necessary to pay it, no matter upon what ground the action is based, will not be sufficient to give a federal court jurisdiction upon

the grounds claimed in the bill, no more than if a private corporation, through its board of directors, attempts to repudiate its obligations. Thus, it was held in New Orleans Waterworks Co. v. Louisiana Sugar Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, that where the legislature of the state itself defines the powers of the city, leaving to the city council only the duty of determining what persons come within the definition, and how the permits are to be granted, such power conferred upon a city council is not legislative, but administrative, and the permit granted by the council is not a by-law of the city, still less a law of the state. The court in that case say:

"If that license (granted by the council) was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended on the law of the state, and not at all on any provision of the constitution or laws of the United States." 125 U. S. 32, 8 Sup. Ct. 749, 31 L. Ed. 607.

In Hamilton Gaslight Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, it was held that:

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state, within the meaning of the constitutional provision against state laws impairing the obligation of contracts. * * * A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States." 146 U. S. 266, 13 Sup. Ct. 92, 36 L. Ed. 963.

On the other hand, if the action of the city is based upon legislative authority to grant a franchise and to enter into contracts with parties for the erection and use of public utilities, to grant the use of the public streets and charge for the use of its privileges, then the action of the city council is legislative, as one of the subordinate agencies of the state, and the deprivation of rights once granted without legal cause, or without due process of law, is within the constitutional prohibitions, and upon such allegations a federal court has jurisdiction of the cause, regardless of the citizenship of the parties. Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921; Railroad Co. v. Dennis, 116 U. S. 667, 6 Sup. Ct. 625, 29 L. Ed. 770; Hamilton Gaslight Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; City R. Co. v. Citizens' St. Ry. Co., 166 U. S. 563, 17 Sup. Ct. 653, 41 L. Ed. 1114; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 9, 19 Sup. Ct. 77, 43 L. Ed. 341.

In Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, Mr. Justice Gray, in delivering the opinion of the court, says:

"The fourteenth amendment to the constitution of the United States, after other provisions which do not touch this case, ordains, 'Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities." 154 U. S. 45, 14 Sup. Ct. 1112, 38 L. Ed. 896.

The statutes of Arkansas governing its municipal corporations, as published in Sand. & H. Dig., so far as they are applicable to this case, are as follows:

"Sec. 5134. They shall have power to provide a supply of water by the construction and regulation of wells, pumps, cisterns, reservoirs or water-

works; to prevent the unnecessary waste of water; to prevent the pollution of the water and injury to the waterworks; and for the purpose of establishing or supplying waterworks, any municipal corporation may go beyond its territorial limits; and its jurisdiction to prevent or punish any pollution or injury to the stream or source of water, or to the waterworks, shall extend five miles beyond its corporate limits."

"Sec. 5136. For the purpose of providing water, gas or street railroads, the mayor and council may contract with any person or company to construct and operate the same, and may grant to such person or company for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose or purposes."

"Sec. 5141. They shall have power to lay off, open, widen, straighten and establish, to improve and keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market places; to open and construct and keep in order and repair sewers and drains. * * *"

"Sec. 5208. The city council shall have the care, supervision and control of all the public highways, bridges, streets, alleys, public squares and commons within the city; and shall cause the same to be kept open and in repair, and free from nuisance."

"Sec. 5274. The city council shall possess all the legislative powers granted by this act, and other corporate powers of the city not herein prohibited, or by some ordinance of the city council made in pursuance of the provisions of this act and conferred on some officer of the city. * * *"

From these provisions it will be seen that the city councils of municipal corporations in the state of Arkansas are expressly granted legislative powers in relation to all municipal affairs, and especially to grant to water companies the exclusive privilege of using the streets and alleys of the city for such purposes. In pursuance of that authority, the bill alleges that the city council did grant to the water company the exclusive privilege of using the streets and alleys for its uses for the term of 50 years, and now, on the recommendation of the board of public affairs and the fire committee of the council, has annulled the contract with the water company and its charter. This action of the city, if unlawfully exercised and without notice and due process of law, is clearly an impairment of the obligation of the contract and destruction of the water company's property without due process of law; for of what value is the plant of the company if it cannot use the streets and alleys to lay and repair its pipes, collect water rates from its customers, or exercise any of the franchises granted to it by the city and essential to the exercise of its functions as a public water company? New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Vicksburg Waterworks Co. v. City of Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. ——. Iron Mountain Ry. Co. v. City of Memphis, 37 C. C. A. 410, 96 Fed. 113; Little Falls Electric & Water Co. v. City of Little Falls (C. C.) 102 Fed. 664; Anoka Waterworks, Electric Light & Power Co. v. City of Anoka (C. C.) 109 Fed. 580; Consolidated Water Co. v. City of San Diego (C. C.) 84 Fed. 369. In the City of Walla Walla Case the court say:

"It is sufficient for the purpose of this case to say that this court has too often decided, for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes

and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it." 172 U. S. 9, 19 Sup. Ct. 81, 43 L. Ed. 341.

In City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886, the contention was, as in the case at bar, that the city had acted solely in its corporate capacity, and not as a governmental agent of the state, and that for this reason no federal question was involved to give the federal court jurisdiction; but the court overruled this, and held that the acts of the council in changing the rates to be charged under the contract was legislative, and not administrative, and therefore within the constitutional prohibition. None of the cases cited by counsel for the defendant on that question are in conflict with the foregoing. St. Paul Gaslight Co. v. City of St. Paul, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788, was an action at law instituted in a state court to recover for the rental of street lamps under the contract made by the gas company with the city. Upon appeal to the supreme court of Minnesota, that court decided that the sole issue involved was a construction of the contract between the gas company and the city, whereupon the cause was removed by writ of error to the supreme court of the United States, and that court, in dismissing the writ of error for want of jurisdiction, held that:

"It is no longer open to question that a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States." 181 U. S. 148, 21 Sup. Ct. 577, 45 L. Ed. 788.

But it found that the record showed the only question involved, and upon which the decision of the state court rested, was the interpretation of the contract, and therefore presented no controversy within the jurisdiction of that court. In Hamilton Gaslight Co. v. City of Hamilton, supra, the court sustained the jurisdiction of the federal court, but held that:

"Although a legislative grant to a corporation of special privileges may be a contract, and the language so explicit as to require such a construction, yet if one of the conditions of the grant be that the legislature may alter or revoke it, a law altering or revoking the exclusive character of the granted privileges cannot be regarded as one impairing the obligation of the contract."

In City of Fergus Falls v. Fergus Falls Water Co., 19 C. C. A. 212, 72 Fed. 873, decided by the circuit court of appeals for this circuit, the decision of the court was limited to the one point that it is not competent, in an action at law on a contract, to inject a federal question into the case by suggesting that the defendant will interpose as a defense to the suit a resolution of the council which impaired the obligation of a contract. Judge Caldwell, speaking for the court in that case, says:

"It is apparent that the only use the plaintiff proposes to make of the constitution is as a barrier to a defense which the plaintiff suggests the

defendant may set up. The appeal to the constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense. The jurisdiction of the circuit court cannot be invoked by any such form of pleading in an action like this. In equity pleadings the complainant is allowed to anticipate and avoid a defense, and this is called the 'charging part of the bill.' Story, Eq. Pl. par. 31. But at law the plaintiff is never expected to state matters which should come more properly from the other side. It is sufficient for each party to make out his own case. 1 Chit. Pl. (Ed. 1867) 222. It is sufficient for the plaintiff to state his own cause of action, and he should not anticipate his adversary's defense, for the reason that the latter may never make the defense sought to be guarded against. Bliss, Code Pl. par. 200. In this case the defendant set up no such defense as the plaintiff pretended to anticipate and avoid. In Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, the supreme court say that: 'By the settled law of this court, as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws.' And it is equally well settled that the suggestion in a complaint in an action at law that the defendant may or will set up a defense based on a state statute repugnant to the constitution does not make the suit one arising under the constitution. The averments of the complaint, beyond those which state a cause of action upon the contract in suit, are mere surplusage. When the statement of the plaintiff's cause of action, in legal and logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the constitution or laws of the United States, then the suit is not one arising under that constitution or those laws, and the circuit court has no jurisdiction." 19 C. C. A. 214, 215, 72 Fed. 875.

The court has undoubtedly jurisdiction of this cause, upon the ground that the action of the council of the city of Little Rock annulling the water company's contract and franchise without a hearing was in contravention of the provisions of the constitution of the United States.

Is there any equity in the bill? During the argument it was claimed by counsel for the complainant that, even if the court should hold that it is without jurisdiction to grant the relief asked for,—the collection of the alleged indebtedness claimed to be due from the city for hydrant rentals,—the court, if it takes jurisdiction on any other ground, will still have the right to grant such relief, on the ground that when a court of equity has once obtained jurisdiction of a cause it is its duty to retain it for all purposes. While this is a general rule, it has no application to causes of this kind in the federal courts. The seventh amendment to the constitution guaranties, in all legal controversies where the value in controversy shall exceed $20, the right of trial by jury. That provision would be defeated if a strictly legal question could be tried by a court of equity. Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. The identical question now raised was before the supreme court in New York Guaranty & Indemnity Co. v. Memphis Water Co., supra, and was decided adversely to complainant's contention. For a full review of the authorities on this point I refer to the able opinion of Judge Woods, delivered on the motion for a rehearing in City of Eau Claire v. Payson, 48 C. C. A. 608, 109 Fed. 676; Smith v. Bourbon Co., 127 U. S. 105, 111, 8 Sup. Ct. 1043, 32 L. Ed. 73.

The allegations in the bill, so far as they seek to prevent a forfeiture

of the water company's franchise, are certainly sufficient to entitle the complainant to relief in a court of equity; for, unless restrained by the courts, it is charged that the water company's franchise will be annulled and thereby its property, which is the principal security held for the benefit of complainant as the guarantor of the water company's bonds to the amount of $2,000,000, made worthless. The numerous citations hereinbefore referred to, and which it is unnecessary here to repeat, are conclusive on this question, for they all hold that a court of equity has jurisdiction to prevent such wrongs if in violation of the constitutional provisions. The action of the city, even if void, is certainly a cloud upon the franchise of the water company.

But it is claimed that complainant is not the proper party to maintain this action; that the water company or the trustee of the mortgage are the only parties who can be heard to complain. The allegations in the bill are that complainant is the guarantor of the $2,000,000 bonds issued by the water company to the trust company and secured by the mortgage; that it became such guarantor in reliance upon this mortgage security, to which in case it was required to pay the debt, or any part thereof, it would become subrogated by operation of law; that it has now paid, as such guarantor, $88,000; that, by reason of the guaranty and the payment of the interest by the guarantor as it matured, there has been no default; and that the trustee of the mortgagee, relying upon complainant's guaranty to pay promptly the interest and principal as it matures, takes no steps to prevent this wrong. It is further charged that, as there has been no default so far as the bondholders are concerned, complainant, having promptly paid the interest, as the guarantor of the water company, the trustee can institute no proceeding to foreclose the mortgage. Upon such a state of facts it would be strange if a court of equity could grant no relief. The creditor who receives securities for a guarantied debt holds such securities in trust for the guarantor, and upon payment of the debt by the guarantor he is entitled in equity to subrogation to all securities held by the creditor. Prairie State Nat. Bank v. United States, 164 U. S. 227, 231, 17 Sup. Ct. 142, 41 L. Ed. 412. Nor is it always necessary that the debt should be paid before the guarantor can apply to a court of equity for protection against the loss or destruction of the security. Lord Redesdale says:

"A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has sometimes been called a bill quia timet, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances." Redes. Pl. 148, cited and followed by the supreme court in City of New Orleans v. Christmas, 131 U. S. 191–212, 9 Sup. Ct. 745, 33 L. Ed. 99; Story, Eq. Jur. § 826.

The trustee may refuse to take any steps to prevent the destruction of the security, by reason of the fact that its debt is perfectly secure, owing to complainant's guaranty. In such case the guarantor cannot compel the creditor to exhaust the security of the principal debtor before calling on it for the debt. Gary v. Cannon, 38

N. C. 64; Miller v. White, 25 S. C. 235; Armstrong v. Poole, 30 W. Va. 266, 5 S. E. 257; Hardy v. Overman, 36 Ind. 549; Roberts v. Jeffries, 80 Mo. 115; Allen v. Woodard, 125 Mass. 400, 28 Am. Rep. 250; Bank v. Wood, 71 N. Y. 405, 27 Am. Rep. 66. The Arkansaw Water Company, the principal debtor, being alleged in the bill to be insolvent, may decline to incur any expense of litigation, for the reason that its entire property is mortgaged for its full value, and it has, therefore, nothing to lose. Upon what principle of equity, then, should the guarantor, the only party who, by the action of the city, is liable to be the loser, be denied relief by a court of equity? How are its rights to be protected if the doors of the courts of equity are closed to it? It must not be overlooked that the object of this bill is not to take the mortgaged property from the trustee or the mortgagor and have it turned over to complainant as an indemnity for its future liability as a guarantor. This could only be done after it has paid the debt. McConnell v. Beatty, 34 Ark. 113. All it asks now is to preserve the mortgaged property from threatened destruction, or, in the language of Lord Redesdale, supra, "to prevent injury to it by interposing, before any actual injury has been suffered, by a bill which has sometimes been called a bill quia timet, in analogy to proceedings at the common law." In my opinion, the guarantor is entitled to protection of the property to which, upon payment of the debt, it would be entitled to subrogation, whenever it has shown that, unless prevented by the courts, that property is liable to be destroyed and the guarantor left without any security for his liability. McCormack's Adm'r v. Irvin, 35 Pa. 111. The rule would be different if complainant sought to deprive the creditor of the security. In such a case it must first make payment of the entire guaranty, and until that is done it has no right to claim the possession of the security. The wrongdoer in this case, according to the allegations of the bill, the city, cannot claim the same privileges which the mortgagor or mortgage creditor could.

But it is urged on behalf of the city, and numerous authorities are cited to sustain the contention, that the assignee or subrogee of a part of an entire security can maintain no action to recover the part due him. This is true, but the object of this bill is not to have the security split up, and thus subject the city to numerous actions instituted by different assignees or subrogees. The relief sought by the bill is to prevent the cancellation and repeal of the franchise of the water company, which is the most valuable part of the security conveyed for a debt guarantied by the complainant. Besides, the trustee, as well as the water companies, are parties to this action, and upon final hearing the rights of all the parties can be fully adjudicated and settled so as to prevent any further litigation.

The argument took a wide range and many other questions were ably presented by counsel, but the views taken by the court as herein expressed make it unnecessary to pass upon them at this stage of the proceeding.

The demurrer to the bill will be overruled, with leave to defendant to answer the bill within such time as counsel may agree upon; otherwise within 60 days.

GUARDIAN TRUST & DEPOSIT CO. v. GREENSBORO WATER SUPPLY CO.

(Circuit Court, W. D. North Carolina. March 24, 1902.)

No. 151.

1. CORPORATION—PRIORITY OF LIEN AS BETWEEN MORTGAGE AND JUDGMENT—NORTH CAROLINA STATUTE.

The statute of North Carolina (Code, §§ 697, 698) provides that, where all the property of a corporation shall be sold and conveyed under a mortgage, the corporation shall ipso facto be dissolved, and the purchaser shall be a new corporation, succeeding to all the franchises and charged with all the duties of the old, except the payment of its debts. The property of a water company was sold on foreclosure of a second mortgage, and, under an arrangement between all parties in interest, including the first mortgage bondholders, was bought by a new corporation, which assumed payment of the first mortgage, and also assumed performance of a contract between the old company and the city for the furnishing of water for a term of years. *Held* that, so far as the rights of the bondholders of the old company were concerned, the new company was but a continuation of the old, and that a judgment against the new company for a tortious injury to property arising from its negligent performance of the duties imposed on it by its contract with the city, which by statute was made superior to the lien of a mortgage upon its property, was equally as effective against such bondholders as though their mortgage had been executed by the new company.

2. SAME—JUDGMENT IN TORT.

A property owner whose property was injured by fire by reason of the negligence of a water company in failing to supply water for fire purposes, as it was obliged to do by a contract with the city, as well as by the duty imposed on it by law as a quasi public corporation which had received valuable franchises from the city, granted for the purpose of securing a water supply for fire protection as well as for private use, may sue such company either in contract or tort, at his election; and a judgment recovered in such an action, which expressly recites that it is "for the tortious injury and damage done him by the negligence of the defendant," is within the terms of Code N. C. § 1255, which gives judgments against corporations for torts committed by the corporation, its agents or employés, whereby property is injured, priority of lien over mortgages given by the corporation.

In Equity. On distribution of proceeds of mortgaged property, and introducing petitions by judgment creditors.

A. H. Taylor, for plaintiff.
John N. Staples and A. L. Brooks, for B. J. Fisher.
Bynum & Bynum, for Guarantee Trust & Safe Deposit Co.
Jas. T. Morehead, for city of Greensboro.
A. M. Scales, for Southern Stock Mut. Ins. Co.
John N. Wilson and L. M. Scott, for Helen G. Brown.
A. M. Scales, assignee of A. A. Hinkle and Hodgin, Pegram & Co.

Before SIMONTON, Circuit Judge, and BOYD, District Judge.

SIMONTON, Circuit Judge. This cause comes up on the pleadings, petitions for intervention, and a report of the master, merely stating testimony before him. The questions made in it arise under a bill for foreclosure of mortgage filed by the Guardian Trust & Deposit Company against the Greensboro Water Supply Company.

The complainant, as trustee, held certain bonds of the defendant company, secured by a mortgage of the property, plant, and franchises of the defendant company, subordinate in lien to a mortgage executed upon the same property, plant, and franchises by the Greensboro Water Company. A receiver having been appointed for the mortgaged property, a contract was entered into between the receiver and the city council of Greensboro looking to the purchase of all the mortgaged property at private sale for the sum of $75,000. Upon applying to the court for the approval and confirmation of this sale, it appeared that the Guardian Trust & Deposit Company of Philadelphia, trustee, holding the mortgage securing the $50,000 of bonds of the Greensboro Water Company, was a necessary party before such sale could be confirmed. An order was entered making this last-named trustee a party. On its appearance, and with its assent, the proposed sale was approved and confirmed; the money derived therefrom to stand in the place of the property in all respects, and to be held subject to the further order of the court. The questions in this case relate to the proper distributions of this fund, and the priority of claims thereon. The trustees of the two mortgages claim that the fund must be applied towards satisfaction of their mortgages according to their priorities. The interveners, who are judgment creditors of the Greensboro Water Supply Company, insist that under the statute law of North Carolina in force when the mortgages were executed, and which must be read as if incorporated in the mortgages, priority is given to judgments of the class to which their judgments belong, over any mortgage executed by the defendant corporation.

The facts of the case are these:

In 1887 a water company was organized in Greensboro, N. C., whose corporate purpose was to furnish that city and its inhabitants with water for domestic, sanitary, and fire purposes. On December 29th of that year the articles of agreement and letters of incorporation were filed with the clerk of the superior court of Guilford county, in which Greensboro was, and the name of the Greensboro Water Company was given to the corporation. These articles and letters were amended and ratified by the general assembly of North Carolina on March 3, 1891. Priv. Laws N. C. c. 166, pp. 1009, 1010. Very soon after its incorporation, in 1887, the Greensboro Water Company secured the passage of an ordinance by the city of Greensboro, under which it obtained franchises and rights to the exclusive use of the streets, sidewalks, and public grounds for the purpose of constructing, operating, and maintaining a complete system of waterworks. At the same time it obtained an agreement from the city to pay annually, for a term of years, money to the said company, in consideration for the supply by the said company of hydrants in various parts of the city, with an adequate water pressure at all times to extinguish fire, and to keep its tower, reservoir, etc., supplied with water day and night, so as to secure to the city and its inhabitants protection against fire. After this contract was made the Greensboro Water Company executed a deed of trust to the Guardian Trust & Deposit Company of Philadelphia to secure the payment of bonds aggregating $50,000, the deed covering all its property and plant. And on the 1st of May,

1891, the Greensboro Water Company executed a second deed of trust upon its plant to R. R. King and A. H. Taylor to secure a second bond issue of $20,000. In 1892 a bill was filed in this court by J. W. Middendorf et al., on behalf of holders of the bonds secured by the second mortgage, and also as representatives of holders of bonds under the first mortgage, against the Greensboro Water Company, seeking the appointment of a receiver, and praying a sale of the property. A receiver (James D. Glenn) was appointed, who managed the property. But in 1895, under a decree of this court, R. R. King and A. H. Taylor were appointed commissioners to sell the property, which sale took place on April 30, 1896. At this sale Hugh L. Pope became the purchaser, under an agreement had between all the bondholders and all parties interested, made before the day of sale; Pope acting as agent of all parties. Conveyance having been made to Pope, he at once conveyed all the plant and property purchased to a corporation then and there formed, named the Greensboro Water Supply Company. The conveyance to Mr. Pope and his conveyance to the new company were expressly declared to be subject to the mortgage held by the Guardian Trust & Deposit Company of Philadelphia for $50,000. Among the property conveyed in the deed of these commissioners, and also in the deed of Hugh L. Pope, was the contract for furnishing the city with water, as above stated, and, of course, the franchises under which the contract was made. This contract, among other things, had this provision:

"Said water company shall be responsible for all damages sustained by the city or any individual or individuals for any injury sustained from the negligence of said company either in the construction or operation of the plant."

This contract having been so purchased and conveyed to the Greensboro Water Supply Company, this company assumed the same, and thenceforward conducted its operations under its provisions; receiving the tolls from the city and from its inhabitants, and from this source principally paying the interest on the $50,000 first mortgage bonds.

On July 1, 1896, the Greensboro Water Supply Company executed a deed of trust of all its franchises and property to the Guardian Security & Deposit Company of Baltimore, Md., to secure the payment of bonds to the amount of $110,000, in two series; the first series, of 80 bonds, known as "Series A," and the other 30 as "Series B." Of series A, bonds to the amount of $50,000 were set apart to meet the $50,000 first mortgage bonds, as the conveyance was expressly stated to have been made subject to this lien. The original first mortgage bonds, however, have never been retired. The proceedings in the bill of this case were instituted to foreclose this mortgage, under which R. R. King was named as receiver. They bear date September 19, 1900. Anterior to the filing of this bill, in the month of June, 1897, two buildings in the city of Greensboro, with stocks of goods therein, were destroyed by fire. One of these buildings was owned by Charlotte Gorrell, and the stock of goods therein by A. A. Hinkle, who had, prior to the fire, made an assignment to A. M. Scales. The other building was owned by Helen G. Brown, and the goods therein by Hodgin, Pegram & Co., who, after the fire,

assigned all their interest to A. M. Scales. In the month of August, 1897, Helen G. Brown and A. M. Scales, assignee, instituted several suits because of these fires in the superior court of Guilford county against the Greensboro Water Supply Company. On the ——— day of June, 1899, another fire occurred in Greensboro, in which the property of B. J. Fisher, known as the "Benbow Hotel," was partially destroyed by fire. Fisher also instituted suit against the Greensboro Water Supply Company because of this fire. These causes were pending when the receiver was appointed for the Greensboro Water Supply Company. The answer having already been filed in the Fisher case, the receiver filed the answers in the Scales cases. At the ensuing January term of the superior court for Guilford county, the cases were heard. Upon the issues submitted to the jury in the several cases, they found for the plaintiff; that is to say, for Fisher, $25,000; for Scales, assignee of Hinkle, $3,200; for Scales, assignee of Hodgin, Pegram & Co., $1,800; and for Helen G. Brown, $3,000. Thereupon the plaintiff in each case submitted to the court an order for judgment, in which, after reciting the issues found by the jury, it proceeds:

"It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff recover of the defendant ——— dollars damage *for the tortious injury and damage done him by the negligence of the defendant*," and the costs of this action.

The court refused to sign this order because of the words underscored. An appeal was taken to the supreme court of North Carolina by the plaintiff, and, on hearing, the action of the lower court in refusing to sign the judgment was held error; that the action was brought, and properly brought, in tort. This decision was filed in the Fisher case. 128 N. C. 375, 38 S. E. 914. Thereupon the appeals were withdrawn in the other cases, the Fisher decision having been held to settle the question.

In the main case the master was instructed to call in creditors. The bondholders coming in proved their deeds of trust and their bonds. The parties holding these judgments proved them. The question is as to the priority of their judgments over the mortgage debt, under the statute law of North Carolina (section 1255 of the Code of 1883). This section is in these words:

"Mortgages of incorporated 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 this state 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 any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This section has been amended so as to eliminate the sentence in brackets.

This section gives priority to judgments obtained against the corporation making a mortgage over the lien of the mortgage. In the case at bar there are two classes of mortgages. One class is a mortgage executed by the Greensboro Water Company. The other is a mortgage executed by the Greensboro Water Supply Company.

The judgments are against the Greensboro Water Supply Company. The judgment creditors claim that they are entitled to priority over the mortgage of the Greensboro Water Company, as well as over the mortgage of the Greensboro Water Supply Company. When the proceedings for the sale under foreclosure of the property of the Greensboro Water Company were instituted, they were conducted in an amicable way; and, when the sale took place, all parties (the stockholders, the corporation, and the creditors) constituted Mr. Pope their common agent. Under the arrangement made by them all, he purchased at the sale, and immediately thereafter conveyed to the Greensboro Water Supply Company. This company took subject to the first lien for $50,000, and bonds of the second lien were used in payment of the bid; the cash advanced by the first mortgage bondholders being returned to them in bonds of the new company. Under the operation of section 697 of the Code of North Carolina, when a sale has been made under a deed of trust or mortgage of all the property of a corporation, and a conveyance made pursuant to such sale, "upon such conveyance to the purchaser the said corporation shall ipso facto be dissolved and the purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the same manner in which the conveyance shall be recorded." Section 698 declares that the corporation so created shall succeed to all the franchises, etc., and perform all such duties as would or should have been performed by the first corporation, save only that it shall not be entitled to the debts due to the old corporation, and be liable for none of its debts or claims which may not have been expressly assumed in the contract of purchase. So when the sale in question, and the conveyance pursuant thereto, took place, the Greensboro Water Company ipso facto was dissolved. The new company assumed all its duties, and in the contract of sale assumed the $50,000 mortgage. All this pursuant to an agreement in which the first mortgage creditors took part. The new corporation was but a continuation of the first. The first mortgage became its mortgage, and must be treated as such. There is another point of view: When the foreclosure of the mortgage of the Greensboro Water Company was had, it was under contract with the city of Greensboro to furnish water for a term of years. This contract was assumed by the new company, with the assent of the old company, and was in course of performance; no new contract having been made. So the Greensboro Water Supply Company was really acting for and in behalf of the old company, and the latter was liable also. James v. Railroad Co. (N. C.) 28 S. E. 538, 46 L. R. A. 306.

This brings us to the question in the case: Have those judgments a lien prior to the lien of the mortgages? Are these judgments "for torts committed by the corporation, its agents or employés," whereby property was injured? The interveners produce the judgments in each case, which distinctly state that damages are given "for the tortious injury and damage done by the negligence of the defendant." The supreme court of North Carolina in this case held that, under the facts of the case, the plaintiff was entitled to declare in tort; that

"although action may have been maintained upon a promise implied by law, yet an action founded on tort was the more proper form of action, and the plaintiff so declared." Fisher v. Supply Co. (N. C.) 38 S. E. 914. This judgment is entitled to full faith and credit. As between the corporation and the plaintiff, it would be conclusive. It is presented in a cause in which mortgagees are parties; and the question is not whether the judgment be valid, but whether it is a judgment of such a character as it will be given priority to the claim of the mortgagees, who were not parties to the suit in which it was obtained. "When such a judgment is presented to the court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." Wisconsin v. Pelican Ins. Co., 127 U. S. 263, 8 Sup. Ct. 1370, 32 L. Ed. 239. In Hassall v. Wilcox, 130 U. S. 503, 9 Sup. Ct. 590, 32 L. Ed. 1001, in a proceeding marshaling claims against an insolvent estate, it was held that the trustees of a mortgage had a right to contest the priority of lien of a judgment rendered in a state court, and compel the intervener to prove affirmatively the existence and priority of his lien. The supreme court of North Carolina, in Fisher v. Supply Co., supra, pressed for a decision upon this point whether that was such a judgment as was protected under section 1255 of the Code, declined to answer the question. This section of the Code gives priority to the judgments for torts committed by such incorporation, its agents or employés, whereby any person is killed, or any person or property injured. In the case at bar property was injured because of the alleged negligence of the Greensboro Water Supply Company. Would an action for tort lie? The Greensboro Water Supply Company had assumed the obligation of supplying the city and its inhabitants with water for domestic and public purposes, and also for the purpose of extinguishing fires. The supreme court of North Carolina had held in the case of Gorrell v. Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, that an action would lie against the corporation as well on the part of the city council as on that of any citizen of the city. The judgments before us establish the fact that such a supply of water for the purposes of fire was not furnished. They also establish the fact that the failure to do so was because of the negligence of the defendants. Is such negligence the foundation of an action in tort? The grand division of causes of action into such as arise ex contractu and such as arise ex delicto—contract or tort—underlies the system of the common law. Under the old practice the forms of action must conform to this division. A contract, as a contract, could not be enforced in an action in form ex delicto. Nor could a tort be relieved in an action in form ex contractu. And although the Code has abolished all distinction between forms of action, still the distinction between causes of action remains. In Code pleading, the action proceeds upon the statement of facts of the case, and on these facts the court draws the conclusion whether the cause of action is founded on the contract or on a tort. Young v. Telegraph Co., 107 N. C. 384,

11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883. The Greensboro Water Supply Company, as has been seen, was under the obligation of a contract to furnish a full supply of water to the city and its inhabitants for sundry purposes, including that of fire. And under this obligation it was its duty to do so whenever needed. Besides this,—indeed, to facilitate the performance of this obligation and in consideration of this obligation,—it was clothed with valuable franchises, under which it used the streets of the city in laying its mains. Under its obligations, it was to furnish the city and its citizens with one of the necessaries of life, and was bound to furnish all that desired it, who paid the price imposed. It served the public, and to this extent was a quasi public corporation, bound to the discharge of a public duty. Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Coy v. Gas Co. (Ind. Sup.) 36 L. R. A. 535 (s. c. 46 N. E. 17). So it was the duty of the water company to furnish the water for fire,—a duty arising out of an express contract, and out of the franchises granted to it for the purposes of public utility and need. It did not fulfill this duty. Chitty, in discussing actions on the case (a form of action ex delicto), and of the injuries for which relief could be had under this form of action, says:

"These injuries may be either by nonfeasance, or the omission of an act which the defendant ought to perform; or by misfeasance, being the improper performance of an act which might lawfully be done; or by malfeasance, the doing what the defendant ought not to do; and these respective torts are commonly the performance or omission of some act contrary to the general obligations of the law, or the particular rights and duties of the parties, or of some express or implied contract between them." Chit. Pl. (11th Am. Ed.) 133.

And in the same volume, in stating the requirements of the declaration, in actions for torts, Mr. Chitty says:

"When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of that duty, which, we have seen, may be founded either on a contract between the parties, or on the obligation of law arising out of the defendant's participation, character, or situation." 1 Chit. Pl. 383.

Jaggard, in his work on Torts, says:

"While normally a breach of a contract gives rise to a cause of action ex contractu, a contract may impose a duty on the part of the defendant as party to it, for the violation of which the plaintiff may recover ex contractu or ex delicto, at his option." 2 Jag. Torts, 897.

And Add. Torts, § 28, holds the same doctrine.

In the case of Fisher v. Supply Co. (one of the judgments proved here) the supreme court of North Carolina held that the complaint stated facts justifying the entry of the judgment "for tortious injury and damage done him by the negligence of the defendant"; that, from the statements of the complaint, "an action founded on tort was the more proper form of action." Fisher v. Supply Co., 128 N. C. 375, 38 S. E. 914. As between the corporation and these judgment creditors, this decision is conclusive. It did not bind the mortgage creditors; nor could the judgments have been enforced against the property of the corporation, as that was in the hands of this court. We have, therefore, examined the record of the case

of Fisher against the water company, and, aided by the arguments of counsel, have inquired into the correctness of the decision therein rendered. The only question is, will an action, as for a tort, lie against a defendant who has negligently performed an express contract? We have seen that, in entering into this contract, the water company assumed a duty to the public. Mr. Chitty, quoted, supra, says that, under circumstances like these, the plaintiff may proceed either ex contractu or ex delicto. In other words, the negligence in not performing a contract of this character, whereby property has been injured, is a tort, as well as a breach of contract, and that on such a tort action will lie. The judgments in question then are judgments in tort, and are protected by section 1255.

Let a decree be entered giving priority to the lien of these judgments over the lien of the mortgages.

COMACHO et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1902.)

No. 3,127.

CUSTOMS DUTIES—APPRAISAL—FOREIGN MARKET PRICE—METHOD OF DETERMINING.

Act June 10, 1890 (26 Stat. 136), makes it the duty of the appraisers of imports, "by all the reasonable ways and means in their power, to ascertain, estimate and appraise the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported." *Held*, that the board of general appraisers, in deducting from the price of merchandise when received in the United States all expenses, in order to determine the wholesale price after exportation in the foreign market, proceeded properly, it appearing that they were unable to find an open market price.

Appeal from a Decision of the Board of General Appraisers.

Daniel O'Connell, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. The material facts are as follows: The importers entered the hides at $5; the local appraiser advanced the value to $6; the appraisal of the general appraiser, affirmed by the board of general appraisers, was $7.50 for each hide. More than a year after the decision of the board of general appraisers the appellants wrote a letter to one of the members of said board, asking him whether the appraising officers in determining the dutiable value of said hides took into consideration the wholesale price at which such or similar merchandise was sold or offered for sale in the United States of America, pursuant to section 11 of the customs administrative act (26 Stat. 136), as amended by the act of July 24, 1897 (30 Stat. 212). In reply Mr. Sharretts wrote a letter in which he stated that the board did take into consideration, as one of the reasonable ways and means of estimating the market value of said hides, the price at which they were sold in the United States, and gave the reason

therefor. In the report of the board to the collector upon the appraisal of the merchandise they stated: We "do hereby certify that in our opinion the actual market value or wholesale price of the said goods, at the time of exportation to the United States, in the principal markets of the country whence imported, was, and we do hereby appraise the same, as follows: [Then follows a description of the goods in suit.]" Counsel for the importer contends that the letter is legal evidence of the doings of the board of appraisers; that it shows they acted illegally in proceeding under section 11 of the customs administrative act, which only applies to goods wholly or partly manufactured; and that, therefore, the entry must be liquidated upon the consular invoice.

Even if this letter could be considered as properly in evidence and competent to show the facts upon which the board made this decision, it fails to show any illegal action on their part. Section 10 of the act of June 10, 1890 (26 Stat. 136), made it the duty of the appraiser, "by all reasonable ways and means in their power, to ascertain, estimate and appraise the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported." It appears from Mr. Sharretts' letter that they were unable to find an open market price, and that they estimated the price of the hides when received in this country after deducting all expenses, for the purpose of determining the wholesale price after exportation in the markets of the country from whence they were imported. It does not appear that this was an unreasonable act on their part. There is no evidence to show that the price was an improper one, or that they acted outside the line of their duty in such appraisement.

The decision of the board of appraisers is affirmed.

YOUNG v. UPSON.

(Circuit Court, S. D. New York. May 8, 1902.)

1. BANKRUPTCY—PREFERENCE—SECURITY FOR PRESENT LOAN.
   The transfer by a merchant of notes and accounts as collateral to secure the repayment of a present loan does not create a preference, within the scope of the bankrupt act.[1]

2. SAME—PRESUMPTION OF FRAUD—CHOSES IN ACTION—GOODS AND CHATTELS—MODE OF TRANSFER.
   Choses in action are not "goods and chattels," within the contemplation of Laws N. Y. 1897, c. 417, art. 2, § 25, providing that every assignment of goods and chattels by way of security, not constituting or intended to operate as a mortgage, unless accompanied by an immediate delivery followed by actual and continued change of possession, is presumed to be fraudulent and void as against the creditors of the vendor; and a transfer of choses in action on the books of the assignor, to secure a present loan, is not presumed to be fraudulent under such act.

3. COLLATERAL SECURITY—BILLS RECEIVABLE—MODE OF TRANSFER.
   Where, on the transfer of bills receivable as security for a loan, the borrower opened a separate account of such bills on his books, and as

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[1] See Bankruptcy, vol. 6, Cent. Dig. § 259 [b, c, d, p, q].

fast as collected the proceeds were paid to the lender, and all questions of renewal and extension were referred to him, the transfer was complete and effectual.

4. SAME—NOTICE TO DEBTORS.
Where accounts and bills receivable are transferred as collateral security for a loan, notice to the debtors is not necessary to make the transfer effectual as against the creditors of the borrower.

5. SAME—APPLICATION OF PROCEEDS.
Where, under an agreement to loan to a merchant the money he should need during a certain season, the loan to be secured by the transfer of notes and accounts, and the money to be advanced from time to time as the needs of the business required, money was advanced at divers times, and each time a note given for the amount, and indorsed with a list of accounts, and notes then assigned as security, the sums so advanced should be taken as a continuous transaction, as between such lender and the trustee in bankruptcy of the borrower, and the net proceeds of such notes and accounts, when collected, should be first applied to the payment of the note for which they stood as collateral, and any excess applied generally on the indebtedness, until the full amount of the loan is repaid.

In Equity.

Wm. Raimond Baird, for complainant.
William F. Scott, for defendant.

HAZEL, District Judge. Defendant and cross claimant, as trustee in bankruptcy of the New York China, Glass & Toy Company, a corporation, withholds from complainant the proceeds of certain accounts paid by debtors of the bankrupt to him as trustee. These collections were made subsequent to assignments by the bankrupt corporation to complainant of these same accounts and claims. The assignments were taken by complainant as collateral security for the payment of loans and advances made to the bankrupt corporation by complainant pursuant to an agreement entered into with the president of the corporation early in September, 1899. The fund created by such collections passed into the possession and control of an assignee of the corporation for the benefit of creditors on December 30, 1899, and subsequently came into the possession and control of the trustee in bankruptcy appointed on March 15, 1900. Thereafter, pursuant to an order of this court, the fund was deposited by the trustee in the Colonial Trust Company, to the joint account of the complainant and defendant, pending a decision of this controversy. The suit is brought in equity by this secured creditor of the corporation to determine the ownership and control of the fund and the rights of complainant under and by virtue of the various assignments in writing made to him as collateral security. The corporation was adjudicated bankrupt in involuntary proceedings instituted by creditors on January 11, 1900. The undisputed proofs show that in the autumn of 1899 the New York China, Glass & Toy Company (which will hereafter, for convenience, be referred to as the "Company"), being unable to borrow from banks the necessary amount of money to prepare for its fall trade on account of a false report printed in a newspaper as to its financial condition, applied to the complainant, brother of the president of the company, for loans and advances to meet its merchandise

account and current expenses during the fall months. The nature of the company's business was such that the principal portion of its sales was made in the fall and early winter, and payments upon such sales were made in most instances after the holiday season. The stringency of its finances produced by the refusal of the banks to accept its collateral resulted in the board of directors of the company authorizing its president to borrow money of the complainant, and to secure repayment by assignments of bills receivable as collateral security. The company was then to collect the assigned accounts as agent for the lender, and without expense to him. Subsequently, at different times between September 16 and December 18, 1899, complainant loaned and advanced to the company various sums, to secure which he exacted and received demand notes for each amount loaned, together with assignments in writing of bills receivable as collateral security. Appended to each note was a list of claims or accounts assigned. The amounts varied from $1,000 to $3,000, and aggregated $53,700. The collateral is estimated to have been 25 per cent. in excess of the loan. It further appears from the evidence that as soon as each account was assigned it was transferred on the ledger of the company to an account designated "Security Account." That was done to distinguish such accounts on the company's books from accounts not assigned. As soon as an assigned account was collected, the proceeds were paid to complainant to apply on the loan. Extensions of time of payment and renewals were referred to complainant for his approval or disapproval.

The transaction is admitted to be free from actual fraud or deceit. It was not seriously contended on the hearing that a preference was created by the act of transfer. A preference, within the scope of the bankrupt act, is created when it shall be given within four months of filing petition, and when the person receiving it has reasonable cause to believe it was intended to give a preference. We have no such claim here. The security was given for a present consideration, and therefore no fraud on creditors, under the bankruptcy act. In re Wolf (D. C.) 98 Fed. 84; In re Soudan Mfg. Co. (C. C. A.) 113 Fed. 804. It does not appear that either the company or the complainant at the time the loans were made had any knowledge of the company's insolvency. The company was always a large borrower at that season of the year, and had ample reason for believing that the holiday trade would insure its commercial stability. The complainant was acquainted with the business of the corporation, and knew of the company's customary financial needs at that season of the year.

The trustee contends that the transaction was in the nature of a pledge, and, as no possession of the property pledged passed, the pledge is not enforceable against creditors; that, although no actual fraud or deceit is charged, the transaction nevertheless was a fraud in law; that the essence of the transaction is presumed to be fraudulent and void as against the trustee representing creditors, as there was no delivery to the pledgee of the property pledged. It is insisted that the "Personal Property Law" applies. Laws N. Y. 1897,

c. 417, art. 2, § 25. I am convinced that a fair construction of the statute, as construed by the highest court of the state, does not include an assignment of a chose in action. The courts of the state of New York have repeatedly declined to read into the statute an intention which does not come within the scope of the words "goods and chattels," used in chapter 279 of the Laws of 1833. It was accordingly held that the words "goods and chattels" do not include choses in action, but only personal property which is visible, tangible, and movable. Booth v. Kehoe, 71 N. Y. 341; Bank v. Chaskin, 28 App. Div. 315, 51 N. Y. Supp. 64, and cases cited. Justice Spring said in his dissenting opinion in Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203:

"The fraud which vitiates the transfer does not consist in the failure to deliver possession of the assigned accounts to the defendant, for choses in action are not the goods and chattels covered by the statute condemning sales unaccompanied by delivery over of the property."

The controlling opinion in the case last cited seems to be decisive of this question. The agreement in that case was that the assignor should collect the assigned accounts, and deposit the proceeds in a bank to their credit. I quote from the opinion, which aptly applies:

"The rules pertaining to a change of possession of goods and chattels upon a sale thereof, or to the filing of a lien thereon, and the dominion required to be exercised by a purchaser, mortgagee, or pledgee of tangible property, cannot be applied to a sale or pledge of indebtedness, intangible of itself, only the evidence of which, if in writing, is perceptible. The conditions are not the same, and the rules of law applicable to transfers of the two classes of property differ. As to one the possession of which is evidence of ownership, the dealings must be open, visible, and public; while as to the other the business may be, as it usually is, private. The necessities of business require it. Aside from the provision of the bankrupt law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right."

I am unable to perceive how a pledge of bills receivable could have been transferred more effectively in the absence of a statute requiring notice to be given than was actually done in the case at bar. Separate accounts were carried on the books of the company. The proceeds of accounts collected were immediately paid to the lender. Requests for renewal notes and extension of time of payment were referred to complainant for his decision. His right of possession is as fully demonstrated as the nature of the security would permit. But it is contended that it is essential to the validity of the transfer that notice should have been given to the debtors whose claims were assigned. This contention is unsound. The necessity for notice by an assignee to the debtor arises where he seeks to protect himself against a payment by the debtor to the original creditor. The debtor is released from liability to the assignee unless he has been notified of the assignment. Richardson v. Ainsworth, 20 How. Prac. 521; Heermans v. Ellsworth, 64 N. Y. 159; Williams v. Ingersoll, 89 N. Y. 522. It is fully established by authority that complainant could legally authorize the company as agent for him to collect the assigned claims and accounts. Clark v. Iselin, 21 Wall. 360, 22 L.

Ed. 568; White v. Platt, 5 Denio, 269; Institution v. Adae (C. C.) 8 Fed. 106; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203.

Since the argument of this case counsel request that I pass upon the question of a method of application of the collateral. I think that the various sums advanced must be taken as a continuous transaction. The proofs justify that conclusion. The president of the company informed complainant at the time arrangements for the loan were perfected that the company needed from $20,000 to $30,000, "not all at once, but as the business needs required." For this reason I am of opinion that the claims paid must first be applied to the payment of the note for which they stand collateral. Any excess may then be generally applied on the indebtedness, including expenses incurred by complainant for collecting accounts after failure of the company. Unless the parties agree on amount of such expenses, an account will be taken by a master.

A decree may be entered accordingly, with costs.

LA REPUBLIQUE FRANCAISE et al. v. CARL H. SCHULTZ.

(Circuit Court, S. D. New York. March 7, 1902.)

TRADE-NAME—INFRINGEMENT.

The use of the compound name "Lithia-Vichy" on artificial mineral waters, with the words "Manufactured from Distilled Waters," inconspicuously under it, indicates that the article labeled is something different from the natural French Vichy waters, and the use thereof will not be restrained as an imitation of plaintiff's natural Vichy.

In Equity.

Charles Bulkley Hubbell, for plaintiffs.
Antonio Knauth, for defendant.

WHEELER, District Judge. This suit is brought to protect the sales of the waters of the Vichy mineral springs of France owned by the republic from the use of that name upon, or in dealing in, other mineral waters. The defendant deals in artificial mineral waters, and appears to have the right to call those made in imitation of the plaintiffs' natural Vichy artificial Vichy, but not to use that name alone, or apparently alone, upon mineral waters, for that would tend to pass them off as the plaintiffs' waters. La Republique Francaise v. Schultz, 42 C. C. A. 233, 102 Fed. 153; La Republique Francaise v. Saratoga Vichy Springs Co., 46 C. C. A. 418, 107 Fed. 459. In the latter case the plaintiffs' rights were held to be invaded by the use of the name "Vichy" prominently upon Saratoga Vichy, with the name "Saratoga" only inconspicuously above it, as that would have a similar tendency to the use of the name "Vichy" alone.

The defendant uses the compound name "Lithia-Vichy" upon artificial mineral waters, with the words, "Manufactured from Distilled Water," inconspicuously under it. This is said, on behalf of the

plaintiffs, to have a like tendency. But the compounding of the word "Lithia" with the name "Vichy" would seem to well indicate that the article labeled was something different from the natural French Vichy waters, and, without the more obscure words below, would not amount to a representation that the waters were from the French springs, and still less with them. This seems to fall short of any real invasion of the plaintiffs' right, within that case, or any of the common principles applicable to this subject.

Mr. Schultz, the vice president of the corporation defendant, testified on direct examination by defendant's counsel: "23 Q. What do you do if a customer comes to your pavilion in Central Park and simply asks for some 'Vichy'? A. In this case they are served with our product." These transactions are said to amount to a passing off of the defendant's waters for the plaintiffs' which should be restrained. They might be such if the use of the plaintiffs' waters was sufficiently predominant; but the defendant's waters are so prevalent that a customer at such places would be likely to expect artificial "Vichy" in answer to such calls, and not be at all deceived into using the defendant's waters supposing them to be the plaintiffs'.

As the case is made to appear, the plaintiffs do not appear to have established any just ground for relief. Bill dismissed.

RYAN v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, S. D. New York. February 10, 1902.)

1 CARRIERS—CONSIGNEES—UNLOADING FREIGHT—DUTY TO PROTECT.
Where a railroad company furnished and hauled a car loaded with concrete for a contractor who was building piers in the company's yard for an overhead highway bridge, the car being loaded and unloaded by the contractor's employés, such employés were rightfully about the car while unloading, and as well entitled to safety from any unusual danger in being near it as a consignee unloading and taking away freight at a depot.

2. SAME—EVIDENCE OF DEFECT—WEIGHT—QUESTION FOR JURY.
Where, in an action against a railroad company for injury to one employed in unloading a car, caused by a door which was suspended by a hook falling, one witness testified positively that he reached up and examined the hook immediately after the accident, and that it was rounded so that it would not be likely to hold, the question whether the hook was defective was for the jury; and their finding should not be set aside, though other witnesses testified that the hook would be out of his reach, and was not situated where he said it was, and produced a hook, which they testified was taken from that place on the car, which was not rounded.

At Law.

Thomas P. Wickes, for plaintiff.
John W. Boothby, for defendant.

WHEELER, District Judge. The defendant furnished and hauled a car loaded with concrete by a contractor building piers in the defendant's yard at Harlem for an overhead highway bridge across

the yard, being built by the city; the concrete to be unloaded wet, and put down about the foundation of a pier by the contractor's men, of whom the plaintiff was one. The car had heavy flap doors at the sides, which turned up under beveled hooks to catch and hold them up for unloading. While the car was being unloaded, one of the doors fell, and struck the plaintiff (who was sprinkling the concrete as it was shoved out and put into the hole for the pier) on the head, and hurt him seriously. This suit is brought for the injury. The plaintiff had a verdict because the car was found to be unfit for prudent use, and the defendant has moved to set it aside for want of duty of the defendant towards the plaintiff, and of sufficient proof of unfitness.

The relation of the defendant to the plaintiff seems to have been the same as that of any carrier furnishing and hauling a car to a consignee who is to unload and take away the freight. That the haul was short, and all within the defendant's yard, and that the delivery was there, would not appear to make any difference. The contractor and his men were there under the exercise of the right of eminent domain of the state by the city, and not as trespassers, or as licensees for a separate purpose. The contractor was rightfully there, and lawfully entitled to have his materials delivered there, to be taken and placed by his men; and his arrangement with the defendant to furnish and haul the car would include a vehicle safe for the receipt and taking away of the freight. Those properly about the car for this purpose would be as well entitled to safety from any unusual danger in being near it as a consignee unloading and taking away freight at a depot, or a passenger approaching or leaving a train, would be to safety from unusual dangers of engines, cars, or stations. Beard v. Railroad Co., 48 Vt. 101; Kowalewska v. Railroad Co., 72 Hun, 611, 25 N. Y. Supp. 184. This was the view in which the case was submitted to the jury.

The claim of the defendant that the plaintiff must prove the dangerous condition of the car, and that this condition caused the injury to him, was recognized and acted upon at the trial. The plaintiff produced a witness who testified that he reached up and examined the hook at that time, and found it rounded so it would not be likely to hold. The defendant produced witnesses who testified that the hook would be out of his reach, and not situated where he said it was, and produced a hook testified to as taken from that place on the car which was not rounded, and claimed that the testimony was so overwhelmingly against there being a defect that the court should direct a verdict for the defendant The important thing was the defect in the hook, and not its exact location. The direct testimony of the witness to the existence of the defect at that time was more than a mere scintilla. It was positive and substantial. The discrepancies and contradictions were for the jury, and were well laid before them in behalf of the defendant. The whole was to be weighed by the jury, and the question as to this now is not whether they weighed rightly, but whether, in reality, there was anything to weigh, and it appears that there was.

Motion to set aside verdict denied

In re PEISER.

(District Court, E. D. Pennsylvania. April, 1902.)

BANKRUPTCY—ANCILLARY PROCEEDINGS.

An insolvent was adjudged bankrupt in the district court of New York, and a receiver was appointed, who obtained an order directing a trust company in Pennsylvania, holding funds of the bankrupt, subject to an attachment issued within four months of the adjudication of bankruptcy, to pay said funds to the receiver. On refusal of the trust company so to do, an order adjudging it in contempt was made, and directing the receiver to apply to the court of bankruptcy in Pennsylvania for its assistance in the enforcement of the orders of the bankrupt court in New York. *Held*, that such trust company would be ordered to show cause why payment should not be made to such receiver in compliance with the order of the district court of New York.

In Bankruptcy. Proceedings ancillary to, and in aid of, proceedings in bankruptcy in the district court for the Southern district of New York, and to collect assets in the Eastern district of Pennsylvania.

On November 9, 1901, Solis V. Peiser was duly adjudicated a bankrupt in the district court of the United States for the Southern district of New York; and on the same day Theodore M. Taft was duly appointed receiver of the said bankrupt, and duly qualified as such.

At the time of this adjudication, the bankrupt had on deposit in the Union Trust Company of Philadelphia, Pa., $350.93. On the day previous (November 8th) the Union Trust Company had been served with a foreign writ of attachment as garnishee in the suit of Rigby and another, creditors, against Peiser.

Shortly after his appointment, the receiver applied to the trust company to pay over to him the deposit. The trust company admitted having the deposit, but declined to pay over on the ground that the deposit had been attached. The receiver then obtained from the bankrupt court in New York an order vacating all attachments, and directing the Union Trust Company to pay the amount on deposit to the receiver, which was duly served upon the trust company and its treasurer, and payment was duly demanded, but refused. The court in New York then made an order upon the Union Trust Company and its treasurer to show cause why it should not be punished for contempt of court, for failing to obey the order of the court to pay over the deposit. This order to show cause was duly served, and on the return day the trust company and its treasurer both failed to appear or show cause. Thereupon the court adjudged them to be in contempt, and to pay a fine of $250 each, and that the treasurer stand committed until he should pay the fine and purge himself of his contempt; and this order also was served upon the trust company and the treasurer, the service of the orders in each case being made upon them in Philadelphia.

In the order adjudging the trust company and the treasurer to be in contempt, etc., the court, referring to the fact that neither of them were within the Southern district of New York, but were within the Eastern district of Pennsylvania, the receiver was directed to apply to the district court for the Eastern district of Pennsylvania for its assistance in enforcing the order of contempt, and of all the other orders of the New York court touching the amount on deposit in the trust company, and for such other and further assistance as might be proper.

The receiver thereupon petitioned the district court of the United States for the Eastern district of Pennsylvania accordingly, and asked that the orders, including the order of contempt, should be enforced by the Pennsylvania court. An answer was put in by the trust company and by its treasurer to the petition, and hearing was had before the Honorable JOHN B. McPHERSON, District Judge, in the Eastern district of Pennsylvania.

Theodore M. Taft and Read & Pettit, for receiver.
Jno. Stokes Adams, for Union Trust Co.

J. B. McPHERSON, District Judge, entered the following order:

Whereas, it appears that Solis v. Peiser, trading as Peiser & Co., was adjudicated a bankrupt by the district court of the United States for the Southern district of New York on the 9th day of November, 1901, and that Theodore M. Taft, of New York, was duly appointed receiver of said bankrupt; and

Whereas, said Theodore M. Taft has presented a petition to this court asking for its assistance in enforcing the orders of the district court of the United States for the Southern district of New York in proceedings ancillary to the said bankruptcy, and in aid thereof:

Now, therefore, this 2d day of April, A. D. 1902, on hearing of the said petition, and the answer of the Union Trust Company of Philadelphia and W. J. Clark, its treasurer, as filed thereto, it is

Ordered and decreed that the Union Trust Company of Philadelphia do pay over, within 10 days from the date hereof, to said Theodore M. Taft, receiver of Solis V. Peiser, trading as Peiser & Co., the above bankrupt, the sum of $350.93, being the amount on deposit with said the Union Trust Company to the credit of said Peiser & Co. on November 9, 1901, the date of the said adjudication in bankruptcy, together with any interest on said deposit as the same is allowed by the said trust company from said date, or show cause why said payment should not be made.

In re GARNER.

(District Court, W. D. Virginia. May 1, 1902.)

1. BANKRUPTCY—HOMESTEAD EXEMPTION—CLAIM OF.
   The mere act of a bankrupt, in claiming a homestead exemption in the schedule filed by him, is not a compliance with Code Va. § 3631, providing that, in order to secure the benefit of the exemption of real estate, the homesteader shall by a writing filed by him and duly submitted to record, to be recorded as deeds are recorded, declare his intention to claim such benefit and select and set apart the real estate to be held by him as exempt, etc., or with section 3639, providing that the personal property claimed as exempt shall be selected and set apart by the householder in a writing signed by him, and the said writing shall be admitted to record, to be recorded as deeds are recorded.
2. SAME—WHEN NOT ALLOWED.
   The homestead exemption will not be allowed where the homestead waiver creditors, and not the bankrupt's family, will secure the benefit thereof.

McDOWELL, District Judge. On October 8, 1900, on the petition of certain creditors, C. S. Garner was adjudicated an involuntary bankrupt. On November 2, 1900, he filed schedules, and in Schedule B 5 he set apart under the "poor debtor's law" and valued certain household furniture and supplies, of a total value of $110.75, and also made claim to his homestead in the following language: "I also claim my homestead exemption of $2,000 under

section 3630, Code Va. 1887, out of the sale of my stock of merchandise and real estate, $2,000." The time of filing the schedules was extended by agreement. At the first meeting of creditors claims aggregating over $2,500, evidenced by "homestead waiver" instruments, were proved; claims subject to the homestead, amounting to over $3,700, were proved; and subsequently something over $3,000 of additional claims, some of them subject to the homestead exemption, and some of them evidenced by homestead waiving instruments, were proved. The appraised value of the bankrupt's estate was:

Stock of merchandise	$3,448 07
Real estate	1,200 00
Accounts, etc., estimated at	400 00
	$5,048 07

Subsequent to the appraisement, by consent of the bankrupt and of his creditors, all of the above property was sold for cash at the lump price of $3,500. On December 21, 1900, the bankrupt filed a petition with the then referee, praying that the trustee be required to deliver to him the specific articles claimed under the poor debtor exemption, and also "that the homestead exemption of two thousand dollars be applied to the creditors of the petitioner as to whose debts the petitioner has waived the benefit of his homestead exemption." On the next day the referee, upon proof that the bankrupt was a householder, made an order reading, inter alia: "It is ordered that said homestead exemption of $2,000 be, and the same is hereby, allowed him, subject, however, to the rights of the creditors whose claims waive the benefit of said exemption to subject the same to the payment of their debts." From this order the trustee has appealed to the court.

No question is made in this case as to the bankrupt's right to the specific articles claimed under the "Poor Debtor's Law" (section 3650, Code 1887). The contest is as to the homestead exemption. Under the Virginia law (Const. art. 11; Code 1887, § 3630 et seq.), a householder is entitled to set apart and hold exempt real and personal estate, or either, to an amount not exceeding $2,000 in value.

The following sections of the Code of Virginia are here of interest:

"Sec. 3631. How Exemption of Real Estate Secured. In order to secure the benefit of the exemption of real estate under the preceding section, the householder shall, by a writing signed by him and duly admitted to record, to be recorded as deeds are recorded, in the county or corporation wherein such real estate, or any part thereof, is, declare his intention to claim such benefit, and select and set apart the real estate to be held by him as exempt, and describe the same with reasonable certainty, affixing to the description his cash valuation of the estate so selected and set apart. Equitable as well as legal estates may be so selected and set apart."

"Sec. 3639. How Set Apart in Personal Estate. Such personal estate shall be selected by the householder and set apart in a writing signed by him. He shall, in the writing, designate and describe with reasonable certainty, the estate so selected and set apart and each parcel or article, affixing to each his cash valuation thereof; and the said writing shall be admitted to record, to be recorded as deeds are recorded, in the county or corporation wherein such householder resides."

"Sec. 3642. When the Exemption may be Set Apart. The real or personal estate, which a householder, his widow, or minor children are entitled to hold as exempt, may be set apart at any time before the same is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process."

"Sec. 3647. Waiver of Exemption; Its Effect; Form of Waiver. If any person shall declare in a bond, bill, note, or other instrument, by which he is or may become liable for the payment of money to another, or by a writing thereon or annexed thereto, that he waives, as to such obligation, the exemption from liability of the property or estate which he may be entitled to claim and hold exempt under the provisions of this chapter, the said property or estate, whether previously set apart or not, shall be liable to be subjected for said obligation, under legal process, in like manner and to the same extent as other property or estate of such person."

The petition of the bankrupt and the order of the referee bring this case under the ruling in Moran's Case (D. C.) 105 Fed. 901, affirmed in Moran v. King, 49 C. C. A. 578, 111 Fed. 730. The only distinction between the two cases is that here the "claim" of homestead was made in the schedule as first filed. But merely claiming a homestead in a schedule is not a compliance with section 3631 as to real estate, or with section 3639 as to personal property. And, aside from this, the principle laid down by the Moran Case is that the homestead exemption will not be allowed where the homestead waiver creditors, and not the bankrupt's family, will secure the benefit of the exemption. Whether this principle be sound or not, it is binding on this court in this case.

The ruling of Referee Coleman is reversed, and an order may be entered directing the trustee to distribute the fund without regard to the claim of homestead.

SUNSET TELEPHONE & TELEGRAPH CO. v. CITY OF MEDFORD et al.

(Circuit Court, D. Oregon. May 6, 1902.)

No. 2,714.

1. LICENSES—FEES—TAXATION.
An ordinance providing that a telephone company shall not occupy streets without paying an annual license of $100 is a revenue provision (the fee being manifestly substantially in excess of enough to defray expense of issuing license and maintaining the regulation), and not authorized by a charter provision that the council may license telephone companies using the streets, and fix the compensation they shall annually pay for such license.

2. TELEPHONE COMPANIES—USE OF STREETS—NEW CONDITIONS.
Where a telephone company has the right to use the streets of a city by permission of its officers, the city cannot, after the company has accepted the grant and established its plant, add a new condition,—that it pay for the use of the streets.

E. S. Pillsbury and F. R. Strong, for complainant.
E. B. Watson, for defendants.

BELLINGER, District Judge. This is a suit to enjoin the city of Medford from removing the poles and wires of the complainant from the streets of that city, under an ordinance imposing a license upon the company of $100 per annum, and requiring it to sign an

agreement not to charge its customers in Medford more than $1.50 per month for its service.

Section 102 of the act of the legislature incorporating the city of Medford provides that:

"The city council shall have power to license, regulate or prohibit telegraph and telephone companies using the roads, streets or alleys of the city and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall grant an exclusive right to any such company."

The ordinance complained of provides that no person shall engage in the telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of $100, and, when this sum is paid, the city recorder shall issue a license to the person, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person or company paying said license fee, during the year for which they have paid such license, shall have a right to occupy the streets and alleys with his or its poles and wires, etc. This is a revenue provision, and is not within the authority conferred upon the city by its charter. "The power to license, as a means of regulating a business, implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it void." Laundry License Case (D. C.) 22 Fed. 701. If the city has authority, under section 102 of the charter, to fix the compensation which shall be annually paid for such license or privilege to use the roads and streets of the city, then the city might have required the payment of the sum fixed by the ordinance for such use. But it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of its lawfully appointed officers. If so, the city cannot add new conditions to the grant after the company has accepted it and established its plant. If by the power to fix compensation is meant the compensation that the city is to receive for the license regulation, the case is within the rule of the Laundry License Case (D. C.) 22 Fed. 701, and the compensation to be fixed must not go beyond the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainant, and, while it may exact compensation for the cense, it cannot, under the power given in its charter, make such compensation a matter of revenue.

The ordinance further provides that no person or company desiring to operate any telephone line within the limits of said city shall receive a license so to do until it files its written agreement with the city recorder not to charge, either directly or indirectly, any greater sum than $1.50 per month to any resident of said city for service and use of a telephone. This provision of the ordinance

is not insisted upon by the defendants. Its invalidity is conceded, and it is therefore not necessary to consider it.

The demurrer to the bill of complaint is overruled.

THE JOHN I. BRADY.

THE WILDCROFT.

(District Court, E. D. Pennsylvania. April 2, 1902.)

Nos. 18 and 19 of 1901.

COLLISION—STEAMSHIP AND TUG WITH TOW MEETING—APPROACHING TOO NEAR BEFORE CHANGING COURSE.

A steamship and a tug both *held* in fault for a collision between the ship and barges in tow of the tug, which occurred on the Delaware river in the night, on the ground that, although the two vessels saw each other when a mile apart, each held its course, and approached head on, until they were so close together that the danger of collision between them was imminent, and in the haste thus made necessary there was a confusion of signals, which brought about the collision.

In Admiralty. Suits for collision.

Curtis Tilton and Robert H. Smith, for the Bertie and Maud and the Calvert.

Henry R. Edmunds, for the John I. Brady.

Convers & Kirlin, for the Wildcroft.

J. B. McPHERSON, District Judge. These two libels are brought upon behalf of the schooner barge Bertie and Maud and of the barge Calvert, respectively, against the tug John I. Brady and the steamship Wildcroft, to recover damages for a collision on the Delaware river in the early night of March 19, 1901, by which both barges were injured. The libelants declare that the tug and the steamship were alike negligent, while each of these vessels endeavors to lay the whole burden of liability upon the shoulders of the other.

The collision occurred under the following circumstances: The tug was proceeding northwardly up the river, not far above the city of Wilmington, having in tow four barges in two tiers. The first tier was composed of the Bertie and Maud and the Calvert, lashed together, the Bertie and Maud being upon the port side of the Calvert, and the second tier was composed of the barges Prevost and Enterprise. The length of the tug and tow was between 550 and 600 feet. The collision occurred at about 10 minutes past 8, upon a night that was dark, but not misty or foggy. There was nothing to prevent an observer from seeing the lights of an approaching vessel at a distance of at least two miles, and probably farther. The tide was flood, and at the point where the collision took place the channel course was straight and free from obstructions. No other vessels were in the neighborhood of the steamship or of the tug and her tow. The Wildcroft is a large steel ship, 315 feet long, and was drawing 21 feet 6 inches. She was on her way down the

Delaware, bound for sea, in charge of a licensed pilot. Both vessels had the proper lights set and burning. The lights upon the tow were placed in accordance with rule XI adopted by the board of supervising inspectors, which provides that, "when two or more boats are abreast, the colored lights shall be carried at the outer sides of the bows of the outside boats." The Bertie and Maud carried a red light upon her port bow, and the Calvert carried a green light upon her starboard bow, neither barge showing any other side light. The steamship and the tug approached each other nearly head on, both being westward of the channel course. Each vessel had a proper lookout, and each saw the other more than a mile away. If the proper maneuvers had been executed, I have no doubt that a collision would have been avoided, for there was abundant room and depth of water in the channel for both vessels, and, if they had taken due precautions, the accident would not have happened. A strong wind was blowing from the northeast, and it may be that this may have had some part in preventing the steamship from hearing the tug's signals. As usual, it is impossible to reconcile the contradictory accounts of the witnesses that were called by the respective vessels, and I shall not attempt to discuss the two theories in detail. I do not accept either of them as a whole, for it seems clear to me that the collision can be explained much more simply and more probably than by following either as if it were completely true. The tug and her tow were certainly upon what would ordinarily be the wrong side of the channel, and, although there seems to be a more or less prevailing custom for tugs with their tows to take the western side of the river at this point, I do not think the custom is sufficiently established to furnish an adequate excuse. Unquestionably, if the tug upon this occasion had been upon the right-hand side of the channel, there would have been no collision, and upon that side I think she should have been. It was a fault in the tug to have been in the wrong place; but, aside from this, I think it is plain that each vessel was to blame for holding a nearly head-on course too long. The evidence satisfies me that each held this course until they came so near each other that, unless signals were precisely and promptly made and obeyed, there was great danger of collision. This, as it seems to me, is the true explanation of what happened. In the darkness of the night they came closer to each other than either vessel supposed the distance to be; and, when the true situation was recognized and each realized the unexpected peril, a not unnatural confusion of signals occurred, neither vessel being quite certain what was best to be done, or what the real intention of the other might be. There is the usual conflict of testimony concerning the color of the lights that could be seen from the respective vessels; and I have little doubt that toward the last, when it was impossible to avoid the collision, the conflict may perhaps be explained by the fact that each vessel changed its course in the hope of escaping the impending disaster. At this stage of the affair it would be useless to apportion the blame, if accurate apportionment be possible The initial fault, as it seems to me,—a fault for which both vessels are equally liable,—was in

approaching each other head on, too close for safety. Apparently each vessel either expected the other to give way, or was confident that the passing could be safely accomplished on the course that each was holding; the result being that when the final effort to pass was made there were mistakes on both sides, in consequence of which the two barges were injured. Immediately before the collision took place the tug, by a desperate sheer to starboard, barely escaped the steamship, which broke the hawser leading from the tug to the Bertie and Maud, and struck its starboard bow against the port side of the barge's stem, forced its way between the two barges, breaking several of the breast lines by which they were attached to each other, and struck the port bow of the Calvert, doing injury to that boat also. Some of the witnesses for the steamship testified that her way had been stopped before the collision took place, and that she was actually going astern; but, considering the extent of the injury that she inflicted, this testimony seems to me to be unreliable.

For the reasons given, I am of opinion that both the tug and the steamship were at fault, and that each of the barges is entitled to recover from both. As I understand, it is not seriously contended that the barges were guilty of negligence; but, if such a position is really taken, I have no difficulty in finding that they were free from blame.

In each case a decree may be entered in favor of the libelant.

BARRETT v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1902.)

No. 2,621.

CUSTOMS DUTIES—PERFORMING HORSES AND DOGS.

Decision of the board of general appraisers sustaining the collector in refusing to admit performing horses and dogs free, under paragraph 686 of the tariff act of 1890, as "tools of trade," must be affirmed, where the only evidence that the animals were in the actual possession of the importer at the time of importation consists of a vague statement of the broker's clerk that the importer came directly to the broker's office on the arrival of the vessel, though he did not know whether he came on the same vessel with the animals or not, and the importer fails to produce further evidence, though given an opportunity to do so by the board.

Appeal by the Importer from a Decision of the Board of General Appraisers, which sustained the action of the collector in the assessment of duty upon the importations in question.

Albert Comstock, for importer.
Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. In April, 1894, the appellant entered certain performing horses and dogs, claiming that they were free, under paragraph 686 of the tariff act of 1890, as "tools of trade." The only evidence that the animals were in the actual possession of the importer at the time of importation consists of a vague statement

by the broker's clerk that the appellant came directly to the broker's office on the arrival of the Denmark, although he did not know whether he came on the same vessel with the animals or not. The board of general appraisers deferred the decision of the case until June 8, 1897, in order to give the protestant an opportunity to be heard, but no further evidence was offered, and the board thereupon affirmed the assessment of duty. In the absence of any sufficient or satisfactory reason for the failure to produce such evidence, this court would not be justified in overruling the decision of the board of general appraisers upon mere inference, and their decision is therefore affirmed.

UNITED STATES v. THOMAS.

(Circuit Court, S. D. New York. January 28, 1902.)

INTERNAL REVENUE—STAMP TAX—SALES OF CORPORATE STOCK—CONSTITUTIONAL LAW.

The defendant was indicted for omitting to attach the required revenue stamps, provided by the war revenue act of 1898, upon memoranda of sale of certain shares of railroad stock, with intent to evade the provisions of section 25, Schedule A, entitled "Stamp Taxes," of such act of congress. The indictment was demurred to on the ground that the act of congress mentioned is unconstitutional; the defendant's contention being that a tax on sales of shares or certificates of stock is a "direct tax," and that it has not been laid in proportion to the census or enumeration, nor apportioned among the several states according to their respective numbers. *Held*, that the tax is not a direct tax, not being a tax upon the property itself, but upon a business, occupation, or transaction, and the burden being upon the person who engages in the business of selling shares of stock.

Henry L. Burnett, U. S. Atty., and William S. Ball, Asst. U. S. Atty.
Pavey & Moore (Frank D. Pavey, of counsel), for defendant.

THOMAS, District Judge. The defendant demurs to an indictment, which charges that he, being a broker in the city of New York, sold certain shares of Atchison preferred stock, and omitted the required revenue stamps from the memorandum of sale, with intent to evade the war revenue act of 1898. The act provides:

"Adhesive Stamps.

"Section 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instrument, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. * * *

"Schedule A.

"Stamp Taxes.

"Bonds, debentures, or certificates of indebtedness issued after the first day of July, Anno Domini eighteen hundred and ninety-eight, by any association, company, or corporation, on each hundred dollars of face value or

fraction thereof, five cents, and on each original issue, whether on organization or reorganization, of certificates of stock by any such association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, and on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents: provided, that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. And any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock, or evidence of the sale of any such stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor."

The defendant urges that the statute, so far as here involved, is unconstitutional. He premises that a certificate of stock is property; that a tax on the sale of property is a tax on the property itself; and from this he concludes that the act provides for levying, without apportionment, a direct, and hence invalid, tax on such property.

The statute lays a stamp duty (1) on the bonds, debentures, or certificates of indebtedness issued by any association, company, or corporation; (2) on original certificates of stock issued by any such body; (3) on all subsequent sales, or agreements to sell, or memoranda of sales or deliveries or transfers of such certificates.

The present inquiry relates to a tax on a memorandum or contract of sale of a certificate of stock. What is such certificate? It is the evidence of the holder's title to shares in the property and franchises of a corporation. The sale of the certificate is a transfer of such shares to another person. The state furnishes facilities whereby persons may form a corporation, which may designate the individual interests of its members by certificates, transferable upon its books, so as to permit the holders to manage or direct the business of the corporation, with such liability, privileges, and immunity as the charter and the law provide. Congress has declared that every person who holds such a certificate in such artificial body, and shall transfer by sale to another the right to participate in such corporation and to become a member thereof, with the accompanying property rights and benefits, shall pay a tax on the contract or transaction whereby the transmission is effected. It is not intended at this time to emphasize the benefits and protection afforded by the law to the members of such bodies, and the enhanced value of their property rights by reason of the facilities afforded them. In a matter of less importance such privilege would deserve, at least, consid-

eration, but the present discussion will pursue broader views and inquiries.

The defendant relies upon certain decisions of the supreme court, and judicial expressions in the opinions, to wit, that congress may not levy a stamp tax on bills of lading of goods exported (Fairbank v. U. S., 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862); nor levy a license tax upon an importer (Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678); nor tax sales by auctioneers of imported goods in the original packages (Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015); nor lay a license tax upon goods not the product of the state, but brought therein for sale (Welton v. Missouri, 91 U. S. 279, 23 L. Ed. 347); nor tax a bill of lading for metal shipped from a point within, to a point without, the state (Almy v. California, 24 How. 169, 174, 16 L. Ed. 644); nor lay a license tax on drummers selling or offering for sale goods by sample, and having no licensed house of business in the taxing district (Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694). These cases involve attempts on the part of the United States to tax exports, or of states to tax imports or exports, or to lay taxes on subjects of interstate commerce. They contain statements or holdings that a tax on the occupation of importer or exporter is a tax on the goods imported or exported; that a tax on a bill of lading of export goods is a tax on the goods; that a tax on a vendor of foreign goods is a tax on what he sells; that a tax upon sales of imported goods in the original packages, payment whereof is obligatory upon the auctioneer, is a tax on the goods; and that a tax on the sale of an article imported only for sale is a tax on the article itself. Brown v. Maryland, 12 Wheat. 444, 6 L. Ed. 678. It will be observed that in each instance the subject-matter of the tax was not within the taxing power. Hence no tax, direct or indirect, could be laid thereon, under any disguise whatsoever. The taxation of property other than exports is within the power of congress, although the tax must be raised in the manner pointed out by the constitution; that is, "direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." The defendant quotes with some special urgency from the opinion in Nicol v. Ames, 173 U. S. 513, 19 Sup. Ct. 524, 43 L. Ed. 786, where the following portion of the war revenue act of 1898 is construed:

"Upon each sale, agreement of sale or agreement to sell any products of merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent."

It was held that the tax was laid upon the facilities of the exchange, and was valid. Mr. Justice Peckham, in the course of the opinion, said:

"A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

The defendant infers from this excerpt that a tax upon sales of property is a direct tax, and invalid unless apportioned. The defendant's argument, so far as based on the decisions, other than the last cited, may be tested. It is that inasmuch as the tax on an importer, bill of lading of export goods, sales by auctioneers of imported goods for the importer, vendors of goods from beyond the taxing state, is a tax upon the goods themselves, and invalid, so a tax on transfers of property is a direct tax upon the property itself. The fallacy of this method of argument quickly appears. Thus a license tax on the importer of tobacco is a tax on the goods imported; hence, a tax on a dealer in domestic tobacco is a direct tax on his commodity. A license tax by a state upon foreign salesmen is a tax on the subjects of their sales; hence a federal tax on the occupation of a salesman, in the state where he resides, is a direct tax on the goods sold by him in that state. A tax on a bill of lading of goods for export is a tax on the goods; hence a federal tax on a domestic bill of lading is a direct tax on the goods. Therefore the occupations of tobacco dealers, salesmen, and transportation companies are not subjects of an unapportioned federal tax, and the taxes laid upon occupations, the selling of property, and trades, found in the act of 1898 and earlier acts, are invalid. But the power of congress to tax occupations, business, trades, transfers of property, and contracts has long since been recognized. Railroad Co. v. Slack, 100 U. S. 595, 598, 25 L. Ed. 647; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759. To such consequence does the defendant's reasoning lead. Syllogisms should not be fashioned upon judicial expressions detached from the particular inquiry at some former time under consideration. The present question is whether a statute providing for a tax on contracts for the sale and delivery of certificates of stock lays a direct tax upon property, within the meaning of the constitution. It is a mere truism that a tax, whatever its form, falls primarily on the taxpayer's property, for how otherwise could it be paid? If a farmer actually pay a tax for the privilege of following his vocation, is not something exacted from his farm, stock, or other property? The same is the case if the tax be laid on the sale of the products of the farm. If a railroad company be taxed on bills of lading, the tax, when paid, is charged to operating expenses, and the result is precisely the same as if the tax were laid upon roadbed and equipment. Yet in no one of the three cases is the tax assessed on the property, nor is the property specifically subjected to the tax. The law commands that, when the owner shall do an act,—for instance, the act of selling property,—he, personally, in the first instance, shall pay a tax. So, if a tax, measured by the proceeds of sale, be laid on the privilege of selling articles in an exchange, the vendor, in case of sale, will have the precise amount of money at night as if the tax had been laid upon the sale of property, or upon the property itself. In short, the tax, however laid, when paid, burdens the taxpayer's property. But all this does not prove that the tax is direct. A system of taxation upon the sale of property is, in essential elements, different from a system that lays the

tax directly upon property. The latter system is certain, because the tax is sure to arise and to be paid in any event. There is but a single condition requisite to the existence and payment of such tax, and that is the existence of the property. The statute is direct in its application, and, in theory, payment is inevitable, and to such payment principal and income alike are pledged. But a tax payable on the sale of property is contingent upon, and is laid upon, an event that may never arise, and the tax in the meantime is nonexistent. For example, a statute providing for a direct tax on a parcel of land is, save as delayed by the acts of assessment and levy, instant in its operation; and the tax attaches as a lien upon the land, from which it may be dissociated only by payment. A statute directing a tax on contracts of sale of land is entirely executory, and may never be executed, and the estate continues in the hands of the owner, without burden or incumbrance. In the case at bar the affixing of the stamp awaits the sale, and even then the certificate passes without disability to the transferee. Hence no burden is laid on the certificate, nor does it ever become liable for the payment of the tax. The law simply says to the vendor, "When you do an act, you shall pay a tax." Moreover, a provision for a direct tax on land at once decreases its beneficial value, whether it be kept or sold, while a tax on an instrument of conveyance or transfer leaves the enjoyment intact. The present owner and his heirs forever may hold the property without diminution of profit. In the one case the state, in effect, seizes the land by the force of the statute, and there is no latitude,—no escape from the compulsory tribute. In the other nothing is taken away from the enjoyment of rights of ownership, save that, in the event of the owner engaging in the business transaction of selling or exchanging his property, a tax must be paid thereon, taking the form of a stamp duty on the indenture, or, if it be personal property, on a bill of sale or contract. It is simply a tax upon transactions in business activities, or forms of commercial dealings, and may be sustained on several grounds. In the first place, the statute may rest upon the power of congress to declare that any person who shall engage in the business (that is occupation) of buying or selling certificates of stock shall pay a tax measured by the price realized. Is not such a statute lawful? The buying and selling of stocks, not by brokers alone, but by a large number of persons in every community who profess some other main vocation, is an occupation more or less constant. This has become a business,—a vocation,—and is amenable to federal taxation as such. These persons, maybe, could not be so well reached if the statute laid a gross duty in the form of a license tax on the individual trader in stocks. But in any case congress has the power to distribute such tax upon each item of business falling under the traffic. For if it may lay a tax of $100 on the vocation of buying and selling stocks, it may lay a tax on the sale of stocks at the rate of 2 cents "on each hundred dollars" sold. The principle that justifies an impost of $10 per annum on a baker supports the right to lay a tax of a fraction of a mill on the sale of each loaf of his bread. The principle that underlies the power, and not the peculiar

form of its exercise, is regarded. Therefore it is not an answer that the instance charged may have been the only transaction of the dealer.

How many sales of certificates are necessary to constitute the business of a vendor of certificates,—5, 10, 20, or 1,—and at what state of his sales will his business be sufficiently apparent to compel the dealer to stamp his transactions? At what point in his business career does the statute become constitutional? The act of 1898, like that of 1862, provides for a tax on many and varied occupations. How many items of business may a person do under each vocation, and so far forth escape the tax? How many instances of sales must the government show against a defendant to establish the validity of the statute as to him? A tax is laid upon retail vendors of tobacco. May a person sell tobacco now and then without paying a tax? So a tax is placed upon the vendors of liquor, but may a person escape compliance with this tax upon the plea that the transaction was his first, second, or some other in numerical order, and that he did not sell liquor for a business? Is the answer that the offender never did it before a defense against the charge of violating the revenue statute? If such be the law, a tax may not be placed upon the occupation, business, or selling, of liquors, tobacco, or stock, or any other thing, consumable or nonconsumable, except under the necessity, in case of attempted enforcement, of proving beyond a reasonable doubt that the vendor had made sufficient sales, so that it may be inferred that it was his regular vocation, and that he was engaged uniformly in the business. In that case the statute would become valid or invalid as the jury might determine. The law is that he shall not pursue a certain business without paying the tax, and, if congress may validly declare that, it may declare that he shall not, untaxed, do any of the business acts that fall within the occupation. A person pursues a business or vocation, whether or not he announces it as his profession. It is what he does, and not what he professes, that determines. It seems to be a political, rather than a judicial, function, to determine what shall constitute a business.

But it may be answered that an unapportioned tax may not be laid upon sales of property unless the tax, in whole or part, may be shifted to another. Such rule would preclude a tax upon occupations. Aside from that consideration, the ultimate incidence of the tax has been very sparingly employed in the solution of questions similar to the one now before the court. The discussions and opinions of political economists are useful for the instruction of legislators in enacting, rather than for judges in the interpretation of, statutes, and the judgments of the court have often disregarded the conclusions of the systematic writers. For instance, Mr. McCulloch (McCul. Tax'n, p. 181) states, "Duties on coaches, carriages, * * * fall wholly on those by whom they are used, and cannot be shifted to any one else." But the supreme court decided that a tax on carriages was indirect in its nature. Hylton v. U. S., 3 Dall. 171, 1 L. Ed. 556. In Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482, it was determined that an act of congress (14 Stat. 146)

which provides "that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amounts of the notes of any state bank, or state banking association, paid out by them," did not lay a direct tax, within the meaning of the constitution. Mr. Chief Justice Chase said:

"Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the constitution. We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority."

After such historical references, the learned chief justice adds:

"This review shows that personal property, contracts, occupations, and the like, have never been regarded by congress as proper subjects of a direct tax."

In Knowlton v. Moore, 178 U. S. 41, 82, 20 Sup. Ct. 763, 44 L. Ed. 969, Mr. Justice White said:

"It is true that in the Income Tax Cases the theory of certain economists, by which direct and indirect taxes are classified with reference to the ability to shift the same, was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word 'direct' was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property; secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

In Nicol v. Ames, 173 U. S. 519, 19 Sup. Ct. 522, 43 L. Ed. 786, the tax was measured precisely by the sum realized on the sale, and fell on the vendor or vendee, under the same economic law that would govern in the case at bar, for the law does not change accordingly as the same shares may be sold within or without an exchange. The curious investigator will find much instruction, and gather no little suspicion of the doctrine of political economists as guides to constitutional interpretation, if he will consult Prof. Seligman's article on the "Shifting and Incidence of Taxation," in the Publications of the American Economic Association (volume 7, p. 6,

et seq.). The narration of the disagreements, past and present, of these theorists, may leave him in doubt whether the usual tax assessed upon real property is not, after all, indirect.

At this point the history of the taxation of contracts will be considered, and proper inference drawn therefrom. It does not appear from the discussion of counsel or the opinions in the Pollock Case that contracts were the subject of direct taxation prior to the adoption of the constitution, nor that economists or jurists have characterized them as such. But shortly after the formation of the national government a system of laying stamp duties upon such contracts was inaugurated. By chapter 11 of the act of July 6, 1797 (1 Stat. 527), a stamp duty was placed on "bonds, bills, * * * foreign or inland bill of exchange, promissory note, or other note for the security of money * * * any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any state, or other bank" (section 1). Chapter 53 of the act of August 2, 1813 (3 Stat. 77), similarly laid a tax on any bond, obligation, or promissory note or notes not issued by any bank, companies, or banker, as aforesaid, discounted by any such bank, company, or banker, and on any foreign or inland bill or bills of exchange above $50, and having one or more indorsers. Chapter 119 of the act of 1862 (12 Stat. 479), laid a tax upon bank checks, inland bills of exchange, drafts, or orders for the payment of money, certificates of stock in any incorporated company, certificates of deposit, broker's note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description, issued by brokers, or persons acting as such, also any "deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction"; also any "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof"; also any "mortgage of lands, estate, or property, real or personal, heritable or movable, whatsoever, where the same shall be made a security for the payment of any definite and certain sum of money; * * * also any conveyance of any lands, estate or property, whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as security," etc. Hence it is seen that from an early period in the history of the national life the power has been exercised of imposing a stamp duty upon personal obligations, certificates of stock of corporations, bonds, notes, and similar securities discounted at banks, and at a later period upon similar obligations, as well as upon conveyances, leases, mortgages, broker's notes, or memoranda of sale of stock, bonds, goods, or merchandise. In all this there has been full acquiescence, and the power of the government has been so thoroughly recognized that in Knowlton v. Moore, 178 U. S. 41, 59, 20 Sup. Ct. 755, 44 L. Ed. 969, Mr. Justice White met an objection to the power of the government to lay the taxes there involved by saying:

"Conveyances, mortgages, leases, pledges, and, indeed, all property, and the contracts which arise from its ownership, are subject, more or less, to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property, or dealings in relation thereto, cannot be taxed by congress, even in the form of a stamp duty. It cannot be doubted that the argument, when reduced to its essence, demonstrates its unsoundness, since it leads to the necessary conclusion that both the national and state governments are devested of those powers of taxation which from the foundation of the government, admittedly, have belonged to them."

And well might the learned justice use such vigorous expression, for stamp duties have been uniformly upheld. In Attorney General v. Insurance Co., 3 App. Cas. 1090, there is helpful discussion. The judgment of the privy council states:

"The single point to be decided upon this is whether a stamp act—an act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a 'popular,' meaning. One or other meaning the words must have; and, in trying to find out their meaning, we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way, there is a multitude of authorities to show that such a stamp, imposed by the legislature, is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau (in the court below) in his elaborate judgment it is not necessary here to do more than refer to. But surely, if one could have been found in favor of the appellants, it was the duty of the appellants to call their lordships' attention to it. No such case has been found. Their lordships therefore think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions and several American decisions on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation."

It will now be inquired why a government that has power to lay an indirect tax upon a bond for the payment of money may not lay the same tax upon the sale; that is, the act of transferring, or (and) the contract for transferring, the bond from one holder to another. What is there so inherently different in the contracts as to enable a court to affirm the validity of the tax in one case, and to deny it in the other? Both are contracts. Both are founded upon the same presumable consideration. Both are business transactions involving a contractual relation. If A. issue his promissory note to B. for $1,000 upon receiving that sum from B., and B. agree to sell it to C., and accordingly does deliver it to C. for $1,000, upon what possible theory may the federal government place an unapportioned tax on the transaction between A. and B., and be denied the ability to place a like tax on the transaction between B. and C.? The only conceivable answer is that the premise is false, but this would deny the power of congress to lay the usual stamp tax on bills or notes. Passing to another assumption, if A., a cor-

poration, issue shares of stock to B. for $1,000 upon receipt of that sum, and B. contract to sell them to C., and accordingly does deliver them to C. for $1,000, upon what theory may the court affirm the power of the federal government to lay an unapportioned tax upon the transaction between A. and B., and deny the power to lay a like tax upon the transaction between B. and C.? Is it because A. is a corporation, and the tax is upon the corporate privilege? Does not the state give the privileges of the corporation to the stockholders, and, if the government may tax one privilege, may it not tax the other? Membership in a corporation created by the state is an artificial privilege, similar, if not equal in degree, to that in an incorporated exchange, and the benefits of incorporation are the only advantages conferred by the state in the latter case; and to the opportunities afforded in both cases the national government is an entire stranger. Again, if the federal government may lay an unapportioned tax upon indentures whereby land is conveyed, why may not a like tax be placed upon contracts for sales of stock? One class relates to the sale of land, and the other to the sales of shares. There is no intrinsic difference. If the tax is on the certificate, so it is on the land. If one transfer is given the protection flowing from registration, so is the other. If the tax shifts in one case, in which case does it shift? One contract carries the land; the other, muniments of titles to shares. It is difficult to understand why speculations or investments in stock should be exempted from, and exchanges or sales of real property exposed to, a stamp tax. It is illogical to affirm that an unapportioned tax upon one contract, for example, for the payment of money, is valid, and a tax upon a contract to sell property is invalid. Both tax an obligation,—one to pay money for property received or to be received; one to exchange property for money. Thus, by looking at the inner nature of the transactions, it is found that all have the essence of contracts, and that it is upon the contract, as embodying a business transaction, that the tax is laid. Whether, upon the sale of stock, the stamp is required to be placed upon the books of the company where the transfer is shown, on the transfer certificate, or on a memorandum of sale, the tax is upon the business or act of making a legal contract; and the basis of the power is precisely the same as that which justifies a tax upon bills, notes, or certificates of shares as originally issued, or contracts of conveyance. Congress may tax contracts in any form. It may tax contracts to buy certificates, or contracts to sell the same. As to such buying or selling, it was said in Treat v. White, 181 U. S. 264, 269, 21 Sup. Ct. 611, 613, 45 L. Ed. 853, where this very statutory provision was involved, "The power of congress in this direction is unlimited." In Knowlton v. Moore, Mr. Justice White adopted the following definition: "Direct taxes bear immediately upon persons,—upon the possession and enjoyments of rights. Indirect taxes are levied upon the happening of an event or an exchange." Thereupon it was demonstrated that an inheritance or legacy tax is laid upon the transmission of property. But what is "transmission" but the transfer of title by one person to another, vesting possession at the time

when the enjoyment of the first holder or owner ceases by the termination of his life? If the donor effected the same distribution of his property in his lifetime, would not congress have equal power to tax it? The assumed right of the federal government to lay death duties has no less remote basis than the highly theoretical and practically unknown power of the state government to seize and confiscate the property of an unoffending citizen who dies, leaving heirs or donees. But the basic theory upon which such tax rests does not change the fact that it is imposed upon the transfer of the title of the property. The state has the power to regulate the use of property, and to direct under what reasonable limitations sales thereof shall be made. As a basis of taxation, this power inures to congress quite as much as does the power to regulate successions. The conception that the state may theoretically confiscate property at the death of the owner, but may only regulate its use and sale during his life, points to a difference in degree of authority. The power of the state to regulate is a true and genuine dominion. It is constantly exercised. It furnishes some real basis for taxation. The power to appropriate a decedent's property is the merest speculation, which no civilized state would ever venture to use. The tax in question falls precisely within the definition stated by Mr. Justice White, because it relates to the act of sale, which act has two constituent elements,—an agreement to sell, and consequent delivery. The two constitute an event upon which the tax takes effect. This event is a business transaction. As such, congress has taxed it; and, as regards the power to do so, it is immaterial whether there is one event isolated, or many events aggregated, so as to constitute a person's uniform or usual vocation. It may be of inconsiderable importance whether an apportioned tax upon sales of property could be collected. Unlike a state, congress, having in view the necessities of maintenance, must fix upon a gross sum, and exactly apportion it. If this sum were laid upon the sales of property, the allotment to New York might be exceeded, while in Dakota a deficiency might arise. For the succeeding year the deficiency must necessarily be included in the gross sum to be raised, whereby it would result that under a new apportionment the amount of deficiency in Dakota would be apportioned anew to the states, and collected therefrom. Hence it would happen that the states meeting their allotment might, and probably would, make up the deficiency of others, and the very theory of apportionment would be violated. The excess in New York and the deficiency in Dakota would raise equally embarrassing questions. While the question of inconvenience or impossibility of placing a tax upon sales of property does not prove that the tax is indirect, it illustrates that it is based upon contingent events, and not upon property; and that, in the uncertainties attending it, is unlike known, direct taxes.

It is desirable to summarize the foregoing views. (1) The expressions in the cases, where no tax was valid, that a tax on vendors or occupations or shipping bills was a forbidden tax on the commodities, would, if applied to instances where the taxing power has been uniformly recognized, vitiate the same. (2) In whatever form

a tax is laid, its payment must be primarily from the taxpayer's property, and in this sense the same is the subject of the tax. (3) A statute providing for a direct tax, with certainty, burdens by lien, or generally, the taxpayer's property, and, in theory, appropriates, pro tanto, his income, and incumbers his principal, while a statute providing for a tax on sales interrupts no enjoyment of property, makes no exaction from principal or income, beyond placing a tax upon a transaction attending the disposition of property, to wit, the contract for the sale and the act of transfer; but in the present case the certificates pass unaffected to the vendee. (4) The right to tax a pursuit, occupation, or business involves the right to tax the same, in whatsoever limited degree it is adopted and followed, so that a right to tax one for carrying on the business of selling shares of stock involves the power to tax the sale of a single share of stock; that is, a tax on venders may be limited to a single instance of vending. (5) The right to lay an unapportioned tax on sales is not limited to sales of commodities, whereby the tax may be shifted, in whole or in part; and the conflicting views of the economists should influence the legislature, and not constrain the courts. (6) The history of legislation shows similar instances where, after the adoption of the constitution, the power was exercised to tax contracts for the payment of money and the transfer of property, and the genuine nature of such contracts is the same as the subject of the act in question. The validity of such taxes is illustrated by their long and uniform enforcement by the court. (7) Taxes on sales or transfers of property are indirect, within the holdings of the supreme court. (8) The fact that the tax is difficult, if not impossible, of apportionment, indicates that it is based upon contingent events, and quite unlike the tax usually conceived as direct.

The defendant's contention, seemingly, is that, in the procession of constitutional interpretation, some reason has just now appeared that should awaken the courts to a fundamental error, of which all men for a century have been profoundly unconscious. But such attention as is due the inquiry from the trial court confirms the wisdom of the past, and the power of congress to lay the tax.

The demurrer should be overruled.

THE ROBERT DOLLAR.

(District Court, D. Washington, N. D. April 2, 1902.)

1. MARITIME LIENS—SUPPLIES—DEFENSE BY CHARTERER.
   A charterer who has obtained necessary supplies on the credit of the ship, in violation of his agreement with the owner in the charter party, cannot plead such agreement to defeat a lien by the creditor.
2. SAME—STATE STATUTES—CONSTITUTIONALITY.
   State statutes giving liens on ships for necessary repairs or supplies furnished on the credit of the vessel, which are enforceable by process in rem, in a court of admiralty, as arising under maritime contracts, cannot be classed as laws intended to impose burdens upon interstate or foreign commerce, and for that reason held unconstitutional, though applied to foreign ships, but their purpose and effect, like liens given by

the general maritime law, are to facilitate commerce by enabling the ship to obtain the things necessary to the prosecution and completion of her voyage.

3. SAME—APPLICABILITY TO FOREIGN SHIPS—WASHINGTON STATUTES.
The statute of Washington (1 Hill's Code, § 1678), which makes every master, consignee, or person having charge of the construction, alteration, repair, or equipment of any vessel an agent of the owner for the purpose of contracting debts on the credit of the vessel, is applicable to foreign vessels obtaining repairs or supplies in ports of the state, as well as to domestic vessels.

4. SAME—NECESSARY SUPPLIES—BAR FIXTURES AND SUPPLIES.
Bar supplies and fixtures furnished to a vessel are not necessaries, for the price of which a suit in rem against the vessel may be maintained, under the twelfth admiralty rule.

In Admiralty. Suit in rem to recover the contract price for supplies furnished to the steamship Robert Dollar, by the libelants, in Alaska, upon the order of the master, and also to recover for supplies and equipments furnished by the intervening libelants, at Seattle, at the request of a charterer in possession, who was obligated by the charter party to pay all expense bills and return the ship free from liens. The charterer alone appears as claimant, and defends on grounds stated in this opinion. Decree for libelants and intervening libelants, except as to bills for fixtures and supplies required for, and consumed in conducting, a bar.

Preston, Carr & Gilman, for libelants and intervening libelants.
Hoyt & Haight, for claimant.

HANFORD, District Judge. It is shown by the uncontradicted evidence in this case that, while the Robert Dollar was being operated as a carrier of freight and passengers between Seattle and Nome and other places in Alaska, it was necessary for her to replenish her supplies of coal and water at Dutch Harbor, both in going north and returning; that her master did not have money to pay her bills for these necessaries; and that upon his request the libelant furnished coal, water, and provisions to the steamer, which were necessary for her use and to feed her passengers and crew; that neither the owner nor charterer had any credit at Dutch Harbor; and said supplies had to be obtained on the credit of the ship. These are the conditions under which, by the maritime law, a lien becomes attached to a ship, and the only semblance of a defense to this part of the case is made upon the ground that by the charter party it was agreed between the owner and the charterer that the latter should pay all the bills incurred in operating the vessel during the period for which she was hired, and should, at the expiration of said period, return the vessel to her owner free from liens. It is not pretended that the libelant had actual knowledge of this stipulation in the charter party; but it is claimed that the fact that the vessel was chartered to the Alaska & Pacific Steamship Company had been announced in newspapers, and was generally known among merchants and shipping men, and that the captain had possession of a copy of the charter party; so that if the libelants had made inquiry they might have become informed with respect to its condi-

tions. There are two reasons why this defense cannot prevail. In the first place, the indebtedness was incurred by the master of the ship, who was appointed by the owner, and whose authority was ample to abrogate the agreement whenever it became necessary to do so in order to enable the vessel to get on and complete her voyage. The second reason is that this defense is not available to the charterer. Liens for supplies upon chartered vessels, in favor of creditors to whom notice has been given that the owners have parted with their possession relying upon agreements that the charterers will keep them free from liens, are not permitted, because the pledging of the credit of a ship under such conditions would be fraudulent, and the courts have refused to recognize such fraudulent claims in cases in which the owners have appeared to defend against them. But when a charterer obtains supplies on the credit of a ship in violation of a promise made to the owner that he will not do so, he has no right to plead his own broken promise to defeat his creditors. Each of the intervening libelants furnished goods which were necessary for supplying and equipping the vessel at Seattle, upon requests from the managing officers of the Alaska & Pacific Steamship Company, the charterer, and as the charter party does not confer authority to pledge the credit of the vessel, these creditors must rely upon the statutes of this state, and not upon the general maritime law. The statute makes every master, consignee, contractor, subcontractor, builder, or person having charge, either in whole or in part, of the construction, alteration, repair, or equipment of any vessel an agent of the owner for the purpose of contracting debts upon the credit of the vessel. 2 Ballinger's Ann. Codes & St. § 5953; 1 Hill's Code, § 1678; The Del Norte (D. C.) 90 Fed. 506; The North Pacific, 40 C. C. A. 510, 100 Fed. 490; The South Portland, 40 C. C. A. 514, 100 Fed. 494. This law is general in its terms, applying to all steamers, vessels, and boats having occasion, within this state, to obtain supplies or new equipments on credit; but in view of criticisms which have been made upon the decision of this court in the case of The Del Norte, and of the decision of the United States circuit court for this district in the case of McRae v. Dredging Co., 86 Fed. 344, it is now contended in this case, and in other cases which have recently been argued and submitted and are now under advisement, that the statute is inapplicable to vessels not owned within the state, for the reason that it is not within the power of the legislature of any state to create maritime liens, or amend the laws affecting liens upon vessels not owned by citizens of the same state, because vessels are instruments of interstate and foreign commerce, and liens upon such vessels are burdens upon interstate and foreign commerce, and repugnant to the clause of the constitution which confers upon congress the power to regulate commerce between the states and with foreign countries, and with the Indian tribes. In a new book on admiralty law the learned author expresses his belief that, when the question shall be presented to the supreme court in such a manner as to render its decision necessary, it will hold that state statutes creating liens on vessels "only apply to the rights of material

men against domestic vessels." Hughes, Adm. pp. 111, 112. As the supreme court has not given any intimation to justify the author's expectations, any mere conjecture is useless. Subordinate courts must decide according to their best judgment, and presume that the supreme court, when it comes to pass upon the question, will render a true decision, based on sound reasons. Therefore consideration must be given to the constitution and laws of the United States, the decisons of the supreme court by which the same have been expounded, and the general principles of jurisprudence of this country. The following are some of the reasons which have come into my mind as being applicable, and of controlling force, in the decision of the question now presented: In the first place, the nature and limitations of valid statutes creating liens upon vessels should be kept in mind The maritime law gives liens for necessary supplies and repairs to a foreign ship, for a purpose; and that purpose is to give wings and legs to ships to enable them to get on and complete their voyages for the good of all concerned, by making the credit of the ship available to procure necessaries. The St. Jago de Cuba, 9 Wheat. 409, 6 L. Ed. 122. Statutory liens, which are enforceable by process in rem in the admiralty courts of this country, have the same purpose and effect; for the federal courts take cognizance of suits in rem to enforce liens given by local statutes only when the lien is asserted as an incident of a maritime debt. for necessary supplies or materials furnished, or for repairs or labor on the credit of the ship. The Lottawanna, 21 Wall. 558–609, 22 L. Ed. 654; The North Pacific, 40 C. C. A. 510, 100 Fed. 490. Therefore it is error to treat statutory liens enforceable in admiralty as burdens upon commerce, or to class them with laws intended to interfere with freedom of commercial intercourse. It is next to be observed that the place of residence of the owner of a ship, or of a railroad, has nothing whatever to do with fixing the relationship of such property to interstate or foreign commerce. A ship employed as a carrier of passengers or merchandise upon public waters within a state, towards their destination, within the state or elsewhere, is as much an instrument of interstate and foreign commerce when her owner resides within the same state as she can possibly be, when the owner's place of residence and her home port is in another state or any foreign country. Any law which discriminates in favor of nonresident shipowners is equally as obnoxious to the principles of justice and the requirements of fair trade as a law which discriminates against nonresident shipowners, and it cannot be presumed that the supreme court, in affirming the validity of statutory liens incidental to maritime contracts, ever contemplated that the laws creating such liens must be so construed as to make them unfair. Another important consideration is that, if the interstate and foreign commerce clause of the constitution is potent to shield foreign vessels from liens provided for by state laws to secure debts incidental to maritime contracts, the same rule of construction, if carried to its logical sequence, would annul all state laws providing legal process for the collection of debts contracted by nonresidents in commercial dealings with

inhabitants of the state; for if a lien upon a ship is a burden upon commerce, the levying of an execution for the satisfaction of a judgment upon the cargo of a ship or any consignment of merchandise brought into the state from another state or a foreign country, to be sold in the course of trade, is also a burden upon commerce, and has a tendency equally as strong to discourage commercial ventures. Whether merchandise can be attached and sold for a debt of the owner pursuant to the laws of the state in which it is situated, when the owner is a citizen and resident of a different state, is not at this time a debatable question. Nearly that precise question, though it was stated differently, was passed upon by the supreme court in the case of Green v. Van Buskirk, 7 Wall. 139–152, 19 L. Ed. 109, which was an action commenced in a court of the state of New York, by a citizen of New York, against another citizen of the same state; and the question was whether the plaintiff or the defendant had acquired a prior lien upon 41 iron safes in Chicago, owned by a debtor of both parties, who was also a citizen and resident of the state of New York. The plaintiff claimed under a chattel mortgage. The defendant caused a writ of attachment to be issued, and a levy made thereunder, after the date of the mortgage, but prior to the recording of that instrument. Under the laws of New York the mortgage was effective from the time of its delivery, and the plaintiff, as mortgagee, acquired a lien superior to the attachment, but under the statute of Illinois the mortgage did not become a lien until it was filed for record in that state; therefore, it was subordinate to the attachment. The supreme court reversed the decison of the highest court of the state of New York, and held that the statutes of the state in which the property was situated were controlling. Walworth v. Harris, 129 U. S. 355, 366, 9 Sup. Ct. 340, 32 L. Ed. 712, is a case in point, and the decision of the supreme court in that case is to the effect that cotton produced in the state of Arkansas, and subject to a landlord's lien there, under a statute of Arkansas, upon being sent to market at New Orleans, became subject to a lien in favor of the consignee for advances and incidental charges under a statute of the state of Louisiana, and that the Louisiana lien was paramount to the Arkansas lien, on the ground that when the property was imported into the state of Louisiana it became subject to the laws enacted by that state. In this the court reaffirmed its rulings in several cases cited by Mr. Justice Miller in the opinion of the court, which he delivered. I consider that the interstate commerce clause of the constitution cannot now be extended to exempt the property of nonresident owners from the claims of creditors under state lien laws, or writs of attachment, or other judicial process, without destroying principles which have become fixed under the sanction of a line of decisions of the supreme court; and I believe that a departure from those principles now would be disturbing, and injurious to the business interests of the country. I think that the supreme court has declared its position on this subject in the twelfth admiralty rule. As originally promulgated, that rule provided that where the local law gives a lien for repairs and supplies or other necessaries

furnished a domestic ship, the creditors might proceed to enforce it as in the case of a foreign ship. By an amendment to the rule in 1859, the right to enforce local lien laws in the admiralty courts was taken away, but on May 6, 1872, the rule was again amended to read as follows:

"In all suits by material-men for supplies, or repairs, or other necessaries, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam."

And no further amendment or modification of the rule has been made. In practice this rule has been construed in harmony with the principle that a suit in rem can only be maintained to enforce a lien, and when there is no lien the remedy of creditors is confined to suits in personam, but the rule is comprehensive in allowing suits in rem to be prosecuted for the collection of debts for supplies, repairs, and other necessaries, when the ship or vessel is subject to a lien, whether that lien is given by a local statute or by the general maritime laws. 19 Am. & Eng. Enc. Law, 1105. I think there is significance in the fact that when the rule was amended the second time, instead of restoring the original phraseology, which limited the application of statutory liens to domestic vessels, the rule was recast entirely, and the words indicating a distinction between domestic ships and foreign ships were omitted.

It has been often asserted, as if it were an axiom, that a state legislature has no power to amend or change the admiralty laws, nor to create a maritime lien; but all the force has been taken out of that idea by the decisions of the supreme court. A summary of the doctrine of the supreme court bearing upon this subject is contained in the opinion of that court by Mr. Justice Gray in the case of The J. E. Rumbell, 148 U. S. 1–21, 13 Sup. Ct. 498–503, 37 L. Ed. 345, and a concise statement of the doctrine is contained in the two paragraphs of that opinion which are here quoted:

"The settled rules of jurisdiction and practice on this subject were stated by Mr. Justice Bradley in The Lottawanna, as follows: 'So long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction; for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts, so as to enable them to proceed in rem for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the district courts of the United States, having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws.' 21 Wall. 580, 22 L. Ed. 654. * * * According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a jus in re,—a right of property in the vessel,—existing independently of possession, and arising

as soon as the contract is made, and before the initiation of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only."

In the case of The Glide, 167 U. S. 606–624, 17 Sup. Ct. 930, 42 L. Ed. 296, Mr. Justice Gray delivered another instructive opinion, reviewing all the previous decisions of the court touching the subject of jurisdiction to enforce state lien laws by proceedings in rem against vessels, and reiterated the declaration that a lien given by a statute of a state to secure a debt created by a maritime contract is for all practical purposes the same as a maritime lien. If a lien upon a ship may not be called a "maritime lien" without offending against accuracy in the use of terms, still the name is not of vital importance, since the supreme court has affirmed that the nature and effect of liens created by state laws, enforceable in the admiralty courts, are the same as liens which have their foundation in the system of laws commonly known as the general maritime law. Substantially, and for all practical purposes, one kind of a lien is as much a maritime lien as the other. The most arbitrary of the state laws affecting commerce and burdensome upon ships are the compulsory pilotage laws, which authorize licensed pilots to tender their services to vessels, and provide that the pilot first to offer his services to an inward bound vessel may, if he is not required, and if his services are declined, collect half the compensation which he would have earned if employed. These laws are admitted to be regulations of navigation, and of interstate and foreign commerce; and yet, so long as congress refrains from enacting laws on the subject, these local statutes, and the rights and obligations which they create, may be enforced by the process of admiralty courts. By its decision in the case of Ex parte McNiel, 13 Wall. 236–243, 20 L. Ed. 624, the supreme court in effect affirmed a decree of the United States district court for the Eastern district of New York, which obtained jurisdiction by attaching a foreign ship for half pilotage fees claimed by the libelant under a New York statute, and the concluding paragraph of the opinion by Mr. Justice Swayne contains the following broad and comprehensive statement of the rule on this subject:

"A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law."

See, also, The China, 7 Wall. 53–71, 19 L. Ed. 67; Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406–417, 21 Sup. Ct. 831, 45 L. Ed. 1155; Huus v. Steamship Co., 182 U. S. 392–397, 21 Sup. Ct. 827, 45 L. Ed. 1146.

In this country suits in rem cannot be maintained to recover damages for a personal injury resulting in death caused by a maritime tort, when there is no local statute creating a lien upon an offending vessel for such damages. The Corsair, 145 U. S. 335–348, 12 Sup. Ct. 949, 36 L. Ed. 727; The Jane Gray (D. C.) 95 Fed. 693; Id., 99 Fed. 582. But the law of the forum, or the law of the country

to which an offending ship belongs, may be applied in such cases. The Scotland, 105 U. S. 24–35, 26 L. Ed. 1001; The Jane Gray, supra; and if a state law gives a right of action and a lien a suit in rem may be brought in the United States district court for the district in which the vessel can be attached to enforce them. Hughes, Adm. pp. 202–210. In many cases the federal courts have held that a lien given by a state law for negligence, or a wrongful act causing the death of a person, may be enforced by a suit in rem in a United States district court. The Oregon (D. C.) 45 Fed. 62. See Id., 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The City of Norwalk (D .C.) 55 Fed. 98; The Willamette, 18 C. C. A. 366, 70 Fed. 874, 31 L. R. A. 715; Association v. Christopherson, 19 C. C. A. 481, 73 Fed. 239, 46 L. R. A. 264; Robinson v. Navigation Co., 20 C. C. A. 86, 73 Fed. 883; 8 Am. & Eng. Enc. Law (2d Ed.) 884.

I cannot hope, and will not attempt, to exhaust the subject in this opinion. All the matters above set forth confirm my belief that foreign vessels are not exempt from liability under the lien law of this state. We must not be blind to the existence of things which are obvious, nor ignore conditions which exist, and it is true in fact that in spite of theories state lien laws have, with the sanction of the supreme court of the United States, become ingrafted upon the maritime law administered by the federal courts in this country, and the changes which have been made by the state laws adopted in practice by the federal courts are likely to be permanent. In view of what has actually taken place, I have no hesitation in holding that vessels which are foreign to the ports of this state are, as to all transactions by their masters, owners, and charterers within this state, subject to the liabilities created by the statutes of this state to the same extent as domestic vessels.

The libel of F. A. Buck & Co. is for the price of liquors and supplies for a bar which was conducted on board the Robert Dollar for the profit of the charterer. It is always optional with the owner of a vessel whether to conduct a bar on board or not, and, as it is not essential to the navigation of the vessel, or to the safety and comfort of passengers, I cannot regard bar supplies as "necessaries" in the sense in which that word is used in the twelfth admiralty rule. Under that rule, material men cannot sue in rem for supplies furnished, other than necessaries. The bill of Frederick & Nelson includes an item of $12 for an ice box, which was required as part of the bar fixtures, and therefore not one of the "necessaries" for the equipment of the ship as a carrier of passengers and freight. This item, and the entire bill of F. A. Buck & Co., must be disallowed. I find from the evidence that all of the other demands of the libelants and the several intervening libelants are for necessary supplies furnished upon the credit of the vessel, and constitute valid liens. A decree will be entered for the several amounts sued for, with interest and costs, except as I have indicated.

MARTIN et al. v. PEOPLE'S BANK OF BUFFALO, N. Y., et al.

(Circuit Court, E. D. North Carolina. April 21, 1902.)

1. APPEAL—LAW OF CASE—AMENDING DECREE AFTER AFFIRMANCE.
Where a decree of the circuit court has been affirmed by the circuit court of appeals, the circuit court cannot review the action of the court of appeals, or entertain a petition to amend the decree.

2. RES JUDICATA—VOLUNTARY APPEARANCE ON APPEAL.
Where, in an action for partition of real property, the holder of a life estate in an undivided share of the property, who was not a party, voluntarily intervenes and presents his contention in the circuit court of appeals, he is bound by the decision of that court.

3. PARTITION—INTEREST OF LIFE TENANT.
Where a life tenant in an undivided share of real estate in North Carolina becomes a voluntary party in the circuit court of appeals to an action for partition of such property, his rights can be fully protected by the circuit court on a sale of the property, under St. N. C. c. 214, § 3, providing that in proceedings for partition of land a life tenant may join, and on a sale the interest on the value of the share of the life tenant shall be paid to him annually, or the value of such share during his probable life shall be ascertained and paid to him out of the proceeds of the sale.

This case now comes up on the petition of G. H. B. Martin and the East Coast Cedar Company. The petition alleges:

That on the 28th October, 1898, the East Coast Cedar Company, being one of the tenants in common of about 167,000 acres of land in the state of North Carolina, known as the "Blount Patent," filed its bill of complaint against the other co-tenants, praying a partition of said lands. That the East Coast Cedar Company and two of the other tenants in common, whose interests it had contracted to buy, and who united with it, owned, together, an undivided interest of 18 per cent. of said lands. That the interest of the East Coast Cedar Company was one-fifteenth of the said land, derived from it by Charles L. Stickney, who inherited it from his mother, one of the heirs of Blount, the original patentee. That upon the hearing of said cause it appeared that John C. Stickney, the father of Charles L. Stickney, was still alive, and that he was tenant by the curtesy in this one-fifteenth, as survivor of his wife. That after the decree was entered in the circuit court John C. Stickney conveyed this tenancy by the curtesy to George H. B. Martin. That upon the hearing in the circuit court of appeals of the appeal (of the East Coast Cedar Company from the decree of the circuit court) Martin filed his petition asking leave to intervene in the cause, and especially asking that his interest be allotted to him in severalty. The opinion of the circuit court of appeals was filed November 8, 1901, affirming the judgment of the court below, and directing the sale of the property for partition. 49 C. C. A. 422, 111 Fed. 446. That this opinion does not mention the intervention of G. H. B. Martin, and decrees the sale of the entire property without provision for the protection of his rights. That this decree of the circuit court of appeals is erroneous, in respects to be pointed out hereafter, and will greatly injure the interest of the petitioner, who will be without remedy. The petition then states the error in the decree in ordering a sale of the lands instead of an allotment in severalty, and denies the power of the court to direct a sale over his protest and objection. The East Coast Cedar Company joins in this petition, basing its right "to ask that the proportionate share of the life tenant, Martin, shall be allotted to him in severalty, in order that the East Coast Cedar Company, the owner of the remainder, may not be subject to any suit or demand of said Martin, caused by a failure to allot his proportionate part to him in severalty." The petition alleges also that Martin and the East Coast Cedar Company have entered into an agreement providing that said life estate may be allotted to him in connection with the estate in remainder of the East Coast Cedar Company. The petition also incidentally

calls attention to the fact that the opinion of the circuit court of appeals is based on the presumption that the circuit court appointed commissioners, who went on the land and examined it, and the opinion declares "that this course has been preserved here, and is approved;" that the examination of the record will show that no commissioners were ever appointed to go on the land; and that the decree was made simply on depositions. The prayer of the petition is that Martin may be permitted to have his petition of intervention considered and passed upon by the court, so that his rights may be determined before a sale of the real estate, instead of leaving it uncertain whether he is entitled to share in the proceeds of sale or is permitted to file his petition for partition, or whether, by reason of his petition filed in the circuit court of appeals, he is entirely deprived of all relief. Upon the filing of this petition a rule was issued to the other parties to the suit, to show cause on a day certain "why the prayer of the petitioner be not granted and the decree amended in accordance therewith." The return to the rule has been made, and cause has been shown. It appeared at that hearing that the petitioners had applied to the supreme court for a certiorari when the decree of the circuit court of appeals was filed, and that their prayer was refused.

F. H. Busbee, for petitioners.

Norris Morey and Jas. E. Shepherd, for respondents.

SIMONTON, Circuit Judge (after stating the facts as above). This court has no right to inquire whether the circuit court of appeals erred in any particular, nor can it sit in review of that court. The petitioners could have prayed a rehearing, or could have invited the review by the supreme court. No inferior tribunal can afford them relief. It follows, therefore, that so much of the prayer of the petition as asks that the decree be amended cannot be entertained.

The decree of the court below, in a cause to which the East Coast Cedar Company was a party, after a full hearing, determined that the partition prayed for by that company could not be made in severalty, and could only be effected by a sale. To that decree John C. Stickney, the supposed life tenant, was not a party, and was not bound by it. Martin, the present petitioner, after the decree was made, purchased Stickney's interest. He was not bound by the decree. But having this immunity, he, of his own accord, intervened in the cause on appeal, took part therein with the appellants, was represented by counsel, and all points which he then contended for and now insists on were presented. The one question before the court was, could this partition be effectually made in severalty, or must it be made by a sale and the allotment of shares in money? On the one side were tenants holding 82 per cent. of the interest in the lands, and on the other side were the shares of the Phenix National Bank and Mary H. Brown, which, during the litigation, had been purchased by the East Coast Cedar Company, and a share of one-fifteenth in the land, the fee in which was in the East Coast Cedar Company in remainder, subject to the life estate of Stickney so purchased by Martin. The contention between these two sides was heard by the appellate court, and it decreed that a partition could only be made by a sale. Intervening as Martin did in the cause, he submitted himself to the jurisdiction of the court (President, etc., v. Merritt [C. C.] 59 Fed. 6), and is bound by its decision. He

made common cause with his tenant in remainder, and between them the whole fee was represented. The court below held that this estate in remainder must be included in the sale, and could not be set apart in severalty. The court could not decree that the life estate be set apart in severalty without also setting apart in severalty the estate in remainder. So their fortunes were bound together. And when the court ordered a sale of the whole tract, against the opposition of the remainder-men and the life tenant, the interests of the latter were concluded as well as the former. It is true that the petitioner Martin was not mentioned by name. He had been admitted into the case, and had been heard on the same side with the East Coast Cedar Company. The court was deciding a controversy, and in that controversy the affirmative was held by the majority co-tenants. Martin was in the company of the minority. The controversy was decided against him and his allies. The petitioner seems to be apprehensive that his rights will be destroyed if the prayer of his petition be not granted. The circuit court of appeals simply decided the controversy before it, holding that no partition in severalty could be made, and that the property be sold and the proceeds divided between the parties in interest in the proportion of their shares. The cause was remanded for such further proceedings as may be necessary. The case having been remanded to this court, it appears that the one-fifteenth of the land is represented by two of the parties to the cause. Of this one-fifteenth the petitioner Martin holds a life estate, and the remainder belongs to the East Coast Cedar Company. A sale of the whole has been ordered. In the proceedings ordering the sale the life tenant has joined. Section 3 of the act of 1887 (chapter 214 of the Statutes of North Carolina) provides exactly for such a case:

"Sec. 3. In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the petition or proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually, or in lieu of such annual interest the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely."

The petitioner, of his own volition, has joined in the proceedings for partition. It is true that he did so for the purpose and with the hope of setting aside the decree of the circuit court, not only as it affected his own interest, but also as it affected the interest of his ally, the East Coast Cedar Company. But, having joined in the proceedings, he necessarily took the consequences. So, in the further proceedings ordered by the appellate court, the circuit court can provide ample protection for the petitioner, and give him all that the state statute has given to life tenants in the same circumstances.

The petition is dismissed.

THE OCEAN.

(District Court, S. D. New York. April 2, 1902.)

COLLISION—STEAM VESSELS CROSSING—VIOLATION OF RULES.

A tug, with two scows in tow, was passing down East river on a course somewhat toward the Brooklyn shore, when she met the steamship Ocean coming up on a crossing course, so that the crossing involved danger of collision. The tug having the Ocean on her starboard side, it became her duty, under articles 19, 22, and 23 of the navigation rules, to keep out of the way, to avoid crossing ahead, and to slacken her speed or stop and reverse. The Ocean gave a signal of one whistle, which the tug answered by a cross signal, and starboarded in an attempt to cross ahead. At a second cross signal the Ocean stopped and reversed, but too late to avoid collision with one of the scows. *Held*, that the tug was primarily in fault for violation of the rules, but that the Ocean was also in default because, under the special circumstances of the case, it was made her duty, by articles 27 and 29, to stop and reverse at once, on receiving the first cross signal.[1]

In Admiralty. Suit for collision.

John F. Foley, for libelants.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. On the 19th day of June, 1901, the tug Annie L. took in tow at Port Washington, Long Island, the scow Dandy and another scow, both loaded with sand, to be towed to the foot of Ninety-Eighth street, North river. The Dandy was on a hawser about 25 or 30 fathoms astern of the tug, and the other scow was a short distance behind the Dandy. As the tow approached the Brooklyn Bridge, between 4 and 5 o'clock in the afternoon, the Ocean, an ocean-going steamer of about 300 feet in length, was seen approaching from a point about a half of a mile below the bridge. She was bound, under her own steam, for North Tenth street, Brooklyn, and was accompanied by two tugs, which were attending her for the purpose of docking her when she reached the pier. The tide was ebb, the wind light, and the weather clear. A collision occurred a little below the bridge between the Ocean and the Dandy, by which the latter was overturned and considerably injured, and the master, it is alleged, lost some personal effects. This action was brought by the libelants, who owned both the tug and the scow, to recover their damages. The master of the scow joined in the libel.

The Annie L. alleges that when she was somewhat above the bridge, on the Brooklyn side of the middle of the river, the Ocean was seen about opposite Pier 10, on the Manhattan side, coming straight up the river, showing her starboard side to the Annie L., which was then showing her starboard side to the Ocean; that she blew a signal of two whistles to the Ocean, to which the Ocean paid no attention, but came on the same course and at the same speed; that the Annie L. kept on until about under the bridge, when she again blew a similar signal to the Ocean, to which no attention was paid, and the Ocean gradually headed towards the Brooklyn shore

[1] Collision rules, see notes to The Niagara, 28 C. C. A. 532; The Mount Hope, 29 C. C. A. 368.

to cross the bow of the Annie L., with the result that she struck the scow, with the consequence stated.

The Ocean alleges that she was proceeding slowly up the river, somewhat on the Brooklyn side, on a course parallel with the shore, when the Annie L. and tow were seen three or four points on her port bow; that a tug, with several schooners in tow, was coming down nearly head and head with the Ocean, and the Ocean signaled her, with a single blast, that she would pass to the right; that the Annie L., instead of passing the same way, headed more towards the Brooklyn shore, whereupon the Ocean gave her a signal of one blast, to which the Annie L. replied with a signal of two blasts, and the Ocean then reversed her engines full speed, but the Annie L., crossing the Ocean's bow herself, brought the scow into collision, the ebb tide setting her down so that the starboard side of the scow came in contact with the Ocean's stem.

A number of witnesses were examined on each side, and there is much contradiction with respect to the positions of the respective vessels and their signals. Out of the confusion I gather the following material facts: The Annie L., with her tow, was near the middle of the river above the bridge, but rather on the Manhattan side. Though bound down the river, she was headed towards the Brooklyn shore. Another tug, the Peck, belonging to the libelant, and having a tow similar to the Annie L.'s, was just behind the Annie L.'s tow and a little nearer the Brooklyn shore. Another tug, the Gypsum King, with a tow of two schooners and a barge abreast on a hawser, which had come from Nova Scotia by way of Long Island Sound, bound to Staten Island, was also behind the Annie L. and her tow, somewhat nearer the Brooklyn shore than the Peck and tow. The Ocean at this time was coming up the river, somewhat on the Brooklyn side of the middle, about head and head with the Gypsum King, and having the Peck and the Annie L. a little on her own port bow, the respective positions being such that it was the duty of the tugs and the Ocean to pass to the right of each other. While in this position the Ocean blew a signal of one blast, which the Gypsum King, after waiting for the Annie L. to answer as the head vessel, answered with a similar signal. The Ocean then ported a little. After this exchange of signals, the Annie L. blew a signal of two blasts to the Ocean, and starboarded her wheel, without waiting for an answer, which was shortly given by the Ocean in a signal of one blast. Shortly after her signal, the Annie L., having then changed her position somewhat towards the Brooklyn shore, and broadened her heading across the bow of the Ocean, blew the Ocean another signal of two whistles. The Ocean answered this signal with a signal of one blast, and stopped and reversed, but too late to avoid the collision. In the meantime the Peck, which, according to her account, had given a signal of two blasts to the Ocean, seeing that there was going to be a collision between the Ocean and the scow in tow of the Annie L., hauled off to the starboard, and passed the Ocean on the Manhattan side. The Gypsum King, however, owing to the position of the Annie L. between her and the Ocean, was unable to comply with the signal she had exchanged

with the Ocean, and compelled to turn towards the Brooklyn shore. The collision happened probably 800 or 900 feet below the bridge, and about 600 feet from the Brooklyn shore.

It is evident, upon the mere statement of the facts, that the Annie L. was primarily in fault for the collision. She had the Ocean on her own starboard side, and, in view of her attempted maneuver, the vessels were crossing so as to involve risk of collision. It was her duty to keep out of the way of the Ocean (Supp. Rev. St. c. 4, art. 19), to avoid crossing ahead of the Ocean (Id. art. 22), and to slacken her speed or stop or reverse (Id. art. 23). She acted in direct violation of these rules, and the collision resulted.

The only question in the case about which there can be any doubt is whether the Ocean was also guilty of a fault which contributed to the collision. If she had stopped a little sooner than she did, the slight headway which she had at the time of the collision would have been overcome, and collision would certainly have been avoided. I do not see how she can escape being implicated in the matter upon her own testimony. The pilot in charge of her navigation testifies that he received the cross reply from the Annie L. to his first signal of one blast, which he said was designed principally for the Gypsum King, as she was in a position to require such a signal, but that it was also intended as a notification to the Annie L. that he was directing his course to the right. The Annie L.'s first signal indicated that she intended to cross the Ocean's bow, and he said that, both before and after the signal, the Annie L. was acting in pursuance of such intention, yet he did nothing to arrest the headway of his vessel until he heard the second signal of two blasts. He said that he first thought there was danger of collision "when the Annie L. blowed her two whistles the last time, seeing that she was determined to cross me," but he was not justified in waiting until that time for precautionary action under the rules. There was risk of collision when the Annie L. crossed the first signal and kept on. That was the time for the Ocean to have stopped and reversed (The Columbia, 23 Blatchf. 268, 25 Fed. 844), especially as the compass bearing of the Annie L. had not changed to the Ocean, and risk of collision then existed under the preliminary rule. This case is distinguishable from The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, a case under rules 19 and 23 of the act of 1885, where it was held that the privileged vessel was not in fault for failing to stop and reverse, in the absence of notice from the burdened vessel that she intended to depart from the governing rule. Here there was such notice. As to the Ocean, the situation was governed by Supp. Rev. St. c. 4, art. 27, requiring her to depart from article 21 in order to avoid immediate danger, and by article 29, requiring her not to neglect any precaution rendered necessary by the special circumstances of the case.

The libelants Murray and Reid, being the owners of the tug and tow, are entitled to half damages. The libelant Johnson, who did not participate in the navigation, was not in fault, and is entitled to full damages.

Decree accordingly, with an order of reference.

DAVIES, TURNER & CO. v. UNITED STATES.

KNY-SCHEERER CO. v. SAME.

(Circuit Court, S. D. New York. March 14, 1902.)

Nos. 3,001, 3,004.

CUSTOMS DUTIES—CATGUT AND WORMGUT—INCLUSION IN FREE LIST.

Catgut and wormgut are free from duty under Free List, par. 517 (30 Stat. 197), as "unmanufactured," and are not classifiable for duty under Tariff Act 1897, par. 448 (30 Stat. 193), as "manufactures of catgut and wormgut, not specifically provided for."

Appeals from Decisions of the Board of General Appraisers.

Howard T. Walden, for Davies, Turner & Co.
Albert Comstock, for Kny-Scheerer Co.
W. Usher Parsons, Asst. U. S. Atty.

TOWNSEND, District Judge. The merchandise in question comprises catgut and wormgut, each claimed to be free, as "unmanufactured," under the provisions of paragraph 517 of the free list (30 Stat. 197). They were classified for duty as "manufactures of catgut and wormgut, not specially provided for," at 25 per cent. ad valorem, under the provisions of paragraph 448 of said act (30 Stat. 193). The board of general appraisers overruled the protests, and sustained the classification of the collector.

The sole question is whether the articles are manufactures of catgut and wormgut. The effect of the decision of the board of general appraisers would be to hold that all catgut or wormgut must necessarily be manufactured. It is admitted that no cruder form of the merchandise than that here in question is imported. The argument based on the history of previous tariff acts throws but little light on the question involved. The opinion of the board of general appraisers is based on the testimony of a foreigner,—Beisel,—called by the government in another case, and who has never been cross-examined; and, while he said that there was a form of unmanufactured catgut, called "schok," it is admitted that no one ever saw any of this article in this country; and one of the government officials testifies that he never knew of the importation of any such article. Catgut is prepared from the small intestine of the sheep by a process of cutting, cleaning, and drying. In fact the intestine of the sheep does not become the catgut of commerce until it has been subjected to this process. Afterwards, when it has gone through an elaborate further process of sterilization, increasing its value from ten fold to one hundred fold, it becomes the manufactured article known as "surgical antiseptic catgut." A small sac taken from the silkworm in Spain, and stretched, dried, and cleaned, becomes wormgut commercially only after it has been thus treated. Single strands, taken from bunches of such wormgut, are manufactured into leaders and snells for fishing purposes, and stitching material for the use of surgeons. As neither of these articles is known in any cruder form, and they are subsequently manufactured as aforesaid, or become parts of manu-

factures of gut, such as tennis racquets, they are gut unmanufactured, and not manufactures of gut.

The decision of the board of general appraisers is reversed.

UNITED STATES v. TOPKEN et al.

(Circuit Court, S. D. New York. March 3, 1902.)

No. 2,908.

CUSTOMS DUTIES—BUCKLES.

Buckles used on shoulder straps of overalls, and which are of the character of suspender buckles, are not trouser buckles, dutiable under Act 1897, par. 412 (30 Stat. 190), as such, but are dutiable under paragraph 193 (30 Stat. 167), as articles of steel or iron not specially provided for, at 40 per cent. ad valorem.

Appeal from a Decision of the Board of General Appraisers.

D. Frank Lloyd, Asst. U. S. Atty., for the United States.

W. Wickham Smith, for importers.

TOWNSEND, District Judge. The merchandise in question comprises certain buckles assessed for duty under the provisions of paragraph 412 of the act of 1897 (30 Stat. 190) as "trouser buckles," at 5 cents per hundred and 15 per cent. ad valorem, and claimed to be dutiable under the provisions of paragraph 193 of said act (30 Stat. 167) as "articles of steel or iron not specially provided for," at 45 per cent. ad valorem. The board of general appraisers found from the testimony and from the report of the appraiser that the buckles are used on the shoulder straps of overalls, and are rather of the character of suspender buckles, and are not trouser buckles, and accordingly sustained the protest. The testimony taken in this court sustains the decision of this question of fact by the board of appraisers, and shows that the buckles in question are generally used on the suspender strap of the overall, and are not trouser buckles.

The decision of the board of general appraisers is affirmed.

ROGERS v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1902.)

No. 2,858.

CUSTOMS DUTIES—CYLINDRICAL TUBES OF GLASS.

Cylindrical tubes of plain glass, in length from two inches to ten feet, which are complete as tubes, and are not to be further manipulated by glass makers, but are ready for the purposes for which they are intended, are properly dutiable under Act 1897, par. 100, at 60 per cent. ad valorem, as blown glassware.

Appeal by the importer from a decision of the board of general appraisers which affirmed the classification by the collector of customs of the importations in question.

Albert Comstock, for appellant.
D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, District Judge. The articles in question are cylindrical tubes of plain glass, on which duty was assessed at 60 per centum ad valorem, as "blown glassware," under the provisions of paragraph 100 of the act of 1897. The importer protested that the articles were dutiable at only 45 per cent. ad valorem, as "manufactures of glass not otherwise provided for," under paragraph 112 of the same act. The original contention of the importer that the articles were not blown glassware was not pressed at the hearing, and could not be successfully maintained, in view of all the testimony. The single question, then, is whether the articles are or are not glassware. It appears that these tubes come in lengths from two inches to ten feet; that they are complete as tubes, and are not to be further manipulated by glass makers, but are ready, without further manipulation, for the purposes for which they are intended. These purposes are chiefly as gauges or indicators for boilers. All that is necessary is to take the completed tube of the appropriate length as imported, and to place it in a metal frame to be attached to a boiler, just as might be done with a glass globe or chimney. For these reasons, the articles are differentiated from the glass blanks in U. S. v. Louis Hinsberger Cut Glass Co. (C. C.) 94 Fed. 645, and Same v. Fensterer, Id., where something further was to be done by the manufacturer of glassware in order to fit them for their intended use. They are complete glass tubes, and, as such, are a commercial article of glassware.

The decision of the board of general appraisers is affirmed.

ASHE v. UNION CENT. LIFE INS. CO.

(Circuit Court, D. South Carolina. April 11, 1902.)

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—NOTICE OF APPLICATION.
Where, in an action commenced in a state court, a petition and bond for removal to the United States circuit court exclusively on the ground of diversity of citizenship are filed, no notice of the application for removal is required to be given to the plaintiff.

2. SAME—ORDER OF REMOVAL—RIGHT TO REVIEW.
Where, on the filing of a petition and bond for removal of an action from a state court to the United States circuit court on the ground of diversity of citizenship, the judge of the state court makes an order for such removal, the federal court has no right to review the order, and decide whether the judge had a right to sign it, especially as no order was necessary, the cause being removed ipso facto on the petition and bond being filed.

3. SAME—FOREIGN CORPORATION—PROHIBITION OF REMOVAL BY STATE LAWS.
A corporation of one state, doing business in another state under license, cannot, by the laws of the latter state, be deprived of the right to remove to the federal courts actions against it commenced in the courts of the latter state.[1]

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[1] Removal of causes as restricted by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 515.

4. SAME — BOND—EXECUTION BY ATTORNEY — AUTHORITY— RATIFICATION—MOTION TO REMAND.

Where, on an application for removal of an action from a state to a federal court, the bond was executed by the attorney of defendant, who then had no power of attorney so to do, and before a motion to remand on the ground that the bond was void a power of attorney ratifying such act was filed, the motion should be denied.

At Law.

W. W. Lewis, for the motion.

Watkins & Thompson and C. E. Spencer, opposed.

SIMONTON, Circuit Judge. This case comes up on a motion to remand. The record in this case, certified by the clerk of the court of common pleas of York county, in which the cause originated, contains the following papers: The summons, complaint, order of publication, affidavit, proof of publication, proof of service, petition for removal into this court, order of removal, and bond. The bond is dated February 15, 1902, and is approved by the clerk the same day. The order of removal is dated September 17, 1901. The motion to remand is based on the following grounds:

1. No notice was given plaintiff that defendant would move the state court for an order of removal. No such notice was necessary. When the ground of removal is exclusively diversity of citizenship, the filing of the petition for removal with sufficient bond ipso facto removes the cause, the jurisdiction of the state court ceases, and that of the circuit court of the United States attaches. Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354; Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; Railroad Co. v. Koontze, 104 U. S. 5, 26 L. Ed. 643. If the diversity of citizenship is denied, that fact must be tried in the circuit court of the United States, and can be tried nowhere else. It is very proper to go before the state court. But, when the sole question of jurisdiction is diversity of citizenship, this court decides that question for itself. Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Carson v. Hyatt, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167; Crehore v. Railway Co., 131 U. S. 244, 9 Sup. Ct. 692, 33 L. Ed. 144.

2. Because the Honorable George W. Gage, who signed the order for removal, had no jurisdiction to sign the order, he being out of the Sixth circuit, where said cause is pending, not being in an adjoining circuit at the time he signed said order, and there being a judge presiding in the Sixth circuit at the time said order was signed as aforesaid. The order of Judge Gage is entitled: "State of South Carolina, County of York. In the Common Pleas." Full faith and credit must be given to this decree, on its face purporting to be an order of the court of common pleas for York county, signed by a circuit judge. This court has no right to sit in review of this order of the court, and decide whether or not the judge had a right to sign it. Besides this, it is immaterial, as the cause was ipso facto removed when the petition, based solely on diversity of citizenship, was filed. Taylor v. Rockafeller, Fed. Cas. No. 13,802.

3. The defendant company having been licensed to do business under the laws of South Carolina, and having accepted as part of

its policy contracts the conditions prescribed by the laws of this state as conditions precedent to its doing business in this state, the said company has waived its right for valuable consideration to remove the pending cause into the United States court. The supreme court of the United States has spoken to this very objection. Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; Railroad Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571; Doyle v. Insurance Co., 94 U. S. 535, 24 L. Ed. 148.

4. In that at the time said order of removal was passed the defendant company had not filed with its petition a valid bond as required by the laws of the United States. As has been seen, the certified record says that the bond was approved by the clerk February 15, 1902, and the order for removal is dated 17th. Plaintiff contends that the bond given by defendant on removal was void for this reason. It is signed for the defendant by Mr. Thompson, its attorney. And at the date of the bond no power of attorney to Mr. Thompson to sign for the defendant was shown. In Dennis v. Alachua Co., Fed. Cas. No. 3,791, it was held that when the plaintiff is petitioner his attorney at law can sign the bond for him. When an agent assumes to act for his principal without written or parol authority to do so, the act is not void, but voidable, for the principal can ratify the act, and the ratification relates back to the performance of the act. "Omnis ratihabitio," etc. So, when Mr. Thompson signed for his principal, his act could be repudiated or confirmed. In the record is a power of attorney to Mr. Thompson, executed by defendant, and this power of attorney in terms ratifies this act.

The motion to remand is refused.

In re VINCENT et al.

(District Court, D. Vermont. February 13, 1902.)

HOMESTEAD—EXEMPTION.

Premises permanently rented are not kept as a homestead, within V. S. § 2179, exempting premises "used or kept" as a homestead.[1]

In Bankruptcy.

V. A. Bullard and Henry Ballard, for claimants.
E. C. Mower and Max L. Powell, for creditors.
R. E. Brown, for trustee.

WHEELER, District Judge. The bankrupts are husband and wife, and each claims a homestead; but the statutes of the state give a homestead only to the head of a family, and there is but one family, and, of course, but one head of a family. V. S. § 2179. And this statute gives or preserves the right to premises "used or kept" as a homestead. These premises were not, on the findings of the referee, at the time in question, used by the bankrupts as a homestead; nor were they merely temporarily vacated, but were perma-

[1] See Homestead, vol. 25, Cent. Dig. § 41 [e, f, w, x], § 46.

nently rented. They were not, therefore, kept as a homestead. Keyes v. Bump's Adm'r, 59 Vt. 391, 9 Atl. 598. The keeping must arise from visible occupation, as well as from intention; and declarations would not be admissible to show intention to keep unless they were made in company with and qualifying some act with reference to the premises. Eddy v. Davis, 34 Vt. 249. The declarations excluded by the referee were not made near, nor in any way with reference to or concerning, these premises, but only with reference to the city where they were situated. The declarations were therefore properly excluded.

Report of referee confirmed, and claim to homestead denied.

CUSHING v. CHAPMAN et al.

(Circuit Court, E. D. Missouri, E. D. May 5, 1902.)

No. 4,409.

1. RAILROAD BONDS—EQUITABLE ASSIGNMENT.
Plaintiff's assignor, in consideration of the assignment of a judgment against a railroad company, received a contract by which another railroad company agreed to transfer and deliver to such assignor its first mortgage bonds, to be thereafter issued, to the face value of such judgment, the bonds to be delivered as soon as practicable, and as early as any issue of bonds were delivered to any one else in the work of constructing the railway. The judgment was assigned, and thereafter all of the bonds authorized by the issue were issued, and transferred to other parties, under separate contracts, without the delivery of any bonds to plaintiff's assignor, who assigned a part of his claim therefor to plaintiff. *Held*, that such contract was a mere promise to pay a debt out of a particular fund or mass of property to be thereafter created, and did not constitute an equitable assignment thereof, enforceable against the bonds issued.[1]

2. SAME—CHARGE—EQUITABLE LIEN.
Such contract did not create a charge or equitable lien either on the entire issue of bonds so issued in the hands of subsequent holders, nor on any particular bonds issued separately to other parties under separate contracts.

3. SAME—IMPLIED CONTRACT.
Where a railroad company contracted, in consideration of the assignment of a judgment, to deliver to the judgment creditor certain bonds of such railroad to be thereafter issued, but the contract did not specify any particular bonds to be delivered, nor otherwise give such judgment creditor any prior right to his aliquot part of the total issue, and the company failed to perform its contract, such judgment creditor had no enforceable equitable interest in the bonds issued to other parties, but was only entitled to recover the value of the bonds in money under an implied contract.

On Demurrer.

In 1893 the Tennessee Central Railroad was organized under the laws of Tennessee for the construction and operation of a railroad between designated points. Newton & Co. contracted for the construction of a portion of this road, and filed a mechanic's lien thereon to secure an account amounting to $47,000 for such work. The railroad becoming insolvent, under a creditors' bill filed in a court of chancery in Tennessee was placed in the

[1] See Assignments, vol. 4, Cent. Dig. § 107, § 111 [b].

hands of a receiver. Newton & Co. obtained judgment for the enforcement of their mechanic's lien in one of the state courts. This judgment was presented to the chancery court administering the property under the receivership, which recognized the claim, and fixed the order of its payment. Under the decree of foreclosure the court fixed an upset price, to wit, $125,000, which the railroad property was to bring at the foreclosure sale. A new company was chartered by the parties interested in the Tennessee Central Railroad, which was incorporated as the Tennessee Central Railway, for the purpose of buying in the property at foreclosure sale, and building and operating the old line, with extensions to other points. The bill alleges that, by conventional arrangement between the syndicate representing the new railway and Newton & Co., it was agreed that if Newton & Co. would not become competing bidders at the foreclosure sale, the new company would take care of their claim out of the first mortgage bonds to be issued by the new company for construction purposes to the extent of 47 bonds of the face value of $1,000 each. After the purchase of the railroad at foreclosure sale, and the execution of the deed of conveyance therefor, said agreement between the Tennessee Central Railway and Newton & Co. was recognized, and the contract was reduced to writing, the controlling provision of which is set out in the opinion of the court. Afterwards the Cumberland Construction Company was organized for the purpose of constructing the railroad, and bonds, secured by a first mortgage lien on the railroad property, were issued to the extent of $1,550,000, and placed with the Mississippi Valley Trust Company, defendant herein, to be delivered by them from time to time for the purpose of raising money in the construction of the road. The bonds were afterwards delivered in part to Naugle, Holcomb & Co., subcontractors, for work done in the construction of the road, and the others were put up as collateral security for moneys borrowed from some of the defendants, to be used in the work of construction, or sold and transferred to other parties for money borrowed for such purpose. The said Tennessee Central Railway failed to carry out its contract with Newton & Co. in not delivering to them the 47 bonds. Newton & Co., becoming insolvent, assigned their interest to different creditors. Forty of the bonds in question, the complainant alleges, were so assigned to him. He brings this suit against said Mississippi Valley Trust Company and all the parties who received any of said bonds as aforesaid who are residents of this jurisdiction to enforce his alleged equitable claim for 40 of said bonds. One Spalding, a citizen of Chicago, Ill., who bought from Naugle, Holcomb & Co. $300,000 of the bonds received by them for construction work, and a large number of the other bonds so obtained as aforesaid by some of the parties who advanced money as above stated, not being within the jurisdiction of this court, is not made a party hereto. To this bill the defendants have demurred.

George A. Mahan and Wm. H. & Davis Biggs, for complainant.
Boyle, Priest & Lehmann, for defendants.

PHILIPS, District Judge (after stating the facts as above). Without undertaking to recapitulate all the facts presented by the amended bill, or discussing all the questions raised by the demurrer, the court will briefly state the grounds of its conclusion. The theory of the bill, as contended by counsel for defendants, is that the Tennessee Central Railway, by its contract with Newton & Co., under whom the complainant claims as assignee, made an equitable assignment and appropriation of 47 bonds, of the denomination of $1,000 each, to be issued by said railway, to be secured by a first mortgage on the railway property. The contention of complainant's counsel is that under the averments of the bill Newton & Co., by said contract, "obtained an equitable estate or title to forty-seven of said bonds to be first thereafter issued, and as soon as issued the railway company held them in trust

for Newton & Co." The said 47 bonds, the bill discloses, were to be a part of a total issue of $1,550,000, of equal dignity, secured by a first mortgage on the railway's property, as the full limit of such issue. This claim depends and turns upon the third paragraph of the written contract between the railway and said Newton & Co., as follows:

"In consideration of said sale and assignment [that is, the assignment of a certain judgment Newton & Co. held against the Tennessee Railroad Company, and assumed by the Tennessee Railway], the party of the second part [the Tennessee Railway] agrees to transfer and deliver to the parties of the first part [Newton & Co.] its first mortgage bonds, to be hereafter issued in the construction of its railway, to the amount of said decree, one dollar of bonds, at their face value, for each dollar of the amount of said decree. The delivery of said bonds to be made as soon as practicable and as early as any issue of bonds are delivered to any one else in the work of constructing said railway."

In its fullest import and broadest construction this is an executory contract or agreement to thereafter deliver to Newton & Co. 47 of the first mortgage bonds to be thereafter issued by the railway "in the construction of its railway," and "to be made as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway." I understand the law to be that a mere promise, however clear or solemn in character, to pay a debt out of a particular fund, does not operate as an equitable assignment of the fund, and especially so when it is a part of a mass of property to be thereafter created. To constitute such an equitable assignment, there must be such an actual or constructive appropriation of the fund or subject-matter "as to confer a complete and present right on the party meant to be provided for, although the circumstances do not admit of its immediate existence"; that, if the holder of the fund could retain control over it, with the power, sua sponte, on his part, to satisfy the promise in cash, it is fatal to an equitable assignment. Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762; Bank v. Beal (C. C.) 54 Fed. 577; Badgerow v. Trust Co. (C. C.) 74 Fed. 925; Ex parte Tremont Nat. Bank, 24 Fed. Cas. 184; Foss v. Cobler, 105 Iowa, 731, 75 N. W. 516; Stearns v. Insurance Co., 124 Mass. 63, 26 Am. Rep. 617; Williams v. Ingersoll, 89 N. Y. 518; Hicks v. Brick Co., 94 Va. 746, 27 S. E. 596; Hassack v. Graham, 20 Wash. 192, 55 Pac. 36.

There is also, from the facts apparent on the face of the bill, an insuperable difficulty in fixing the alleged equitable lien upon any specific bonds issued by the Tennessee Central Railway, and turned over, for a valuable consideration, to different parties at different times, to raise money for the construction of the railway. It appears from the bill that $300,000, par value, of bonds issued by Tennessee Central Railway, were delivered to Naugle, Holcomb & Co., as subcontractors, for work done by them in constructing the railway; and the contract made between the complainant's assignor and the Tennessee Railway contemplated that such bonds might be issued and delivered to the contractor, as it also contemplated that first mortgage bonds might also be issued and delivered "in the work of constructing said railway." It also appears from the face

of the bill that the other bonds issued by the railway were put up as security and delivered to the Mississippi Valley Trust Company in trust to secure $1,550,000, borrowed for the purpose of constructing the railway. The bonds issued to Naugle, Holcomb & Co., together with other bonds, issued and delivered by the railway as security for moneys borrowed in the work of construction, to Chapman and others, the first lenders, were transferred in part to one Spalding, of Chicago, Ill., who is not a party to this suit. Is the complainant entitled to enforce an equitable lien upon all of the $1,550,000 of first mortgage bonds issued by the railway? Or is he entitled to have his alleged lien enforced upon any particular numbers of said bonds, and, if so, upon which particular numbers? Under the contract the complainant's assignor was only entitled to the delivery of the bonds "as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway." Was he entitled to the first 47 bonds issued in kind? If so, who holds them? It does not appear that they are held by the defendants. If he was not entitled to have received the first 47 bonds issued, but was entitled to receive 47 bonds in order next to those issued and delivered to the first taker, which one of these defendants holds said 47 bonds? If this be the proper construction of his contract, and the limitation of his rights, upon what principle can any of the defendants who do not hold said 47 bonds be brought into this suit to be held here while the complainant is litigating and establishing his lien upon 47 bonds, unless the bonds are held in common by all the defendants? If the proper construction of the contract be that Newton & Co. became the equitable assignee of, or acquired equitable title to, 47 bonds, and the complainant is entitled to fix such charge upon the whole mass of $1,550,000 of bonds issued by the railway, the court will have to make ascertainment of the number of bonds held by each taker upon which the equitable lien charged is to be enforced, and make an equitable apportionment among all the purchasers of bonds who took with notice. As Spalding, who, the bill discloses, holds a large bulk of the bonds, is not a party to this suit, no decree made by the court could affect any bonds in his hands, or make any apportionment of the loss as to him. In this aspect of the case the court would have to proceed as to the defendants before it, and fix the alleged equitable lien or charge upon the bonds held by them, and make an equitable apportionment of the loss and burden among them pro rata. The learned counsel for complainant, anticipating this objection, in his brief asserts that, as all the takers of the bonds are, as to Newton & Co., tort feasors, they are jointly and severally liable to answer for the injury to the extent of their several holdings. But under the allegations of the bill all the takers of the bonds issued by the Tennessee Railway are not joint wrongdoers. Naugle, Holcomb & Co., the contractors who did the work on the road, Chapman and others, who made the first loan, and Van Blarcom and the National Bank of Commerce, who made the second loan, each took under separate, independent contracts, at different times, acting entirely independent of each other, without preconcert of action or

common understanding. Therefore there can be no accountability of the several designated classes of takers of the several distinct numbered bonds, except for their own individual wrongful act, if any; and therefore the bill must be multifarious.

The bill, moreover, discloses that this complainant is the assignee of only $40,000 of the claim of Newton & Co. against the Tennessee Central Railway; the remaining $7,000 of the $47,000 claim is outstanding in the hands of third parties not before this court. To which, then, of the 47 bonds, is this complainant entitled? If, under the contract, his assignor was entitled to have issued and delivered to them the first 47 bonds after those issued to Naugle, Holcomb & Co., is he to have the first 40 of the next 47? And, if so, which one of the defendants obtained and holds the particular 40 bonds? Furthermore, if the contract be construed to mean that the Tennessee Central Railway could proceed to issue its bonds "in the work of constructing said railway" up to the limit, leaving a margin of 47 first mortgage bonds for delivery to Newton & Co., in fulfillment of the contract, it would seem to follow that his specific lien, if he have any, could be enforced only against the party who took the last 47 bonds with knowledge that Newton & Co. were entitled to receive 47 of the whole number of first mortgage bonds issued. For it must be conceded that parties advancing money to the construction company for building the road, to be paid for by the issue of first mortgage bonds, would have had a perfect right to make such contract, and be entitled to receive first mortgage bonds within 47 of the whole number issuable; and, inasmuch as there would then have remained in the hands of the railway's trustee 47 first mortgage bonds, the complainant would have been compelled to look to them alone for recovery. In other words, the defendants who advanced to the construction company the money with which to construct the road, to qualify it to give a mortgage to secure the issue of bonds, had a perfect right to do so, and take the bonds as security, up to the point where the margin was left of 47 first mortgage bonds remaining undistributed. As all the first mortgage bonds issued for construction purposes, within the limitation, were of equal value and dignity, it was quite immaterial to Newton & Co. whether they received the first or last numbered 47 bonds. And as Newton & Co. had not contracted for any particular numbered bonds, I am unable to perceive how it can be maintained that their contract created a charge or equitable lien upon the whole mass of bonds issued separately to other parties under separate contracts.

Counsel for complainant, also recognizing the rule respecting equitable assignments of a fund asserted in the first part of this opinion, seeks to avoid its force by saying that he is not seeking to enforce an equitable lien, "but is asking the court to protect his alleged equitable title or estate in the bonds in question, which he contends is enforceable in equity not only against the Tennessee Central Railway, but also against all subsequent creditors of the Tennessee Central Railway, and all other persons holding or claiming under the Tennessee Central Railway, as purchasers or otherwise, with

notice of such title." In other words, that "he had an equitable estate in the bonds," and therefore these defendants "must answer for the resulting damage, provided they had notice of such title." This broad statement includes the further proposition that the contract gave to Newton & Co. an undivided equitable interest in the whole issue of $1,550,000 of first mortgage bonds. But the contract does not say so. Newton & Co. were to receive 47 bonds out of a permissible issue of 1,500, and not before any other bonds were issued to any other person, but under terms and circumstances that indicated that a large number of such bonds would be issued by the railroad company to other persons "in the work of constructing such railway," and that this entire number might be issued as early as those to Newton & Co. Therefore Newton & Co. acquired no prior right to their aliquot part of the 47 bonds. Indeed, the contract was in no legal sense for the sale of specific personal property by the railway to Newton & Co. It was simply and purely a contract providing a method for the payment of a debt owing by the railway company to Newton & Co., which was out of the promissory obligations to be thereafter issued by the debtor, secured by a first mortgage lien on the railway property. And because the debtor did not keep his promise, but issued like obligations to pay other persons from whom it borrowed money to build the road, the disappointed creditor seeks to charge the bonds—the promises to pay—in the hands of such other creditors with the payment of his debt. I know of no precedent or rule of law supporting so broad a proposition. The provision of the contract for satisfying Newton & Co.'s debts for $47,000 by delivering to them 47 bonds of the first mortgage class was one for the benefit of the debtor, to avoid paying in money, as the money would be needed in the construction of the road. On failure to so pay it could be liquidated in money. C. Aultman & Co. v. Daggs, 50 Mo. App. 280–289, and cases cited. And that was the implied contract, and, as far as these defendants are concerned, it was the complainant's remedy, provided all the bonds had been delivered by and had passed out of the hands of the trustee.

The demurrer to the bill is sustained.

URSULA BRIGHT S. S. CO., Limited, v. AMSINCK et al.

(District Court, S. D. New York. May 2, 1902.)

1. MARINE INSURANCE—PARTIAL LOSS—INSURER'S LIABILITY.
   In case of a partial loss of goods covered by a valued marine policy, the measure of the insurer's liability is the proportion which the loss bears to the sound value at the port of discharge.
2. SAME—CARRYING GOODS ON DECK—INSURING PARTIAL LIABILITY—AMOUNT OF RECOVERY.
   Where the owners of a steamship insured a part only of their liability for carrying goods on deck under a valued policy reciting that the goods were valued at the sum for which the insurance was effected, which was less than the actual value, on a total loss the insurers were liable for the amount of the policy, which was in the nature of liquidated damages, and were not entitled to any deduction by reason of the fact

that the shipowners settled their liability for less than the value of the goods.[1]

8. SAME—SUBJECT OF INSURANCE.
A carrier's liability for carrying goods on deck is a proper subject of marine insurance.

Convers & Kirlin, for libelant.
Butler, Notman, Joline & Mynderse, for respondents.

ADAMS, District Judge. This is an action upon a policy of marine insurance, issued by the respondents in the city of New York on the 30th day of March, 1898, to Frank R. Whitson, on account of whom it might concern, on 879 barrels of cotton-seed oil, to be laden on the deck of the steamer "Ursula Bright" on a voyage from Philadelphia to Rotterdam. The sum insured was $10,000, and the oil was valued (premium included) at that sum. The material parts of the policy are as follows:

"Touching the adventures and perils which the said ASSURERS are contented to bear, and take upon themselves, in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandise, or any part thereof. AND in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in and about, the defense, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered as a waiver or an acceptance of an abandonment; to the charges whereof, the said ASSURERS will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured, or their assigns, at and after the rate of Two per cent. net. * * * Provided always, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said ASSURERS shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured. * * *"

Upon the voyage there was a total loss of the oil by sea perils and jettison, and Whitson, by an indorsement on the policy, ordered that the loss be paid to the libelant. The latter sues to recover the sum insured.

Several defenses were at first interposed by the respondents, but all were finally withdrawn excepting one, set up in the eighth article of the answer, to the effect that the respondents are not liable for any greater part of the sum insured than is equal to the proportion existing between an amount paid by the libelant to the consignees of the oil in settlement of a claim of loss through the shipment having been made on deck and the true value of the oil, which proportion, it is alleged, does not exceed 80 per cent. This defense is based upon the following facts: At the end of March, 1898, the steamer was loading a general cargo at Philadelphia for Rotterdam, under a charter party dated December 6, 1897, between the libelant and C. B.

[1] See Insurance, vol. 28, Cent. Dig. § 1240.

Richard & Co. This charter did not authorize the shipment of a deck load. Whitson, the master of the vessel, was induced, however, by the charterers to take the oil on deck upon their engagement to procure this insurance as a protection to the vessel and her owners against any liability that might arise from the method of shipment. It was in conformity with such engagement that the deck load was insured in the valued amount of $10,000. By the terms of the bills of lading under which the oil was carried, it was stipulated that the liability of the shipowner for any loss of oil should be measured by the current value of the oil in Rotterdam on the day of the steamer's entry at the Custom House. The value of 873 barrels of this oil under such stipulation was $14,532.64 or £2,986.5s.

After the arrival of the steamer at Rotterdam, the consignees of the oil instituted proceedings for the recovery of their losses by attaching the vessel's freights. Subsequently they sued their underwriters on policies which they had taken out, and the Dutch Courts gave judgment against the underwriters, on the theory that the loss was within the insurance against barratry. Actions were subsequently brought against the shipowner in London, the libelant here, in the name of the consignees of the oil, but for the benefit and account of the Dutch underwriters, to recover the amount of the loss from the shipowner, upon the ground of its breach of contract in carrying the goods on deck. The amount claimed in this proceeding was £3,000, and the libelant compromised the action upon the advice of counsel, by payment, on the 4th of April, 1900, to the consignees, of the sum of £2,330.

One of the original defenses was that by the terms and conditions of the policy it was provided that, if the assured should have made any assurance upon the oil prior to the policy issued by the respondents, then the respondents should be answerable only for so much as the amount of such prior insurance might be deficient towards covering the goods insured, and that the parties did have other marine insurance prior in day of date to the insurance in question here, and that consequently the respondents were only answerable for so much of the loss, when properly adjusted, as the amount of such prior insurance was deficient. Subsequently, however, this defense was waived, and it was agreed that this insurance should be treated as liability insurance. The following stipulation was made to carry out this agreement:

"The respondents being satisfied that it was the intent of the brokers who applied to them for the policy of insurance herein to secure the benefit thereof to the master and to the shipowner in respect of liabilities incurred by the master, owner or vessel by reason of the fact that certain barrels of cotton-seed oil were received and carried on deck when the bills of lading authorized only carriage under deck. IT IS NOW AGREED by the parties to the action that said policy be considered by the Court as though such intent had been specifically embodied in it, and that the rights and liabilities of the parties in respect of said policy be adjudged accordingly."

The respondents now contend that they are liable only for such proportion of $10,000, the sum insured, as £2,330, the amount paid by the libelant in settlement of the cargo claims, bears to £2,986.5s., the value of the 873 barrels of oil, which proportion would amount to $6,950. For some reason to which my attention has not been

called the action in London was for 873 of the total of 879 barrels that were lost, but the deficiency would only make a trifling difference, and no further consideration need be given to it. The respondents' theory is that when the shipowner effected the settlement in London, its liability then was £2,986.5s., with interest from April 18, 1898, to April 1, 1900, a total of about £3,351 and as it paid only about 69½ per cent. of the loss, thus saving 30½ per cent., the respondents are entitled to the benefit of the salvage, for the reason that the liability is governed by the rule for computing a particular average loss on goods rather than by the rule establishing the right of full recovery where the hull of a ship has an insured value.

The doctrine is well established that, in case of a partial loss of goods covered by a valued policy, the measure of the insurer's liability is the proportion which the loss bears to the sound value at the port of discharge (The London Assurance v. Companhia de Moagens Do Barreiro, 167 U. S. 149, 171, 17 Sup. Ct. 785, 42 L. Ed. 113; International Nav. Co. v. Atlantic Mut. Ins. Co. [D. C.] 100 Fed. 304, 317, 318, 324; Arnould, Marine Ins. [7th Ed.] 340); and if this were a case of partial loss of goods, it would seem that the recovery should be reduced to the proper percentage of the insured value. But it was not a partial loss. The goods were a total loss, and if the owner or consignee of the goods had taken out the insurance he would have been entitled to recover the agreed value. The insurance, moreover, according to the stipulation between the parties, was not upon the goods; it was upon the liability of the shipowner incident to the shipment of the goods on deck. The insured had no interest in the goods, apart from its liability due to the method of carriage; and the underwriters could acquire no interest in the goods by subrogation, as is the case where there is a total loss under a valued policy. Association v. Armstrong, L. R. 5 Q. B. 244, 248. The ordinary rules governing the relations of the parties to the subject of a valued insurance in a marine policy apparently have no application here. The intent, in view of the stipulation, was to indemnify the insured against a particular risk, and the rights and liabilities of the parties must be adjudged accordingly. The liability was incurred, and the loss is ascertained to have been in excess of the stipulated amount of indemnity. The amount of the insurance was determined by the amount of the premiums paid (Post v. Insurance Co., 10 Johns *79, *84), and it seems that the insured became entitled to recover the loss actually sustained, not exceeding the sum stipulated (16 Am. & Eng. Enc. Law [2d Ed.] 840; 19 Am. & Eng. Enc. Law [2d Ed.] 1052). This is the general principle governing insurance, except in valued policies of the marine class. Though the form of this policy was of a character to fall within the exception, nevertheless it has been agreed that the form does not express the intent, and it must be concluded that, as the policy was an open one, and designed merely to provide against a breach of the carrier's duty, which is a proper subject of insurance (Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed.

873; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730), the recovery is not subject to reduction because the whole amount at risk was not insured. And if it be assumed that the policy was not open, but that it was the intent of the parties, under the stipulation, to preserve the valuation of $10,000, as covering the interest of the insured and binding both parties, the result is the same. The object of the insurance being indemnity against loss to the extent of the value of the interest of the insured, the agreement with respect to the value was conclusive as to the amount at risk, and stood, by way of liquidated damages, in lieu of any proof as to the value of the interest. Watson v. Insurance Co., Fed. Cas. No. 17,286 (29 Fed. Cas. p. 433); 19 Am. & Eng. Enc. Law, 1048. Where a value has been agreed upon, and there has been a total loss, it would be obviously inequitable to permit the insurer to escape from the payment of any part of a fixed indemnity, to secure which a corresponding premium was paid by the insured, upon a plea that the insured should be compelled to stand as constructive insurer of any uninsured value of his liability for the actual insurer's benefit (International Nav. Co. v. Atlantic Mut. Ins. Co., supra), unless it clearly appears that such was the intention of the parties, or some rule of law is shown to exist producing the result, which the parties must have had in contemplation when making the contract. I cannot find that there was any intention here to vary from the sum agreed upon to be paid in the event of loss or liability, or that the rule which has been invoked, relating to partial loss of goods, should be considered as embodied in the contract so as to prevent a full recovery. Perfected proofs of loss and interest were presented to the underwriters on the 30th day of June, 1900, and became payable, under the policy, 30 days thereafter.

Decree for the libelant for $10,000, with interest from July 30, 1900.

In re CARLETON et al.

(District Court, D. Massachusetts. April 24, 1902.)

No. 5,880.

1. BANKRUPTCY—PARTNERSHIP—PETITION BY ONE PARTNER—DEFAULT OF OTHER PARTNER—VOLUNTARY PROCEEDING—INTERVENING CREDITOR.

Under Bankr. Act 1898, § 5, providing that a partnership may be adjudged a bankrupt, and General Order No. 8, providing that any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and that notice of the filing of the petition shall be given to him, where, on the filing of a petition by one partner, a copy was duly served on the other partner, and he entered no appearance, and was defaulted, the proceeding should be deemed voluntary on the part of both partners as against a creditor who sought to intervene and contest on the ground that the firm was not insolvent.

2. SAME—CREDITOR—RIGHT TO INTERVENE.

A creditor cannot intervene to oppose an adjudication under an ordinary voluntary petition in bankruptcy by setting up that the petitioner is not insolvent.

In Bankruptcy.

William H. Preble, for Carleton.
Brandeis, Dunbar & Nutter and John G. Palfrey, for creditor.

LOWELL, District Judge. A petition was filed by Carleton setting out that he was a partner with Freeman in the firm of J. E. Carleton & Co., and that the partners were unable to pay their debts in full; that Carleton was ready to surrender "his and their" property for the benefit of their creditors, "and desire to obtain the benefit of the acts of congress relating to bankruptcy." No act of bankruptcy was alleged. Schedules A, B, C, and D were appended and filled out. The petition followed form No. 2 as closely as might be, and was similar to that generally used in this district in like case. Pursuant to general order 8, Freeman was duly served with a copy of the petition. He entered no appearance within the time appointed, and was therefore defaulted. An attaching creditor seeks to intervene in order to contest the adjudication upon the ground that the firm was not insolvent, that Carleton was not a partner, etc. The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

Section 14 of the act of 1841 provided:

"That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners: upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted." 5 Stat. 448.

This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

"That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted."

This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

"In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be

entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act."

Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. No. 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214; In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 453, Fed. Cas. No. 17,784. Yet in Metsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, the supreme court held that a case in which one partner petitioned and the other partner came in and confessed himself bankrupt was a case of "compulsory or involuntary bankruptcy," within the provisions of St. 1874, c. 390, § 10 (18 Stat. 180), and Rev. St. § 5128, dealing with preferences. Mr. Justice Miller said:

"We do not doubt that Metsker's was a case of involuntary or compulsory bankruptcy within the meaning of this amendment. The distinction intended by this language is clearly between the cases in which the bankrupt himself and of his own volition initiates proceedings in bankruptcy and those in which they are commenced by some one else against him. In the one case it is voluntary, and in the other compulsory. It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by any one else; and it is compulsory and involuntary if he refuses to join in such case, and is forced into it, as much as in any other enforced bankruptcy." Pages 70, 71, 108 U. S., page 353, 2 Sup. Ct., 27 L. Ed. 654.

Section 5 of the act of 1898 provides that "a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867. Notwithstanding the decision of the supreme court in Metsker v. Bonebrake, it appears to me that this court is not compelled to hold, either

under the act of 1867 and general order 18, or under the act of 1898 and general order 8, that this petition is so far involuntary as to permit a creditor of the firm to intervene in order to resist adjudication. See In re Murray (D. C.) 96 Fed. 600. As to the petitioner, these proceedings are purely voluntary. As to him a creditor has no more right to intervene than in the case of any other voluntary petition. As to the nonjoining partner, the proceedings are in some sense involuntary. As to intervention by a creditor, it is most convenient, and most consistent with justice and the general scheme of the act, to hold that the right "to make all defenses which any debtor proceeded against has a right to make" is confined to the nonjoining partner. If he makes no objection, then, so far as adjudication is concerned, the petition is to be treated generally as if it were altogether voluntary. Had this been an ordinary voluntary petition by both partners, the creditor could not have intervened to contest the adjudication. If partners are willing to be adjudged bankrupt, whether on the petition of one or on that of all of them, they are to have their way.

Difficulties may arise in construing either act. For example, the court may have to consider what defenses are now open to the nonjoining partner. Under the act of 1867 as has just been stated, the petition needed to allege no more than insolvency, and the nonjoining partner might take issue on the alleged insolvency. Under section 11 of the act of 1867, insolvency was necessary to support a voluntary petition. There is no such requirement in the act of 1898, though forms Nos. 1 and 2 both require the voluntary bankrupt to set out his inability to pay his debts. This inability may, perhaps, be taken to represent insolvency, though inability to pay debts is not the precise equivalent of insolvency as defined in section 1 of the act of 1898. Under the act of 1867 it was suggested in some cases that one partner might put the firm into bankruptcy by a petition alleging either insolvency without an act of bankruptcy or an act of bankruptcy without insolvency. It would be somewhat difficult to apply this theory to the act of 1898, and the matter is stated here only to show that the difficulties involved in the conclusion here reached have not been overlooked.

It cannot be pretended, indeed, that the result thus reached is in all respects satisfactory. The control of a partnership is the most difficult and complicated matter with which a court of bankruptcy has to deal, and no scheme of administration has yet been devised at once perfectly logical and perfectly workable. See In re Wilcox (D. C.) 94 Fed. 84. For example: (1) To deal with the joint estate in bankruptcy without at the same time dealing with the separate estate of all the partners, and (2) to refuse to deal with the joint estate in bankruptcy unless the separate estate of all the partners is brought under the same commission, are courses alike so difficult that neither can be followed to its last logical conclusion. A partnership can be treated neither as an entity altogether separate from the partners, nor as merely the sum of them. The case at bar illustrates this proposition.

The attaching creditor further contends that, even if this petition be treated as voluntary, yet he is entitled to intervene. The question thus presented amounts to this: Can a creditor intervene to oppose

an adjudication under an ordinary voluntary petition by setting up that the petitioner is not insolvent? This is not a case in which a person manifestly able to pay all his debts files a petition in bankruptcy for the purpose of embarrassing a particular creditor. In an unreported case of that sort this court has held that the creditor may have the adjudication set aside on the ground that the whole proceeding is a fraud upon the act, and an abuse of process. To permit a creditor, in an ordinary case, to resist adjudication on a voluntary petition, or to have an adjudication once made on such petition set aside upon the ground that the bankrupt was solvent, would introduce endless confusion.

Petition to intervene dismissed.

DUNTON v. ALLAN LINE S. S. CO., Limited.

(District Court, E. D. Pennsylvania. April 10, 1902.)

No. 53 of 1901.

COLLISION—STEAM AND SAILING VESSELS MEETING IN FOG—UNAVOIDABLE ACCIDENT.

A collision occurred at sea, during a thick fog, between a schooner and a steamship, which met on nearly parallel courses. Each heard the fog signal of the other, and the steamer at once slowed down to a moderate speed and proceeded with caution, while the schooner, which was sailing closehauled on the port tack at a speed of about two knots, kept her course and speed; the wind being very light. The vessels were both properly manned and equipped, and had proper lookouts. After they sighted each other, when they were about 100 yards apart, the steamer did all that was possible to prevent collision. *Held*, that neither vessel was chargeable with any fault, and that the collision must be attributed to unavoidable accident.

In Admiralty. Suit for collision.

Curtis Tilton and Robert H. Smith, for libelant.
Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. This controversy grows out of a collision between the four-masted schooner Lydia M. Deering and the British steamship Siberian, owned by the Allan Line Steamship Company. It took place in daylight, but during a thick fog, at half past 6 in the afternoon of June 2, 1901, about 75 miles east from the capes of the Delaware. The schooner was carrying 1,300 tons of ice from Maine to Washington, D. C.; and the steamship was bound from Philadelphia to Glasgow by the way of St. John's, Newfoundland, carrying a general cargo. The wind, which was very light, was from the S. W. or S. S. W. The schooner was carrying all her sails except her jib topsail, and was closehauled upon the port tack; her course being nearly west, and her speed about two knots an hour. The Siberian is a steamship of 2,454 net tons register, and her course upon the day in question was E. by N. ½ N. Both vessels were properly manned and equipped, and lookouts were stationed upon both, although the lookout on the schooner was a boy 17 years old, who had only been at sea for 3 months, and was not an experienced seaman.

Both vessels were blowing proper fog signals, and each vessel heard the signals upon the other as they approached. Owing to the thickness of the fog, it was impossible for either ship to see the other until they came as near as about 100 yards, and it was then too late to avoid a collision. The testimony satisfies me that, as soon as the vessels came in sight of each other, everything that was possible was done upon the steamship to avert the threatened disaster. She had already slowed down upon hearing for the first time the fog signal from the schooner, and this, I think, was her full duty. As the supreme court of the United States has said in The Ludvig Holberg, 157 U. S. 68, 15 Sup. Ct. 477, 39 L. Ed. 620, "No case has ever held that a steamer was obliged to stop at the first signal heard by her, unless its proximity be such as to indicate immediate danger." Clearly, there was no such indication in the present case, and the steamship was not at fault, therefore, in doing no more than slowing down to a moderate speed, and thereafter proceeding with caution. As soon as the Siberian saw the schooner, she immediately had her engines put full speed astern, and put her helm a-starboard in the effort to pass in safety. The schooner held her course, and in this I am unable to say that she was in error; for, if it be true, as was testified by some of the witnesses for the steamship, that the schooner's helm was put to port, the result would probably have been what these witnesses say that it actually was, namely, to swing the schooner's stern to port, and thereby bring her more directly across the bow of the approaching steamship. The bluff of the Siberian's port bow struck the schooner's port quarter well aft, and did a good deal of damage. Neither vessel, I think, was moving through the fog at a negligent rate of speed. The schooner's sails were all drawing, but the wind was so light that, as I have already said, she was not moving faster than 2 knots an hour, which gave her little more than steerage way; and the steamship had slowed her speed at the first intimation of danger, and thereafter proceeded with due caution.

My conclusion upon the whole case is that the collision was the result of unavoidable accident, and that the steamship is not in any degree responsible for the harm done to the schooner. I think the collision was due in large measure—perhaps was altogether due—to the well-known difficulty of determining with certainty in a fog from what point signals proceed. The unanimity with which the crew of the schooner declare their ability to fix the precise position of the steamship from the sound of her whistle, namely, at a half point upon the port bow, seems to me to be almost enough to discredit their story. They saw the steamship afterwards in that position, and this may account for the harmony in their testimony. But if she had previously been heard in that precise direction,—all hands agreeing about it then, as they do now,—the schooner ought to have ported immediately, and thereby have got as far to starboard as was possible. Prompt action in this direction on board the schooner would undoubtedly have avoided the collision, and I believe this action would have been taken if the crew of the schooner had really agreed then, without dissent, that the steamship was approaching nearly head on. Certainly the boy that was upon the lookout, and declared that in his opinion a point

was 60 degrees, should have his testimony at least carefully scrutinized before it is accepted.

I am of opinion that the libel should be dismissed, but, under the circumstances, I shall leave each party to bear his own costs.

UNITED STATES v. LUEY GUEY AUCK.

(District Court, D. Vermont. March 12, 1902.)

DEPORTATION OF CHINESE—JURISDICTION.

A proceeding to deport a Chinese person will be dismissed where he appears to have been already ordered deported by the commissioner of another district, the latter having acquired an exclusive jurisdiction of the case.

Chinese Appeal.

Fuller C. Smith, for appellant.
James L. Martin, U. S. Atty.

WHEELER, District Judge. The appellant appears to have been ordered to be deported by Commissioner Paddock, of the Northern district of New York, and to have been deported thereupon, notwithstanding an attempted appeal, which he claims was perfected, and the government claims was not. If the appeal was perfected there, it should be heard there, and the case and the man disposed of there, according to the usual course. If the appeal was not perfected, the original order of deportation remains there in full force, to be carried out unaffected by the attempt to appeal. The appearance of the man in this country again shows either that the order has not been effectively executed, or that he has returned to this country in violation and contempt of it. If it has not been fully executed, the marshal there should complete the execution of it. If he is here in violation of it, the court there should deal with him for that. He is not entitled to try his luck in successive districts by appearing in them, but only in one, and the one which first takes jurisdiction of him and of his claims of a right to remain here. This court cannot properly deport him or discharge him, but only dismiss the proceedings, which releases him, to be proceeded with by the authorities of that district as they may be advised.

Proceedings dismissed.

UNITED STATES v. McELROY.

(Circuit Court, D. New Jersey. May 16, 1902.)

1 ACTION—FORM—TO RECOVER FIXED PENALTY—DEBT.

Under 23 Stat. 332, § 3, providing that a person knowingly assisting the importation of any alien into the United States under a contract to perform labor or services therein shall forfeit $1,000, which may be sued for and recovered as debts of like amount are now recovered, and also on general principles, an action for debt is the proper form for the recovery of such penalty, the sum being certain.

2. SAME—DECLARATION—SPECIFYING SERVICE.
In an action to recover the penalty imposed by 23 Stat. 332, for assisting the importation of an alien into the United States under a contract to perform labor or services therein, a declaration alleging that he was "to perform labor and services as a workman in a certain factory or manufacturing plant of said defendant, and not as private secretary," etc.,—negativing the various specially excepted classes, but not otherwise showing the character of labor or services in which he was to be employed,—is insufficient, being too general.

3. SAME—ASSISTANCE—SPECIFICATION OF ACTS.
In an action to recover the penalty imposed by 23 Stat. 332, for assisting the importation of an alien into the United States under a contract to perform labor or services therein, a declaration alleging, in the language of the statute, that defendant "assisted, encouraged, and solicited" the immigrant, without showing what acts of assistance, etc., were rendered, is insufficient.[1]

Sur Demurrer to Declaration. Action of debt, to recover penalty under the acts of congress of 26th of February, 1885 (23 Stat. 332), and 3d of March, 1891 (26 Stat. 1084), relating to the importation of alien labor.

Chas. K. Chambers, for demurrer.
D. O. Watkins, U. S. Atty.

ARCHBALD, District Judge.[2] The form of action in this case is good, not only by the statute, which declares that the penalty imposed for a violation of its provisions may be sued for and recovered "as debts of like amount are now recovered in the circuit court of the United States" (Act Feb. 26, 1885; 23 Stat. 332, § 3), but also on general principles. For while it is, no doubt, true that the action, being based on a violation of the statute, sounds in tort (Chaffee v. U. S., 18 Wall. 516, 21 L. Ed. 908), yet, as is there stated, "debt lies for a statutory penalty, because the sum demanded is certain."

But the declaration is not sufficient, at least in two particulars: In the first place, it ought to show the character of labor or service in which the immigrant alien is to be employed, so that the court may judge whether it comes within the law. According to the policy which dictated the enactment, it was designed to keep out cheap, unskilled manual laborers, and not others. Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; U. S. v. Laws, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151; U. S. v. Gay (C. C.) 80 Fed. 254. All that is alleged in the present instance is that the immigrant was "to perform labor and service as a workman in a certain factory or manufacturing plant of the said defendant, and not as private secretary," etc., negativing the various specially excepted classes. But this is too general. There are many kinds of workmen, to any one of which it would apply, and it is not too much to ask that the particular character of work which the immigrant was employed to do should be stated. In the next place, the acts of assistance or encouragement which constitute the alleged violation of the law, and form the basis of the action, should be set out. U. S. v. Craig (C. C.) 28 Fed. 795; U. S. v. Bornemane (D. C.) 41 Fed. 751; U. S. v. Edgar (C.

[1] See Aliens, vol. 2, Cent. Dig. § 113 [f].

[2] Specially assigned.

C.) 45 Fed. 44; Moller v. U. S., 6 C. C. A. 459, 57 Fed. 490; U. S. v. Gay (C. C.) 80 Fed. 254. This is important, as enabling the defendant to know just what he has to meet. It is a specification of the offense which cannot be dispensed with. In the act of 1885 it is made unlawful "in any manner whatsoever to prepay the transportation, or in any way assist or encourage the importation or immigration of any alien," under contract to perform labor or service, etc.; and by the supplement of 1891 it is to be deemed a violation of the act, "to assist or encourage the importation or migration of any alien by promise of employment through advertisements, printed and published in any foreign country." In which way is it alleged that the defendant broke this law? He is surely entitled to know; and it is not sufficient to simply charge, in the words of the statute, as in the present declaration, that he "assisted, encouraged, and solicited" the immigration of the alien mentioned, without stating what acts of assistance, encouragement, or solicitation were rendered. We must have substance, and not form, to sustain so highly penal an action. It may be that the acts of assistance, when set out, will prove entirely harmless and inoffensive; and, at all events, we are entitled to know what they were.

The demurrer is sustained, with leave to plaintiff to amend.

TILGE v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. May 16, 1902.)

CUSTOMS DUTIES—COTTON NET—STATUTE APPLICABLE.

Cotton net, cut into narrow strips or small pieces, and known to the trade as "cotton net," "cotton net cut," "hat tips," "hat crowns," or "hat sides," are dutiable as cotton netting, under Tariff Act 1894, par. 276, fixing an ad valorem duty of 50 per cent. on such netting, and not as manufactures of cotton dutiable under paragraph 264 as 35 per cent.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

Frank P. Prichard, for appellant.

James B. Holland, U. S. Atty., Jos. W. Thompson, and Wm. M. Stewart, for the United States.

J. B. McPHERSON, District Judge. The facts involved in this controversy appear in the following quotation from the brief of appellant's counsel:

"The importer, Henry Tilge & Co., imported into the port of Philadelphia the merchandise which is involved in the present appeal, the nature and character of which is set forth in the following agreement as to the facts which has been entered into by counsel for both parties:

"It is agreed by and between counsel for the appellant and for the United States that the merchandise covered by the appeal in the above-entitled cause consists of strips of the fabric called 'cotton net,' cut into narrow strips or small pieces, designed for use in the lining of men's hats; that these strips are bought and sold and known in

the trade and commerce both as 'cotton net,' or 'cotton net cut,' and as 'hat tips,' 'hat sides,' and 'hat crowns,' and, as imported, they are intended and suitable for use for the lining of the sides and crowns of men's hats, and for no other purpose; that cotton net is usually woven in pieces of about fifty to one hundred yards long, by forty-five to one hundred inches in width.

"The collector, upon the arrival of the merchandise in question, assessed duty upon the same at the rate of fifty per cent. ad valorem, as 'cotton net,' under paragraph 276 of the tariff act of 1894. The importer claimed that the merchandise was dutiable at thirty-five per cent. ad valorem as manufactures of cotton, under paragraph 264 of the same act. The United States board of general appraisers sustained the decision of the collector, and thereupon this appeal was taken.

"The two paragraphs which are involved in this case are as follows:

" '264. All manufactures of cotton, including cotton duck and cotton damask, in piece or otherwise, not specially provided for in this act, and including cloth having india rubber as a component material, thirty-five per centum ad valorem.'

" '276. Laces, edgings, nettings and veilings, embroideries, insertings, neck rufflings, ruchings, trimmings, tuckings, lace window curtains, tamboured articles and articles embroidered by hand or machinery, embroidered handkerchiefs and articles made wholly or in part of lace, rufflings, tuckings or ruchings, all of the above named articles, composed of flax, jute, cotton or other vegetable fibre, or of which these substances, or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem.'

"The question which is therefore presented by the present appeal upon the agreed state of facts is whether the merchandise in question, consisting of narrow strips or pieces of cotton net, designed for use in the linings of men's hats, is to be regarded as cotton netting or as a manufacture of cotton."

In my opinion, the answer to this question is, that the merchandise should be regarded as cotton netting, and not as a manufacture of cotton. Whether the process of cutting is of itself sufficient to make each separated piece a manufactured article, is a point upon which the cases are apparently not in harmony. It seems to me unnecessary, however, to decide the point upon this appeal, for the agreed facts show that the merchandise in controversy continues to be known by the name of "cotton net," or "cotton net cut," as well as by the names "hat tips," "hat sides," and "hat crowns." I think, therefore, that it is specially provided for by paragraph 276, falling within the words "nettings * * * composed of * * * cotton." If it had acquired a definite and exclusive name of its own, as was the case in Re Kursheedt Mfg. Co., 4 C. C. A. 262, 54 Fed. 159, it would then be necessary to determine whether the mere process of cutting had made it an article that was properly described as a "manufacture of cotton." But as it has acquired no such exclusive designation, I regard it as specifically provided for by paragraph 276.

The decision of the board of appraisers is accordingly affirmed.

HEMPSTEAD et al. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. May 17, 1902.)

CUSTOMS DUTIES—TUNGSTEN ORE, OR WOLFRAM.

Tungsten ore, or wolfram, is dutiable at 20 per cent. ad valorem, under paragraph 183 of Act July 24, 1897, imposing that rate upon "metallic mineral substances in a crude state," and is not exempt under paragraph 614, which puts on the free list "minerals, crude, or not advanced in value or condition by refining or grinding, or by other process, not specifically provided for"; nor is it dutiable at 10 per cent. ad valorem, under section 6, as a "raw or unmanufactured article not enumerated or provided for."

Hatch & Wickes, for plaintiff.
Wm. M. Stewart, Jr., and James B. Holland, for defendant.

J. B. McPHERSON, District Judge. The appellant imported into Philadelphia at various times between October, 1898, and January, 1901, certain tungsten ore, or wolfram, upon which the collector assessed a duty of 20 per cent. ad valorem, under paragraph 183 of the act of July 24, 1897, which imposes this rate upon "metallic mineral substances in a crude state." The appellant protested that the ore was exempt from duty under paragraph 614, which puts upon the free list "minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this act." In the alternative, he protested that the merchandise was only subject to a duty of 10 per cent. ad valorem as a nonenumerated unmanufactured article, under section 6, which levies this rate upon "all raw or unmanufactured articles not enumerated or provided for in this act." The board of general appraisers approved the collector's classification, and an appeal was thereupon taken to this court. It seems to me that the question is not difficult to solve. Undoubtedly, if the word "metallic," in paragraph 183, is to bear its scientific meaning, or any one of many meanings that are given to it by the various dictionaries, the ore in controversy is not a metallic substance. It does not have the characteristics of a metal, and is therefore not "metallic." It is a crude ore, properly described as a mineral, and it has not been advanced in value or condition by refining or grinding. If, therefore, it is not specially provided for elsewhere in the act, paragraph 614 admits it free of duty. But if the whole phrase used in paragraph 183 be considered,—"metallic mineral substances,"—and if it be further considered that when the adjective "metallic" qualifies the word "ore," or its equivalent, "mineral substance," it bears in ordinary speech the meaning of "metalliferous," and not the strictly scientific, dictionary meaning of "metallic," it seems to me that the solution of the difficulty has been found. For evidently, if "metallic," as here used, is equivalent to "metalliferous," the merchandise in question has been specially provided for by paragraph 183, and the duty of 20 per cent. was properly imposed.

The decision of the board of general appraisers is accordingly affirmed.

MURPHY v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit. May 6, 1902.)

No. 1,138.

APPEAL—FINDINGS OF MASTER—REVIEW.

Findings of fact by special master are conclusive on appeal, there being some evidence to support them, and reference to him being by consent, and covering the law and facts in the case.[1]

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

Clifford L. Anderson, for appellant.

P. H. Brewster and Saunders McDaniel, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On December 19, 1895, the appellant filed a petition against the appellee, I. Y. Sage, and J. W. Lambert in the superior court of Fulton county, Ga., in which he alleged he owned certain real estate. He further alleged that the appellee, said I. Y. Sage, and J. W. Lambert had taken possession of a portion of said property. He further alleged that Gray street was extended north from D'Alvigny street to the south line of a certain D'Alvigny strip, and east therefrom to a 30-foot street, running along the west side of the right of way of W. & A. Railroad to North avenue, said Gray street being 60 feet wide, and the defendants had excavated the north extension of Gray to a point 35 feet south of the northeast corner of lot 3, and its entire length east, from the north extension to the 30-foot street, thus destroying said street, in which he had and claimed an easement, and the fee of the east extension of Gray street. These were the material allegations of the original petition. The answer of the defendants denied that Murphy had any title to the land he claimed had been excavated, and denied the existence of the alleged streets. On a hearing before the judge the appellee, being dissatisfied with the decision, appealed the case to the supreme court, and that court affirmed the decision of the lower court. The appellant in the state court amended his petition, and alleged that there existed a street across the W. & A. Railroad to Marietta street from his property, and the defendants had laid tracks across the same, and that the land-lot line between land lots Nos. 81 and 82 was not 185 feet north of D'Alvigny street, but was some 20 feet further north. The case coming on for trial in the state court, appellant dismissed his suit as to I. Y. Sage and Lambert, whereupon the appellee removed it into the circuit court of the United States for the Northern district of Georgia. The cause in that court was referred by consent to a special master, with full power to adjudicate all questions of law and fact. The special master made a report, to which the appellant filed exceptions as follows:

"First. That the master erred in finding that the plaintiff has no right or title or interest in and to the D'Alvigny strip, which has been graded or is in

[1] See Appeal and Error, vol. 3, Cent. Dig. § 3998.

use or occupied by the tracks of the defendant railway company, and is entitled to no damages on that account. Plaintiff says that said rulings and findings of the master is error; that he should have found, as alleged in the pleadings of the plaintiff, that the plaintiff did have a right, title, and interest in and to a part of the D'Alvigny strip, which has been graded, and is in use or occupied by the tracks of the defendant railway company, as alleged in said petition of plaintiff, and he is entitled to damages on account thereof, as alleged in said petition, and that said position of the plaintiff is sustained by the evidence before the master, and that the master's findings in this part of the case was not supported by the evidence adduced upon the trial of said case before him.

"Second. Plaintiff says that the master erred in his rulings and findings set out in paragraph two thereof. Plaintiff says that defendant railroad company had taken possession of all that part of lot described in his petition, and that the evidence adduced upon the trial of said case shows that the defendant had graded and taken possession of that portion of said lot described in said pleadings, and that the same was damaged in a much larger sum of money than found in his favor by the master in said paragraph of said findings, to wit, in the sum alleged in his petition, and that the evidence bore out this theory of the plaintiff's case; therefore finding No. 2 of the master was error.

"Third. Plaintiff says that the master erred in his findings in paragraph three thereof, by finding that the plaintiff had no right or title to any way, street, or road across the defendant railway company's tracks between the north extension of Gray street and the present location of North avenue, as it is extended across said railway tracks. Plaintiff says he never did claim in his pleadings any right to a street running on the north extension of Gray street to any point on North avenue, but he did claim in his pleadings, and sustained by evidence, that he had a right of way to use a sixty (60) foot street on the east extension of Gray street, and extending from the north end of the north extension of Gray street east, crossing the tracks of the Southern Railway Company and the Western & Atlantic R. R. and Marietta, through the woodyard of Randall. Plaintiff further excepts to the finding in said paragraph three, subparagraph 'a,' and says that said finding is error, and that the north and east extension of Gray street about D'Alvigny street were and are public streets in the legal sense, and that plaintiff, as a member of the public, and as owning property abutting on said street, has a right, title, and interest therein, and an easement therein, and that the evidence adduced upon the trial of said case entitled him to a finding in his favor upon this point in the case, and does not sustain the master's finding upon this point in the case. Plaintiff says that the finding of the master, to wit, that the plaintiff had no right to an easement, was error; that he has a right of easement in said street, and a right to have same kept open.

"Plaintiff says the court erred in not holding that he should have a permanent injunction against the defendant preventing it from using the east extension of Gray street, as prayed for in the petition; that an amendatory injunction should have been issued requiring the defendant company to remove its tracks from the east extension of Gray street. Plaintiff further excepts to the findings of the master, and says the master should have found that the land-lot line was twenty feet north of the point where he found it was located, and as set out in plaintiff's petition. The evidence justified such a finding, and the master found contrary to the evidence when he found the land-lot line was located as claimed by the defendant.

"Plaintiff further excepts to the master's report; says that the court erred in not giving him damages against the defendant for cutting the dirt from Gray street and destroying its usefulness to this plaintiff as a street.

"Plaintiff further says he had a right to the use of said street by reason of the deeds under which he held lots No. 3, No. 4, No. 5, and No. 6 of the Loyd property, and that he had the right to the use of said street because the same had been dedicated to the public and accepted by the public, and it constituted one of the easements to this said property; that the evidence in said case justified this position and the findings of the master was contrary, and is error.

"Plaintiff says the master erred in finding that the east extension of Gray street was never graded and worked up by the public, and that finding of master was contrary to evidence."

On these and other exceptions the court, on January 17, 1900, rendered an opinion, and therein decided "all exceptions of both parties will be overruled and a decree entered confirming the report of the special master." On the 17th day of December, 1901, a formal decree was entered as follows:

"On the 17th day of January, 1900, came on to be heard the exceptions of complainant and defendant to the report of the special master, filed herein on the 13th day of February, 1899, and the same were argued by counsel for complainant and defendant, respectively; whereupon, upon considering thereof, because it is the opinion of the court that such is the law, it is ordered, adjudged, and decreed by the court that the exceptions of the complainant be, and the same are hereby, each and all overruled and denied; that the exceptions of the defendant be and the same are each and all hereby overruled and denied; that the report of the special master in said cause be and the same is hereby confirmed as to each and all of the findings, both of fact and law therein set forth, and said report in its entirety made a part of this decree. This decree is rendered conformably to the opinion of the court filed on the 17th day of January, 1900. This 17th day of December, 1901."

And thereon the appellant brought the case here, assigning errors on the lines of his exceptions to the special master's report. The evidence taken before the master on which the findings of law and fact are based is voluminous and conflicting. On inspection of the appellant's exceptions to the report of the special master, we see that there is no particular evidence, nor particular finding of fact of the master cited to sustain any exception made; but in each instance, to sustain the exception, the court below was referred, and this court is referred, to the entire evidence reported. As to the insufficiency of the exceptions filed in the court below, see Harding v. Handy, 11 Wheat. 103, 6 L. Ed. 429; Farrar v. Bernheim, 21 C. C. A. 264, 75 Fed. 136. Further, we hold that, as the reference was by consent and covered the law and the facts in the case, and as the evidence is conflicting, and there is some evidence to support every finding of the special master, his finding of the facts is conclusive. See Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Shwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

On the facts as found by the special master, the decree of the circuit court (99 Fed. 469) is correct, and the same is affirmed.

In re FELDSTEIN.

(Circuit Court of Appeals, Second Circuit. April 8, 1902.)

No. 130.

1. BANKRUPTS—BOOKS OF ACCOUNT—SUFFICIENCY.

A bankrupt, who merely enters loans made to him by members of his family in private personal memorandum books, always kept in his personal custody and concealed by him from every one, does not comply with the provision of the bankruptcy act requiring him to keep "books of account or records."

3. SAME—"IN CONTEMPLATION OF BANKRUPTCY."
Failure of a bankrupt to keep the requisite books of account must be deemed to have been "in contemplation of bankruptcy," within Bankr. Act, § 14b, providing that a bankrupt's discharge shall be refused if, with fraudulent intent and "in contemplation of bankruptcy," he fails to keep books of account, where for at least a year prior to his failure his condition was one of such hopeless insolvency that he must be presumed to have known it.

3. SAME—"FRAUDULENT INTENT."
Failure of a bankrupt to keep the requisite books of account must be deemed to have been with "fraudulent intent to conceal his true financial condition," within Bankr. Act, § 14b, providing that a bankrupt's discharge shall be refused if with "fraudulent intent," etc., and in contemplation of bankruptcy, he fails to keep books of account, where his testimony conceded an intent to conceal his true condition, and it appeared from the evidence that he knew he was insolvent and on the verge of failure.

4. SAME—FAILURE TO KEEP BOOKS.
The fact that loans made to a bankrupt and not entered by him in his regular account books were made before the bankrupt act was passed did not excuse his failure to enter them as required by the bankrupt act.

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

This cause comes here upon appeal by the bankrupt from an order of the district court, Southern district of New York (108 Fed. 794), refusing the discharge of the bankrupt.

H. B. Twombly, for appellant.

Emmanuel Blumenstiel, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The bankrupt was in the silk business under the name of A. Feldstein & Co. He had no partner. Upon application for discharge the only specifications which were seriously pressed were those relating to the failure to keep proper books of account and the concealment of assets from the trustee. The referee found the latter specification not sustained, but recommended that the discharge be refused on the ground that "with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, the bankrupt had failed to keep books of account or records from which his true financial condition could be ascertained." The district court sustained the referee. The referee, in an exhaustive report, found this conclusion on several different assignments of improper bookkeeping. Inasmuch as we do not in all respects agree with his conclusions, but yet find in one of these assignments sufficient to sustain the specification, the discussion of the question presented on this appeal may be much shortened.

A few excerpts from the referee's report will indicate the general situation prior to May 7, 1900, when the bankrupt's voluntary petition was filed:

"The bankrupt was insolvent to the amount of $75,000 and more on January 1, 1898, and more than $175,000 on December 31, 1898, and more than $360,000 on December 31, 1899, and more than $500,000 on May 1, 1900, without regard to debts owing to his wife and her family, amounting to more than $90,000. Between September 19, 1898, and April 12, 1900, during

all or part of which time the bankrupt was hopelessly insolvent, he lost in gambling at roulette, etc., the enormous sum of more than one hundred and sixty thousand dollars in gambling houses in New York City, and paid the same out of moneys drawn from his business, in addition to about the sum of seventy-five thousand dollars lost in speculations in stocks."

Counsel for the appellant contests the statement that Feldstein was insolvent $75,000 in January, 1898, upon the theory that $59,000 of his indebtedness at that time was to E. Zellweger & Co., of Bache, Switzerland, a concern which appears in the bankrupt's schedules as his creditor to the amount of $320,000. It is contended that Feldstein was a general partner in this concern, and that by counting certain possible interests in that concern as assets the deficiency of $75,000 on January 1, 1898, would be practically wiped out. It will not be necessary, however, to go into this question of partnership, because the $75,000, as the accountant testifies, did not include the $90,000 due for loans made to Feldstein by members of his family. Counting that sum as a liability, he was undoubtedly insolvent in January, 1898, and his condition grew rapidly worse until the crash came in May, 1900. It is manifest from the testimony that certainly by the end of the year 1898 he was in a condition of hopeless insolvency; and it is difficult to escape the conviction that he knew it, and that, as the referee found, knowing he "could not meet his obligations, he turned to gambling and stock speculations in hopes of retrieving his losses, but went from bad to worse, and rapidly used up his assets and the money of his creditors."

The bankrupt had a regular set of books kept by a bookkeeper during his entire business career, and under his directions and instructions. These books comprised ledger, cash book, sales books, check book, order book, storage book, stock book, invoice book, and letter-press copy book. There was no book of bills receivable in usual form, but four small books were produced, in which there were memoranda of notes received from customers, with the disposition thereof. The entries in these small memorandum books were made by the bookkeeper. The usual records, such as invoices, returned checks, correspondence, accounts, etc., were also kept. And there was produced on the hearing a personal check book of the bankrupt, with returned checks. As stated before, the referee and the district court found that the way in which the accounts were kept, in several particulars, was calculated to mislead and deceive as to the capital of the bankrupt invested in the business, which, under this system of bookkeeping, appeared at all times to be much larger than it was in fact; and that the bankrupt has thus "failed to keep books of account or records from which his true condition might be ascertained." It will be necessary only to discuss the indebtedness to his family. In the schedules filed by the bankrupt, in the list of unsecured creditors, there appear the names of Anna C. Feldstein, $75,000; estate of Tabitha Sierck, $9,000; C. W. Sierck, $10,000,—all for "money loaned." Anna C. was the bankrupt's wife, Tabitha Sierck was his mother-in-law, and C. W. Sierck, his brother-in-law. From the proofs of claim it appears that in 1892 Tabitha Sierck loaned Feldstein $35,000, taking his promissory note there-

for. After her death in January, 1896, and prior to November, 1897, he paid to her administrator $26,000 of this amount, leaving $9,000 still due. This $26,000 had been loaned to him by his wife, and she had, in addition thereto, between December 23, 1895, and December 31, 1896, loaned him other sums, amounting (with the $26,000) to $75,000. The $10,000 due to C. W. Sierck was loaned to Feldstein January 22, 1892. In none of the bankrupt's books above enumerated,—in none of the records or papers kept in his business,—is there the slightest indication of the existence of any of these claims against him. Any one examining the books, whether an ordinary person having a general knowledge of accounts or a most skillful and competent accountant, would inevitably have reached the conclusion that Feldstein was $90,000 better off financially than he really was. Counsel for the appellant asserts in his brief that "the Anna C. Feldstein running account * * * was entered in the check books of the bankrupt and the checks were all kept so that Klaw (the expert accountant) was able to make a complete and exact statement from these records of the same account"; but examination of the testimony to which he refers does not bear out this assertion. We find no such statement made up from such records. Certain checks drawn by Sierck, administrator, to the order of Anna C., and indorsed by her and by the bankrupt, were shown to him, and he testified that they "appeared in the deposits of his check book," but the returned checks of "Sierck, administrator," were no part of the records of the business of A. Feldstein & Co., and there is no evidence to show that they were kept by that concern. Except for an assertion as to two certain small memorandum books, the bankrupt admitted—as he had to admit—that there was nothing in the books or records to indicate that he owed any of these people (members of his family) the amounts set forth in the schedules. The bankrupt insisted that he had made full entries as to these loans and the interest upon them, and also statements as to transactions with stockbrokers, in two small memorandum books. These books were never produced. The bankrupt's story is that they were locked up in his desk in his private office at the time of the failure; that when he came there afterwards the desk had been broken open, and the books had disappeared. The trustee, who broke open the desk, testified that he saw no such books; that he preserved all he found there, except some printed advertising matter. Schweizer, the bookkeeper, who was present at the time, corroborates him. There is no conceivable reason why any one should have made away with these memorandum books, if they were there; and we are inclined to the opinion that no such books were in the desk on the day of the failure. But if they were, it makes no difference. The bankrupt himself testified that the amounts due his wife and the Siercks were never entered in the business books of A. Feldstein & Co., only in these two small memorandum books, which apparently no other eye but his ever saw. He alone kept them; the bookkeeper never made a single entry in them,—never saw them. They were kept secret and apart,—his private, personal memoranda; always in his personal custody, concealed from every one. This cer-

tainly is not the "[keeping] of books of account or records" which the bankrupt act calls for. They were no more a part of such books and records than if the bankrupt had noted his indebtedness to his family on the back of a visiting card and kept it in his pocketbook, or had written it on the fly leaf of a book in his library.

It is necessary that the failure to keep books or records must have been "with fraudulent intent to conceal his true financial condition," and "in contemplation of bankruptcy." Bankr. Act, § 14b. The bankrupt testified that he did not know he was insolvent till April, 1900, within a month prior to the bankruptcy; but the court is not constrained to accept his statement as controlling. If such were the rule, the provisions of section 14b would be futile. For at least a year prior to his failure his condition was one of such hopeless insolvency that he must be presumed to have known it. Indeed, the only charitable explanation of his testimony is that, during that period of reckless plunging, he was cherishing the hope that some run of luck at the gaming table or on the stock market would bring him money from outside his business operations which would enable him to restore his depleted assets. When he let his books and records remain without any entry in them to disclose these debts, amounting to $90,000, during this period, when he must have known bankruptcy was imminent, his failure to keep the books and records which the statute required must certainly be held to have been "in contemplation of bankruptcy."

As to "fraudulent intent to conceal his true financial condition": His own testimony concedes an intent to conceal. He neglected to enter these loans in the business books, was careful not to allow the confidential bookkeeper, who kept all the other books, and held a power of attorney to sign checks, to make a single entry in them, nor even to see them, for the express purpose, as he admits, of concealing these loans from every one in any way connected with or employed in the business, so that from the books and records he did keep no one might know what money he borrowed. When the intent to conceal his true financial condition is conceded, and knowledge that he is insolvent and on the verge of failure is brought home to him, it is an irresistible inference that the intent was fraudulent.

We find no force in the suggestion that the loans were made before the bankrupt act was passed, and the failure to enter them in the books or records of the business began then. The referee held that "while he was solvent, and could promptly meet all his obligations, and before the passage of the bankrupt act, he was at liberty to keep his books in any manner he pleased, or to keep no books at all, but when he asks the benefits of the bankrupt act he is bound to show a compliance with its provisions regarding his books as well as any other requirements; but if he kept improper or incorrect books before the passage of the bankrupt act, and to such an extent as to make them improper or insufficient under the act, he should, upon the passage of the act, have altered his system of bookkeeping so as to comply with its requirements, if he ever expected to seek the benefit of its provisions." In this opinion we concur.

The order of the district court is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. MUIR.

(Circuit Court of Appeals, Second Circuit. April 8, 1902.)

No. 112.

BANKS—PRESIDENT—POWERS — STATEMENT TO SURETY COMPANY — CASHIER'S BOND.

A bank cashier applying to a surety company for a bond accompanied the application with a statement as to his past conduct and the condition of his account, signed by the president of the bank, which was incorrect, though made in good faith. Such statement was not referred to in the bond issued. The president had no special authority to make it, and none of the directors knew of it until interposed as a defense in a suit on the bond; defendant claiming that the statement was either a false warranty by the bank, or a misrepresentation by it of material facts, which induced defendant to execute the bond. *Held*, that making the statement was no part of the duties of the office of president, and not within his implied powers or ordinary duties, but was his individual act, by which the bank was not bound.

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

This cause comes here upon writ of error by the defendant from a judgment of the circuit court, district of Vermont, entered upon the verdict of a jury, under instructions of the court, in favor of defendant in error, who was plaintiff below. The action was for debt, to recover the penalty of a bond executed by the defendant, guarantying the faithful performance by Chas. W. Mussey of his official duties as cashier of the plaintiff bank. The breach of the bond consisted in the unlawful and fraudulent misappropriation of the funds of the bank by the cashier to an amount largely in excess of the penalty of the bond.

W. B. C. Stickney, for plaintiff in error.

Joel C. Baker and F. F. Oldham, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The bond is dated December 27, 1898. Prior thereto the American Surety Company had been the surety for the cashier. He applied to the board of directors to be allowed to substitute the defendant company, for the reason that it would cost him less. Consent was given by the board to his doing so if he could obtain a bond from the new company. No other action was taken by the board, Mussey being left to take whatever steps were necessary to procure it. There is no dispute that there were defalcations by the cashier, subsequent to the execution of the bond, in excess of its penalty; nor is there any dispute that, for a considerable period of time before the bond was applied for, the cashier was a defaulter in a very large sum,—certainly in excess of $20,000. The principal defalcation consisted in having loaned to Marvin A. McClure funds of the bank, for which he took said McClure's notes, without authority and against the will of the bank, and under circumstances which amounted to embezzlement of the funds of the bank. An examination and comparison of the notes in the bank with the discount register and general balance would at any time have immediately detected

the defalcation. A committee of the board of directors made periodical examinations, but failed to discover anything wrong, because, even in the examination of his accounts, they placed entire confidence in the cashier. The way in which he deceived them was this: He brought before them all the notes, except the notes of McClure, and with them several loose sheets of paper, on which the amounts of the notes were entered; these sheets being in his own handwriting. These sheets were handed to the committee. One of them would read the maker and amount of a note, and the other would check the amount off which agreed with it. After that the first sheet was handed to the cashier, who, while the committee were busy with sheet No. 2, would add to sheet No. 1 whatever figures were necessary to make a prearranged amount. So when the committee came to add that sheet of paper the additions would be correct, and the total additions of all the sheets would agree with the total amount of bills receivable, as shown by the general ledger. The examinations, therefore, failed to reveal the cashier's defalcations, because the committee of the board of directors in effect made the defaulter himself one of the examiners.

When he applied for the bond, Mussey, the cashier, presented a written application, in which he made certain representations and answered certain questions. He also presented a paper called "Employer's Statement," which is given below. The bond is not printed in the record, but from the pleadings it must be assumed that it contained no reference whatever to the written application or to the employer's statement. The last-named document reads as follows:

"Employer's Statement.

"(For Completion by Proper Officers on Behalf of the Employer.)

"The replies of the applicant herein are, to the best of my knowledge and belief, correct. He has been in the service of the undersigned employer since March 1, 1885, filling position of cashier, and has continuously filled the position for which this bond is required since March 1, 1885. He has always, to the best of my knowledge and belief, given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default. When last examined or audited by board of directors, on the twelfth day of December, 1898, all the accounts of his office were found in every respect correct up to December 12, 1898.

"He has not been, nor is he at present, so far as I know or believe, in arrears, default, or with unsettled balance, in this or any previous service. I know of nothing concerning his habits or antecedents affecting his title to confidence, and I know of no reason why the guaranty hereby applied for should not be granted.

"(If there are any exceptions to the statements made in the above certificate, please give particulars hereunder.) * * *

"The maximum amount of employer's money he will probably have in hand at one time is $———. Bond is required to be in force from Dec. 1, 1898, up to Dec. 1, 1899, to cover applicant as cashier at Merchants' Nat. Bank. Amount required, $20,000.

"Premiums to be paid by said Mussey.

"Dated at Rutland, Vt., this 15th day of December, 1898.

"[Signature] John A. Mead,
"(Official Title) President.

"On behalf of
"The Merchants' Nat. Bank,
"The Employer."

This statement was signed by Mead, the president of the bank, at the request of Mussey, who brought it to him filled out as it now appears. He signed it entirely of his own motion; neither the board of directors, nor any of the directors individually, having ever directed or authorized him to sign such statement, or having even heard of its existence.

The contention of the defendant's counsel is thus set forth in the brief:

"So far as said statement purports to represent what the said bank had done and ascertained about the subject-matter concerning which inquiry was made of it, to wit, 'when last examined or audited by board of directors, on the twelfth day of December, 1898, all the accounts of his [said Mussey's] office were found in every respect correct up to December 12, 1898,' the plaintiff in error claimed that the same was a false statement by the bank, and that it was either a false warranty or a misrepresentation of a material fact by the other contracting party to the bond in suit; it being an unqualified statement of the matters alleged as true, when said party did not know them to be true, and when in fact they were false; said statements having been made with a view to induce the plaintiff in error to believe them and to execute the bond in suit; said plaintiff having no other knowledge about them. That said plaintiff in error, by reason thereof, relying upon the truth of said representations, executed and delivered said bond, which it would not have done except for such belief and reliance."

In the first place, it may be noted that there is no suggestion of any fraud in the case, except on the part of Mussey. The president and the directors all acted with entire good faith. Each and all of them honestly believed that the cashier was faithful, and his accounts correct. In the second place, there is no question here of any warranty. It was entirely within the power of the surety company to have made some statement as to the cashier's past faithfulness a part of the policy, or even to refer in the policy to the application and employer's statement, making them a part of the contract; but, for some sufficient reason, it chose not to do so. In the third place, although the directors may have been grossly negligent in their examination of the cashier's accounts, a stranger cannot make of that negligence, alone, a cause of action or a ground of defense. Apparently the defendant concedes this, because the argument for reversal is based upon the propositions that the surety company had no knowledge or information as to the cashier's accounts, except this employer's statement; that it believed the same; that it issued the bond in reliance upon the truth of said statement; and that, but for such belief and reliance, it would not have issued said bond. The only question in the case, then, is, did the bank, the obligee under this contract, make this statement or representation as to the examination of the cashier's accounts, and the result of such examination? Upon the facts in proof here, this is no longer an open question in the federal courts. The decision of the United States supreme court in Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, is controlling. In that cause a surety company had given a bond for the faithful performance of his duties by a cashier. Prior to execution of the bond the cashier had made a written application containing answers to certain questions as to age, history, habits, etc., and had presented a certificate signed by the president of the bank, neither of which documents were referred to in the

policy, or made by reference a part of the contract. The certificate is substantially the same as the statement now before us. It reads:

"I have read the foregoing declarations and answers made by George N. O'Brien, and believe them to be true. He has been in the employ of this bank during three years, and, to the best of my knowledge, has always performed his duties in a faithful and satisfactory manner. His accounts were last examined on the 28th of March, 1891, and found correct in every respect. He is not, to my knowledge, at present, in arrears or default. I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him."

The certificate in the Pauly Case, as the statement in this case, was signed by the president of the bank of his own motion. Referring to many authorities cited in argument, the supreme court calls attention to the circumstance that many of them arose directly between the sureties and corporations represented by their boards of directors, or by some of their officers, acting within the authority conferred upon them; and the others arose out of the agent's acts or declarations in the course of the business intrusted to him. The court then proceeds:

"None of the cases cited embrace the present one. In the first place, the procuring of a bond for O'Brien, in order that he might become qualified to act as cashier, was no part of the business of the bank, nor within the scope of any duty imposed upon Collins as president of the bank. It was the business of O'Brien to obtain and present an acceptable bond. And it was for the bank, by its constituted authorities, to accept or reject the bond so presented. The bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as president to sign, any certificate as to the efficiency, fidelity, or integrity of O'Brien. No relations existed between the bank and the surety company until O'Brien presented to the former the bond in suit. What, therefore, Collins assumed, in his capacity as president, to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the bank, nor within any authority he possessed. He could not create such authority by simply assuming to have it. The circuit court of appeals well said that there were many acts which the president of a bank may do without express authority of the board of directors, in some cases because the usage of the particular bank impliedly authorized them, in other cases because such acts were fairly within the ordinary routine of his business as president, but that the making of a statement as to the honesty and fidelity of an employé, for the benefit of the employé, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president; and there was nothing to show that, by any usage of this particular bank, such function was committed to its president. It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he, as president, gave the certificate in question."

It is true that in the Pauly Case the president and cashier were in collusion; but the above excerpt places the decision on the broader ground, and that decision is in no way qualified by Guarantee Co. of North America v. Mechanics' Sav. Bank, 22 Sup. Ct. 124, 46 L. Ed. ——. In the case last cited, before the cashier's bond was issued the company "submitted for reply on behalf of the bank" certain questions, addressed to the president, which, and the answers thereto by the president as such, are referred to in the bond as "Employer's Guaranty, No. 154,806." The bond further contained this clause:

"That any written answers or statements made by or on behalf of said employer in regard to or in connection with the conduct, duties, accounts,

or methods of supervision of the said employé, delivered to the company, either prior to the issue of this bond or to any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guaranty, or of its continuance."

In differentiating this Case of the Mechanics' Savings Bank from the Pauly Case, the supreme court says:

"The statements were made, and were required to be made, on behalf of the bank, and the president acted for the bank in so doing; and the bonds were procured by the bank, and the bank paid the premiums."

The fundamental principle laid down in the Pauly Case is unqualified by the later decision, and is controlling of this case.

The judgment is affirmed.

LOUISVILLE & N. R. CO. v. McCLISH.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 975.

1. WITNESSES—PROOF OF GENERAL GOOD REPUTATION—WHEN ADMISSIBLE.
The fact that the testimony of a witness is contradicted by that of other witnesses, even in such manner that the conflict is irreconcilable, and cannot be explained consistently with the truthfulness of both sides, does not authorize the introduction of evidence to show his general good reputation for truth and veracity, which is only permissible where a direct attack has been made on the general character of a witness for truth by some recognized method of impeachment, as distinguished from an attack upon his testimony in the particular case.

2. RAILROADS—KILLING OF PERSON WALKING ON TRACK—CONTRIBUTORY NEGLIGENCE.
The question of the contributory negligence of a person killed by a train while walking on a railroad track is not affected by a universal or general custom of people to use such tracks for footways, nor by the question whether the deceased knew that trains were due at the time; but where no question of license or public crossing is involved, and the deceased was a mere trespasser, walking upon an embankment eight feet high, the railroad company, in an action for his death, is entitled to an instruction that he was guilty of contributory negligence as a matter of law.

3. APPEAL—REVIEW—LIMITATION BY EXCEPTION.
A question arising on the charge of the trial court, presented for review by an appellate court, is limited by the exception taken in the court below, and cannot be broadened by the assignment of errors or by the brief of counsel.

4. TRIAL—INSTRUCTIONS—MATTERS AFFECTING CREDIBILITY OF WITNESS.
Where those in charge of the engine of a railroad train which it was alleged struck and killed plaintiff's intestate were witnesses and testified as to the occurrence, which was in a state in which a statute made it their duty to keep a lookout, and to give warning signals, and, if possible, stop the train on discovering a person on the track, and made the omission of such precautions a criminal offense in case such omission resulted in the death of a person, for the purpose of showing the interest of the witnesses, to be considered by the jury in weighing their testimony, it is not error to call attention to such criminal liability, where the testimony in the particular case warrants it.

5. EVIDENCE—INFERENTIAL PROOF—HABITS OF DECEASED.
In an action against a railroad company to recover for the death of a person alleged to have been struck and killed by a train, where there

was no eyewitness to the accident, it is not competent for defendant to show a habit of deceased to jump on moving trains near the place where his body was found, for the purpose of raising an inference that his death resulted from such an attempt, but the testimony should be confined to his acts on the particular occasion in issue capable of being directly or circumstantially proved.

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

Charles N. Burch, for plaintiff in error.

Wm. Kinney and H. J. Livingston, for defendant in error.

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

DAY, Circuit Judge. This action was brought to recover damages sustained by the wrongful death of George McClish, it being alleged that he was negligently run over by one of the trains of the defendant company. The testimony tended to show that on the afternoon of February 4, 1899, the deceased left Brownsville in the direction of his home, and later in the afternoon his body was found about one mile north of Brownsville, at the foot of an embankment, near the railroad track. The injuries on his person were of such a character as to cause death. It is the claim of the plaintiff that he was knocked from the track and killed by one of the locomotives of a passing train, while the company contended that death ensued from the wrongful attempt of the deceased to board one of the trains of the company. It is strenuously argued that the case should not have been submitted to the jury, but should have been arrested by an instruction to find for the company at the conclusion of the testimony. It would serve no useful purpose to summarize our views of the evidence, which we have carefully considered. It is only necessary to say that we have reached the conclusion that under the Tennessee statute a case was made upon the testimony sufficient to warrant its submission to the jury. We proceed to consider several of the assignments of error.

1. The witness Henry Wright, called by the plaintiff, gave testimony tending to show that he was at work on a telephone pole some distance south of the place of the injury; that he saw McClish, with whom he was well acquainted, pass up along the track northwardly shortly before the passenger train went in the same direction. Further, that shortly after the passenger train passed he saw parties bringing the body of McClish from the scene of the injury. The company offered the testimony of three witnesses, tending, with more or less certainty, to show that Wright was not at this pole that day, but was at a certain opera house until the body was brought into town. Over the objection of the defendant company the plaintiff was permitted to introduce the testimony of witnesses to establish the general good character of the witness Wright for truth and veracity. The question of the admissibility of this kind of testimony has led to no little contrariety of decision in the courts of this country. The practice is not regulated by any statute of Tennessee, so far as we are advised, and is a question of general law, not controlled by state decisions. Garrett v. Railroad Co., 41 C. C. A. 237, 101 Fed. 102, 49 L. R. A. 645. The

question was presented to this court under facts differing from those now before us in Spurr v. U. S., 31 C. C. A. 202, 87 Fed. 713. In that case it was sought to sustain the admission of this class of testimony upon the ground that the cross-examination had impeached the defendant's character for truth and veracity. Of this claim the court, speaking by Judge Swan, said:

"A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradictions exist between his testimony and that of other witnesses affords no ground for its admission. 1 Greenl. Ev. § 469. In his character as a witness defendant is not entitled to any privilege not extended to other witnesses. Reagan v. U. S., 157 U. S. 301–305, 15 Sup. Ct. 610, 39 L. Ed. 709; U. S. v. Hollis (D. C.) 43 Fed. 248. In general, where no attempt has been made to impeach him by evidence of bad character, or by contradictory statements, or by the cross-examination, he cannot corroborate his testimony, or give it weight by evidence of his general reputation for truthfulness; nor will his own view of the effect of his cross-examination make such testimony competent. The rule as to the admissibility of testimony of character is thus broadly stated by Greenleaf (1 Greenl. Ev. § 54): 'And in all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him.' The evidence was obviously intended to give weight to the defendant's personal testimony; not for the purpose of establishing a general character inconsistent with the offense charged. The weight of reasoning and authority justified its exclusion. Stevenson v. Gunning's Estate, 64 Vt. 609, 25 Atl. 697; Fundorburg v. State, 100 Ala. 36, 37, 14 South. 877; Tedens v. Schumers, 112 Ill. 263, 267; People v. Cowgill, 93 Cal. 597, 29 Pac. 228."

In the present case we perceive in the character of Wright's cross-examination nothing which tends to impeach his general character for truth. It is true it is searching and exhaustive, but it relates entirely to details of his alleged conduct and observation of McClish to which he had testified in chief, and we think the doctrine of the Spurr Case entirely applicable to the case in hand so far as that feature is concerned.

Did the contradiction of Wright by the witnesses who claim that he was not where he says he was, and consequently could not have seen what he attempted to describe, put in issue the general character of the witness for truth, and thereby justify the introduction of witnesses to sustain it? Greenleaf, who goes farther upon this subject than many of the authorities are willing to follow in admitting this class of testimony, supports the doctrine that the contradiction of a witness by other testimony does not lay the foundation for the introduction of other testimony supporting his general reputation for truth. Greenl. Ev. § 469, and notes. What more is there in this case than the contradiction of Wright by other testimony? It is true that the contradiction is of that character that admits of no reconciliation of the testimony upon any theory of honest mistake or failure of memory. This is often true of witnesses whose general character for truth is unassailable. If, in every case where the witnesses are in direct and irreconcilable conflict, general character proof can be introduced, the disputed issues of fact will be lost sight of in a mass of testimony sustaining or impeaching the various witnesses in the case. The present case affords a striking illustration of the effect of the introduction of this

class of testimony, for we find no less than six other witnesses at the trial whom it was deemed necessary to sustain by proof of general reputation. If this practice is to be followed, as is said in Russell v. Coffin, 8 Pick. 142, "great delay and confusion would rise; and, as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and, indeed, it would be a trial of the witnesses, and not of the action." An attentive consideration of the cases and of the reasons upon which they are founded leads us to the conclusion that the introduction of this class of testimony should be confined to cases where an attack has been made upon the character of the witness by some method which tends to impeach his general character for truth. It is true that contradicting testimony may have an effect indirectly to impeach in the mind of the trior the character of the witness contradicted, but that is not the purpose of the testimony. It does not matter how much a witness may be contradicted, his general character is presumed good until it is assailed by some recognized method of impeachment. This may be undertaken by showing that the general reputation of the witness for truth is bad, by showing by direct proof or upon cross-examination that he has been convicted of an infamous crime. In these instances the attack is made upon his character, and is not so much upon his testimony in the particular case as upon his unreliability as a witness. When his character is thus assailed, the attack may be repelled by proof of general good reputation for truth. Until it is impeached it is not in issue, and we think the ends of justice will be subserved by confining the testimony to the issues of fact essential to the determination of the controversy before the court. While, as we have said, the cases are by no means uniform upon this subject, the conclusion reached is sustained by many well considered cases; among others; Wertz v. May, 21 Pa. 274; Brann v. Campbell, 86 Ind. 516; State v. Ward, 49 Conn. 429; Webb v. State, 29 Ohio St. 351; State v. Archer, 73 Iowa, 320, 35 N. W. 241; Russell v. Coffin, 8 Pick. 142; Brown v. Mooers, 6 Gray, 451; Gertz v. Railroad, 137 Mass. 77, 50 Am. Rep. 285; Stevenson v. Gunning's Estate, 64 Vt. 609, 25 Atl. 697; People v. Gay, 7 N. Y. 378; Tedens v. Schumers, 112 Ill. 263.

Whether the introduction of proof tending to show that the witness has made statements out of court inconsistent with his testimony is such an attack upon his character as justifies the introduction of sustaining testimony of general reputation is not a question involved in the record now before us. The cases are much in conflict upon the question, as a perusal of them will show. We cannot say that the admission of this sustaining testimony was harmless error. It tended to give undue weight and influence to the testimony of Wright over witnesses who rested upon the presumption of the law as to good character. Brann v. Campbell, 86 Ind. 516.

2. Under the decisions of the supreme court of Tennessee construing the statute under which this action was prosecuted, while the contributory negligence of the person killed will not bar a recovery, it may be taken into consideration in mitigation of damages. Upon this branch of the case the court instructed the jury:

"Take this case. I think you will agree with me in saying that it is always negligence, under any circumstances, for any man to walk along the track within the lines of contact by moving trains, unless it be under exceptional circumstances, where a man has scarcely any other choice of a pathway. Ordinary prudence would suggest that every man should keep off the railroad tracks unless he is compelled to use them for a walkway. But you know, as a matter of practical experience, that in a vast country like this it is impossible for the railroad company to keep the people from using their railroad tracks as a walkway. You know that people will take the railroad track because it is always a better road, higher and drier, and better kept than common roads and pathways that run parallel to them. This almost universal habit of using the railroad tracks as a walkway is to be considered by the jury in determining how far the intestate is to be chargeable with negligence in mitigating the damages; and this without regard to circumstances whether or not the railroad company has permitted it. If the railroad company has taken steps to exclude the public from using its tracks as a walkway, and, notwithstanding, the intestate violates the safeguards of the railroad by disregarding the means to prevent it, there the jury would naturally charge the intestate more readily with negligence. But if the company has taken no distinct means of warning off such intruders, that circumstance is to be considered by the jury in estimating the sum to be allowed in mitigation of damages. Again, if the intestate is not only walking upon the track, but he uses it for a walkway at a time and at a place when he knows or ought to know that trains are due to pass that way, that he is liable to come in contact with them, such a condition or circumstance would require the jury to increase the sum allowed in mitigation of damages. Thus, as before, the jury takes into consideration the facts and circumstances of this particular occasion and this particular man, and fairly and impartially estimates how much the damages should be mitigated by a reduction on account of the particular negligence shown by him on that occasion. Also, if the jury can see from facts and circumstances that after he had taken the track to use as a walkway he used it negligently by going heedlessly along without attention to the danger he is in from trains that are likely to pass or repass along the track at that time, such a circumstance would incline the jury to increase the amount to be allowed in mitigation of damages. And so it is, gentlemen of the jury, all the facts and circumstances of this case are submitted to you for your consideration to determine how much it would be fair to reduce the damages by reason of any negligence you find on the part of the plaintiff's intestate on this particular occasion."

Exception was duly taken to that part of the charge permitting the universal custom of people to walk upon railroad tracks to be considered as lessening the contributory negligence of the deceased.

The seventeenth request of the defendant was as follows:

"If you find from the evidence that plaintiff's intestate was killed by being struck by one of defendant's trains, then you must mitigate and reduce the damages which you allow plaintiff by taking into consideration the negligence of plaintiff's intestate in being upon defendant's track. I charge you that it was gross negligence on the part of plaintiff's intestate to go upon a railroad embankment eight feet high, where trains were frequently passing, and this negligence must be taken into consideration in assessing damages. The damages should be mitigated, and reduced to such amount as you deem proper. You can reduce the damages to a merely nominal amount."

Instead of giving request as asked, the court charged the jury as follows:

"If you find from the evidence that plaintiff's intestate was killed by being struck by one of defendant's trains, then you must mitigate and reduce the damages which you allow plaintiff by taking into consideration any negligence of plaintiff's intestate in being on defendant's tracks. I charge you that if you believe from the evidence that the plaintiff's intestate

walked upon a railroad embankment eight feet high, where trains were frequently passing, and at a time when he knew that trains were due, if you find that he did not know the schedule trains, this negligence would and must be taken into consideration in assessing damages. The damages should be mitigated and reduced to such amount as you deem proper; and you may even reduce the damages to a merely nominal amount, if you think his negligence demands this as a matter of fairness and justice to the defendant. You must allow whatever mitigation you think just for any negligence on his part."

The objectionable feature of the charge given lies in the instruction that the jury might consider the almost universal habit of using the railroad tracks as a walkway in determining the question of the contributory negligence of the deceased. There is no testimony in the record showing a universal custom to thus use the right of way of a railroad for a footpath, and we do not perceive that a practice of this sort would make it any the less negligent. In such cases it has been frequently held that such use, where no question of license or public crossing is involved, is at the risk of those who see fit to thus expose themselves without cause. Even in the case of a licensee there is, under such circumstances, the highest duty to exercise the utmost degree of vigilance in looking out for approaching engines or cars. Railroad Co. v. Cook, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181. In the absence of a license, the deceased, under the circumstances of this case, was a trespasser, to whom the company owed no duty except to avoid, after discovering his danger, any wanton or unnecessary injury to him. Railroad Co. v. Cook, supra. We think the defendant was entitled to a charge that the deceased was guilty of contributory negligence in thus exposing himself to danger by walking upon the track, and this without the qualification contained in the modification of the request in his behalf, "that, if the jury believed that the plaintiff's intestate walked upon a railroad embankment eight feet high, where trains were frequently passing, and at a time when he knew that trains were due, if you find that he did not know the scheduled trains, this negligence would and must be taken into consideration in assessing damages." This charge, by itself considered, might well justify the jury in believing that it was only negligence to make this use of the track when the deceased might expect trains to be due. We cannot agree to this proposition. The track is the property of the railroad company, which it has the legal right to use at any and all times. "It can never be presumed that cars are not approaching upon a track, or that there is no danger therefrom." Elliott v. Railroad Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. It is true that in other parts of the charge the learned judge instructs the jury that to make use of the track of a railway for walking purposes except in cases of necessity may be contributory negligence, but in the respects pointed out the jury may well have understood the court otherwise, and, in our opinion, the charge was misleading.

3. As to the weight to be given to the testimony of the engineer and fireman, who were important witnesses in behalf of the defendant, the court charged:

"Counsel for the plaintiff have properly called your attention to the fact that we have a statute making it a felony for a fireman or an engineer on

a railroad train not to observe the regulations of the statute which has just been called to your attention. In other words, if either of these engineers or firemen saw McClish as an obstruction on the road, and did not blow the whistle, and do all that was necessary to stop the train, or if they failed to see him, they are guilty of a felony, and would be punishable under the statute for that crime. It is plain, therefore, that these witnesses were testifying in their own interest in respect to that criminal liability. It is also to be observed that they are in the employment of a railroad company, and have such bias in that regard as belongs to ordinary human nature. But I have told you, even in criminal cases, that if the jury can see that the witness, notwithstanding the gravity of his interest, is telling the truth, that they not only may, but should, believe him, and base their verdict accordingly."

It is argued by counsel for plaintiff in error that this charge was erroneous. It is claimed that a proper interpretation of the Tennessee statute only requires the person in charge of the locomotive to be on the lookout ahead for obstructions; that in this case the engine was in charge of the engineer, and it was his duty to give the signals and take the precautions prescribed by the statute. Furthermore, that neither the engineer nor the fireman could be held criminally responsible under the laws of Tennessee unless the omission to take the statutory precautions resulted in the death of McClish. These questions raise important issues under the Tennessee Code, which do not seem to have been passed upon by the supreme court of that state. The exception taken, however, does not raise the question argued. It is as follows:

"(4) To that portion of the court's charge which calls the jury's attention to the statute making it a felony for an engineer or fireman to disregard the statutory precautions. Defendant excepts to said statute being referred to at all in the court's charge, and further excepts because, if referred to at all, the court should have stated that the omission to observe these precautions must have been willful, in order to make the lookout guilty of felony."

It is true that the assignment of errors is broader than the exception, and equally true that the argument is broader than the exception and the assignment. It has been frequently held that it is not the office of an assignment of error to extend the exception originally taken. It is the purpose of the rules of this court 10, 11, and 12 (31 C. C. A. cxlv, cxlvi, clii, 90 Fed. cxlv, cxlvi, clii), to require an exception to be specific, that attention may be called to the grounds thereof, and the error, if any, corrected. Van Gunden v. Iron Co., 3 C. C. A. 294, 52 Fed. 838. It is not permitted to look beyond the terms of the assignment of error to the brief for a specific statement of the question to be raised. Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891. Looking, then, to the specific exception taken, we find it objected: First, that the court referred to the statute at all; second, the court should have stated the omission to observe the statutory precautions must have been willful in order to make the defendant guilty of felony. As to the first objection we see no reason why the court may not properly refer to a statute making the omission of a duty the subject of criminal as well as civil liability, where the witness is one who may be held criminally liable under the circumstances involved in the inquiry in the civil suit. That fact

may influence his testimony, and, like other facts showing feeling or interest, may properly be considered by the jury under proper instructions. To justify reference to the criminal liability imposed by this statute, there must be testimony tending to show an omission to perform a duty required by the statute of the witness which may subject him to punishment. It is to be borne in mind, in this connection, that under the Tennessee statute there may be a liability in damages for failure to give the signals, while no conviction for crime can be had unless the omission causes death. The second part of the exception relates to the requirement that the omission must have been willful to involve criminal responsibility. The section of the Tennessee Code fixing criminal liability, so far as it relates to the circumstances shown in the present case, is as follows:

"If any engine driver or other person connected with the running of the locomotive or train upon any railroad shall omit to observe the precautions prescribed for the prevention of accidents, whereby an accident shall occur, and any person shall be killed, he shall be guilty of a felony."

This statute evidently does not make the crime dependent upon any particular element of purpose or intent upon the part of those who come within its terms. It is the omission on the part of such persons to observe the statutory requirements, which results in accident causing death, that renders them criminally responsible. We do not know what the court would have held had the exception directed attention to the applicability of this statute alone to the engineer under the circumstances shown; nor did the exception challenge the court's attention to the necessity of pointing out the fact that death must result from the omission to act before the witness could be indicted and convicted of a criminal offense.

4. Another proposition is much discussed in the briefs, and was the subject of oral argument. It involves the right of the defendant company to introduce evidence tending to show that the deceased was in the habit of jumping on trains near the place where the body was found. In the form in which the offer of proof in this branch of the case was made it is quite likely that the question sought to be made was so involved with incompetent matter proposed to be proven at the same time that the alleged error in ruling upon it has not been properly brought into the record. As it has been thoroughly discussed, and may be an important question in a new trial of the case, we have concluded to give our views upon it. The learned counsel for plaintiff in error admit the general rule to be that testimony offered for the purpose of establishing contributory negligence of the deceased, like other testimony, must be limited to proving facts existing at the time of the happening of the injury complained of. It is contended, however, that when there is no eyewitness to the occurrence, and the manner of its happening is to be left to circumstantial evidence alone, it is competent to show the habit of the deceased in the respect of doing the thing which it is claimed he did at the time of receiving his injury. The argument is, proof of habit to do the thing in question renders it more likely that it was done at the time in controversy. There are not lacking authorities to support this view, but we think the better rule is that such testimony tends to raise

collateral issues, to beget uncertainty and false inferences from events which have no bearing upon the real issues. A man may be careful upon one occasion and careless upon another. It is not fair deduction to say that because the deceased sometimes boarded trains in motion that, therefore, he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony tending to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury to the consideration of the character and habits of the deceased at other times. We think the testimony should be confined to the conduct of the deceased in the particular instances under investigation in the light of the facts competent to be directly or circumstantially proved. While differing in its facts, we think the case of Thompson v. Bowie, 4 Wall. 463, 18 L. Ed. 423, is decisive in principle of the question now under consideration. In that case action was brought to recover upon three promissory notes. Bowie, the maker, sought to avoid payment on the ground that the notes were founded on a gaming consideration, and therefore void. There was no direct evidence offered at the trial to impeach the consideration of the notes, and circumstantial evidence only was relied upon. The trial court permitted a brother of the defendant to testify that whenever his brother was under the influence of liquor he had a propensity to gamble, and, as the maker was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, payable to the keeper of a gambling house, the inference was that they were given for money won at play. Mr. Justice Davis, delivering the opinion, said:

"All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proof to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev. § 54. Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."

In discussing the principle herein involved in Harriman v. Palace Car Co., 29 C. C. A. 194, 85 Fed. 353, Judge Thayer uses this language:

"When, therefore, a complaint does not charge incompetency, but simply alleges that an employé acted negligently on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue."

To the same general effect are Jones, Ev. § 162, and cases cited; Eppendorf v. Brooklyn St. R. R. Co., 69 N. Y. 195, 25 Am. Rep. 171;

Franklin v. Franklin, 90 Tenn. 441, 16 S. W. 557. In the latter case it was held incompetent to cross-examine a witness accused of forging a will then in dispute by showing that he had forged other signatures. Judge Lurton, then of the supreme court of Tennessee, delivered the opinion; saying, among other things:

"The fact of a forgery of a particular paper cannot be shown by proof of other crimes of the same kind. If it had been shown that he had written this will, and the defense was that it had been written innocently, or by direction of the testator, then, to show guilty purpose or motive, it might have been admissible to show other offenses of the same kind. That was not the question here."

Chase v. Railroad Co., 77 Me. 62, 52 Am. Rep. 744, was a case where no one saw an accident at a crossing causing instant death. The court ruled that evidence of the general character and habits of the traveler for carelessness was not competent as bearing upon the question of due care upon his part. Upon the whole, while the question is not free from difficulty, we think the better rule excludes such testimony, and that there was no error in the action of the trial judge in the respect mentioned.

For the reasons heretofore set forth, the judgment will be reversed.

PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK v. DUNCAN et al.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,008.

LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM—ESTOPPEL.

The holder of a life insurance policy which provided that premiums might be paid to an agent of the company, but only in exchange for the company's receipt, was notified by the company that the receipt for a premium had been sent to a certain bank, and that payment could there be made. On the last day for such payment it was found that, by direction of the company, the bank had previously returned the receipt. There was no other agent in the place who was authorized to receive payment, and the company refused to accept it thereafter without a health certificate, which could not be furnished, and the premium was not paid. In an action on the policy after the death of the insured, the only defense was that of forfeiture for nonpayment of such premium. The jury found for plaintiff, under instructions charging that such a verdict could only be returned in case it was found that payment of the premium was prevented solely by defendant's withdrawal of the receipt, and there was evidence which supported such a finding. *Held*, that defendant, having, in violation of its duty under the contract, withdrawn the receipt, and thus prevented payment of the premium except on a condition which could not be complied with, and of which fact the evidence tended to show it had previous knowledge, was estopped to claim a forfeiture because the payment was not made or tendered.

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

This was an action upon a policy of life insurance issued by the Provident Life Assurance Society upon the life of Wm. M. Duncan for $10,000, and payable to Mrs. Carrie E. Duncan, wife of the assured. The policy was issued September 8, 1897. The annual premium was $807. Among other matters, the policy contained the following provision: "All premiums are

due and payable in advance at the office of the society, in the city of New York. They may, however, be paid to an authorized agent of the society on or before the dates when due, but only in exchange for a receipt, and countersigned by such agent. A grace of thirty days will be allowed in the payment of premiums hereafter due on this policy: provided, always, that, whenever advantage is taken of this grace, interest at the rate of five per cent. per annum shall be paid to the society for the time deferred." The first renewal premium was due September 8, 1898; but, as a consequence of this grace provision, the insured had until and including October 8, 1898, in which to pay same. The assured died in March, 1899, without having ever paid this renewal premium. This action is brought upon the policy, for the use of Mrs. Carrie E. Duncan individually, and for the use of W. D. Talbot, to whom one-half of the policy had been assigned October 10, 1898, in pursuance of a prior parol agreement by which the assignee undertook to pay the whole of the first renewal premium and one-half of each recurring premium in consideration of a one-half interest in the policy when it should become a claim. The sole defense made by the society was that the policy had been forfeited by the nonpayment of the first renewal premium, due October 8, 1898. The official receipt for the first renewal premium had been placed by the society in the American National Bank, at Nashville, prior to September 8, 1898, and notice had been duly given to the assured that it could be paid there. A few days prior to October 8, 1898, the last day of grace, and without any notice to the assured, this renewal receipt was returned by the bank to Boswell & Buckley, general agents for the society at Cincinnati, Ohio. The agents of the company at Nashville, October 8, 1898, were F. L. McKernon and Frank Pryor; the latter being a subagent or soliciting agent under McKernon. There was evidence tending to show that it was the duty of both McKernon and Pryor to look after collections of renewals due at Nashville, by urging on the assured the payment of such renewal premiums, and that both had an interest in the payment of renewals, by way of a commission on collections of renewals at Nashville upon policies issued within a limited date. But neither had any authority to collect such renewal, or to extend the time of payment. Both McKernon and Pryor, the Nashville agents of the society, were informed prior to October 8, 1898, of the arrangement by which Talbot was to pay the renewal premium due October 8, 1898. In explanation of the failure to pay that renewal premium, Mr. W. D. Talbot testified as follows: "Q. State what occurred, and all about it. A. Mr. Pryor came to my office on Saturday, the 8th day of October, 1898, to collect the premium on the policy. I reached for a check to make the payment, at the same time asking for the receipt, in order to get the exact amount to be paid; and I also repeated, 'I don't want to give any note for part of the premium,'—that I wanted to pay it all cash. Mr. Pryor said the receipt was on the notice, and I said that was the first time I ever knew the receipt to be on the notice, and he said all he had to do was to countersign it. On examination he found that the receipt was not on the notice. He then said: 'The receipt is down at the bank. I will go down and get it.' He left my office, and in a short time returned and said: 'The bank has returned that receipt to Cincinnati.' I think he said Cincinnati, but I would not be positive. Q. Returned it to some place? A. To the manager at Cincinnati, I understood it; and he said: 'I will telegraph for it, and bring it to you Monday.' I said: 'You take the check now, and bring me the receipt hereafter.' He said: 'That is all right. I will telegraph for it, and bring it Monday.' He started to go out of the office, and I said: 'Here, Pryor, if it will make a particle of difference, you take the check, and bring me the receipt hereafter.' He said: 'That is all right. I will telegraph for it, and bring it up Monday.' He then left my office." There was evidence tending to show that either McKernon or Pryor wired on Saturday, October 8, 1898, the society's general agents at Cincinnati to return the Duncan renewal receipt, and that this wire was received sometime during the afternoon of October 8th. Instead of wiring a reply, the general agents wrote on the same day to McKernon, inclosing the receipt, together with a medical health certificate, and instructed him not to receive the renewal premium unless accompanied

by a duly certified health certificate. Mr. Duncan's health was at this time such as that he was unable to obtain a proper health certificate. Both Duncan and Talbot were notified of this instruction, and that no payment would be received unless accompanied by a health certificate. In consequence of this, no further tender was made. It was also in evidence that W. D. Talbot was a man of large means. There was a jury, and verdict for the plaintiff.

J. M. Dickinson and John A. Pitts, for plaintiff in error.
Baxter Smith, for defendant in error Mrs. Duncan.
John J. Vertrees, for defendant in error W. D. Talbot.

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.

Most of the errors assigned are based upon an erroneous interpretation of the charge, and of the issues submitted to the jury. The learned trial judge did not assume that Pryor had any authority to either collect the renewal premium due October 8, 1898, or to extend the time within which it might be paid. Upon all these matters the charge was quite as favorable to the defense as they could claim, for he refused to submit the plaintiffs' case to the jury upon any issue as to Pryor's right to either collect the renewal premium on the Duncan policy, or to extend the time of payment until Monday. Rightly interpreted, and considered as a whole, the original charge submitted the case to the jury upon the single issue as to whether, on all the facts and circumstances, the payment of the renewal premium had been prevented by the withdrawal of the company's official receipt from Nashville before the time had elapsed within which it might have been paid. But if there was any ambiguity in respect to the issue submitted to the jury, it was fully cleared up by the subsequent charge to the jury, who, after being charged, returned into court and propounded this inquiry:

"The jury wants to know whether or not there was more than one point to be considered. If but one, was that as to whether or not payment failed on account of absence of receipt?"

Whereupon the court further instructed the jury as follows:

"Now, gentlemen, in answer to your question, I can only repeat the substance of what I have already said to you,—that the case is submitted to you on the single question of whether or not payment of the renewal premium due October 8, 1898, was defeated or prevented by reason of the fact that the receipt for the premium had been returned to Cincinnati, or was not then in the city. If, substantially as stated by Mr. Talbot, he desired to pay, and was ready and willing to pay, and called for the receipt, and the local agent, Mr. Pryor, went to the bank to procure the receipt and ascertained that it was not in the city, and so reported to Mr. Talbot, and thereupon agreed to telegraph for the receipt, and Mr. Talbot, bona fide, desiring then to pay the premium, and acting bona fide on the belief that the receipt would be returned, and that he could and would pay the premium Monday, then, under such circumstances as these, the company would not be permitted to rely on the failure to pay the premium on the last day when due, for the purpose of forfeiting the policy; and in that view, if you are satisfied of that by the weight of the evidence,—the burden being on the plaintiff to show this,—then your verdict should be in favor of the plaintiff.

If, on the contrary, substantially as stated by the agent, Mr. Pryor, he went to Mr. Talbot's office on one or more occasions and urged him to pay the premium, and Mr. Talbot delayed until late in the afternoon, and at the last interview Mr. Pryor told him that he supposed that the receipt was then probably gone, as the banks had closed, and thereupon agreed, at the suggestion of Mr. Talbot, to telegraph for the receipt, and that was all that occurred, that would not save the policy. On the contrary, the failure to pay would have worked forfeiture, and, in that view, your verdict should be for the defendant. This is what I have heretofore said to you."

The case is in narrow compass. Mr. Duncan was notified that the society's official renewal receipt had been sent to the American National Bank, at Nashville, and that he might pay his renewal premium to that bank in exchange for the official renewal receipt at any time before the expiration of the last day of grace, October 8, 1898. Mr. Duncan, in consequence of this notice, had a right to rely upon finding his receipt in the American National Bank until otherwise notified. The conceded fact is that this receipt was returned to the company's general agents at Cincinnati prior to Saturday, October 8th. Why this was done, and just when it was done, is unanswered by the evidence. The facts were within the knowledge and control of the society, but, for its own reasons, it has not chosen to explain its conduct in this matter. But if Mr. Duncan was not prevented from paying his renewal premium by the withdrawal of the receipt from Nashville, the beneficiaries under the policy on his life have no right to complain. It would be a matter of no consequence whether the receipt was in Nashville or Cincinnati on the last pay day, provided the insured had no purpose to pay the renewal, or was in no way prevented from paying the premium by the return of the receipt to Cincinnati. Now, this is just the issue upon which the case was submitted to the jury. There was a sharp conflict in the evidence bearing upon this question. The evidence of Talbot we have heretofore stated. That of Pryor, for the society, was a substantial denial of every fact which had been testified to by Talbot from which it might have been inferred that Talbot, in good faith, proposed to pay Duncan's premium on the due day, and was only prevented from so doing by the fact that the receipt had been returned to Cincinnati prior thereto without notice to Duncan or himself. Talbot was in all substantial matters corroborated by a disinterested witness present in his office, who heard the conversation between Talbot and Pryor detailed by Pryor.

For the plaintiff in error it has been urged that an offer to pay Pryor was of no consequence, because he had no authority to collect, and that the only way in which a forfeiture of the policy could be avoided was to have made a tender to the American National Bank. But if the fact that Pryor had no authority to collect Duncan's renewal premium made the offer to pay him ineffectual in avoiding a forfeiture for nonpayment, it is difficult to see on what better ground an offer to pay the American National Bank would have stood. The authority of the bank depended upon its possession of the society's official receipt. Duncan, under the express provision of the policy, could pay his renewal premium only "to an authorized agent of the society," "but only in exchange for a receipt signed by the president or secretary, and countersigned by such agent." The bank had, after the return of

the original receipt, no more authority to collect or receive Duncan's renewal premium than Pryor. To have made a tender to the bank would have been an idle ceremony, except in so far as such an offer to pay would tend to show that the unlawful withdrawal of the receipt before the close of the day had prevented the payment on the due day. But that was just as fully evidenced by the offer to pay Pryor for the company. Neither the bank nor Pryor had authority to receive the payment, and in the absence of such authority an offer to pay one would be no more efficient in avoiding a forfeiture than the other. If there was any advantage in a tender to one over the other, it would seem to be in favor of the tender to Pryor, rather than the bank. The authority of the bank as an agent for any purpose had been withdrawn by the recall of the official receipt. Pryor's agency, though limited, was unaffected by that fact; and he was, when the tender was made to him, an agent having authority to "look after" collection of renewal premiums, but without power to receive such premiums in the absence of the society's official receipt. It is not clear that Pryor's promise to send for the official receipt, and to present it again for payment on Monday, has any further or other significance than as evidence tending to show a good-faith purpose by Talbot to pay the premium on the due day, frustrated by the assured's inability to find any agent of the company authorized to receive such payment in exchange for the society's official receipt. Certainly the plaintiff in error cannot complain if the charge be so construed as to require the plaintiff below to show that Pryor did agree to procure the return of the receipt, with authority to receive payment of the premium upon its return.

Conceding Pryor's want of general authority to collect renewal premiums, or extend time for their payment, it is not clear, under the state of circumstances existing when he undertook to secure the return of the society's receipt and power to deliver it upon payment being made, that the company should be permitted to deny his authority, if, in reliance thereon, the assured, who was otherwise wholly without fault, should be misled and induced to rely upon that arrangement, rather than resort to some other equally uncertain scheme to avoid a forfeiture which was about to ensue through no fault of his.

Upon the facts of the case, it is enough, however, to say that there was abundant evidence from which the jury might find that the payment of Duncan's renewal premium was only prevented by the withdrawal of the society's official receipt from the American National Bank, and its return to Cincinnati. Under the terms of the policy, and of the notice given him, he had a right to rely upon the retention of the receipt by the bank until the close of the last due day, and a right to believe that he could pay his renewal premium at that bank, and receive the company's official receipt, at any time during the last day of grace. If, by reliance upon the society's agreement, as evidenced by its notice, he postponed payment until too late to pay elsewhere or otherwise, the society should not be permitted to rely upon a forfeiture brought about through its own mismanagement and breach of duty because a technically good tender was not made as between the bank and Pryor, provided it was clearly made to appear that, but for the situation brought about by the unauthorized with-

drawal of the company's official receipt, the renewal premium would have been paid ad diem. The society, under such a state of facts, was bound to have received payment when in a position to furnish the assured with its official receipt. This plain moral and legal obligation it repudiated by notifying the insured that payment would be accepted only when accompanied by a health certificate. This was impossible, and the evidence tends to show that the Cincinnati general agents of the company, who imposed the condition and withdrew the receipt from Nashville, knew of Duncan's state of health before there was any default in payment of premiums. In claiming a forfeiture, and according to the assured only the right to restore a forfeited contract upon terms imposed by itself, and impossible of compliance, the society is endeavoring to avail itself of a forfeiture brought about by its own fault. This it cannot do. It is estopped to claim that the tender made to Pryor was insufficient, or that any forfeiture has resulted from the failure to pay or offer to pay an authorized agent on the due day. The case is, in its essential principles, governed by the rule of estoppel applied in Insurance Co. v. Eggleston, 96 U. S. 572, 24 L. Ed. 841.

There was no error in instructions given or refused, and the judgment is accordingly affirmed.

WESTALL et al. v. OSBORNE.

(Circuit Court of Appeals, Second Circuit. April 22, 1902.)

No. 143.

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE OF FELLOW SERVANT—DECLARATIONS—RES GESTÆ—EVIDENCE.
   Where a stevedore on a steamship, while removing a hatch preparatory to loading the vessel, fell into the hold, owing to the giving way of the hatch cover on which he was standing, evidence of declarations of the stevedore and winchman, who were assisting him, made immediately after the accident, and while he was being removed from the hold, tending to show that the accident was caused by their carelessness instead of the defective appliances of defendant, as alleged by plaintiff, should be received as part of the res gestæ, though their attention was not called to such statements on cross-examination.[1]

2. SAME—IMPROPER EXCLUSION OF EVIDENCE—PREJUDICE—NEW TRIAL.
   Where, in an action to recover for an injury which plaintiff claims resulted from defective appliances furnished by his employer, evidence tending to show that the accident was caused by the carelessness of fellow servants is improperly excluded, and where it is not apparent that its rejection was not prejudicial to defendant, this is reversible error.

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

J. Parker Kirlin, for plaintiff in error.
R. S. Ransom, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

[1] See Evidence, vol. 20, Cent. Dig. §§ 331, 365.

PER CURIAM. We are constrained to reverse the judgment in this case because of the erroneous exclusion of evidence offered by the defendants upon the trial. The evidence consisted of the declarations of the fellow servants of the plaintiff made immediately after the happening of the accident by which he was injured, and was apparently offered for the purpose of showing that it had been caused by their carelessness instead of the defective appliances of the defendants, as alleged by the plaintiff. The plaintiff, a stevedore, while uncovering a hatch of a steamship preparatory to loading the vessel, fell into the hold owing to the giving way of the hatch cover upon which he was standing; and the declarations were those of the stevedores and a winchman, who were assisting him in uncovering the hold, and were made, some of them instantly after the falling of the hatch cover, and some of them shortly later, but within a few minutes, and while the plaintiff was being removed from the hold. The trial judge ruled that the evidence was only competent for the purpose of contradicting some of the plaintiff's witnesses, and, as their attention had not been called upon cross-examination to the statements which they had made at the time, a proper foundation had not been laid, and it was not admissible. We think the evidence was a part of the res gestæ. What was said just after the hatch cover gave way by those present was a concomitant of the accident, and seems to have grown directly out of it as a natural incident. What was said very shortly after by those who had participated in uncovering the hold was so nearly contemporaneous with the accident as to belong to the same class of evidence. Within numerous authorities it was competent original evidence. Railroad Co. v. Coyle, 55 Pa. 396; Insurance Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437; Com. v. Hackett, 2 Allen, 136; Com. v. McPike, 3 Cush. 181, 50 Am. Dec. 727; 3,880 Boxes of Opium v. U. S. (C. C.) 23 Fed. 367. In Peirce v. Van Dusen, 24 C. C. A. 280, 78 Fed. 693, decided by the circuit court of appeals, an action in which a railroad employé had been injured by the movement of cars about which he was at work, it was held that statements of the conductor of the train, made almost immediately, and while the cars were moving or had just stopped, and while the injured man was bleeding from the injury received, describing his part in bringing about the accident, were competent as part of the res gestæ.

It may be that the testimony excluded would not, if it had been received, have affected the result of the trial, and, if so, it is much to be regretted that an unnecessary objection was interposed to its reception; but it is apparent that it was offered to contradict the plaintiff's theory of the accident, and it is not apparent that its rejection was not prejudicial to the defendants, and the defendants are consequently entitled to rely upon their exceptions to the ruling.

Judgment reversed.

WALTER SCOTT & CO. v. WILSON.

(Circuit Court of Appeals, Seventh Circuit. May 8, 1902.)

No. 880.

1. APPEAL—DECISIONS REVIEWABLE—ACTION AGAINST RECEIVER OF BANKRUPT.
A final decree rendered in a proceeding by a third person to recover property in the possession of the receiver of a bankrupt is reviewable by a direct appeal, as in cases in equity.

2. SAME—FINAL DECREE.
An order, in a proceeding by a third person to recover property in the possession of a bankrupt, overruling exceptions to the report of a referee, and approving such report, is not a final decree, and appealable.[1]

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

James F. Hutchinson, for appellant.
David B. Gann, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

PER CURIAM. Upon the adjudication of the J. C. Winship Company as a bankrupt, the appellant filed its petition in the court below, alleging such adjudication in bankruptcy on November 1, 1901, and the appointment of appellee as receiver, who had taken possession of the premises and property of the bankrupt, including certain goods specified, which, it was claimed, belonged to Walter Scott & Co., and had been leased to the bankrupt and were in its possession under such lease. The petition represented the value of the goods to be $7,000, and that they were wrongfully detained by the bankrupt and by the receiver, after failure to pay rent therefor. The receiver denied the title of the petitioner, and set forth that the property was sold and delivered to the J. C. Winship Company pursuant to a contract between the petitioner and the bankrupt, dated July 25, 1899, and that the lease was executed to create and preserve a secret lien upon the property in favor of the petitioner in fraud of the creditors of the bankrupt, contrary to law, whereas, the property was in fact sold absolutely to the bankrupt, and the so-called "lease" was in effect a chattel mortgage and void.

The matter was referred to take proofs, the referee reported in favor of the receiver, and the court below, on December 14, 1901, entered the following order:

"This matter coming on to be heard on exceptions of Walter Scott & Company to the report of Referee Eastman and petition of Walter Scott & Company for return of certain property, come the parties by their solicitors, and, after arguments of counsel and the court being fully advised in the premises, it is ordered that said exceptions be, and the same are hereby, overruled, and the said report be, and the same is hereby, approved."

To this order the appellant excepted, and entered its motion for an appeal, which was allowed.

The appellee now moves to dismiss the appeal upon the grounds: (1) That the order appealed from is not (a) "a judgment adjudging

[1] See Appeal and Error, vol. 2, Cent. Dig. §§ 377 [n, p, r], 475.

or refusing to adjudge the defendant a bankrupt"; (b) "a judgment granting or denying a discharge"; (c) "a judgment allowing or rejecting the debt or claim of five hundred dollars or over." 30 Stat. c. 541, § 25a. (2) That the order is interlocutory, and not appealable. (3) That the appeal cannot be entertained as a petition to revise, under paragraph "b" of section 24 of the bankruptcy act.

The first objection must be overruled. The proceeding below, within our ruling in Stelling v. G. W. Jones Lumber Co. (decided May 6, 1902) 116 Fed. ——, was, in substance, a bill in equity filed against the receiver to obtain property then in possession of the court through its receiver. It was an independent suit in the nature of an equitable replevin. The court below had jurisdiction only because the appellant consented to and invoked the jurisdiction. Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. It was not a proceeding "in bankruptcy," as the term is employed in the section granting an appeal, but a decree of the court below in that proceeding is reviewable here by a direct appeal, as in all cases in equity.

We are, however, of opinion that the appeal is premature. There was no final decree from which an appeal could be taken. The order complained of is not a final decree adjudging the appellant's right and dismissing its bill or petition. It simply overruled the exceptions to the master's report and approves of the report. It neither determines the appellant's right nor disposes of its suit. It still remains within the power of the court below to set aside that report, to re-refer the case, and to direct further evidence to be taken. "A confirmed report, at best, stands in the same relation to a decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered." Kingsbury v. Kingsbury, 20 Mich. 212.

The appeal, being therefore premature, must be dismissed.

LEWIS v. PARRISH.

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

No. 101.

1. EXECUTORS AND ADMINISTRATORS—SUITS BY CREDITORS—JURISDICTION AND VENUE—LIABILITY TO SUIT IN FOREIGN COURTS—FOREIGN DEBTS.
An executor or administrator, being exclusively bound to account for the assets of the estate to the proper tribunals of the government under which he derives his authority, and the courts of another state having no right to interfere with the application of such assets according to the lex loci, an executor or administrator is not liable to suit as such in the courts of another state for any debt therein against the estate.

2. SAME—SUIT IN FOREIGN COURT—LIABILITY TO ACCOUNT AS TRUSTEE.
An executor or administrator who carries funds or property of the estate with him into a state other than that under which he derives his authority is there personally, though not as executor or administrator, liable to account in equity, to the extent of such funds or property, as trustee for those entitled to the effects in his hands, provided it appears that he is accountable to the complaining party for the breach

of some express or constructive trust under the will, or as a trustee ex maleficio; but not otherwise.[1]

8. SAME—MALADMINISTRATION—FAILURE TO ACCOUNT—REMEDY.
Mere failure of an executor or administrator to account for assets received by him is not such a maladministration of a trust as will make him liable to a suit and accounting as trustee in a state other than that of his appointment, the remedy in such case being by proceedings for an accounting as executor or administrator in the proper tribunal of the state of appointment.

4. SAME—RIGHT TO REQUIRE ACCOUNTING—INTEREST OF CREDITORS.
A creditor of a decedent's estate has a sufficient interest therein to maintain proceedings in a probate court to compel the executor or administrator to account for assets received by him.

5. SAME—PERSONAL LIABILITY—ACTION AT LAW.
In the absence of a devastavit, an express promise to pay, or statutory authority, an executor or administrator is not personally liable in an action at law for a debt against the estate, either in the state of his appointment or elsewhere, even though it appear that he has received assets; the proper judgment in such case being against him in his representative capacity, to be levied out of assets in his hands, unless none can be found, in which case it may be levied out of his proper goods.

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

Robt. B. Honeyman, for appellant.
Joseph A. Thompson, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an action in equity brought by the receiver of an insolvent national bank to recover an assessment made by the comptroller of the currency against one Hardin Parrish as a stockholder of the bank. The defendant is the executor of the last will and testament of Hardin Parrish, and is not sued as an executor, but individually. There was a decree for the complainant for the amount of the assessment, and the defendant has appealed.

The liability of the defendant's testator for the amount of the assessment is not challenged by the assignments of error; consequently we shall not examine the record to see if that liability was established by the proofs. Upon the question of the defendant's liability to account, the case disclosed by the record rests wholly upon the pleadings, no proofs having been introduced by either party. It appears by the bill and answer that the testator died in July, 1897; that his will was admitted to probate in the city of Philadelphia; that the defendant was by that will appointed an executor and sole legatee; that the defendant took possession of the estate; and that at the time of the commencement of the action (in 1898) he had not filed an account thereof. The record does not show when the will was proved, nor the value of the estate of the decedent, nor whether there were any debts except the disputed claim in suit, or that there are or ever have been any assets of the estate within this state; and no evidence was offered in respect to these facts. The bill of complaint does not

[1] See Executors and Administrators, vol. 22, Cent. Dig. §§ 2350 [f], 2352.

allege or suggest that the defendant has been guilty of any misconduct as executor, except that he has taken possession of the estate and not accounted therefor, and contains no averment or suggestion of any facts to denote that the complainant has not a plain and adequate remedy by resorting to the probate court and compelling the defendant to account. We are at a loss to understand upon what considerations the decree proceeded, no opinion having been rendered by the court below upon the decision of the cause.

An executor or administrator is exclusively bound to account for all the assets which he receives under and by virtue of his administration to the proper tribunals of the government under which he derives his authority. The tribunals of other states have no right to interfere with, or control the application of, those assets according to the lex loci. Hence it has become an established doctrine that an administrator or executor is not liable to be sued in that capacity in the courts of another state by any creditor for any debt due there by the intestate. Vaughan v. Northrup, 15 Pet. 1, 10 L. Ed. 639. It has been held, however, by the courts of New York, that when a foreign representative comes into the jurisdiction of the court, bringing with him assets of the foreign appointment, a bill in equity will lie against him to account therefor, where, but for the interference of a court of equity, there would manifestly be a failure of justice. Brown v. Brown, 1 Barb. Ch. 189; McNamara v. Dwyer, 7 Paige, 239, 32 Am. Dec. 627. Respecting this jurisdiction Chancellor Walworth said, in Brown v. Brown, 1 Barb. Ch. 217:

"It is sufficient to say that where this court interferes, in special cases of that or a similar character, it proceeds upon the principle that wherever there is a right there ought to be a remedy, either in this or some other tribunal, and where no remedy exists elsewhere to enforce the right this court will furnish such remedy, whenever it is necessary to prevent a total failure of justice, where the property in controversy, or the person of the wrongdoer, is within the jurisdiction and control of the court."

Manifestly the present case is without any special features to justify the cognizance of a court of equity. So far as appears, there are no assets within this state, or within the jurisdiction of this court. The action is an attempt to obtain a decree against the executor personally upon a liability of his testator for which he cannot be held responsible in his representative capacity. If a foreign executor comes into another state and brings with him funds or property belonging to the estate, he may be held to account in equity to that extent; not in the character of executor or administrator, but as a trustee for those entitled to the effects in his hands. Van Bokkelen v. Cook, 5 Sawy. 587, Fed. Cas. No. 16,831; Brownlee v. Lockwood, 20 N. J. Eq. 255; Tunstall v. Pollard's Adm'r, 11 Leigh, 1; Atchison's Heirs v. Lindsey, 6 B. Mon. 86, 43 Am. Dec. 153; Alger v. Alger, 31 Hun, 471; Brown v. Knapp, 79 N. Y. 136. He is not liable as a trustee merely because he has assets undistributed in his hands and has not paid all the debts of the testator; but it must be made to appear that he is accountable to the complaining party as a trustee for the breach of some express or constructive trust under the will, or as a trustee ex maleficio; and when this appears the assets within the jurisdic-

tion of the court may be subjected to the trust, and applied to the payment of debts or distributed among the beneficiaries of the will according to the laws of the state of his appointment. In this case there are no assets within the jurisdiction; and there is no maladministration of trust, except such as exists in every case in which an executor has not accounted for assets in his hands.

An action at law could not be maintained against the defendant upon the facts in proof. An executor may become personally liable for the debt of his testator by an express promise to pay it, or he may become personally liable on a devastavit; otherwise, in the absence of some statutory authority, a judgment de bonis propriis is unwarranted.

"Even if it appear that the executor has received assets, still the judgment or decree should be against him in his representative character, to be levied out of the assets in his hands, when no devastavit is averred or proved, unless it appear that no such assets can be found, in which event the rule is that the amount may, if so ordered, be levied out of his proper goods." Smith v. Chapman, 93 U. S. 41, 23 L. Ed. 795.

This is the rule at common law when he is sued in the state of his appointment, and no different rule obtains when he is sued elsewhere.

If an executor or administrator does not return an inventory as required by the law, the court of probate has power to compel him to do so, and a creditor has a sufficient interest to compel a return. Upon the facts of this case the appropriate remedy of the complainant would seem to be by proceedings in the court of probate of Philadelphia. The supreme court said, in Railroad Co. v. Vinet, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400:

"We do not recall a case now where the federal courts have not paid respect to the principle that all debts to be paid out of the decedent's estate are to be established in the court to which the law of his domicile has confided the general administration of estates."

This principle applies to all cases which do not come within the jurisdiction of a court of equity because of a trust or maladministration.

The decree is reversed, with costs, and with instructions to the court below to dismiss the bill.

UNITED STATES v. DIAMOND MATCH CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1902.)

No. 1,009.

1. CUSTOMS DUTIES—DECISIONS OF CIRCUIT COURT—MODE OF REVIEW.
Act June 10, 1890, relating to revenue, provides in section 15 for an appeal from the decision of the board of general appraisers to the circuit court, and declares that the latter's decision shall be final, "unless such court shall be of the opinion that the question involved is of sufficient importance as to require a review by the supreme court of the United States, in which case said circuit court * * * may * * * allow an appeal to said supreme court." Act March 3, 1891, creating the circuit court of appeals, transfers to the latter court jurisdiction of the appeals to the supreme court allowed by section 15. *Held*, that

the mode of review remains the same, and the proceedings in the circuit court cannot be reviewed by writ of error.

2. SAME—APPEAL—WRIT OF ERROR—DISTINCTIONS BETWEEN.
A writ of error only brings up errors of law, while on an appeal the facts also are open to inquiry.

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

James V. D. Wilcox, for plaintiff in error.
Harrison Geer, for the United States.

Before SEVERENS, Circuit Judge, and WANTY and COCHRAN, District Judges.

SEVERENS, Circuit Judge. This is a writ of error upon an order of the circuit court reversing the decision of the board of United States general appraisers affirming the decision of the collector of customs at Detroit, fixing the rate and amount of duties chargeable on certain merchandise upon the basis of the original invoice, notwithstanding the importer's protest that a clerical mistake had occurred in making out the invoice in the character of the merchandise, whereby the goods had been valued in the invoice at a sum much larger than their actual value. From the record it appears that the circuit court was of the opinion that, upon the evidence reported by the board, the collector ought to have allowed the importer's protest, upon the ground that the facts were as therein represented. The district attorney thereupon sued out this writ of error in behalf of the United States, upon an allowance thereof by the presiding judge of the circuit court. It is manifest, however, that we cannot review the proceedings in the circuit court upon a writ of error. The statute providing for such review expressly prescribes that it shall be had upon an appeal. Section 15 of the act of June 10, 1890, declares that the decision of the circuit "court shall be final * * * unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the supreme court of the United States, in which case said circuit court, or the judge making the decision, may, within thirty days thereafter, allow an appeal to said supreme court." By the act of 1891 creating the courts of appeals, the appellate jurisdiction of such appeals as are provided for by the sixteenth section of the customs act above referred to is transferred from the supreme court to the circuit courts of appeals. It was so held by this court in Warehouse Co. v. Collector of Customs, 1 C. C. A. 371, 49 Fed. 561, 6 U. S. App. 53. But the method and system of review remain unaltered. Section 7 of the act creating the court of appeals. The provision for review in such cases is special, and no authority is given to review the decision of the circuit court, except in the mode prescribed. The distinction between a writ of error and an appeal is important. Upon a writ of error only errors of law can be assigned or considered by the court. Upon an appeal the facts, also, are open to inquiry, and their determination may control the action of the appellate court. In Muhlenberg Co. v. Dyer, 13 C. C. A. 64, 65 Fed. 634, 31 U. S. App. 109, it was held by this

court (what, indeed, is elementary) that these remedies are fundamentally distinct, and that their use must conform to the nature of the case, and the law regulating the exercise of appellate jurisdiction. And in that case the appeal was dismissed, a writ of error being the only appropriate remedy. In the particular case before us, it seems to have been assumed by the circuit court that it had authority to review the finding of the board of appraisers in respect to the dutiable value of the goods. There are grounds for thinking that the court may have been in error in this, and that the power of the court was limited to the classification and the rate of duty chargeable upon the goods. But if there was a mistake in this respect, we are without authority to correct it. The case having been brought to us in this way, we are not justified in reviewing it for any purpose.

These considerations require that the writ of error in this case should be dismissed, and it is ordered accordingly.

KAHN v. CONE EXPORT & COMMISSION CO.

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

No. 1,105.

BANKRUPTCY—PREFERENCES—DEDUCTION OF NEW CREDITS.

Bankr. Act 1898, § 60c, entitles a creditor who has received preferential payment on account, but who has extended further credit, as therein specified, to a deduction of the amount of such new credit from the preferences he would otherwise be required to surrender before proving the remainder of his debt, and is not limited in its application to cases where the trustee sues to recover the preferences.

McCormick, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia, in Bankruptcy.

L. W. Thomas, L. Z. Rosser, E. V. Carter, and C. L. Anderson, for appellant.

Alex. C. King, J. J. Spaulding, and J. T. Pendleton, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After an attentive consideration and examination of this case, we are of opinion that it was correctly decided in the lower court, and that the reasons given by Judge NEWMAN for his judgment (111 Fed. 518) sufficiently cover the case.

Affirmed.

McCORMICK, Circuit Judge (dissenting). The case is not stated in the opinion by the court, nor is it stated in the opinion by Judge NEWMAN, whose decision this court affirms, substantially indorsing the reasons given by him for his judgment. These reasons are expressed in Judge NEWMAN'S opinion as reported in In re Southern

Overalls Mfg. Co. (D. C.) 111 Fed. 518. The report does not show by whom the syllabus was prepared, but that syllabus is as follows:

"Bankruptcy—Preferences—Deduction of New Credits.

"Bankr. Act 1898, § 60c, entitles a creditor who has received preferential payments on account, but who has extended further credit as therein specified, to a deduction of the amount of such new credits from the preferences he would otherwise be required to surrender before proving the remainder of his debt, and is not limited in its application to cases where the trustee sues to recover the preferences."

With the utmost unfeigned respect for my brethren of this court and for the learned district judge whose judgment this court affirms in this case, and whose reasoning in support of his judgment this court approves, I am constrained to dissent, and to say that, in my opinion, the decision of the district court and of this court is in direct opposition to the most thoroughly-considered and clearest declarations of our supreme court in the case of Pirie v. Trust Co., 182 U. S. 442, 21 Sup. Ct. 906, 45 L. Ed. 1171. Waiving all question as to how much of the opinion in that case is entitled to the weight of authority, and how much of it should be received as dicta, its reasoning is more persuasive to my mind than the reasoning of the learned district judge. The weight of the reasoning in the opinion of the supreme court is materially increased by the authority of the circuit court of appeals for the Ninth circuit in the case In re Fixen, 42 C. C. A. 354, 102 Fed. 295, 50 L. R. A. 605, and by the reasoning in the well-considered opinion of Circuit Judge Morrow in announcing the decision of that court, and by the very able review of the question and of McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923, which we find in the opinion of District Judge Shiras in the case In re Keller (D. C.) 109 Fed. 118. As a case of first impression (if it were such), on a consideration of the language of the different provisions of the statute, it would appear to me that the construction of those provisions by the district court in the decision of this case was wrong; on the persuasive force of the argument of the judges who announced the decision of the court in the Pirie Case, in the Fixen Case, and in the Keller Case, just cited, I would have no doubt of it; and upon the authority of the three cases cited, and especially of the Pirie Case, I am not only justified in expressing my dissent from the decision by the court in this case, but feel required to do so.

AMERICAN SURETY CO. OF NEW YORK v. BALLMAN et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,598.

1. PRINCIPAL AND SURETY—BOND—JUDGMENT—ESTOPPEL OF SURETY.
Where a surety company was given a bond to indemnify it against liability as surety on other bonds, and, an action having been brought against such company, it notified the indemnitors to appear and defend, but, instead, it was agreed that such indemnitors should employ counsel to assist the company in the defense of the suit, and that, if necessary, the case should be prosecuted on appeal, which was done, and on the day the case was set for trial in the appellate court the company paid the judgment rendered against it, without the indemnitors' consent, it was thereby estopped from claiming any benefit against such indemnitors by virtue of the judgment.

2. SAME—DISCHARGE OF SURETIES.
The payment of a judgment by the surety company without the indemnitors' consent discharged such indemnitors from liability.

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

This action was brought by the American Surety Company of New York, the plaintiff in error, against Henry W. Ballman and Joseph Durfee, the defendants in error, on an indemnity bond. The defense presented by the answer, and upon which the cause was decided, sets forth that the bond in question was given by defendants to indemnify the American Surety Company for loss by reason of having signed, as surety of Tromanhauser Bros., a certain other bond to the Burlington Elevator Company, for $50,000; that, when suit was brought by the Burlington Elevator Company on the bond against the American Surety Company, the latter gave notice to defendants, as indemnitors, to come in and defend the action, and it was then agreed between the parties that the indemnitors, instead of coming in and defending the action themselves, should employ counsel at their own expense who should co-operate with the counsel of the surety company in defending the action, and, further, that the surety company, with the co-operation and assistance of defendants, through their counsel, would, if necessary to the maintenance of the defense, sue out a writ of error and obtain the judgment of the appellate court; that defendants, the indemnitors, in good faith performed their part of the agreement, and expended a large sum of money in payment of counsel employed to assist in the defense of the cause; that an adverse judgment was rendered, which was deemed erroneous, and thereupon, in accordance with the understanding between the parties, a writ of error was sued out, a transcript of the record filed in the appellate court, and likewise briefs and abstracts, so that the cause was ready to be argued and submitted; that upon the morning of the day the cause was set for hearing the surety company paid to the Burlington Elevator Company the full amount of the judgment, with interest and costs, and dismissed the writ of error; that this was done without the consent and despite the protest of indemnitors' counsel, who, under the agreement, were present in court for the purpose of arguing the cause; that the course thus pursued by the surety company was not in good faith to defendants, but was adopted for its own advantage, and with the assurance that it would thereby conciliate the Burlington Elevator Company, and thus secure the influence of that company and its business associates, which would ultimately result in a profit to the surety company greater than the loss resulting from the payment of the judgment. By virtue of the premises, the defendants claimed that they were released and discharged from all liability as indemnitors. A jury was duly waived, and the case tried before the court, which made the following special findings of fact:

"The court finds the facts to be that upon giving the notice by plaintiff to defendants as stated in the amended petition, and answer thereto, the defendants, by counsel employed by them, forthwith proceeded, in conjunction with the plaintiff, to defend the suit referred to in the notice; that from and after the giving of the notice, and until the day the plaintiff dismissed the writ of error as stated in the pleadings, the plaintiff so treated the defendants as to reasonably cause them to believe that they might make any defense desired by them in plaintiff's name in the trial court, and might thereafter prosecute in plaintiff's name a writ of error to the circuit court of appeals in case of defeat in the trial court; that, acting and relying on the notice and conduct of plaintiffs as just stated, the defendants employed counsel, expended time and money, and incurred large obligations for legal services in defending the suit in the trial court, in preparing for and suing out a writ of error, and subsequently in preparing for argument of the case in the circuit court of appeals; that all this work was done, this money expended, these obligations incurred, and these acts done by the defendants in good faith, believing there was a valid defense to the action, and for the purpose of exonerating themselves from liability by reason of the bond sued on; that on the day the case was set for hearing in the court of appeals the plaintiff, without the knowledge or consent of the defendants, paid the judgment rendered by the trial court, together with interest and costs, and dismissed its writ of error.

"In my opinion, on the foregoing facts, judgment should be entered in favor of the defendants."

The opinion of the circuit court in the case is reported in 104 Fed. 634.

David Goldsmith and Eben Richards (John D. Johnson, on the brief), for plaintiff in error.

Clinton Rowell and Joseph S. Laurie (Joseph H. Zumbalen, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

Do the facts found estop the plaintiff from recovering on the defendants' bond?

The first contention of the learned counsel for the plaintiff in error is that while the facts found may constitute a contract, with the usual consequences of a contract, they cannot operate by way of estoppel, because the agreement and representations of the plaintiff relied on for that purpose related to matters of intention with respect to future conduct, and not to a present or past state of things. While the representations that will constitute an estoppel generally have relation to a present or past state of things, the rule is not inflexible. In Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618, the supreme court says, "This remedy is always so applied as to promote the ends of justice;" and it was applied in that case upon representations relating solely to matters of intention with respect to future conduct. And see, to the same effect, Holland v. Drake, 29 Ohio St. 441; Preston v. Mann, 25 Conn. 118; Southard v. Sutton, 68 Me. 575; Shields v. Smith, 37 Ark. 47; Halliday v. Stuart, 151 U. S. 229, 14 Sup. Ct. 302, 38 L. Ed. 141; Insurance Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674. In the case last cited, the court say:

"The doctrine of estoppel is applied with respect to the representations of a party, to prevent their operating as a fraud upon one who has been

led to rely upon them. They would have that effect if a party, who by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition upon reliance upon them, could be permitted to deny the truth of his statements or enforce his rights, against his declared intention to abandon them."

When the plaintiff notified the defendants to come in and defend the suits brought by the Burlington Elevator Company against the plaintiff, the defendants had the right to appear and defend the action in the court of original jurisdiction, and, if beaten there, to prosecute a writ of error to the circuit court of appeals in the name of the plaintiff, holding the plaintiff harmless from the costs and expenses incident to such proceedings. The defendants were prevented from pursuing this course by the agreement of the plaintiff that the defendants, instead of coming in and defending the action themselves, should employ counsel at their own expense who should co-operate with the counsel of the plaintiff in defending the action, and that, if beaten in the trial court, the plaintiff, with the co-operation and assistance of the defendants, through their counsel, would sue out a writ of error, and obtain the judgment of the appellate court. The defendants, at heavy expense, performed their part of this agreement. An adverse judgment was rendered by the trial court, which was deemed erroneous, and thereupon, in accordance with the understanding between the parties, a writ of error was sued out in good faith, and a transcript of the record filed in the appellate court, and briefs of defendants' counsel, so that the cause was ready to be argued and submitted on its merits, when the plaintiff, without the knowledge or consent of the defendants, dismissed the writ of error, and paid to the Burlington Elevator Company the full amount of the judgment against it. Even though the plaintiff had not formally dismissed the writ of error, its payment of the judgment appealed from necessarily worked that result, and terminated the defendants' right to prosecute a writ of error to final judgment in the court of appeals. In view of the agreement of the parties, this action on the part of the plaintiff clearly estops it from now asserting any claim against the defendants based on the judgment of the Burlington Elevator Company against it. Under the facts found by the circuit court, the payment of that judgment by the plaintiff was a waiver of any claim against the defendants based on it.

A further contention of the plaintiff in error is that, if the facts raise an estoppel, it extends no further than to merely destroy the conclusiveness as against the defendants of the judgment obtained by the Burlington Elevator Company against the plaintiff. Since the plaintiff by its notice compelled the defendants to either defend the former action, or to be bound by the judgment, and they did defend it in good faith and at great expense, until their right to do so was cut off by the wrongful act of the plaintiff, the plaintiff cannot compel them to incur the same expense to make the same defense which it called upon them to make in the former action. That would have the effect of permitting it to litigate again the question of its liability on the primary bond in this suit. It cannot play fast and loose with sureties

in that way. By compelling them to defend the former action, and then depriving them of the benefit of a full defense, it deprived itself of the right to pursue these sureties, and discharged them from liability. Stark v. Fuller, 42 Pa. 320. The case of Boyle v. Edwards, 114 Mass. 373, is not in point, because the sureties in that case were not vouched in to defend, but volunteered to do so.

The judgment of the circuit court is affirmed.

McCLAIN, Collector of Internal Revenue, v. MERCHANTS' WAREHOUSE CO.

(Circuit Court of Appeals, Third Circuit. May 5, 1902.)

No. 13.

INTERNAL REVENUE—STAMP TAX—WAREHOUSE RECEIPTS.

Postal cards sent out by a warehouse company on receipt at its warehouse of goods consigned to a party, reciting: "The merchandise designated below is now at these warehouses subject to your order on payment of the freight due thereon. * * * Merchandise not removed within 10 days from date will be stored subject to tariff of charges," etc.,—are not warehouse receipts, within Schedule A of the war revenue act of June 13, 1898 (30 Stat. 458), and are not subject to stamp tax as such.

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

J. Whitaker Thompson and James B. Holland, for plaintiff in error.
R. C. Dale, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The defendant in error brought an action in the circuit court for the Eastern district of Pennsylvania to recover the sum of $1,126.50, which it had paid under protest to the plaintiff in error, collector of internal revenue, as taxes upon certain documents which the collector claimed were warehouse receipts, and as such liable to stamp tax under Schedule A of the war revenue act of June 13, 1898 (30 Stat. 458). The facts being undisputed, the court, reserving the point of law involved, directed a verdict for the plaintiff below, which, subject to that reservation, was accordingly rendered. Thereafter the defendant moved for judgment non obstante veredicto, and to the court's denial of that motion (112 Fed. 787) and its entry of judgment for the plaintiff below upon the verdict, this writ of error was taken.

The instruments to which the argument submitted on behalf of the plaintiff in error has been exclusively directed were printed upon postal cards, and were in form as follows:

Merchants' Warehouse Company.
Flour Warehouse, Market and Eighteenth Streets,
Philadelphia, 190

The merchandise designated below is now at these warehouses, subject to your order, on payment of the freight and charges due thereon:

Please bring this notice.

Car.	Original.	Lading.		Brand.	B/L Req'd X
		Bbls.	Sacks.		

Merchandise not removed within ten days of date will be stored subject to tariff of charges, and it is understood is at the owner's risk as to loss or damage by fire, unless insured through this company.

Jacob Michel, Jr., Supt.

The only question is whether such a communication as this is (in the words of Schedule A) a "warehouse receipt for any goods, merchandise, or property of any kind held on storage in any public or private warehouse." We are of opinion that it is not. A warehouse receipt is a familiar commercial instrument, which stands in no more need of defining than does a bill of lading. But the definitions which the appellant has supplied may be accepted. They are not inclusive of the paper under consideration. It is not a receipt for goods "received for storage," with "an agreement on the part of the warehouseman to redeliver the property on demand to the bailor or his order." It is simply a notification to the consignee that the merchandise designated is at the warehouse for delivery, on payment of the freight and charges due to the railroad company by which it had been transported. It does not state that the goods were then "held for storage," and the inference that they were so held, if otherwise possible, would be precluded by its declaration that "merchandise not moved within ten days of date will be stored, subject to tariff of charges," etc. The extrinsic facts, which, as we have said, were undisputed, accord with this construction of the terms of the document itself. These postal cards were, and for a long time had been, used only for the purpose of notifying the consignees of the arrival of merchandise, whereas for merchandise really taken on storage the defendant in error issued acknowledgments which, in fact and in law, were unquestionably warehouse receipts, and were distinctly unlike the mere note of apprisal with which this cause is concerned.

The judgment of the circuit court is affirmed.

BAKER v. BAKER (two cases).

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

No. 81.

1. INJUNCTION—USE OF TRADE-NAME.
A manufacturer by the name of Baker, who had been enjoined from using in his business the name "Baker" or "Baker's" alone on labels, wrappers, advertisements, etc., or the name of "W. H. Baker & Co.," and who had been required to insert in lieu thereof the name "W. H. Baker, of Winchester, Va.," and also, in as prominent type, the statement, "W. H. Baker is distinct from the old chocolate manufacture of Walter Baker & Co.," was entitled to be protected from a competitor endeavoring to market his own products by the use of the same name on misleading circulars or otherwise.

2. SAME—NOMINAL DAMAGES.
In an action for an injunction and an accounting for the illegal use of a trade-name, where the evidence did not show that any one had purchased goods of the defendant supposing them to be the product of the complainant, or that a single customer had been lost by defendant's conduct, complainant was entitled to only nominal damages.

3. SAME—LAWFUL USE OF CORPORATE NAME.
Where the evidence in an action for injunction and an accounting for the illegal use of a trade-name showed that the complainant had nothing to complain of, except the use of a corporate name made up of the name of the owner of the defendant concern, with the name of his place of business attached, and which had not been selected unnecessarily or for the purpose of illegitimate competition, the complainant was not entitled to relief; it being immaterial whether the business was conducted as that of a corporation or that of an individual by the same description.[1]

Appeals from the Circuit Court of the United States for the Northern District of New York.

A. T. Gurlitz, for appellant.

Louis Marshall, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. These are appeals by the complainant from decrees in two actions in equity brought to restrain unfair competition in trade. In the first action there was a decree for the complainant for an injunction and for nominal damages, and in the second there was a decree dismissing the complainant's bill.

Prior to 1894 the chocolates and cocoas manufactured by the concern of Walter Baker & Co. had acquired great popularity with dealers and retail purchasers throughout the country. Their business had been long established; their products had always maintained a high quality of excellence; and the word "Baker," when applied to these articles, had come to represent to purchasers generally the products

[1] Use of corporate or firm name as trade-name, see notes to R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 579; Kathreiner's Malzkaffee Fabriken Mit Beschraekter Haftung v. Pastor Kneipp Medicine Co., 27 C. C. A. 357.

of Walter Baker & Co. The word had become a trade-name of such value in the commerce of those articles that various persons of the name of Baker had been led to engage in making and selling them, in the expectation of marketing them as the products of the original concern. In 1894 the complainant, induced by this notion, commenced the manufacture and sale of chocolates and cocoas at Winchester, Va. He put them upon the market as those of "W. H. Baker & Co.," in packages simulating in various respects those of Walter Baker & Co., and became an extensive competitor with that concern. In 1897, in a suit brought against him by the successors of the original concern, he was enjoined from using in his business the name "Baker" or "Baker's" alone on labels, wrappers, advertisements, etc., or the name of "W. H. Baker & Co.," and was required to insert in lieu thereof the name "W. H. Baker, of Winchester, Va.," and also, in as prominent type, the statement, "W. H. Baker is distinct from the old chocolate manufacture of Walter Baker & Co." In August, 1899, the defendant commenced the sale, and later the manufacture, of chocolates and cocoas at Syracuse, N. Y.; being partly induced thereto, as the complainant had been, by the expectation of profiting by the trade-name of Baker, but also induced by the hope of diverting to himself some part of the business of the complainant. He put his articles upon the market as those of "Wm. H. Baker." He employed as his managing agent one Sanders, who had formerly been in the employ of Walter Baker & Co., and who had subsequently been employed by the complainant. Through Sanders he was able to approach the customers of the complainant; and, to do so more effectually, he issued circulars to them, simulating the circulars of the complainant, calculated to lead them to believe that orders sent to him would be filled by the complainant. He caused his circulars and the labels on his packages to be impressed with a notice which read, "Wm. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Co.," but in both the circulars and labels his place of business was given at Syracuse. In October, 1899, the complainant filed a bill in equity against the defendant, alleging unfair competition in trade, and praying for an injunction and an accounting. In that action a preliminary injunction was granted, restraining the defendant from using in his circulars, or on his packages, or in his business, in any form, the words "W. H. Baker," or "Wm. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Co.," but permitting him to use the name "William H. Baker" conjoined with "Syracuse." That action proceeded to an interlocutory decree by which the injunction preliminarily granted was made perpetual, and an accounting was ordered. Upon the accounting it was found by the master that the complainant was entitled to nominal damages only. The complainant filed exceptions to the master's report. These exceptions were overruled, and a final decree was entered in conformity with the interlocutory decree and the master's report.

During the pendency of this action the defendant changed his business methods, and conformed to the requirements of the preliminary

injunction. He not only did this, but he conformed his advertisements, packages, labels, etc., to the approval of the successors of Walter Baker & Co. He adopted as a trade-mark the words "Justice Brand," with a figure of Justice bearing the scales, and in other respects so differentiated the dress of his products as to minimize as far as possible the risk of confusion between them and those of the complainant. Before the final decree was entered he transferred his business, which had become an extensive one, to a corporation organized pursuant to the laws of the state of New York under the corporate name "William H. Baker, Syracuse, N. Y." Thereafter the complainant filed a second bill in equity against the corporation, alleging unfair competition, and praying for an injunction and an accounting. The action was prosecuted to a final hearing, and resulted in a decree of the court dismissing the bill. The complainant has appealed from the decree in each case.

We are satisfied that substantial justice has been done by each of the two decrees. The complainant, notwithstanding he commenced business under false colors, and occupied a position which did not commend him to the very solicitous consideration of the court, was entitled to be protected in the circumscribed use of his own name which had been accorded to him by a court of equity. He had no right to complain of the use by another of a rightful patronymic, and much less of the name of Baker, in selling the same class of products; but he has a right to complain if a competitor was endeavoring to palm off his own products as those of the complainant by the use of the same name, on misleading circulars or otherwise, and was entitled to be redressed. The evidence shows that the substantial grievance of the complainant is found in the conduct of William H. Baker at the inception and early in the history of his competition. This was remedied as to the future by the preliminary injunction in the first action. That injunction gave the full measure of relief to which the complainant, under the circumstances of the case, was entitled, except such a recovery for profits and damages as he might be found entitled to. The evidence upon the accounting failed to disclose that the complainant was entitled to any recovery of profits, or any except nominal damages, by reason of the defendant's conduct. It failed to disclose that a single person had purchased goods marketed by the defendant, supposing them to be the product of the complainant, or that the complainant had lost a single customer by the defendant's conduct.

We have examined with care the evidence in the record of the second action to ascertain whether the defendant in that action has, by its circulars, its advertisements, or the dress in which its goods have been presented, done anything of which the complainant can reasonably complain; and we have found nothing, unless he has cause to complain of the use of its corporate name. A part of that name is the place of business, and every person who deals with the defendant is thereby notified that its business domicile is not the domicile of the complainant. If the name had been selected unnecessarily, or for the purpose of illegitimate competition with the complainant,

we should not hesitate to enjoin its use. Wm. Rogers Mfg. Co. v. R. W. Rogers Mfg. Co. (C. C.) 66 Fed. 56; R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 576, 70 Fed. 1019. But it was selected without any element of bad faith or unfair use. It was not a new name, and it represented a widely known concern, engaged in a large business, which had acquired a valuable good will. For reasons of convenience, the owner concluded to reorganize the concern as a corporation, and, desiring to preserve the good will, he chose the name with which the good will was identified. He intended to remain the owner of the concern, and has remained its owner, as before. As regards the complainant, it is wholly immaterial whether the business is conducted as that of a corporation, or that of an individual, by the same description.

The decrees are affirmed, with costs.

LACOMBE, Circuit Judge. I concur in the result, but solely for the reason that the complainant does not come into equity with clean hands. It is true that, since the decrees against him in the suits brought by the original Walter Baker & Co., he has conformed to their requirements. Nevertheless he is still diverting some portion of the business of the original firm by reason of a confusion which he might easily terminate, although, under the decisions, a court might be powerless to give further relief against him. In my opinion, he never was, and is not now, a fair trader. The defendant's conduct has been equally reprehensible. The individual defendant began by a fraudulent effort to palm off his goods as the manufacture of the complainant, and it does not seem to me that the corporation defendant has acted with any greater measure of fairness. Its name is so printed on the packages as to deceive the public; it has devised and still uses for one of its wrappers a color scheme closely imitating that of the complainant's; and its corporate name was selected, as it seems to me, in bad faith, and for the purpose of illegitimate competition with the complainant. The business methods of both sides have been, and still are, unfair; both are piratical traders, seeking to sell their goods on the strength of the reputation of another manufacturer, whose name was a household word throughout the country before either of them appeared; and, in my opinion, neither of them is entitled to equitable relief against the other.

CUDDY et al. v. CLEMENT et al.

(Circuit Court of Appeals, First Circuit. April 10, 1902.)

No. 393.

MARITIME LIEN—SUPPLIES—CONTRACT WITH OWNER.

The presumption that no maritime lien arises for supplies furnished on the order of the owner of a vessel is not overcome merely by proof of an undisclosed belief or understanding on his part when the contract was made that the person furnishing such supplies would be entitled to a lien.[1]

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

On petition for leave to reopen case in the circuit court.

Harvey D. Goulder (Carver & Blodgett, on the brief), for appellants.

Louis Hasbrouck, for appellees.

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

PUTNAM, Circuit Judge. Judgment was entered in this case on January 16, 1902, in accordance with our opinion passed down that day. 113 Fed. 454. On February 13, 1902, the appellants, by leave of court, filed a petition which we must regard as a petition for leave to reopen the case in the circuit court on the ground of newly discovered proofs, conforming the proceedings to the practice fully stated by us in Re Gamewell Fire Alarm Tel. Co., 20 C. C. A. 111, 73 Fed. 908. It will appear that, in accordance with the practice thus stated, we can finally dispose of the petition.

The original case was fully explained in our former opinion; but, in order that the merits of the present petition may be correctly understood, it is advisable for us to repeat some details. The appeal arose out of a claim for maritime liens on certain steamers to which coal had been furnished, which coal, in the opinion of the majority of the court, was so furnished in pursuance of a formal contract made with the corporation which was their owner. The contract was signed in behalf of that corporation by F. W. Baldwin, styling himself "Manager." The record also states that he was the treasurer, but it contains nothing to show his powers, beyond the fact that the parties conceded that he was authorized to sign the contract. How far, beyond the execution thereof, he could bind the corporation, if at all, we have not been advised.

The pith of our opinion of January 16th was to the effect—First, that not only was there no evidence that there was any agreed lien, but that the circumstances disproved its existence; and, second, that there was no evidence of any maritime necessity for credit to the vessels. Either of these findings was sufficient to maintain the con-

[1] Maritime liens for supplies and services, see note to The George Dumois, 15 C. C. A. 679.

clusion which we reached, adverse to the appellants. They now claim that, since our judgment was rendered on the appeal, in a casual conversation between F. W. Baldwin and one of the appellants at a hotel in New York City, Baldwin stated that, in making the contract referred to, "he did so in the belief, and with the understanding, purpose, and expectation," that, for any fuel supplied, the appellants would have "an undoubted right to look to each steamer, as well as to the company," "and that he accepted and approved the vouchers charging the steamers with like understanding." The same conversation is repeated in the record with somewhat different phraseology, but substantially to the same effect.

The affidavits attached to the petition are to the effect that, before the case was heard in the court below, a solicitor for the petitioners applied to Mr. Baldwin for "the facts connected" with the claim, and that Mr. Baldwin refused to give him any information on the subject. It does not appear what class of facts the solicitor was endeavoring to obtain from Mr. Baldwin; but, certainly, if it related to the latter's intent and belief at the time the contract was signed, it was an easy matter for the solicitor to have compelled him to testify, and thus to have ascertained what they were. Therefore the record lacks proper specific facts leading up to a proposition that prior to the trial in the court below the petitioners made any effort to ascertain the mental condition of Mr. Baldwin in connection with the contract, as now said to have been stated in the conversation at the New York hotel. If this mental condition was of substantial importance, it is apparent that it would have been almost the first thing that the appellants' solicitor should have sought for; and, for this reason, there seems to be a lack of diligence, such as is fatal to applications of the kind now before us.

Passing by the question whether Mr. Baldwin had any power to bind the corporation by an undisclosed mental condition, or by anything beyond the execution of the contract referred to; also passing by the fact that the mere testimony of any person as to his undisclosed mental condition at a prior time would be of too feeble character to sustain the burden which, according to our opinion of January 16th, rests on the appellants (Insurance Co. v. Hillmon, 145 U. S. 285, 295, 12 Sup. Ct. 909, 36 L. Ed. 706); and also passing by the proposition that the new proof offered is ineffectual with reference to the fact that the case does not disclose a maritime necessity for credit to the steamers, which alone is fatal to the appeal,—we are of the opinion that the new evidence offered is inconclusive on the issue to which it is said to appertain.

It is true that on a limited class of issues, especially with reference to certain criminal proceedings, and also cases where actual knowledge is important, the mental condition of only one individual may be essential, and may be proved by his uncorroborated testimony. Wallace v. U. S., 162 U. S. 466, 477, 16 Sup. Ct. 859, 40 L. Ed. 1039; Steph. Dig. Ev. (2d Am. Ed.) 176, notes. But it will readily appear that the case at bar is not among the classes referred to. In our opinion of January 16th, we quoted from The Iris, 40

C. C. A. 301, 100 Fed. 104, to the effect that no lien for supplies is presumed to arise on a contract made by the owner of a vessel, and that "proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created." We added, "That understanding may, of course, be inferred from facts as well as from express language, as is ordinarily true with reference to all alleged contracts where it must be shown that the minds met." But there was nothing said which suggested that a lien can be raised by the mere undisclosed mental condition of one or both of the parties to a written contract, when such lien is not fairly and reasonably within its terms; nor was there anything which waived the general rule that a mere mental condition is of no value in law with reference to a contract, unless it is expressed by, or may be inferred from, visible acts and circumstances. How can the minds of two parties be said to have met, merely because one of them entertained an undisclosed mental condition? While, under exceptional circumstances, as we have said, an undisclosed mental state may be the connecting link to complete a case or a defense, yet that, for all the ordinary purposes of the law, both bodily and mental feelings are ordinarily shown only by visible acts or circumstances, was sufficiently indicated by the explanation of the usual course of proof in reference thereto in Insurance Co. v. Hillmon, ubi supra. It is said at page 295, 145 U. S., and page 912, 12 Sup. Ct., 36 L. Ed. 706, that "a man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written." Our opinion of January 16th, in connection with The Iris, makes it clear that, in order that there could be liens in either case, there must have been a contract therefor, however it might be proved; that is, something binding in law the parties to each other. Such "something" cannot arise from a "mere state of mind or feeling" not "manifested to others." Consequently the new proofs now offered by the appellants, in connection with everything else which the record shows, and independently of the other difficulties to which we have referred, would fail to show that the minds of the parties "met" in the way in which they must meet to overcome the presumption that no maritime lien arises for supplies furnished on the order of the owner of the vessel against which the lien is claimed.

The petition filed by the appellants on February 13, 1902, is denied, and the mandate will issue forthwith.

WEBB, District Judge, took no part in this decision.

BOARD OF MAYOR, ETC., OF CITY OF MORRISTOWN, TENN., v. EAST TENNESSEE TELEPHONE CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,019.

1. MUNICIPAL CORPORATIONS—GRANT OF FRANCHISES IN STREETS—MODE OF EXERCISING POWER.

   Power conferred on a city by its charter to grant privileges and franchises in the use of its streets "by ordinance" cannot be exercised by a mere resolution, nor can an ordinance of the city making such a grant be amended in respect to any of its terms or conditions by a resolution.

2. SAME—ACCEPTANCE OF GRANT—VALIDITY AND EFFECT.

   An ordinance passed by a city, under power given by its charter, granting to a telephone company the right to erect and maintain its poles and wires in the streets, on certain conditions, when accepted by the company creates an irrevocable contract, unless the power to alter or revoke it is reserved, and an acceptance of such an ordinance as amended by a subsequent resolution created a valid and binding contract as against the city, which it could not repeal by a subsequent ordinance, although the resolution was in fact void and inoperative to change the terms of the original grant, where the company took no steps to withdraw its acceptance on that ground, but proceeded to avail itself of the grant, even though while doing so it continued to insist on the validity of the resolution as an amendment.

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

The East Tennessee Telephone Company is a corporation organized under the law of Kentucky, which is engaged in the operation of telephone systems in various towns of Tennessee. Prior to the controversy as to its right to do a local business and conduct an exchange at Morristown, it seems to have been conducting, in Morristown, a long-distance telephone station, by which the town was connected with other towns in the vicinity in which it was doing a local business. Prior to September, 1899, the local business and exchange at Morristown was done by a local Tennessee corporation called the Morristown Telephone Company. On September 1, 1899, the council of Morristown passed an ordinance giving to the East Tennessee Telephone Company the right to erect poles and string wires over the streets and alleys of the city for the purpose of conducting a local telephone exchange. This ordinance fixed the maximum rate of charges, and required that the city should be given the free use of two telephones, and the right to use the company's poles for stringing a fire alarm system. September 25, 1899, a resolution was passed by the Morristown city council giving to the telephone company the right to increase its maximum charges in respect to one class of telephones. On the day following, the company, in writing, accepted the terms of the ordinance as thus amended. In pursuance of the consent thus given, the company took some steps toward the enlargement of its local facilities, and incurred some expense in preparing for further more considerable extensions. There seems to have been some popular discontent with the resolution allowing an increased charge for service under the action of the city council last taken, which led to the repeal on November 17, 1899, of the ordinance of September 1st. Pending the matters stated, the local company seems to have been in the hands of a receiver appointed by the circuit court of the United States upon a creditors' bill. Under this creditors' proceeding the entire property and franchises of the Morristown Telephone Company were brought to a judicial sale. At this sale the property and franchises of the company were purchased by the East Tennessee

Telephone Company, and the sale confirmed and title vested February 28, 1900. From this time the last-named company claimed to exercise all the rights and franchises which pertained to the old Morristown Telephone Company as well as such rights and franchises as had been granted to it by virtue of the ordinance and resolution heretofore mentioned. The municipal authorities, upon the other hand, denied the validity of the ordinance under which the Morristown Telephone Company had been maintaining its poles and wires upon the streets, and denied the authority of the East Tennessee Telephone Company as a foreign corporation engaged in a competitive business to acquire the rights and franchises of the Morristown Telephone Company. The Morristown authorities also denied that the East Tennessee Telephone Company had acquired any street rights by virtue of the ordinance of September 1, 1899, or the resolution of September 15, 1899. In short, the position of the municipal authorities was that the East Tennessee Telephone Company had no authority from any source to erect or maintain a local telephone system by using the streets or alleys of the town for their posts and wires, and was therefore a trespasser upon the streets. Acting upon this line, the agents and officers of the East Tennessee Telephone Company were prevented by the municipal police from erecting poles or stringing wires for the purpose of prosecuting the business of a local telephone company. This interference is charged to have been destructive to the franchises claimed, and a remedy by injunction was therefore sought. Upon the pleadings and proof the court below granted a perpetual injunction as prayed. From this decree the municipality of Morristown has appealed, and assigned error.

W. N. Hickey and Robt. E. L. Mountcastle, for appellant.
Edward T. Sanford, for appellee.

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.

The power of the city of Morristown, prior to the amendment of its charter by the act of April 21, 1899, to grant any street rights to the Morristown Telephone Company, is denied, and an ordinance passed February 22, 1896, giving to that company the right to erect poles and string wires on the streets and alleys of the town, subject to certain limitations, is claimed to have been an ultra vires act. Morristown is incorporated under a special legislative charter passed November 21, 1867. Priv. Acts Tenn. 1867–68, p. 18. Curiously enough, that charter does not, in express terms, deal with the question of the grant of privileges or franchises in the streets. Neither does it, as is usually the case, provide in so many words that the corporation shall have general "control" over its streets and alleys. Upon this rests the case against the validity of the ordinance under which the Morristown Telephone Company erected its poles on the streets of the town, and for years conducted a local telephone business without let or hindrance from the municipal authorities.

That no telegraph or telephone company can lawfully occupy the streets or alleys of a town with their poles and wires without legislative authority granted directly by the legislature, or by the municipal authority in pursuance of power delegated, is a plain and obvious proposition. That the authority to consent to the use of the streets

of a town by a railway, telegraph, or telephone company resides primarily in the legislature of the state is well settled also, though usually delegated to the municipality directly concerned. City of Knoxville v. Africa, 23 C. C. A. 252, 77 Fed. 501, 507. That the power to grant a right of way to street railways through the streets of a town, when its motive power is animal or electricity, may be implied from a grant of general control over the streets, we had occasion to decide in Detroit Citizens' St. Ry. Co. v. City of Detroit, 12 C. C. A. 365, 64 Fed. 628, 636, 26 L. R. A. 667. The court below held that while the charter of Morristown did not, in express terms, delegate to the municipality general control over its streets and alleys, the powers in reference to streets and alleys were so numerous and sweeping as to be equivalent to general control. We are not prepared to disagree with this conclusion, but find it unnecessary to determine the validity of the ordinance under which the Morristown Telephone Company established its poles and wires on the streets of the town.

By the Tennessee act of April 21, 1899, the charter of Morristown was so amended as to include within the powers which might be exercised by ordinance the power to grant privileges and franchises in the use of the streets. This act removed all doubt as to the power of the city, and after its enactment, and on September 1, 1899, an ordinance was duly passed giving to the East Tennessee Telephone Company the right to erect poles and string wires on the streets and alleys of the city, "in such a way and manner as not to obstruct the streets and alleys, and to erect their poles in such a way as to be the least inconvenient to the public travel, as may be agreed by the street committee." The ordinance prescribed the maximum charges to be made, and required the company to give to the city two telephones free of charge, and to allow their poles to be used for the purpose of stringing a fire-alarm system. On the 25th of September, following, the city, on application of the East Tennessee Telephone Company, amended this ordinance by a resolution increasing the maximum rate chargeable by the company for one class of telephone service. On September 26, 1899, the telephone company wrote and signed on the foot of this original resolution an acceptance in these words:

"In consideration of this resolution, together with an ordinance heretofore passed, we accept both as taken together as a contract between the East Tennessee Telephone Company and the city of Morristown."

For some unexplained reason, the city council at a meeting held October 6, 1899, passed a resolution reciting the above clause as having been "added" to the resolution without authority, and ordering that the minutes of the former meeting be corrected by striking out the clause of acceptance above quoted. November 17, 1899, the council formally repealed the ordinance of September 1, 1899, under the claim that the city had the right to repeal or withdraw its consent to the use of the streets, as provided by that ordinance, at any time before the ordinance had been legally accepted. The argument that the repeal occurred before acceptance is based upon two propositions: First, that the resolution of September 26th was a void thing,

because the ordinance of September 1st could not be altered or annulled by resolution; second, that the acceptance was of the ordinance and resolution together, and, the resolution being void, the acceptance goes for nothing.

The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved. This principle has too many times been declared and applied by this court to require further elaboration. Detroit Citizens' St. Ry. Co. v. City of Detroit, 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667; Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296; Iron Mountain R. Co. v. City of Memphis, 37 C. C. A. 416, 96 Fed. 113; Citizens' Ry. Co. v. Africa, 23 C. C. A. 252, 77 Fed. 501.

The telephone company in consideration of this street easement agreed to permit its poles to be used by the city for stretching the wires of a fire-alarm system, and also to furnish two telephones free for municipal uses. The amendment of this ordinance by the resolution of September 25th was ineffectual. The charter as amended having conferred the power of granting street franchises "by ordinance," no other method was admissible. When, by statute or charter, power is conferred upon a municipal council and is silent as to the mode of action, the decision may be by either ordinance or resolution, at discretion of the council. But when the charter prescribes that franchises can be granted by ordinance it is not competent to make such a grant by resolution. Board v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; Dill. Mun. Corp. (2d Ed.) § 244 et seq., and notes; Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815; Van Vorst v. Jersey City, 27 N. J. Law, 493; City of Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503; Illinois Trust & Sav. Bank v. Arkansas City, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518.

The by-laws of the city required that an ordinance should be passed at two separate meetings. No such requirement exists as to the passing of a resolution. So far as the resolution sought to alter any term or condition upon which the ordinance granted an easement in the streets to the East Tennessee Telephone Company its invalidity must be conceded; for it would seem to follow that if a franchise can only be granted by an ordinance that such an ordinance can only be altered or amended, in respect to any of its terms or conditions, by another ordinance, and not by a mere resolution. This brings us to the crux of the case. The ordinance conferring the right to erect and maintain its poles and wires upon the streets was repealed by an ordinance passed November 17, 1899.

The learned counsel for the appellant concede that if there had been an "unequivocal acceptance of this consent ordinance, and substantial action under its terms, that it would have constituted an inviolable contract." City of Knoxville v. Africa, 23 C. C. A. 252, 77 Fed. 501;

Detroit Citizens' St. Ry. Co. v. City of Detroit, 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667.

The right to revoke the easement granted is based upon the fact that the telephone company, in writing, accepted the ordinance only as amended by the invalid resolution. This acceptance, it is said, was but a conditional acceptance, and that, if the resolution turn out to be ineffective as an amendment or alteration of the terms of the consent ordinance, the acceptance goes for nothing. The position is untenable. The telephone company, under the circumstances, might very well have said, upon discovery, that the modification of the terms of the ordinance had not been made in a valid manner, "that it would not avail itself of the franchise granted, and was not bound to carry out any implied agreement to construct or maintain a local telephone system, as its acceptance of the street franchise had been based upon the supposed validity of the resolution modifying the terms of the ordinance granting a street easement." But this it has not done, and does not now say. On the contrary, it in effect says: "Although I have not so good a contract as I desired and supposed I had, yet I stand upon the rights conceded me by the valid ordinance, and upon the terms and conditions there prescribed."

An ordinance conferring street easements in excess of the power of the municipality to grant is not necessarily void. For example, ordinances conferring exclusive rights by a municipality having no power to grant exclusive rights have been held valid so far as to convey a right, subject to the right of the city to grant like privileges in same streets to others. Levis v. City of Newton (C. C.) 75 Fed. 884; City of Waterloo v. Waterloo St. Ry. Co., 71 Iowa, 193, 32 N. W. 329.

The same rule would apply to an ordinance valid in part and invalid in part which is applicable to a statute. If the grants are so distinctly separable that each can stand alone, and the court is able to see that there is no such interdependence as to make the validity of a part depend upon the validity of every part, the ordinance will be upheld so far as valid. But here nothing has failed but an effort to amend an ordinance confessedly valid. The amendment was one proposed by the telephone company, and wholly in its interest. If it chooses to go on, although the modifying resolution has failed to accomplish its purpose, it is not for the city to escape responsibility upon the assumption that everything done by the telephone company in acceptance of the easements granted was made dependent upon the validity of this amending resolution. The plain purpose of the telephone company, by its written acceptance and by the subsequent prosecution of the work of putting in its local lines, was to avail itself of the grant made by the ordinance. Undoubtedly it acted upon the theory that the resolution had worked a valid modification of the ordinance, and this it has maintained to the end of this litigation. This contention it has now lost, and it is now confronted with the novel claim that the easement remained revocable, because its acceptance included a supposed modification which turns out to have been irregularly granted, and therefore invalid. The acceptance of the grant by writing and by acts prior to the repealing ordinance was, in our judgment, such as to give

the ordinance, so far as valid, effect as a contractual ordinance, and render it irrevocable.

Street rights so vested cannot be devested without the consent of both parties or by clear acts of abandonment indicating an intention not to accept. Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296. The street rights thus granted are, of course, subject to the provisions of the ordinance itself, as well as the police power of the city, which can never be contracted away.

Whether the Morristown Telephone Company had any street easement, and whether the appellees, as purchasers of its property, acquired such street rights as it had, we do not decide. That it acquired the physical property of that company is not denied. What we do decide is that the East Tennessee Telephone Company acquired a valid and irrevocable right to erect its poles and string its wires on and over the streets and alleys of Morristown, under and subject to the terms and provisions of the ordinance of September 1, 1899. We also hold that the resolution of September 25, 1899, was ineffective as an amendment of the prior ordinance, and that the East Tennessee Telephone Company, by its acts and deeds, has accepted the terms of the ordinance of September 1, 1899.

We also decide that the ordinance repealing the ordinance of September 1, 1899, was ineffective to deprive the telephone company of the easement granted under the ordinance of September 1, 1899. The street rights thus acquired must be held subject to the provisions of the ordinance under which they were granted, and also subject to the reasonable regulations of the municipality by virtue of its police power. City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160.

The general result below was sound, and is affirmed, but the appellant is entitled to have the injunction modified as indicated by this opinion. Remand, with directions to modify the decree. Costs of this court will be divided.

DEITCH et al. v. STAUB.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 963.

1. BUILDING AND LOAN ASSOCIATIONS—LEGALITY AND POWERS—TENNESSEE STATUTES.

A building and loan association chartered by a chancery court of Tennessee, purporting to act under Acts Tenn. Jan. 30, 1871, authorizing the organization of corporations by such courts, although its charter was invalid for lack of power in the court to create a corporation for such purpose and with such powers, was authorized to become a valid corporation, with all the powers prescribed for such associations, by Acts 1875, c. 142, by virtue of Act March 23, 1883, which provided "that any persons organized as a corporation under a charter granted by a chancery court" might obtain any power granted by the act of 1875, by making an application for amendment of its charter in accordance with its provisions, "provided however that this act shall in no way apply or affect corporations where suits have already been brought to declare their charter void"; and the fact that such association, in its application

made under the latter act, designated some of the powers it desired to obtain by a general reference to the section of the act of 1875 relating to building associations, which it described sufficiently to identify the same, instead of enumerating such powers, was a mere irregularity, not affecting the validity of the amendments to its charter thus obtained by reference.

2. STATUTORY CONSTRUCTION—PROVISO—OFFICE OF.
The primary and usual office of a proviso is to except something out of a statute which would otherwise be within it.

3. BUILDING AND LOAN ASSOCIATIONS—BORROWING MEMBERS—ESTOPPEL TO DENY LEGAL ORGANIZATION.
A member of a building and loan association who obtains a loan from it, and executes his note and mortgage therefor, waives the right to deny the power of the association to make such loan or to carry on the business of such an association, and is estopped to set up an irregularity in its organization in defense to an action to enforce the contract.[1]

4. CURATIVE STATUTE.
Whether a corporate organization be invalid, because of failure to comply with the terms of a valid law, or because the organization was under an invalid law, there is no impairment of the obligation of any contract by subsequent legislation permitting such corporation to become a corporation de jure.

5. BUILDING AND LOAN ASSOCIATIONS—SUIT TO FORECLOSE MORTGAGE—DEFENSE OF USURY.
Under the statute of Tennessee which permits building and loan associations to charge and collect a premium on loans, in addition to legal interest, where the same is bid in open competition, but not otherwise, an averment in a bill to foreclose a mortgage securing such a loan to a shareholder that the premium contracted for was so bid is supported by the presumption that the law was complied with; and the burden rests upon the defendant to disprove such allegation, and to establish his defense of usury.

6. SAME—PROCEDURE FOR MODIFICATION OF INTERLOCUTORY DECREE.
Where the defense of usury pleaded by a defendant in a suit to foreclose a mortgage was adjudged against him by an interlocutory decree, and no application was made to reopen the case to admit newly discovered evidence on the issue, in accordance with the recognized practice in equity, a master to whom the cause was referred to state the account was justified in ignoring testimony introduced before him tending to support the claim of usury, and it was not error for the court to overrule exceptions to his report based on that ground.

7. SAME—RIGHTS OF PURCHASER ASSUMING MORTGAGE—USURY.
A purchaser of property upon which there was a mortgage to secure a loan from a building and loan association, upon which the contract required monthly payments of interest and premiums, and the payment of the principal at a fixed time, who assumed payment of the same as a part of the purchase price, and who has had the benefit of the loan until its maturity by its terms, paying the interest and premiums thereon in accordance with the contract, cannot set up the defense of usury to an action to recover the principal on account of the premiums so paid; nor is he entitled to have the premiums paid credited as payments on the principal because the association has become insolvent.

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

Creditors of the Knoxville Building & Loan Association filed a bill in the court below for the purpose of winding the association up as an insolvent

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[1] See Building and Loan Associations, vol. 8, Cent. Dig. § 76 [b, h, p]; Corporations, vol. 12, Cent. Dig. §§ 84, 85.

corporation. Under that bill the appellee, Peter Staub, was appointed receiver, and directed to collect in all of its assets of every kind. By virtue of this authority the receiver filed this bill against the appellants for the purpose of foreclosing two mortgages made to the association to secure money advanced to members of the association. One of the mortgages was made by Bloom and Goodfriend to secure a note for $2,000, of December 20, 1889. The mortgaged property was subsequently conveyed to the appellant Morris Deitch; he assuming to pay off the note and debt of Bloom and Goodfriend, and taking an assignment of the shares of stock in the association held by them, which had been also pledged to secure said loan. The other mortgage was made in 1896 by Deitch and wife, and was to secure a loan to Deitch of $4,400, evidenced by a note. Deitch also pledged 22 shares of the stock of said association as collateral security for same loan. There was a decree for the complainant, from which the defendants appealed.

H. M. Ingersoll, for appellants.

Leon Jourolmon, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

The enforcement of the mortgages made to secure loans by the association to its stockholders and members is resisted by the appellants upon the grounds: First. That the association was not, when the mortgages were made, a building and loan corporation, either de jure or de facto, and was therefore unable to exercise the powers granted by law to such corporations only,—of making premium loans to their members; that, not being a lawful building and loan corporation, the loans secured by mortgage, and herein sought to be enforced, were usurious, as both were upon contracts requiring the borrower to pay both legal interest and a monthly sum in addition, called a "premium." Second. That if the said association is held to be a building and loan corporation, de jure or de facto, the loans here involved were made upon and for a level premium fixed by the association, and not as a result of competitive biddings, as required by the Tennessee law regulating the loans of Tennessee building and loan corporations.

1. The Knoxville Building & Loan Association was organized under a decree of the chancery court of Knox county, Tenn., pronounced February 24, 1872. In addition to the ordinary powers incident to every corporation, it was given power to "purchase, hold and convey real estate," and to lend money "thereon for building and other purposes." None of the usual powers of a building and loan association, such as the advancing of money to shareholders upon competitive premium biddings, are undertaken to be conferred by this court charter. This organization purported to be under and in pursuance of the Tennessee act of January 30, 1871; being an act authorizing the organization of corporations by the chancery courts of the state. So far as that act specifically provided what kind of corporations might be organized by the chancery court, and defined what their powers should be, the act has been held valid. But so far as it undertook to authorize the creation of corporations with powers subject to the discretion of the court, it has been held void. Ex parte Chad-

well, 3 Baxt. 98; Railroad Co. v. Johnson, 8 Baxt. 332; Heck v. McEwen, 12 Lea, 97. The act of 1871 does not mention building and loan corporations, nor corporations for buying and selling land or lending money upon lands, nor define the powers of any such corporations. It is probable that the court acted under the tenth section of the act, which provides for the incorporation of corporations to carry on any "local business." Neither that section, nor any other of the act, defines what shall be the powers of such corporations. Under the Tennessee decisions cited above, this section of the act is plainly unconstitutional, and no valid corporation could be organized under any decree depending upon that section for its authority. By chapter 142, Acts Tenn. 1875, a very elaborate and complete law was provided for the organization of many kinds and classes of private corporations, which repealed the act of 1871 and all prior laws upon the subject. This act has been in force ever since its passage, and is the law under which all organizations have since been made. That act, among other things, provided for the organization of building associations, and defined their powers. Among other things, it empowered such companies to lend their funds to their shareholders,—to such one of them as at a stated meeting, and upon a competitive bidding, should agree to pay for the preference in obtaining a loan the highest premium in addition to legal interest. By the nineteenth section of the act of 1875 it was provided as follows:

"That any corporation heretofore chartered by an act of the general assembly, which may desire to change its name, increase its capital stock, or obtain any powers granted by this act, shall have the right to do so, by the board of directors of said corporation copying said amendment, and making an application in these words: 'We, the undersigned, comprising the board of directors of (here insert the name of the corporation), apply to the state of Tennessee, by virtue of the general laws of the land, for an amendment to said charter of incorporation, for the purpose of investing said corporation with the power (here state the clause in the general law aforesaid, which is desired as an amendment, or if it be simply to change the name, so state the fact). Witness our hands the ——— day of ———.' The same to be probated or acknowledged as provided by section 15 of this act, and the certificate of registration given by the secretary of state, under the great seal of the state, shall complete the amendment to said act of incorporation, and the validity thereof shall not, in any legal proceeding, be collaterally questioned, as in cases of application for original charter."

This section, it will be noticed, did not extend to corporations organized under orders of the chancery courts the privileges of amendment extended to those "chartered by an act of the general assembly." This was remedied by Act March 23, 1883, which is in these words:

"Section 1. That any persons organized as a corporation under a charter granted by a chancery court of this state, or under the Acts of 1875, who may desire to change the name of such corporation, increase its capital stock, or obtain any power granted by the act entitled An act to provide for the organization of corporations, approved March 23, 1875, shall have the right to do so under and in the manner provided by section 19 of said act, which provides for the amendment of charters granted by the legislature, and with the like effect as therein provided: provided, that this act shall in no way apply to or affect corporations where suits have already been brought to declare their charters void, and shall have no effect on any kind of litigation or suits now pending against such corporation, for any purpose.

"Sec. 2. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it." Laws 1883, c. 163.

Long prior to the transactions involved, the Knoxville Building & Loan Association attempted to acquire the powers conferred by this act of 1875 upon building associations by amending the court charter, under which it had been operating, by an "application" for an amendment as provided by the nineteenth section of that act. That application was in these words:

"We, the undersigned, comprising the board of directors of the Knoxville Building & Loan Association, a corporation chartered under the laws of Tennessee, and organized under a decree of the chancery court of Knox county, Tennessee, pronounced on February 24, 1872, in the matter of R. R. Bearden et al., ex parte, for the purpose of carrying on the business of a building and loan association in said Knox county, Tennessee, apply to the state of Tennessee, by virtue of the general laws of the land, for an amendment to said charter (which is spread of record in Record Book A of said court, pp. 345 to 347), for the purpose of investing said corporation with all the powers and privileges provided for building associations by the Acts of the general assembly of the state of Tennessee (chapter 142, section 14), especially the following powers and privileges provided by said act, viz.: The members of said corporation shall have the power to adopt a constitution, and the constitution adopted, the by-laws and regulations, shall have the force and effect of a legal enactment on the members of said corporation: provided, the same are not in conflict with the general laws of the land. The corporation shall have the power to take and hold all such real estate as may be mortgaged to it, or conveyed in trust, to secure any debt of the corporation for loan of its funds; and the said corporation shall have power to purchase any such real estate at any sale thereof, and the same to hold, sell, or otherwise dispose of as the said corporation may deem expedient. Said corporation may purchase at judicial or execution or trustee's sale any real estate mortgaged or conveyed to it to secure a debt, and said real estate, or any other real estate the corporation may be entitled to hold, the said corporation shall have the power to sell, convey, lease, or mortgage at pleasure. Married women may hold stock in such corporation, free from the claims or debts of their husbands. The corporation may, by by-laws, make regulations concerning the subscription for, or transfer of stock, fix upon the amount of capital to be invested in the enterprise, the division of the same into shares, the time required for payment thereof by the subscribers for stock, and the amount to be called for at one time. Witness our hands," etc.

This was duly acknowledged, registered in Knox county, and filed with the secretary of state, who affixed thereto the great seal of state, and recorded it in his office as required by law.

The objections which have been made to this amendment of the powers of the association are: First, that the charter was invalid, and, as such, nonamendable, and that the act of 1883 does not purport to apply to an invalid corporation; second, that the amendment did not purport to confer power to make premium loans.

The act, in terms, applies to "all persons organized as a corporation under a charter granted by a chancery court of this state," etc. This describes the precise status of this association. The organization was invalid. This must be conceded. Whether, being a good-faith organization under a law purporting to give authority to the chancery courts to organize corporations to conduct any lawful business with such powers as the court should deem needful and not hurt-

ful, it was a corporation de facto as to those who dealt with it as such, we need not decide. But the act is not, in terms, confined to valid organizations, and contains no word or phrase indicating an intent that it should apply only to "persons" validly "organized as a corporation," etc. That invalid organizations were included is made evident from the proviso, which provides that the act shall not "apply to or affect corporations where suits have been already brought to declare their charters void," etc. The proviso thereby excepts out of the act the case of corporations organized by the chancery courts, against whom suits were pending to declare their charters void, and also declares that the act shall have no effect upon any suit pending against such corporations. Why except out of the benefits of the act corporations against whom suits were pending, involving the validity of their charters, if invalid corporations were not within the terms of the act? The primary and usual office of a proviso is to except something out of a statute which would otherwise be within it. Its use is to take special instances out of a general class. Suth. St. Const. §§ 222, 223; Gibbons v. Ogden, 9 Wheat. 191, 6 L. Ed. 23. The power of the state to permit an invalid corporate organization to become valid by compliance with the terms of a curative statute cannot be denied. Shields v. Land Co., 94 Tenn. 146, 153, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700. Whether the organization was invalid because of failure to comply with the terms of a valid law, or because the organization was under an invalid law purporting to authorize such a corporation, there is no impairment of the obligation of any contract by subsequent legislation permitting the irregular or invalid corporation to become a corporation de jure.

It is next urged very earnestly that the only powers added by this amendment are those copied into the amendment, and that the application for "all the powers and privileges provided for building associations by the act of the general assembly of the state of Tennessee (chapter 142, section 14), especially the following powers and privileges provided by said act," etc., does not sufficiently identify the act referred to, or the powers and privileges applied for, because it omits the date of the act; and, secondly, that, if this objection is without merit, the failure to copy into the amendment all of the powers desired is fatal to the acquisition of any powers except those set out in full. The objection that the date of the act is not set out, and therefore not identified, is without merit. The maxim, "Certum est quod reddi potest," has application. There was no other law defining the powers of a building association, except chapter 142, § 14, Acts 1875. From the character of the powers applied for, the reference to a Tennessee act as chapter 142, § 14, makes it absolutely certain that the application was for the powers and privileges provided for building associations by the act of 1875. The objection that all of the powers desired should have been copied into the application in hæc verba, and not brought in by reference, has more substance. The purpose to obtain all of the powers and privileges conferred by the act upon building associations, in addition to those "especially" asked for and copied, is clear beyond dispute. It was not an application for certain

of those powers only, but for all. This being the case, the mere failure to copy all of the powers desired in full into the application, instead of applying for a part by reference to the act and a part by specific application, should be regarded as a mere irregularity, not affecting the validity of the amendments thus obtained by reference to the act, and general characterization of the powers desired. Aside from general principles of law which would reach the same result, the act of 1875 itself provides in respect to all such amendments that "the validity thereof shall not, in any legal proceeding, be collaterally questioned." When the directors of the Knoxville Building & Loan Association applied for an amendment to the chancery court charter under which they had been acting as a building and loan incorporation, there was a valid law under which a valid building and loan incorporation might have been organized, and a law under which any building corporation organized theretofore under either a general or special law of the legislature, or under a chancery court decree, might obtain the powers conferred upon building incorporations by the act of 1875. This condition brings the case within even those definitions of a "de facto corporation" which seem to hold that there can be no de facto corporation unless there was a valid law under which a de jure corporation might have been organized. The irregularity of applying for all the powers conferred upon building associations by reference to the section and chapter of the act specifying them ought not to avail the appellant to enable him to escape his obligations as a borrowing member, whereby he very solemnly recognized the association as a valid building incorporation under the law of Tennessee. He waived the right to make any such objection by the execution of his note and mortgage, and by the assumption of the note and mortgage of Bloom and Goodfriend. Whatever might be the result of a proceeding by the state to prevent the association from assuming to be a corporation at all, or a corporation having the powers of a building incorporation under the act of 1875, it is not competent for the appellant to raise any such objections in a proceeding to enforce mortgages recognizing the corporate character of the association. Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 155, 165, 95 Fed. 497; Merriman v. Magiveny, 12 Heisk. 494; Railroad Co. v. Johnson, 8 Baxt. 332; Anderson v. Railroad Co., 91 Tenn. 44, 17 S. W. 803; Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55; Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Douglas Co. v. Bolles, 94 U. S. 104, 24 L. Ed. 46; Association v. Chamberlain, 4 S. D. 271, 278, 56 N. W. 897; Freeland v. Insurance Co., 94 Pa. 504; Mor. Corp. §§ 750, 759; Smith v. Sheely, 12 Wall. 358, 20 L. Ed. 430; McTighe v. Construction Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153; Cowell v. Springs Co., 100 U. S. 55, 61, 25 L. Ed. 547.

The loans involved purport to be loans made for a premium in addition to lawful interest. This is authorized by the law under which such building associations do business in Tennessee, and such loans are not illegal or usurious. Patterson v. Association, 14 Lea, 689. But the law authorizing the selling of loans for a premium pro-

vides that such premium shall be paid, "not as a part of the loan, not as interest, but as a means of determining which one of the shareholders shall receive the loan, whenever there are a number of shareholders who may simultaneously desire to effect a loan." To effectuate this the law requires that the funds of such associations "shall be offered for loan in open meeting, at a rate not in conflict with the law of the state, and the stockholder who shall bid the highest premium for the preference or priority, shall be entitled to receive a loan of $200.00 for each share of stock held by such stockholders." Where the loans were made not at open meeting upon competitive biddings, but for an arbitrary premium fixed by a by-law or otherwise, the Tennessee courts have uniformly held the loan usurious to the extent of the premium so exacted. Post v. Association, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Douglass v. Kavanaugh, 33 C. C. A. 107, 90 Fed. 373.

This cause came on to be heard upon all the evidence in the case, and on November 22, 1899, the trial judge filed an opinion, in which, among other things, he said:

"Although not without some difficulty, I reach the conclusion that the defendant has failed to show (the burden being on him) that the loan was upon a level premium, without bidding. C. Aebli does not sustain the defendant in this contention, and defendant's own testimony is purely negative and hearsay."

2. The second defense made in the answer was that:

"Neither of said loans was the result of competitive biddings among the members as a means of determining which one should receive the loan of money then in the treasury, but the substance of the transaction was a mere loan of money for a bonus, to wit, a premium charged and paid as heretofore shown, which was fixed by agreement of parties to the loan, whereby said association was to receive more than six per cent. per annum as compensation for the use of said money," etc.

There was evidence tending to both support and contradict this defense of usury. A petition to rehear the case upon this and other points was denied. But no application was made to reopen the case for new or additional evidence. Thereupon a decree was entered which adjudged the defense of usury against the defendant. The cause was then referred to a special master to ascertain and report what amount was due upon each of the loans, and to ascertain the present cash value of the shares upon which the loans had been made, and fixing the basis upon which this accounting should be had. Upon the hearing before the master under this decree the deposition of C. Aebli was again taken, and additional evidence tending to show that the loans were not made upon open competitive biddings was elicited. This evidence was objected to as irrelevant to any issue before the master, who, while making no express ruling, yet ignored it altogether, and confined his report to the matters referred to him. The defendant excepted to the report because he did not report that the loans were usurious, as not being made upon competitive biddings. The master overruled the exception, and the court did likewise. It is now insisted that we must consider this new evidence thus introduced. The decree adjudging that the loans were not usurious was

not final, in the sense that an appeal would lie therefrom. It was undoubtedly interlocutory, and not appealable, and, being interlocutory, was subject to change by the court before final decree or upon the final hearing. Fourinquet v. Perkins, 16 How. 82, 84, 14 L. Ed. 854; Latta v. Kilbourn, 150 U. S. 524, 529, 14 Sup. Ct. 201, 37 L. Ed. 1169; Bates, Fed. Eq. Proc. § 781. Though interlocutory, it was a decree upon the merits deciding upon the facts and law one of the material issues in the case, and, as such, was a proper subject of a rehearing, according to the settled principles of practice when a rehearing is desired upon the ground of newly discovered evidence. Such an interlocutory decree cannot be reopened to let in new evidence, except upon the same terms and conditions upon which new evidence may be heard in the case of a final decree. Bates, Fed. Eq. Proc. § 684; Gillette v. Refrigerating Co. (C. C.) 12 Fed. 108. In Baker v. Whiting, 1 Story, 228, Fed. Cas. No. 786, and Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267, the whole subject of the practice in such cases is examined with the care characteristic of Justice Story. The proposal of the defendants to inject into the record additional evidence, without laying any ground or obtaining any order of the court upon a matter which had been adjudged against him by the interlocutory decree, was without any precedent whatever, and would tend to break down every principle affecting the finality of an adjudication upon facts until reopened according to the settled principles of equity practice. The new evidence was properly disregarded by the master, and there was no error in overruling the appellants' exception to the master's report. The law authorized building associations to lend money upon a premium in addition to legal interest. The loans were presumptively made according to law, and not in violation of law; the transaction being one between a building association and a shareholder. The fact that the bill averred that the lending was upon competition was a fact made out in the absence of proof by the presumption of legality. The case of the defendant was not made out by the evidence upon which he went to trial, and he could only introduce new evidence by showing that it was new, and not cumulative; that he had no knowledge of it until after the decree, and had been guilty of no negligence in not sooner producing it.

3. The court below directed that Deitch should be credited, upon the principle of partial payments, with all of the premiums and interest paid by him upon the loan made to him personally. This crediting of the principal with sums paid under a valid contract as premiums seems to have been put upon the ground that the insolvency of the association had and would prevent the payment of the loan by the payment of the shares according to the scheme of the business of such associations, and the terms of the loan to Deitch, and to therefore relieve him of all obligation, except to return the money actually received, with interest from date of loan. The association has not appealed, or complained of this decree. But in respect to the loan to Bloom and Goodfriend, which Deitch assumed to pay as the price for Bloom and Goodfriend's equity of redemption in the land mortgaged to secure the loan to them, the court held that Deitch must settle according to the contract, and was not entitled to have pay-

ments of premiums credited as payments upon the principal of the debt. The contracts in the two cases were not alike. Bloom and Goodfriend borrowed $2,000, for which they gave a straight note, payable in 10 years. The agreement, as evidenced by the bidding and mortgage, was that for this loan they should pay interest at the lawful rate monthly, and a premium of $7.59 monthly, and pay the note at maturity, and that failure to pay either interest or premium should precipitate the maturity of the principal. The full term of 10 years had expired when the decree below was made, and the borrowers had had the loan for the full term of the agreement, and were bound to pay the principal according to the agreement. Deitch made all the terms of this agreement his own by his assumption of the contract as the price he was to pay for the mortgaged property. After paying both interest and premium for years, according to the contract, he notified the association, before it had passed into the hands of a receiver, that he should pay nothing more. By a multitude of cases, Deitch was in no situation to strip the loan to Bloom and Goodfriend of usury, even if such a defense had been open to the borrower. The defense was personal so far as that no one assuming the debt could rely upon it. As the purchaser of the mortgaged property, he got the full benefit of the incumbrance, in the reduced price paid. Nance v. Gregory, 6 Lea, 343, 40 Am. Rep. 41; Parker v. Hotel Co., 96 Tenn. 289, 34 S. W. 209, 31 L. R. A. 706; Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833. Having had the full benefit of the loan for the full term of the contract, it was not inequitable to require Deitch to comply with the terms upon which the loan was made. He has been paid to do this, and is in no situation to complain, for the agreement has not been broken by the association in any particular.

The decree must be accordingly affirmed.

CITY OF OWENSBORO v. OWENSBORO WATERWORKS CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,007.

1. SUPREME COURT—APPELLATE JURISDICTION—CONSTITUTIONAL QUESTION.
   A municipal ordinance passed under the authority of a power over the subject-matter delegated to the municipality by the legislature, at least where there is good color for the claim that it was in fact passed under delegated authority, is in effect a "law of the state," within the meaning of section 5 of the act creating the circuit courts of appeals (26 Stat. 826); and where a bill filed in a circuit court seeks to enjoin the enforcement of such an ordinance on the ground that it is in contravention of the constitution of the United States the supreme court has jurisdiction of an appeal in the case under said section.

2. CIRCUIT COURT OF APPEALS—JURISDICTION.
   Where the jurisdiction of a circuit court is based solely on the ground, clearly disclosed by the plaintiff's pleading, that a law of a state is claimed to be in contravention of the constitution of the United States, the parties being citizens of the same state, the supreme court has exclusive jurisdiction of an appeal in the case, and an appeal will not lie to the circuit court of appeals, although other questions may also have been involved and may have determined the decision.[1]

[1] See Courts, vol. 13, Cent. Dig. § 1099 [h, i, ii, j, p, t].

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

George W. Jolly, for appellant.
W. T. Ellis and W. W. Davies, for appellee.

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

SEVERENS, Circuit Judge. The Owensboro Waterworks Company, a Kentucky corporation, filed the bill in this case in the circuit court for the purpose of restraining the city of Owensboro from putting in execution a certain ordinance, which the common council of the city had passed for the purpose of regulating the rates at which water should be supplied to the people of that city, and the collection of such rates; and also for the purpose of requiring the waterworks company to put meters into the lines of pipe supplying the water to the several consumers in certain conditions specified. The bill sets forth the ordinances and the terms of the contract under which it was supplying water to the city and its inhabitants, the contract being one between the city and the predecessor of the waterworks company, to whose rights the waterworks company had, with the consent of the city, succeeded, and certain supplementary stipulations between the city and the waterworks company made at the time when the latter took over the contract from its predecessor. The ordinance granting the franchise to the predecessor contained the following provisions:

"Sec. 9. The said company shall have the power and authority to make and enforce as part of the conditions upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law, or the provisions of this ordinance.

"Sec. 10. The city will adopt and enforce all ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition and against injury to the hydrants rented by it to said city and against waste of water by consumers."

And the bill alleges that the waterworks company had established, and was operating under, rules and regulations pursuant to the authority of these sections of the ordinances. Thereupon the bill proceeds to allege that on March 12, 1900, the common council of the city passed an ordinance fixing the rate at which the company should supply water to the inhabitants of the city, denying the company the right to collect the rents in advance, and requiring it to put in meters for measuring the water delivered in certain cases specifically provided for. The bill alleges, further, that the city claims and pretends that it had rightful authority to pass this ordinance, and that it is valid, and that the city intends to enforce it. The complainant thereupon alleges against the ordinance that it is in contravention of the grant to the company of the right to make rules and regulations; that the city has no lawful authority to fix the rates at which the company shall charge its customers; that the rates fixed by the ordinance are so low, and the requirements made so oppressive, that the company cannot conform to them and obtain any income from its investment, and, in fact, could not carry on its business without positive loss. The insistence of the bill is that the ordinance is in violation of the con-

stitution of Kentucky, which forbids ex post facto laws and laws impairing the obligation of contracts; and it is also insisted that the ordinance is in contravention of the fifth amendment to the constitution of the United States, in that it takes private property for public use without just compensation, and also of the fourteenth amendment to the constitution of the United States, which provides that "no state shall make or enforce any law, which will abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its precincts the equal protection of the laws."

The answer admits the passage of the ordinance, and the intention of the city to enforce it; claims that it had lawful authority to pass it; denies that it is prohibited by any of the provisions of the constitutions of Kentucky or of the United States above referred to, or that it is unreasonable, or that it prevents the company from securing a fair return on its investment.

Other averments are made in the pleadings, but it is unnecessary to recite them for the present purpose. The foregoing contains the substance of the controversy. Proofs were taken, and at the hearing the circuit court decided in favor of the complainant, upon the ground that the legislature of Kentucky had not delegated to the city the power to pass such an ordinance, referring to section 3290 of the Kentucky Statutes, which contains the grant of power in respect to such subjects to municipalities of that class to which the city of Owensboro belongs. That section reads as follows:

"Sec. 3290. The common council of said city shall, within the limitations of the constitution of the state and this act, have power, by ordinance: * * * (5) To provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the price to private consumers and customers."

The construction adopted by the court was that the power of the city to make rules and regulations extended only to waterworks constructed and operated by itself, and the court seems to have held that the city had no other power in the premises than the power thus expressly conferred.

An appeal was taken to this court, and, prior to its being reached for hearing, the appellee moved to dismiss the appeal upon the ground that this court had no jurisdiction to entertain it, but that it should have been taken to the supreme court, because the case involved the question whether the ordinance complained of was in contravention of the constitution of the United States. Upon the submission of the motion we passed an order directing that it be postponed to the hearing on the merits, and be then heard. The case having now been fully argued, the first question with which we have to deal is that arising upon the motion to dismiss the appeal. Inasmuch as an ordinance of a municipality, if passed under the authority of a power over the subject-matter delegated to it by the legislature of a state, stands upon the footing of a legislative act for the purpose of determining whether

a right, secured by the constitution of the United States, has been infringed thereby, and such a case is upon that ground regarded as one falling within the jurisdiction of the federal courts, we see no reason to doubt that such an ordinance is to be regarded as a law of the state, within the meaning of section 5 of the act of March 3, 1891, creating the circuit court of appeals, and distributing the appellate jurisdiction. Perhaps we should add the proviso, which would apply to both the original and appellate jurisdictions, that the case be one in which there is good color for the claim that the ordinance was in fact passed under a delegated authority. But we think, without going into a discussion of the matter, that there is fair ground in the present case for contending that the common council had legislative authority for dealing with the subject to which the ordinance relates. The question is therefore whether the appeal in this case is one comprehended within the classes of cases enumerated by section 5 of the act referred to. If it is, it must be taken to the supreme court; for it is only of such cases as remain after those enumerated in section 5 have been carved out of the whole body of appellate cases that the circuit courts of appeals have jurisdiction; and as was said by Chief Justice Fuller in American Sugar Refining Co. v. City of New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859: "Where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the constitution or some law or treaty of the United States (Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn v. Gold Min. Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276; W. U. Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052)," such a case falls within the exclusive appellate jurisdiction of the supreme court. Looking at the language of the act, we can see no good reason for thinking that the destination of the appeal is altered by the circumstance that other questions besides those enumerated in section 5 are comprehended in the controversy which the case presents. It is still, and none the less, a case in which a question arises of the character specified in designating what cases must go by appeal or writ of error to the supreme court. The appeal or writ of error in all cases, in which no question of the character described in section 5 is involved, goes to the circuit court of appeals under the operation of section 6, which expressly bounds the appellate jurisdiction of the latter court in that way. Saving such questions as arise under the first clause of the enumeration of section 5, relating to the original jurisdiction, and the consideration of the effect of making final the judgments of the circuit courts of appeals when the jurisdiction of the circuit court depends upon diversity of citizenship by section 6 (a matter to which we shall presently recur), this makes the line of demarcation clear, and the only difficulty to be encountered in prosecuting an appeal or writ of error is in determining whether or not there is in truth a question involved in the controversy comprehended in the classes mentioned in section 5.

Respecting those cases where the jurisdiction of the circuit court rests upon diversity of citizenship, it was distinctly held in Loeb v. Columbia Tp. Trustees, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280, that it was immaterial, in determining the appellate jurisdiction of the supreme court, that the federal question did not become involved by the plaintiff's pleading, but was brought in by a claim set up in defense. That determination seems to settle the proposition that regard is to be had, not alone to the particular ground on which the trial court acquired jurisdiction, but to all the questions which arose during its progress and were determined by the judgment, and the grounds on which that decision proceeded seem unanswerable. The result was that the appeal was held properly brought to the supreme court notwithstanding the federal question had been brought into the case by the answer of the defendant. But the ground on which the original jurisdiction rested in that case was that of diversity of citizenship, and the court went on to say that the appeal might also have been taken to the circuit court of appeals. This was, as we understand, because of the peculiar provision in the sixth section of the act, that "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." The result of this holding would seem to be that the appellate tribunal in such a case—that is, where jurisdiction has been acquired upon the ground of diverse citizenship and federal questions are also involved—is not fixed by the law, but is left to the choice of the party, carrying out in this respect the analogy of the rule applied to a question of the right to appeal arising under the first clause relating to the jurisdiction of the trial court. And the law had been so held in several previous cases. Mining Co. v. Turck, 150 U. S. 135, 14 Sup. Ct. 35, 37 L. Ed. 1030; Publishing Co. v. Monroe, 164 U. S. 105, 17 Sup. Ct. 40, 41 L. Ed. 367; Ex parte Jones, 164 U. S. 691, 17 Sup. Ct. 222, 41 L. Ed. 601. But that proposition is not here involved, because the jurisdiction of the circuit court rested entirely upon the federal question.

In the case before us the parties were both citizens of Kentucky, and the jurisdiction was invoked on account of the presence of a federal question of the class included in section 5 of the appellate act. It is true the circuit court decided the case upon another ground, but upon appeal the whole case is opened, and the appellate court will give such judgment as the case requires, and plant the judgment upon such ground as it thinks it ought to be. The question here is not affected by the circumstance that the court below made the case turn on another point.

The appellant relies upon language used by the chief justice of the supreme court in delivering the judgment in Carter v. Roberts, 177 U. S., at page 500, 20 Sup. Ct. 714, 44 L. Ed. 861, where it was said that, "when cases arise which are controlled by the construction or application of the constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals those courts may decline to take jurisdiction, or, where such

construction or application is involved with other questions, may certify the constitutional question, and afterwards proceed to judgment, or may decide the case in the first instance." But we think this language was probably intended to be modified by limitations not fully expressed, and that this inference is warranted by former decisions of the court, and by the language used by the chief justice in qualifying the foregoing expression in American Sugar Refining Co. v. City of New Orleans, 181 U. S., at page 282, 21 Sup. Ct. 646, 45 L. Ed. 859, and especially by his language in delivering the opinion of the supreme court in Huguley Mfg. Co. v. Galeton Cotton Mills (October term, 1901) 22 Sup. Ct. 452, 46 L. Ed. ——, where he said: "If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the constitution, laws, or treaties of the United States, then the jurisdiction of this court is exclusive,"—because it is clear that the cases first instanced are within the exclusive jurisdiction of the supreme court. But if the original jurisdiction is founded entirely upon the ground of diversity of citizenship, and a constitutional question becomes involved, the appeal might go to either court. If it should go to the supreme court, that court would, of course, decide the whole case; if to the court of appeals, that court might also decide the whole case, or certify the constitutional question to the supreme court, and, on receiving its answer, decide the case. If it should decide the constitutional question in the first instance, the unsuccessful party might apply for the writ of certiorari under the provision of the sixth section to correct any mistake made by the court of appeals upon the subject. Thus is accomplished the whole scheme by which congress intended to give to the supreme court, by one method or another, appellate power over all constitutional questions.

We have not failed to notice that the circuit court of appeals for the Eighth circuit, departing from its own former decisions, reached a different conclusion in Pikes Peak Power Co. v. City of Colorado Springs, 44 C. C. A. 333, 105 Fed. 1, from that which we have expressed, being constrained thereto by a misapprehension of the meaning of the language above quoted from Carter v. Roberts. But we have had the advantage of the instruction afforded by the later utterances of the supreme court in regard to the interpretation which should be put upon the language employed in the Carter Case, and feel relieved from the constraint which induced the decision in the case of Pikes Peak Power Co. v. City of Colorado Springs.

In this case, for the reasons that a constitutional question was directly involved by the plaintiff's pleading and the jurisdiction of the court below was not based upon diverse citizenship, so as to give us jurisdiction of the appeal upon that ground, we are constrained to think that the exclusive jurisdiction is given to the supreme court under the fifth section of the act above mentioned, and that the appeal should be dismissed. It is so ordered.

JONES v. CYPHERS et al.

(Circuit Court, W. D. New York. February 18, 1902.)

No. 73.

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING—ANTICIPATION.
Prior patents relied on by a defendant in a suit for infringement as anticipations of the one in suit must be pleaded; otherwise they cannot be considered for that purpose, but only to show the state of the art, and to limit the claims involved.

2. SAME—INFRINGEMENT—INCUBATOR.
The Jones patent, No. 586,088, for an improvement in incubators, relating to their heating and ventilation, in view of the prior art, must be limited to the exact combination shown, which includes an inlet pipe passing directly from the external atmosphere to the interior of the egg chamber, and an exit pipe leading to the heating device, so that the exhaust of air from the chamber, to produce ventilation, is effected by the suction or draft caused by the heating device. As so construed, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 586,088, issued to Walter B. Jones July 6, 1897, for an improvement in incubators. On final hearing.

Charles A. Hawley, for complainant.
Osgood & Davis, for defendants.

HAZEL, District Judge. This is a suit in equity for infringement of United States letters patent No. 586,088, issued to Walter B. Jones July 6, 1897, and assigned by him to complainant. The patent relates to what are described as new and useful improvements in an apparatus for artificial incubating and brooding. Defendants admit that the exhibits in evidence (an incubator and brooder apparatus claimed by complainant to infringe the patent in suit) were made by them, and that they are engaged, as partners, in their manufacture and sale. The claims of the patent alleged to be infringed are 1, 2, 3, 9, and 14. They consist of a combination of elements involving a method of circulating heat or warm air from a source of heat in an incubating and brooding chamber to a heating device attached to the incubating and brooding apparatus, and communicating with the upper part of the chamber. More specifically, a fresh-air inlet pipe is so constructed as to communicate with the upper part of the chamber, whereby the fresh air is warmed before entering the chamber. The inlet pipe is so arranged and connected to the chamber, with an exit pipe leading to the lamp used as a heating device, as to result in controlling the entrance of fresh air into the chamber. As the fresh air is admitted through the inlet pipe, it occupies the space of the vitiated air drawn off by draft or suction caused by the heater. Complainant's expert says:

"The chamber or heater produces a rarification of the air adjacent thereto, and the colder or heavier air rushes toward it from below, or latterly toward it; and the means for heating is the element that produces the positive circulation of air from the bottom part of the chamber."

Complainant does not broadly claim a system of ventilation, as applied to an incubator and brooder. The necessity of such ventilation has long been understood and recognized. Different arrangements and devices for performing that indispensable function have been invented. The difficulty experienced in the use of the incubating apparatus, however, has been that at various conditions of outside temperature the efficiency and regularity of hatches were retarded. This was due to a failure to impart such air to the egg chamber as would maintain an unvarying temperature. The patentee, by his invention, proposes to obviate the apparent difficulties and inefficiencies of the prior art by claiming a combination of old and new elements, resulting in the adaptation of means for a constant and positive change of air in the incubator and brooder chamber. Claim 1 of the patent in suit reads as follows:

"An incubator or brooder comprising a closed chamber having a fresh-air inlet, means for heating the chamber, including a heating device and an exit pipe connecting said chamber with the heating device, whereby, owing to the draft caused by such heating device, a positive circulation of air within the incubator or brooder is produced, substantially in the manner described."

The second claim includes means for heating the fresh air before entering the chamber. Claim 3 describes a combination of elements whereby air is heated before it enters the chamber, and for withdrawing the same by suction after it becomes contaminated. Claim 9 describes the means employed to create the suction from the chamber to the lamp or heating device. Claim 14 regulates the quantity of air passing from the chamber to the heating device. The answer alleges aggregation of old devices, anticipation, and denies infringement. Defendants contend that all of the elements upon which are based the claims of the patent in suit are a mere aggregation of known elements; that by the assemblage of parts the patentee has merely aggregated various elements in his incubator and brooder, without causing them to perform by their united action any new function which they did not perform separately before. His union of forces is not productive of a patentable result. On the argument it was admitted by complainant that practically the only novelty of his claims is an exit pipe arranged to lead from the egg chamber to the heating device. He claims this exit pipe as the essential element of a combination, and that this feature, in conjunction with the other elements described in his claims, produces a vigorous, wholesome, and constant passage of air through the incubator and brooder chamber at a predetermined degree of heat, thus assuring a regular and effective operation of the apparatus at all seasons of the year. At the time complainant's application for patent was filed, the examiner of patents rejected his specific claims for a ventilating system. The Gouge and Hoadley patents for ventilating apartments and cellars were cited by the patent office in support of the contention that the claims for a system of ventilation resulting in a constant change of air were old and well known. The patentee insisted that the citations were erroneously urged against an invention in incubators and brooders; that to ventilate a house was not analogous to ventilating an incuba-

tor. The examiner of patents, however, rejected the claims of the patentee on the ground that, although a nonanalogous art, the citations in anticipation of the claims were proper, and that the art of ventilating a dwelling house was not distinct from the art of ventilating an incubator. On appeal from the decision of the examiner of patents, the board of examiners in chief sustained the decision. Subsequently the applicant was granted a patent on the claim for ventilating an airtight or closed chamber, to which fresh air enters from an inlet pipe heated at the top of the chamber, and is thereafter discharged or withdrawn by the suction caused by the heating device. The Schultz United States patent, No. 101,168, dated March 22, 1870, and the Vanderheyden United States patent, No. 504,544, dated September 5, 1893, were not cited or considered by the patent office at the time of filing the application containing the claims for ventilation covered by the patent in suit. These patents have not been pleaded by the defendants in anticipation. They were introduced in evidence by the defendants, and are now cited as completely anticipating the claims of the complainant's patent. Inasmuch as they were not pleaded by the defendant as in anticipation, these patents may only be considered to show the state of the art, and to construe or limit the claims involved. Rev. St. § 4920; Brown v. Piper, 91 U. S. 41, 23 L. Ed. 200; Grier v. Wilt, 120 U. S. 412, 7 Sup. Ct. 718, 30 L. Ed. 712. Complainant does not pretend that there is any substantial novelty in his claims in suit, provided the art of ventilating incubators or brooders is analogous to heating and ventilating houses or apartments, as described by the patents of Schultz and Vanderheyden. The proofs show that prior patents for incubating and brooding do not show a combination including a foul-air outlet leading to the exterior of the incubating chamber, and directly to the heating device, so as to afford a joint means of combustion and ventilation. No patents other than the Schultz and Vanderheyden patents need be considered. It is admitted by counsel and expert for complainant that these patents disclose, substantially, in principle and mode of operation, all the elements of the claim in suit. Complainant, however, contends that, although there are analogies between the mode of operation of heating and ventilating an incubator and brooder and a dwelling house, such appliances, suitable for economically hatching eggs, are not suitable, without change, for living apartments. It is quite true that vast differences exist in the appearance and construction of structures such as are disclosed in the Vanderheyden and Schultz patents and the incubator and brooder patent in suit. Nevertheless the Vanderheyden patent describes a substantially airtight living apartment, so that the warmth and ventilation artificially provided will alone affect its interior, and, as heretofore stated, has all of the essential elements combined by the complainant in his construction. The prime purpose of the patent in suit is similar to that of the Vanderheyden and Schultz patents, to wit, to create a system of ventilation which will insure an unchangeable degree of warmth to the chamber or compartment described in the respective patents. It seems to me, therefore, that the sole question here is whether the patents under consideration belong to a nonanalogous art. I am unable to discover that com-

plainant's invention performs any new or different functions than those disclosed by the prior art for warming and ventilating dwelling houses. An examination of the decisions rendered in analogous cases is convincing that by the use of the elements described and claimed by the patentee nothing new was created, worthy of the dignity of invention. Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co. (C. C.) 34 Fed. 130; Holmes Elec. Protective Co. v. Metropolitan Burglar Alarm Co. (C. C.) 33 Fed. 254; Briggs v. Ice Co. (C. C.) 54 Fed. 376; Briggs v. Duell, 36 C. C. A. 38, 93 Fed. 972; Stearns & Co. v. Russell, 29 C. C. A. 121, 85 Fed. 218; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 19 C. C. A. 534, 73 Fed. 469. The incubator and brooder are merely a reduction in size of the chamber or compartment described by the Vanderheyden patent. Moreover, it appears with satisfactory clearness that a chamber or compartment constructed like that described in the Vanderheyden patent may be operated and is adapted for the purpose of incubating. The proofs show that a room of suitable dimensions for human habitation had been used with more or less success as an incubator. Defendants claim that a building 22 feet square by about 10 feet to the eaves, with ordinary pitched roof, has been successfully used for incubating. No difficulty was experienced in maintaining a proper temperature and ventilation. From the evidence in this case on this point, it may be fairly deduced that the system of ventilation described in the Schultz and Vanderheyden patents may be applied to the use of considerably smaller chambers or compartments than are described in the Schultz and Vanderheyden patents. These uses are precisely the same. The Vanderheyden house ventilating patent was granted several years prior to the patent in suit. Complainant is presumed to have had knowledge of this patent, and therefore it may be fairly assumed that a system of ventilation suitable for human habitation suggested, possibly, a better system of ventilation for an incubator. The patent can in no sense be regarded as a pioneer, and therefore its scope must be limited to a foul-air exit pipe leading directly to the lamp used for heating the egg chamber. The defendants having failed to plead the Vanderheyden and the Schultz patents, the invalidity of the Jones patent because of their existence is not in issue. Defendants' device for ventilation is somewhat different from that of complainant. The heating device has no connection with the incubator chamber. It takes its draft from the outside air, and delivers the foul air to the exterior of the chamber, having no connection or communication with the incubator chamber, or air contained therein. The heat from the air-heating chamber is controlled at the top of the heating device by an outlet which remains closed until the generated heat exceeds the normal. Then, by the opening of a regulable escape passage, the hot air escapes from the air-heating chamber directly to the atmosphere. A portion of the hot air, only, escapes from the air-heating chamber, which is immediately replaced by fresh air from the outside atmosphere, entering the air-heating chamber at the lower end. Defendants' proofs show that all of the fresh air entering the heating chamber does not pass into the incubator chamber, but only such portion thereof as may be required to replace the foul air

that has escaped. Obviously, defendants' construction neither contains a fresh-air inlet, nor an exit pipe connecting the incubator chamber with the heating device. It follows that the Jones patent must be so limited as to confine it to the exact combination shown, including an arrangement by which an inlet pipe passes directly from the external atmosphere to the interior of an egg chamber, and to a construction in which an exit pipe leads directly to a heating device, so that the exhaust of air from the egg chamber to produce ventilation is effected by the suction or draft caused by a heating device. Thus limited, the patent is not infringed. It is unnecessary to consider any other element of the claims.

A decree must therefore be entered dismissing the bill, with costs.

NATIONAL NEWS BOARD CO. v. ELKHART EGG CASE CO.

(Circuit Court, D. Indiana. April 1, 1902.)

No. 9,907.

PATENTS—INFRINGEMENT—PAPER BOARD.

The McEwan patent, No. 492,497, for an improved paper board made from printed newspaper or the like, by a process described, the essential feature of which is to keep the paper stock as hot as possible during the entire process of manufacture, avoiding the use of cold water and of alkaline or bleaching substances, to the end that the ink may be kept soft and the permanent particles minutely subdivided during the beating process, must be strictly construed in view of the prior art, and is not infringed by board made by a process in which 1 per cent. of soda ash is added to the newspaper stock, and cold water is used in the beating engines.

In Equity. Suit for infringement of letters patent No. 492,497, issued March 7, 1893, to Robert B. McEwan and others for a new and useful improvement in paper board. On final hearing.

Briesen & Knauth, Henry M. Turk, and Harvey, Pickens, Cox & Kahn, for complainant.

Van Fleet & Van Fleet, for defendant.

BAKER, District Judge. This is a suit for alleged infringement of letters patent numbered 492,497, dated March 7, 1893, issued to Robert B. McEwan, Jessie L. McEwan, and Richard W. McEwan "for a new and useful improvement in paper board." The bill alleges that on March 21, 1893, Robert B., Jessie L., and Richard W. McEwan, by assignment in writing, sold, assigned, and transferred to the McEwan Bros. Company, a corporation, the entire right, title, and interest in and to said invention and letters patent; that on May 31, 1899, the said McEwan Bros. Company, by an assignment in writing, sold, assigned, and transferred to the National Board & Paper Company, a corporation, the entire right, title, and interest in and to said invention and letters patent, including all rights to damages and profits due or accrued, arising out of the past infringement of said letters patent, and the right to sue for and recover the same; that on January 10, 1900, the National Board & Paper Company, by an assignment in writing, sold, assigned, and transferred to the McEwan

Bros. Company the entire right, title, and interest in and to said invention and letters patent, together with all subsisting causes of action belonging to the National Board & Paper Company for infringement of said letters patent subsequent to May 25, 1899, and the right to sue for and recover the same; that on August 10, 1900, the McEwan Bros. Company, by an assignment in writing, sold, assigned, and transferred to the complainant, the National News Board Company, the entire right, title, and interest in and to said invention and letters patent, together with all subsisting causes of action belonging to the McEwan Bros. Company. It is thus shown that the complainant possesses no right of action for any infringement of the letters patent except such as may have arisen between May 25, 1899, and September 3, 1900, when the present bill was filed. The evidence shows that the defendant's mill was operated for about 12 hours on May 25, 1898, in making news board from printed newspapers according to the process described in the patent. But, except on that occasion, the evidence shows that, when manufacturing news board from printed newspapers and the like, the defendant has always used at least one pound of soda ash to each one hundred pounds of newspaper stock. If the defendant infringed the patent on May 25, 1898, the right of action therefor belongs to the National Board & Paper Company, and not to the complainant.

The question for decision, then, is, did the defendant, between May 25, 1899, and September 3, 1900, infringe the complainant's patent by manufacturing news board from newspapers according to the process practiced by it and described in its patent? The patentees claim simply "to have invented a new and useful improvement in paper board." They recognize the manufacture of paper board as old in the arts. The statute provides that:

"Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor in writing to the commissioner of patents and shall file in the patent office a written description of the same, and of the manner and process of making, constructing, compounding and using it in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound and use the same." Rev. St. 1878, § 4888.

"Accurate description of the invention is required by law for several purposes: (1) That the government may know what is granted and what will become public property when the term of the monopoly expires; (2) that licensed persons desiring to practice the invention may know during the term how to make, construct, and use the invention: (3) that other inventors may know what part of the field of invention is occupied." Bates v. Coe, 98 U. S. 31, 39, 25 L. Ed. 68.

The claim is as follows:

"As a new article of manufacture, a paper board formed from printed newspaper or the like ground to a pulp and having the permanent particles of the printer's ink minutely subdivided and uniformly distributed throughout the body of the board, whereby a smooth and even tint is imparted to the board."

The patent is for a product, but the product is the result of a specified process. The statute requires that the process shall be described "in such full, clear, concise and exact terms as to enable any person skilled in the art * * * to make and construct" news board ac-

cording to the complainant's patent. The patented product is a paper board made according to the process specified in the patent. It is not claimed that the process is novel. Indeed the failure to claim any step in the process raises a presumption that no one of them is novel. Richards v. Elevator Co., 159 U. S. 477, 486, 16 Sup. Ct. 53, 40 L. Ed. 225. The process, then, practiced by the complainant, not being new, it is not quite clear on what ground the product of an old process can be patentable. Judge Bradford says:

"The essence of the alleged invention consists in the retention in the finished product of the printer's ink in minute and distributed particles, unimpaired by chemical action, coupled with an avoidance of any impairment of the fiber through such action." McEwan Bros. Co. v. McEwan (C. C.) 91 Fed. 787, 790.

But if these results are accomplished by the practice of an old process, we still fail to see how the old process, when practiced by the complainant, can produce any new result. If any better results are obtained, it must be because the complainant exercises greater care and skill in using the old process. But, assuming that the complainant's process is to be regarded as new because it leaves soda ash and bleaching powder out of its process, still it is not claimed that all of the carbon and oily substances contained in the ink were removed by the use of soda ash or bleaching powder. Some part of these substances would doubtless still remain and enter into the paper board. The complainant's process simply leaves more of these substances to enter into the board than would enter if soda ash or bleaching powder were used. Such a change, however, would at most be a change in the amount of carbon and oily substances entering into the board. It is not apparent why leaving out the soda ash or bleaching powder from the old process should constitute an inventive act. If the question were res nova, I should hesitate to hold the patent valid, on the ground that it seems to be wanting in patentable novelty. This question, however, is not open, because the defendant, acquiescing in two former decisions at the circuit, admits the validity of the patent. The defense is noninfringement. This leads to the inquiry, what is the process by which the complainant produces his patented board? In the specification the whole process is thus described:

"In the manufacture of our improved article we preferably use, on account of its cheapness, its freedom from size, and its softness, printed newspaper or other printed paper possessing the characteristic properties of the ordinary paper upon which newspapers are printed, and we have found that old copies of newspapers, or the over-issues, can be bought up at low rates and utilized for our purposes. We have found that our improved product can be manufactured most economically and with the best results by following the process which is described below, but it will be understood that the product can be obtained in other ways. In the process referred to we first cleanse the stock from dust and foreign matter, and soak it in hot water until it is thoroughly soft. Without permitting it to cool we transfer it to the beating engine, and when the pulp is sufficiently beaten it is allowed to pass to the stuff chest, from which it is pumped to the making cylinder vat, and at all times it is kept as hot as possible under the circumstances. We find that this process is expeditious, because, when the ink on the paper has once been softened by the hot water, it is thereafter kept soft instead of being set again by the use of cold water at any point, and the permanent particles of the ink which are not dissolved and washed away are

therefore during the beating more readily subdivided with exceeding minuteness, and are thoroughly and uniformly distributed throughout and blended with the fibers. Our novel product, whether made by the process above described or by any other which may be used in its stead, is a board which has the permanent particles of printer's ink minutely subdivided and uniformly distributed throughout its body to produce a smooth and even tint throughout, while the strength of the fibers has not been impaired by more or less expensive attempts to bleach out the ink."

The salient feature of the process is to keep the paper stock as hot as possible under the circumstances, from the beginning to the end, avoiding the use of cold water and of alkaline or bleaching substances. By keeping the stuff constantly hot the ink is kept soft and the permanent particles of the ink during the beating are more readily subdivided with exceeding minuteness, and are thoroughly and uniformly distributed and blended with the fibers. By the use of cold water at any point, the ink which has been softened by the hot water is set again, thus preventing the subdivision of the permanent particles of ink by the beating process. No method of practicing the invention is suggested except by the application to the paper stock of water as hot as possible from the beginning to the end of the process. It is distinctly stated that if, after the ink has been softened by the use of water as hot as possible, the paper stock is again subjected to an application of cold water, the softened ink is again set, and thus it cannot be readily subdivided in the beating engine. The two indispensable features entering into the manufacture of the patented board are the absence of any alkaline substance and the application of hot water to the paper stuff from the beginning to the end of the process. No board, unless produced by this process or its equivalent, can be held to be an infringement of the patent. The process practiced by the defendant in the manufacture of its board is thus described: We put the papers into our rotary boilers and cook them with a certain amount of soda ash, and after cooking we dump the stuff into a pit and furnish it to our engines, where the stock is beaten in cold water, emptied into a stuff chest, and from there pumped onto the machine. The amount of soda ash is one pound to one hundred pounds of the paper. The newspaper stock is cooked in the rotaries with the soda ash for the period of about six hours. The effect of the cooking with the soda ash is to soften the stock and to cut out the ink by uniting with the grease in the ink, reducing the grease to a soapy condition, which enables us to wash the grease and a large part of the ink out of the stock. The carbon in the ink, being freed from the grease, is in such condition that we are able to wash a large part of it out of the stock. The defendant's process as practiced by it is an old one, and differs in two essential particulars from that covered by complainant's patent, namely, in the use of an alkali, and in using cold water in the beating engines. The defendant's board is not produced by the same process as the complainant's, nor do I regard the two processes as equivalents. It is apparent, and, indeed, is admitted, that the use of cold water in the beating engines prevents the minute subdivision and uniform distribution of the permanent particles of ink obtained by the practice of the process employed by the complainant. Nor do I think it is satisfactorily shown by the evi-

dence that the 1 per cent. of soda ash does not saponify some portion of the oily substances contained in the ink. The general manager of the defendant, who superintends and directs the process of manufacture practiced by it, testifies positively that the soda ash used in cooking the stock in the rotaries does saponify a portion of the oily substances in the ink, which is removed by washing. His testimony is corroborated by a number of employés who have worked in the mill since the defendant began to manufacture board from newspaper stock. The only evidence tending to contradict their testimony is that of complainant's two chemical experts, who form their opinions from chemical analyses made by them of some small specimens of paper board manufactured by the defendant. The burden is on the complainant to prove infringement, and it does not seem to me that the opinion of the chemical experts is sufficient to satisfy this burden. The defendant's witnesses testify from actual, personal experience and observation, and, in my opinion, their testimony is entitled to quite as much weight as the opinions of the chemical experts produced by the complainant. The boards made by the two processes are, no doubt, similar, but they are not the same. The defendant produced two samples of board made from a single bunch of newspapers. One sample was made according to the process of the patent, and the other was made according to the process practiced by the defendant. The difference in the appearance and texture of the two is plainly apparent to the unaided eye. Construing the patent strictly, as I think I must, in view of the prior art, and limiting it to a paper board made according to the specification of the patent, it seems to me that the defendant's board, made by a process differing in essential particulars, is not an infringement.

The bill will be dismissed for want of equity at the costs of the complainant.

ATWOOD LOCK CO. v. YALE & TOWNE MFG. CO.

(Circuit Court, D. Massachusetts. April 8, 1902.)

No. 1,148.

PATENTS—ASSIGNMENT OR LICENSE—CONSTRUCTION OF INSTRUMENT.

An instrument by which a patentee transfers to another "the exclusive right, license, and privilege to manufacture and sell" the patented article "for use in any and all places" does not convey the right to use, and is not an assignment, but a mere license, which does not give the licensee any title to the patent nor right to sue at law in his own name for its infringement.

At Law. Action for infringement of patent. On demurrer to declaration.

Alexander P. Browne, for plaintiff.
William A. Jenner, for defendant.

COLT, Circuit Judge. A patentee may assign the whole patent, or an undivided part, or the exclusive right under the patent for a specified portion of the United States. Any assignment by the patentee

of either of these three kinds of interest must convey the monopoly granted to the patentee on the issue of his patent, which is the right to make, use, and vend the invention for the term of 17 years. Any assignment or transfer which does not cover the monopoly is a "mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement." Waterman v. Mackenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923, and cases cited.

In the case at bar, the grant to the plaintiff of the exclusive right under the patent is set forth in the following provision of the instrument:

"Now, therefore, I, the said James M. Atwood, in consideration of the sum of six thousand dollars to me paid by the said Atwood Lock Company, hereby sell and grant unto the said Atwood Lock Company the exclusive right, license, and privilege to manufacture and sell to the full extent of the grant contained in said letters patent, and of any extension or renewal thereof, the sash fasteners containing the patented improvements and manufactured under said patent, for use in any and all places, subject to the conditions hereinafter recited."

By the terms of this provision there is no grant of the exclusive right to use, but the grant is limited to the exclusive right to manufacture and sell. A part of the monopoly, namely, the exclusive right to use, still remains in the patentee. Under the authority of Waterman v. Mackenzie, this instrument is a mere license, and gives the assignee no right to sue in his own name. The words, "for use in any and all places," cannot be construed as a grant of the exclusive use. These words follow the grant of the exclusive right to manufacture and sell, and can only be interpreted as signifying the right to use in any and all places the patented article which may be manufactured and sold by the plaintiff. In view of the clear and express language of the instrument, I do not feel warranted in varying its terms to meet what the plaintiff contends was the intention of the parties.

Demurrer sustained.

DAVIS v. PERRY.

(Circuit Court, E. D. New York. December 26, 1901.)

PATENTS—INFRINGEMENT—INKSTANDS.

The Davis patents, No. 399,844, claim 1, No. 413,390, claims 1 and 3, No. 491,640, claims 1 and 2, and No. 605,177, claims 1 to 9, inclusive, all relating to inkstands having a float therein by the depression of which the pen is filled, each construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 399,844, issued March 19, 1889, No. 413,390, issued October 22, 1889, No. 491,640, issued February 14, 1893, and No. 605,177, issued June 7, 1896, all granted to Emry Davis for inkstands. On final hearing.

Walter S. Logan (Fred C. Hanford, of counsel), for complainant.
Clifton V. Edwards, for defendant.

THOMAS, District Judge. The bill is to restrain infringement of rights alleged to be secured to the complainant by several letters pat-

ent. The first of such letters, numbered 399,844, was issued in 1889. The only claim in question is:

"(1) The body or well, A, of the stand, having airtight cover, B, and tube, C, fitted in said cover, and reaching into the well and above the cover, B, in combination with the float, F, placed in the tube, the apertured cover, E, closing the upper end of the tube, C, and the dip funnel or tube, G, held fast in the float, F, and projecting up through the said cover, E, substantially as described."

The specification states:

"The object of my invention is to provide a cheap and practical inkstand, constructed to avoid almost altogether the evaporation of ink; and to this end my invention consists, principally, of a float and dip funnel, the float being placed loosely in a tube fitted in an airtight cover of the inkwell, so that pressure on the float will depress it, and cause the ink to rise and fill the pen. Upon removing the pressure the float rises and the ink recedes, so that only a very small surface is exposed to the atmosphere. The invention also consists of the construction and arrangement of parts, all as hereinafter described and claimed."

It will be observed that claim 1 describes certain parts: (1) The body or well; (2) the airtight cover, B; (3) the tube, C, fitted in said cover, and reaching into the well and above the cover, B; (4) the float, F, placed in the tube, C; (5) the apertured cover, E, closing the upper end of the tube, C; (6) the dip funnel or tube, G, held fast in the float, F, and projecting up through the cover, E. In defendant's infringing inkstand there is no cover, E, nor any equivalent thereof. Therefore in the defendant's stand there is one less element than is contained in the combination.

But it is urged that this element, to wit, the cover, E, is an unimportant and useless part of the complainant's invention. Such view cannot be accepted, inasmuch as the specification at all times designates the cover as a factor aiding the essential function of the combination, and, indeed, Davis seems to have so regarded it.

It may be inferred fairly that the complainant had two ends in view—First, to construct the stand so as to minimize evaporation; and, second, to adjust the parts so that, on pressure upon the funnel surmounting the float, the latter would be depressed, and the ink thereby forced through the float and funnel to meet the pen at a higher point than the level of the ink in the stand itself. For these two ends Davis regarded an airtight chamber as a necessity. In the specification he says:

"In the cover, B, is fitted the tube, C, which reaches nearly to the bottom of the inkwell, and projects somewhat above the plate, B2, where it is provided with the small ring, D, in which fits the small annular cover, E, for the tube, C. The tube, C, is formed with a flange, b, and the central opening of the rubber disk, B', is drawn in close contact with this flange, so that the said tube is held airtight in the cover, and over or above the flange, b, is placed the small soft rubber ring, d, to act in connection with the soft rubber disk, B', to make an airtight connection between the tube and cover. The ring, D, is screwed upon the upper end of the tube, C, and serves as a nut to connect the tube to the cover, and when screwed down the ring, d, is compressed between the flange, b, and the inner surface of the outer cover, B2. The outer edge of the soft rubber disk, B', is by preference somewhat thickened or enlarged, as shown at f, to form a cushion between the upper edge of the ink well or stand, A, and the flat portion, f', of the metal cover, B', so that when this outer cover is screwed down upon the threads, g, of the inkwell, the cushion, f, will be compressed, and

the cover as a whole made airtight upon the stand, A. In the said tube, C, is placed the float, F, in which is fitted the funnel or dip tube, B, which reaches up through the annular cover, E. The lower end of the tube, G, is open at the bottom to receive the ink."

From this it will appear that Davis intended by the cover, B, and the annular cover, E, to make his inkwell airtight. This would prevent evaporation, and the manifestation of care to bring about an adjustment that would delicately close the inkwell indicates that he regarded the containment of the air in the well as necessary to force the ink through the float, when the same should be depressed, and also to aid in preventing the ink from rising too freely between the float and the tube.

The defendant's stand is relatively a simple structure. Although a cover is provided, it does not make an airtight connection with the well, as it is held in position by gravity alone. Otherwise, defendant's cover does take the place of the cover, B, and while it is not fastened to the well, and is removable at once, yet when resting upon the well the air is practically maintained therein. But the annular cover, E, is entirely wanting. The float and the funnel are integral, and while the flaring funnel, when the float is depressed, rests upon the cover, closing the mouth of the tube, it does not closely engage the same, nor is there any connection which makes, or is intended to make, the well airtight. Therefore, unless the claim may be recast, and the patentee's conception that the well should be airtight, and that there should be an annular cover for the purpose of effecting this, may be rejected, upon the theory that the results desired would be obtained quite as well otherwise, no infringement is shown. Such recasting of the claim and reversal of the patentee's conception is not justified.

The next inquiry relates to the infringement of letters patent No. 413,390, issued October 22, 1889. The claims alleged to be infringed are as follows:

"(1) An inkstand provided with a cover, combined with a tube fitted in the cover, a float placed in the tube, a dip funnel fitted in the float, and a check placed in the passage of the float, substantially as and for the purposes described."

"(3) The cover, B, formed with the plate, E, and dome, F, having opening, f, the said dome and plate forming a space, G, substantially as and for the purposes set forth."

It was found, upon a depression of the float in the usual introduction of the pen, that the ink would spurt from the funnel. To use the words of the patentee:

"The invention consists, principally, in the employment of a check in the ink passage through the float to prevent the ink from being forced in a jet up into the dip funnel. The invention also consists in the employment of a double-walled cover forming a chamber to catch and return any overflow of ink. The invention finally consists in the construction, arrangement, and combination of parts, all as hereinafter described and claimed."

Respecting the check the specification states:

"The dip funnel screws into the top of the tube, D', and its lower end is formed with the check, i, which prevents the ink from being forced in a jet up into the funnel when the float and funnel are forced downward by pressure on the pen placed in the funnel. The check, i, instead of being

made a part of the funnel, may be placed anywhere in the passage, D'. The ink, after passing the check, 1, enters the funnel through the openings, 1', above the check."

The defendant's combination has an entirely dissimilar device for checking the flow of ink. Through the float as used by both parties runs a cylindrical tube through which the ink rises. The defendant contracted such opening at the base of the float, enlarging its diameter as it proceeded upwards, so as to restrict the entrance of the ink at the lower extremity, and facilitate its passage as it continued to arise. This is the only check used by the defendant. The particular provision for checking described by the complainant is entirely wanting. But it is urged that the claim is sufficiently broad to cover any checking device, whatever the mechanical arrangement. No such enlarged conception seems to have been held by the patentee, and none is described in the letters. It is thought that the claim cannot be broadened so as to prevent any person from ever using any form of check that would impede the free flow of the ink. What the complainant really did was to convert the lower end of the funnel into a plug, arresting for the moment the flow of the ink, and then allowing it to again enter apertures in the funnel, and so find its way upward, or, as complainant's expert describes it:

"The device described in the second patent, which should act as a check for preventing squirting of the fluid up into the tube, consisted essentially in dividing the tube into two parts, and interposing between the parts a device which would interfere with the upward flow of the fluid in the volume which it was received at the bottom of the ink tube. In other words, the funnel at the top of the inkstand is provided with a prolongation with lateral openings, and the funnel suitably secured to the top of the ink tube. The ink in rising through the tube strikes the closed end of the prolongation of the funnel, passes through the lateral opening, and thence upward into the funnel. This device effectually prevents squirting."

It will be observed that the defendant's interior tube is straight, and that the checking is effected by a gradual enlargement of its diameter. There is no division of the tube into parts, nor interposition between the parts of a device graduating the upward flow of the ink received at the bottom of the tube. There are no lateral openings in the tube, nor does the ink in rising strike the closed ends of a prolonged funnel. Claim 1 of this patent is not infringed.

Claim 3 relates to an overflow chamber, and is elaborately described and diagrammatically represented in detail in the specification. In important particulars the description given in the letters first considered is applicable, save as to the check and the overflow chamber itself. The intention seems to be to form a chamber above the top of the float that should receive any overflow of ink, the upper walls of such chamber being formed by the cover of the inkstand and the smaller annular cover placed thereon. It is difficult to find any corresponding device in the defendant's stand. Defendant's stand No. 1 shows a tube of increasing diameter from the bottom upwards, and near the outer opening such diameter is abruptly increased, and the shoulder thereby formed at the point of enlargement would, to a slight degree, interrupt ink that might come into the upper portion of the tube from flowing back into the tube. But the absence of the cover, which was

discussed in the first patent, permits the ink to flow out of this chamber upwards, the dome, F, is entirely wanting, as is the opening, f, and if the space, g (the intended ink chamber), may be found, it is of very trivial dimensions. It is difficult without employment of much imagination to find in the slight enlargement of the superior portion of the tube the elaborate overflow chamber described in the complainant's letters, and it is considered that infringement is absent.

The next inquiry relates to letters patent No. 491,640, issued February 14, 1893. Claims 1 and 2 are alleged to be infringed, and are as follows:

"(1) An inkstand having a buoyant vertically movable ink supply tube, provided with air inlets at its lower end, and a flange or rim at the top of the pen cup at its upper end, and having the inlet for the ink at its lower end contracted, and means for holding said tube in equilibrium, for regulating the point of equilibrium of said tube, and for filling the inkstand and an ink overflow chamber surrounding said tube, eccentrically thereto, substantially as shown and described, for the purpose specified.

"(2) An inkstand having a buoyant vertically movable ink supply tube, provided with air inlets at its lower end, and a flange or rim at the top of the pen cup at its upper end, and having the inlet for the ink at its lower end contracted, and means for holding said tube in equilibrium, for regulating the point of equilibrium of said tube, and for filling the inkstand, and an ink overflow chamber surrounding said tube eccentrically thereto, and means for connecting the cover with the well, substantially as shown and described, for the purpose specified."

The essential element is means for holding the tube (tube here means float) in equilibrium, for regulating the point of equilibrium of the tube, and for filling the inkstand. This is to be done by means of "an ink overflow chamber surrounding said tube, eccentrically thereto, substantially as shown and described."

In defendant's inkstand there is no overflow chamber, eccentric to the tube, into which the air is admitted through a "plug controlled aperture," as described in the letters. On the other hand, the defendant's tube or float is placed in the inkwell so that the bottom thereof is recessed into the bottom of the inkwell, and rests upon a rubber disk, and air is admitted to the float through an aperture in the bottom, by raising the float as desired. There is no plug-controlled aperture in an eccentric chamber. It is not understood how a claim that demands an eccentric overflow chamber can be broadened to cover a device which includes a concentric overflow chamber, even if such exists.

The second claim differs from the first only in providing "means for connecting the cover with the well." The specification states:

"Within the mouth of the well is held an elastic rubber ring, 13, to insure an airtight joint between the well and the cover of the inkstand, and also to exclude dust and impurities. The cover is preferably constructed of vulcanized rubber, although other suitable material may be employed, and consists of an annular flange, 14, having a central circular aperture, 15, for the reception of the buoyant ink tube."

Nothing of the kind is discoverable in the defendant's stand. It is concluded that there was no infringement of these letters.

The next question relates to letters patent No. 605,177, issued June 7, 1898. The claims alleged to be infringed are 1, 2, 3, 4, 5, 6, 7, 8,

and 9. All these claims express a combination which is an alleged reduction of the patentee's devices already considered to two elements, an open inkwell and a float. The well itself, save as hereafter stated, is represented as of uniform diameter, and intended to receive a "float, being of a form and adapted to substantially wholly occupy the interior of said reservoir, whereby air is excluded from said fluid other than through the center of the float" (claim 1); a "float substantially occupying the interior of the reservoir, and fitting wholly within the same" (claim 2); a float "having exteriorly longitudinal and lateral dimensions and form approximately corresponding to those of the interior of the reservoir" (claims 3, 4, 5); a "float laterally fitting the walls of the reservoir, and longitudinally formed so that when resting upon the bottom of the reservoir it will project above the top of the same" (claim 7); a float "formed to telescope within said first part or reservoir, and closely fit the wall thereof," and of the same length (claim 8).

However, claims 6 and 9 read:

"The longitudinal and lateral dimensions of the float being substantially equal to the corresponding dimensions of the interior of the reservoir, and said reservoir being provided at the top thereof with an annular overflow chamber, the inner wall of which is formed by said float" (claim 6); "said reservoir being of a uniform width throughout the major portion of its interior, and being of an increased width at the top thereof, to form a vertical annular groove or recess itself of uniform width, said upper recessed portion of the reservoir being wholly open at the top to permit the free insertion and removal of the float" (claim 9).

This recess is shown in the diagram (Fig. 1), and corresponds with that employed by the defendant, as already described. The specification states:

"I do not claim, broadly, in this application the construction of the tubular float, which forms an element of my previous patents hereinbefore referred to, and particularly of patent No. 491,640, granted February 14, 1893, nor do I claim, broadly, an overflow chamber, the subject-matter of this application being the combination of such a float directly with the interiorly cylindrical reservoir, 5, whereby I dispense with intervening elements of construction, and form a perfectly operating inkstand, which consists of two parts, it being noted that I dispense with an outer supply reservoir and an interior feed reservoir, and combine said parts in one for the particular purpose of such a form of device which I have herein shown, and that I fit the tubular float in direct engagement with the inner walls of the reservoir, instead of providing the separate interior guide which the feed reservoir of the aforesaid patent constitutes, whereby air was admitted to the ink from outside the float and a circumferential air chamber formed, thereby necessitating the provision of means for equalizing or regulating the pressure of the air upon the ink at all times, and it will further be observed that the overflow chamber, 16, in this device is formed in the inner walls of the reservoir. * * * It is further to be noted that by this invention I dispense with all the auxiliary mechanism, and provide a two-part inkstand, in which there are no covers, in which the reservoir is entirely open at the top, except for being closed by the float, as herein stated, and that these two parts are mutually detachable directly without manipulation."

In other words, the devices provided for in the former patents are all dispensed with, save an inkwell and float, and concerning the float no peculiarity of construction is claimed.

It is urged that the invention consists in the reduction and elimina-

tion of a number of parts regarded as serviceable in the old device. But the defendant's inkstand consists of three parts,—a float, and an ordinary inkwell, in which is placed a relatively small tube with an apertured cover, which closes the mouth of the well. This tube has a small circular perforation in its base, and when in position the ink may flow from the main well through this aperture into the tube. Hence, while the general supply of ink is in the outer well, it rises through the aperture in the float to a degree, and also rises freely and much higher about the tube, whose diameter is much less than the diameter of the well itself. Into this tube a float is placed, corresponding with the float illustrated in the complainant's patent. Therefore, while there are but two parts in the complainant's stand, there are three in the defendant's. The complainant may store only such ink as may be contained in the tube, to which the float corresponds nicely, to the extent above noted, while in the defendant's stand the ink is largely contained in the outer well, and is allowed to rise into the interior tube to an inconsiderable degree, through the inferior end thereof.

If the complainant's patent may be sustained at all, it is on account of its simplicity and the elimination of parts. It is true that if the aperture in the defendant's tube were closed, and ink were poured into it, it would be the device described in the letters. But such is not the case, and there is obvious utility in the additional element employed by the defendant. If a combination show invention, by the elimination of all parts save two, it is not perceived how the addition of a third useful element is an infringement; and if it be answered that the device would be equally valuable if the new part were also eliminated, then the burden would rest upon the complainant to make proof that the additional element is only colorable. While it is perfectly apparent that the tube might be closed, and that upon such suggestion infringement could be found, it is equally apparent that it could not be closed without impairing the value of the stand.

In view of these considerations, it is not deemed necessary to consider the prior art with reference to the several letters issued to the complainant.

The bill should be dismissed, with costs.

In re BERGEN.

(Circuit Court, D. Kansas, First Division. May 19, 1900.)

1. INTERSTATE COMMERCE—STATE LAW REGULATING SALE OF LIQUORS—CONSTITUTIONALITY.

Sess. Laws Kan. 1885, c. 149, § 12, which makes it a criminal offense to "take or receive any order for intoxicating liquors from any person in this state, other than a person authorized to sell the same as in this act provided," as applied to a commercial traveler or agent for a liquor house having its place of business in another state, who solicits and takes orders in Kansas from persons who desire liquors for their own use, and not for sale, which orders he forwards to his principal for acceptance or rejection, is an attempted interference with interstate com-

merce, and void, as in violation of the commerce clause of the federal constitution.[1]

2. SAME—EFFECT OF WILSON ACT.

Act Aug. 8, 1890 (26 Stat. 313), commonly known as the "Wilson Act," goes no further than to permit the police laws of a state to be applied to liquors which have been shipped into the state as an article of interstate commerce after such liquors have reached the end of the shipment and have been delivered to the consignee.

On Petition by William Bergen for Writ of Habeas Corpus.

J. C. Rosenberger, for petitioner.

A. A. Godard, Atty. Gen., J. S. West, Asst. Atty. Gen., and E. L. Branson, Co. Atty., for respondent.

HOOK, District Judge (orally). It appears from the petition of William Bergen for the writ of habeas corpus that he is a citizen and resident of the state of Missouri; that he is in the employ of a firm dealing in intoxicating liquors at wholesale and retail, and having its sole office and place of business in Kansas City, Mo., and that the members of the firm are citizens of that state; that the firm keeps no liquors in the state of Kansas for sale or otherwise; that the petitioner, having been employed by said firm as a traveling salesman, came into the state of Kansas, and was here engaged in soliciting orders for the sale of intoxicating liquors, which orders were to be transmitted to his employers, to be accepted or rejected by them, as the case might be; that in the performance of his duties he accepted no money or other thing of value, but was acting solely as a commercial traveler, soliciting orders for transmission to his employers; that he was arrested in Franklin county, Kan., for violating a provision of a state law to which I will hereafter refer, was tried before a justice of the peace, and was convicted, and sentenced to the county jail, where he still remains in the custody of the sheriff. He alleges that his detention is unlawful, in that the provision of the law under which he was prosecuted and convicted is, as applied to his case, violative of the commercial clause of the constitution of the United States. It is also alleged in the petition that the petitioner did not solicit orders from persons who were engaged in the unlawful selling of intoxicating liquors within the state, but only from those who desired liquors for their own consumption. A stipulation signed by the county attorney and by the attorney for the petitioner has been filed, in which it is agreed that the allegations of fact in the petition for the writ of habeas corpus shall be taken as true.

The section of the statute under which the petitioner was convicted, and which is claimed to be unconstitutional as applied to nonresident persons, firms, and corporations and their traveling salesmen, who, within this state, merely solicit orders for intoxicating liquors, is section 12 of chapter 149 of the Session Laws of Kansas of 1885. It is as follows:

[1] See Commerce, §§ 30 [a], 91 [d], 92 [f, s].

State laws interfering with interstate or foreign commerce, see note to McCanna & Fraser Co. v. Citizens' Trust & Security Co. of Philadelphia, 24 C. C. A. 13.

"Any person who shall take or receive any order for intoxicating liquors from any person in this state other than a person authorized to sell the same as in this act provided, or any person who shall, directly or indirectly, contract for the sale of any intoxicating liquors with any person in this state other than a person authorized to sell the same, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided in this act for selling intoxicating liquors."

A printed brief has been presented by counsel for the state in opposition to the discharge of the petitioner, in the opening sentence of which it is said that "the sole question desired to be raised and decided is as to the constitutionality of" this section of the law. A similar statement appears in the brief for the petitioner. Being thus invited and requested by both parties, it is deemed proper that the court proceed to a consideration of the question of law arising from the stipulated facts set forth in the petition. There are several propositions of law well established by the decisions of the supreme court of the United States which are decisive of the controversy in this case. One of these propositions is that any restriction or limitation imposed by state laws, whether by way of license taxes or otherwise, upon traveling salesmen coming from one state into another for the purpose of soliciting orders for the sale of any commodity which is a proper subject of interstate commerce, is a burden upon interstate commerce, and is void, in the absence of permissive legislation by congress. Another proposition is that intoxicating liquors are lawful subjects of interstate commerce. The police power of the state exercised in respect of proper subjects of interstate commerce must yield to the federal constitution. That constitution, and the laws passed in pursuance thereof, are the supreme law of the land. The right to send intoxicating liquors from one state into another pertains to and the act of sending the same is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress; and a state law which, in the absence of congressional sanction, denies such right, or substantially interferes with or hampers the same, is in contravention of the constitution. It is contended by counsel representing the state that the act of congress approved August 8, 1890, and commonly known as the "Wilson Bill" (26 Stat. 313), has established a different rule with reference to interstate trade in intoxicating liquors, and that the provisions of that act control the case at bar. In the case of Leisy v. Hardin, 135 U. S. 109, 10 Sup. Ct. 681, 34 L. Ed. 128, which probably led to the passage of this act, the supreme court held that, notwithstanding the prohibitory laws of a state forbidding and punishing the sale of intoxicating liquors therein, it was lawful not only to transport such liquors from another state, but that the importer, after their arrival in the prohibiting state, had the right to resell them in the original packages in which they had been imported; that the interstate commercial character of the shipment protected it thus far. That, undoubtedly, would be the law to-day, were it not for the act of August 8, 1890. If that act were repealed, intoxicating liquors might again be shipped into the state of Kansas, and, while contained in the original packages, be lawfully resold. The effect of the act of congress was merely to strip the protection of the original package from

the liquors upon their arrival at their destination within the state. It simply removed an impediment to the operation of the police laws of the state respecting the imported property which theretofore existed by reason of the silence of congress upon that subject. The imported liquors, upon reaching their destination, were, by the force of that act, then deemed to have become mixed with and a part of the general mass of the property of the state, and therefore subject to the same legislative regulations or prohibitions as any other like property therein. It is apparent that its effect is not so broad or comprehensive as counsel for the state claims it to be. The power of congress to regulate commerce among the several states in respect of proper subjects thereof is necessarily exclusive. The failure of congress to exercise such power in any case is equivalent to an expression of its will that the particular subject shall be free from restrictions imposed by the states. If congress but partially removes an obstacle to the attachment of state laws to a subject of interstate commerce, the operation of such laws is limited and confined to the field thus afforded. The right to resell an imported article whilst remaining in its original box, barrel, or other package is an incidental, but not a fundamental, feature of interstate commerce. The consent of congress that such incidental feature be subject to the laws of the state cannot, by mere construction, be enlarged so as to affect one that is substantial and vital, and is necessary to the very life of commercial intercourse between the several states. Commerce between the several states means more than the mere transportation of commodities. It comprises as well commercial intercourse in all of its phases. At the very foundation of interstate trade lies the right of the merchant or manufacturer to seek business in other states than that of his domicile by means of solicitation either in person or through traveling representatives. It is obvious that the act of congress referred to does not affect traveling salesmen engaged in soliciting orders as the petitioner was, but that, on the contrary, it relates solely to the status of intoxicating liquors or liquids after their arrival in the state. It is pertinent to observe in this connection that the supreme court, in construing this act of congress, has held that the liquors did not become subject to the laws of the state into which they were introduced until arrival at the point of destination and delivery to the consignee. Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. So, if one of the orders solicited and obtained by the petitioner had been forwarded by him to his firm in Missouri, and after approval of the order the liquors desired had been shipped to the customer in Franklin county, the laws of Kansas would not have attached and become operative so far as the shipment was concerned prior to its arrival at its destination and its delivery by the carrier to the person giving the order. And the supreme court has also held that, even after such liquors reached the hands of the consignee, and became a part of the general mass of property of the state, they were exempt from seizure and destruction under state laws if the consignee did not intend to use them unlawfully. Vance v. W. A. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1111. The case of Leisy v. Hardin, the act of congress of August 8, 1890, and a consideration of the conditions which its pass-

age was designed to remedy, clearly indicate the line of division between the exemption of interstate commerce in intoxicating liquors from state restriction on the one hand and the proper field of the operation of the police laws of the state upon such commodities on the other. The conclusion is plain that the commercial clause of the constitution of the United States inhibits the application of the state law which has been quoted to a nonresident traveling salesman representing citizens and residents of other states, who comes into the state of Kansas, and merely solicits orders for the sale of intoxicating liquors of those who desire them for their personal consumption, and transmits such orders to his employers beyond the boundaries of the state, to be there passed upon by them. I am familiar with the case of Westheimer v. Weisman, 60 Kan. 753, 57 Pac. 969. It is true that in that case there was presented to the supreme court of Kansas the question as to the validity of the section of the state law which has been quoted as applied to facts very similar to those of the case in hand. Although a part of the syllabus of the reported decision might possibly bear the interpretation that a different conclusion was announced than that arrived at by this court, yet, when taken in connection with the body of the entire opinion, I think it is clear that the judgment in that case went upon other grounds. However this may be, the case at bar is one essentially involving the interpretation and application of the constitution of the United States, and, incidentally thereto, of an act of congress. This court may not escape its duty to exercise an independent judgment upon questions of such character which necessarily arise for determination.

For the reasons which I have briefly stated, I am of the opinion that the imprisonment of the petitioner is in violation of the constitution of the United States, and that he is entitled to an order discharging him from custody.

UNITED STATES v. GREENE et al.

(District Court, E. D. Georgia, S. D. February 24, 1902.)

1. INDICTMENT—CONSTRUCTION.
   In construing an indictment based on Rev. St. § 5440, for conspiring to defraud the United States, on demurrer, under the liberal rule required by section 1025, which provides that an indictment shall not be deemed insufficient by reason of any defect of form which shall not tend to the prejudice of the defendant, a statement, in the first count, of the general scheme of the conspiracy, its purpose, and the intended manner of its accomplishment, and of the powers of one of the alleged conspirators as an officer of the United States, must be read into every count, whether it describes a conspiracy or an overt act.

2. CONSPIRACY TO DEFRAUD UNITED STATES—SUFFICIENCY OF INDICTMENT.
   A conspiracy to defraud the United States is punishable under the statute, notwithstanding the fact that the scheme to defraud was originally devised and entered into at a time so remote that a prosecution for acts then done would be barred by limitation, when it was continuous in its operation, and overt acts have been committed thereunder within the period of limitation; and an indictment, which, after reciting the original scheme, charges a conspiracy at a later date to apply it, in pursuance of which overt acts were committed, is not objectionable on the ground of duplicity.

3. SAME—ELEMENTS OF OFFENSE.
It is not necessary, in charging a conspiracy to defraud the United States, under Rev. St. § 5440, to aver that it succeeded, but the crime is complete when the conspiracy is shown, and that one or more of the parties have done some act to effect the object of the conspiracy.[1]

4. SAME—DESCRIPTION OF OFFENSE—OVERT ACTS.
A count in an indictment for conspiracy to defraud the United States, which charges as an overt act done in pursuance of the conspiracy the knowing and willful presentation and payment of false and fraudulent claims against the United States, is not insufficient because it does not specify the particulars in which such claims were fraudulent; the only purpose of such count being to show that the unlawful agreement was carried into actual operation.

5. SAME.
A charge in an indictment that defendants conspired with an engineer officer in charge of government work to defraud the United States by obtaining through such officer contracts by which they were to be paid high prices for inferior work; that large amounts of useless and unnecessary work were to be done and paid for; that such officer was to exercise the powers of his office fraudulently and corruptly in favor of the contractors in such contracts as might be so obtained by the conspirators by approving and accepting the work so fraudulently done.—is supported by averments of overt acts in presenting for payment to such officer a false and fraudulent claim against the United States for work done, pursuant to such conspiracy, and in the approval and payment of such claim by the officer, although it is further averred that such claim and payment were made under a contract antedating the alleged conspiracy, the conspiracy alleged being broader than one for the purpose alone of obtaining a contract and extending to the manner of conducting the work generally, and the obtaining of payment therefor.

6. SAME—PRESENTING FRAUDULENT CLAIM—SUFFICIENCY OF INDICTMENT.
An indictment under Rev. St. § 5438, for conspiracy to defraud the government of the United States by obtaining the allowance and payment of a false and fraudulent claim, which charges as the overt act the presentation of such claim, must state the particular facts showing the fraudulent character of the claim, and a general averment in the language of the statute that it was fraudulent is not sufficiently specific.

Indictment for Conspiracy to Defraud the United States. On demurrer.

See 100 Fed. 941, 108 Fed. 816, and 113 Fed. 688.

Marion Erwin, U. S. Atty., and Samuel B. Adams, Sp. Asst. U. S. Atty.

Walter G. Charlton, Fleming Du Bignon, Thomas B. Felder, and Daniel W. Rountree, for defendants.

SPEER, District Judge. The indictment in this case is demurred to upon many grounds, and a plenitude of decided cases have been cited in the exhaustive arguments of counsel for and against the demurrer. The principles of criminal pleading to which these authorities relate are familiar, and it seems serviceable to a satisfactory determination of the questions raised by the demurrer to analyze the indictment in view of the law said to have been violated, and determine whether it is sufficient, in the language of the constitution, to "inform the accused of the nature and cause of the accusa-

[1] See Conspiracy, vol. 10, Cent. Dig. § 89; 1898 Dig. § 4 [g]; 1901B Dig. § 13 [b].

tion." If the indictemnt is sufficient for this purpose, the accused are not prejudiced.

Section 1025, Rev. St., provides:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding therein be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The indictment in this case first sets out the scheme of the conspiracy, which it is alleged that the accused afterwards formed. This scheme, as described, consisted generally in the collusive, fraudulent, irregular, or illegal subordination of the power of the engineer officer in charge of the Savannah district to the purpose of the conspirators. That purpose was to secure all of the bidding on the government works here, to exclude all competitors, to so frame the specifications as to leave it at the option of the engineer officer whether he would accept an expensive or a cheap mattress for jetty works or training walls, to compel other bidders not favored to furnish the expensive mattress, to so construe or to so inspect the work of his coconspirators as to enable them to furnish the cheap and inexpensive mattress and to charge the government all the while for the costly and more valuable mattress, to approve their accounts presented as a result of this fraudulent work so that they might secure pay from the treasury, and, when in funds as a disbursing officer, to pay these accounts himself. In the statement of this scheme we find fully stated the powers of the engineer officer, and this statement of his powers will serve to throw light upon every ground of the indictment. To condense the language used by the pleader:

"As such officer in charge of said Savannah district, he was vested with sundry powers, duties, and discretion during said period, and, amongst other things, with power in devising and drafting from time to time specifications for contracts for the improvements proposed to be made in said district; in drafting and suggesting forms of advertisements for giving notice to the public that competitive bids would be received by him; in fixing the time such advertisements would be published prior to the opening of bids; in suggesting and causing to be fixed and fixing the time designated in specifications for contracts within which the successful bidder would be required to commence work; in giving out information in regard to such contracts to be let; in receiving proposals for and recommending the awarding of such contracts, and in approving or rejecting the bonds required to be given by such contractors; in superintending the work to be done by such contractors in said district; in approving and accepting or rejecting the work done by such contractors, according as the same was in accordance with the requirements of such contracts or not; in suggesting and approving modifications of such contracts; in approving or rejecting the accounts rendered to him by such contractors for work done or claimed by such contractors to be done by them, according as said accounts should be fair and honest or false and fraudulent; and, when in funds, as a disbursing officer, with power, duty, and discretion in paying such contractors or refusing to pay such contractors the amounts claimed by them to be due for work done according as such claims were honest and fair or false and fraudulent."

It is perhaps difficult to overstate the importance of the averments just quoted in their effect to clear away the difficulties which are presented by the mooted questions now before the court. This state-

ment of the powers of the engineer officer under the liberal rule applicable to criminal pleading made obligatory by the statute of the United States above quoted must be read into every count of this indictment, whether these describe a conspiracy or whether they describe an overt act. From this statement it will be seen that it was in the power of the engineer officer, provided his mind met in illegal conspiracy with the others charged, to do what it is charged that they all did; in short, to control all of the government contracts through a series of years, for the expenditure of appropriations of the public money for the rivers and harbors of this district, to have that work done in a cheap and inexpensive manner, to charge the government a great price for such services, and to divide the excess of illegal gain above the necessary expenditure between the conspirators themselves. It is not deemed essential for the clear expression of the views of the court upon the demurrer to recite all the details of the method by which these results were to be accomplished as described in what may be termed the scheme of the conspiracy. In the narration of the pleader so far as the statement of the alleged scheme, plot, or device, the averments exhibit a degree of circumstantiality perhaps more than necessary to inform the accused of the nature and character of the accusation against them. Indeed, some of the statements of this plot or device may be regarded as surplusage. After his ample statement of the methods intended to be employed by the co-conspirators, he states that they would use some one or more or all of said means and devices aforesaid, "and such other and additional devices as might become necessary for the accomplishment of the general fraudulent design of the scheme hereinbefore set forth." This language, of course, would obviously be not sufficient to apprise the accused of the nature of such additional device as might become necessary. To that they are entitled, and it follows that in submitting proof under the indictment the government will be restricted to material and essential averments of which the accused has received notice from the language of the indictment.

Thus understanding the plot or device ascribed to the persons accused, we next find in the indictment the first charge of conspiracy. There are sundry definitions of conspiracy which are familiar. For the purposes of this case, without stating the usual antithesis, it is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose. Let us consider next what are the particular conspiracies denounced by the laws of the United States, with which these prisoners are charged. They are defined by sections 5440 and 5438, Rev. St. Section 5440 provides:

"If two or more persons conspire either to commit an offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

Section 5438 provides:

"Every person who makes or causes to be made or presents or causes to be presented, for payment or approval to or by any person or officer in the

civil, military or naval service of the United States, any claim upon or against the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, * * * or who enters into any agreement, combination or conspiracy to defraud the government of the United States or any department or officer thereof, by obtaining payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years or fined not less than one thousand dollars nor more than five thousand dollars."

Now, we know from the brief analysis of the indictment the plot and device for the alleged conspiracy. We know the law which denounces it. It will be observed that the statute makes penal a conspiracy to commit any offense against the United States or to defraud the United States in any manner or for any purpose. What is equally important, it makes it penal for the parties accused to do any act to effect the object of the conspiracy. It further makes penal the act of knowingly presenting for payment or approval any false, fictitious, or fraudulent claim, and particularly the act of entering into any agreement or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.

Now, we next inquire, what is the particular conspiracy charged upon the accused as a violation of these comprehensive statutes enacted to protect the government and the funds of the people of the United States in its treasury. This is set forth in the last clause of the first count of the indictment. Avoiding the technical verbiage used, it is charged that on the 1st day of January, 1897, all of the alleged conspirators were proceeding with the construction of jetties at Cumberland Sound and training walls at Savannah. This was under two contracts which had been made on the 8th day of October, 1896, obtained by the alleged conspirators for their secret benefit and in the name of the Atlantic Contracting Company, a corporation under the laws of New York, of which Greene and two of the Gaynors had control, "which contracts had been so obtained fraudulently from the United States by means of said fraudulent schemes and devices hereinbefore set forth," and that the parties accused unlawfully, knowingly, and feloniously, and with other persons to the grand jurors unknown, did conspire to defraud the United States of large sums of money by means of applying said fraudulent scheme to the execution and completion of the work secured by the contracts made on the 8th of October, 1896. To obtain the money for this purpose, this count charges that it was conspired a fraudulent account should be rendered to Oberlin M. Carter, as such engineer officer as aforesaid, and generally to carry said fraudulent scheme into execution by the obtaining of contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States. In support of this count of the indictment, which, as we have seen, comprehends the description of the plot and device of the conspiracy and the conspiracy itself, there are four other counts, numbered 2, 3, 4, and 5. These counts contain averments of overt acts alleged to have been done by the accused in pursuance of

the scheme hereinbefore described. The first of these overt acts charge that Carter and Connolly, on the 17th day of March, 1897, prepared articles of agreement, entered into between Carter in his official capacity and the Atlantic Contracting Company of New York. This agreement purported to modify the contract of the 8th day of October, 1896, for work at the entrance of Cumberland Sound. This contract itself had been mentioned in the first count of the indictment, and the agreement to modify it purports to be signed by Carter, as captain of the engineer corps United States army, and by John F. Gaynor, president, for the Atlantic Contracting Company, and by William T. Gaynor, secretary. The name of Michael A. Connolly appears thereon as a witness. It is also charged that Michael A. Connolly forged the name of said William T. Gaynor to said document. The count further charges that Michael A. Connolly and Oberlin M. Carter prepared another document, purporting to be dated the 18th day of March, 1897, and to be a written consent of Anson M. Bangs and Eugene Hughes to the modified agreement relative to the Cumberland Sound work above described. It further charges that Connolly forged the signatures of Anson M. Bangs and Eugene Hughes to this document; and, further, that Connolly also forged the signatures of James C. Bogart and Henry Smith, whose names appear thereon as witnesses of the signatures of Bangs and Hughes; and that Carter knowingly caused these forged documents to be forwarded to the war department. It is to be carefully observed that the joint action on the part of Connolly and Carter is alleged to have been done "in pursuance of said conspiracy in" the first count of the indictment set forth. A third count of the indictment sets forth another overt act. This was that all of the alleged conspirators caused to be presented for approval to the said Oberlin M. Carter, engineer officer in charge of the Savannah district aforesaid, a certain claim against the United States, all of them well knowing said claim to be fraudulent. The words and figures of the claim are set forth in the indictment, and amount to an account of the Atlantic Contracting Company against the United States engineering department for more than $30,000 for brush mattress and more than $6,000 for fourth-class stone. It is also charged in this count that this was done in pursuance of said conspiracy in the first count of this indictment mentioned. In the fourth count another overt act is described. It is that Carter, as engineer officer in charge of the Savannah district as aforesaid, issued to the said Atlantic Contracting Company a check, signed by him as captain corps of engineers, and drawn on the assistant treasurer of the United States at New York, for the sum of $345,000, for contract work improving Cumberland Sound, Ga., and did deliver the check to John F. Gaynor in payment of the claim of the said Atlantic Contracting Company for the sum of $345,000 for work claimed to have been done by that company in the improving of Cumberland Sound under the contract of October 8, 1896, in the first count of the indictment mentioned. The count further charges that Carter then and there knew this claim to be fraudulent. This, it is also charged, was done in pursuance of the conspiracy set out in the first count. In the fifth count of the indictment there appears the description of another overt

act, which is that Carter, in his official capacity hereinbefore described, issued a check on the assistant treasurer of the United States in New York for the sum of $230,749, for contract work for improving Savannah harbor, Ga. This check was payable to the order of the Atlantic Contracting Company, and the count charges Carter delivered the check to John F. Gaynor in payment of the claim of the Atlantic Contracting Company to this amount. This was for work claimed to have been done by the Atlantic Contracting Company in improving Savannah harbor, Ga., under the contract of October 8, 1896, in the first count of this indictment mentioned. And the count charges that Carter knew this claim to be fraudulent, and also charges that his action was done in pursuance of the conspiracy charged by the first count.

The first count, setting out the general plot and device, and the conspiracy of 1897, with the overt acts herein described in the second, third, fourth, and fifth counts, constitute a separate and distinct feature of the indictment. The first count is attacked by the defendants because it charges a conspiracy in 1891 and another in 1897, and they insist that this makes the count void for duplicity. We are not able to perceive the correctness of this contention. The indictment charges that the fraudulent scheme was first devised, concocted, and put in operation about the year 1891, and has been continuously in process of execution until on or about the 1st day of October in the year 1899. As a result of this scheme, the indictment charges that these parties got control of the contracts for river and harbor improvements in this district; and the conspiracy charged in the first count, as we have seen, is that, having thus fraudulently obtained two contracts, namely, those dated the 8th of October, 1896,—one for the construction of jetties at Cumberland Sound, and the other for the construction of training walls in the harbor of Savannah,—they applied the fraudulent scheme to the execution and completion of the work under those particular contracts to defraud the United States of divers large sums of money. But, say the defendants, it was not possible to have made a conspiracy on the 1st day of January, 1897, to the effect that Carter should so fraudulently exercise the power of his office and the discretion vested in him that he could cut off competition in bidding for contracts to be let by the United States, so as to relate to the contracts of October 8, 1896, for on the 1st day of January, 1897, all bids for contracts of October 8, 1896, had been offered. Hence, say they, it was impossible to apply this conspiracy of January 1, 1897, to the contracts of October 8, 1896; nor was it possible on January 1, 1897, that the fraudulent device to the end that work in said district should be let at high and exorbitant cost to the United States, and done at little cost to the contractors, and in a worthless manner, could relate to contracts of 1896; and so they argue with regard to all the other alleged methods of the plot and of the conspiracy. This is, however, by no means a practical or wholesome view of the power of the law over offenders who enter upon that most subtle and dangerous of all crimes,—a continuous conspiracy. It is a crime in which organization, combination, leadership, numbers, the power and effectiveness of astute and trained intelligences can all be directed, as an army by a

commander, against the integrity of government and the welfare of the people. If it be true, as charged in this indictment, that this scheme was formed as early as 1891, and its details were from time to time put in operation, and finally in 1897 that it was made to apply to particular works of the government then in progress, with a view to obtaining fraudulently a share of the sums appropriated for the public welfare, not only would there be no duplicity in the narration of the successive steps, but the final act, even though the statute of limitations had intervened as to other incidents, would remove the bar, and bring the entire scheme and all of its details under the scrutiny of the court, in order to determine from all the facts whether the parties were guilty of the conspiracy which it is charged was renewed or was completed at a date when the penal authority of the law was in full force and effect. It matters not that the specifications of these particular contracts for work at the entrance of Cumberland Sound and on the training walls at Savannah may have been drawn and adopted in 1896, nor that as early as that date, or previously, the secret understanding between Carter and the other alleged conspirators to shut off other bidding, or to advertise for costly work and permit cheap work, or to do any of the other details, had been formed before the statute intervened; yet if, within the period of effective prosecution before the date of the indictment, joint action was taken by the alleged conspirators, or by two of them, in pursuance of the general scheme, eo instanti the tenacious grasp of the law seized upon the parties, and the courts will proceed to lay bare from its inception every incident of the conspiracy. The train may have been long laid, and the public may remain unconscious of the pending catastrophe; but, if the match is applied seasonably to the enforcement of the law, and the explosion follows, society is no longer powerless to redress the consummated crime not less aggravated because long contemplated and prepared for. It is true in this count that there is no allegation that the United States was actually defrauded. Such an averment might have imparted what may be termed moral force to the indictment, but in a legal sense is not essential to the completeness of the crime charged. It is said that there is no sufficient description of the fraudulent purpose of the conspiracy. Can this be true, in view of those pregnant averments to the effect that these parties had conspired to prevent competition, and by this, by unfair inspection, by keeping bidders in ignorance, not only to destroy the opportunities of the government to secure cheaper bids, thus, if the charges are true, perfecting what may be termed a criminal trust in river and harbor improvements, the profits to be paid from the public treasury, and the injuries inflicted on the commerce of the country? These devices are all set out in the first count, which charges that the contracts had been obtained fraudulently by means of the fraudulent scheme set forth. It is not necessary, in charging conspiracy, to aver that it was successful. The crime is complete when the conspiracy is shown; and, after the conspiracy is shown, in the language of the law, "if one or more of the parties do any act to effect the object of the conspiracy, all the parties shall be liable" to the penalty.

It is said, however, that the overt acts charged in the second, third, fourth, and fifth counts are not set out with sufficient fullness to put the accused on notice of the fraudulent character imputed to their claims for labor and material. They contend that the forgery of the names of guarantors and other persons imputed in the indictment to Carter and Connolly is not sufficiently set forth; that the fraudulent character of the claims presented to Carter for approval as engineer officer by all of the conspirators, and approved or paid by him, is too indefinite. This contention might be true if we were trying the accused solely for the presentation of fraudulent claims. It would seem proper on separate indictments for that crime to inform the accused of the nature and character of the falseness or fraud of which they were accused. As far, however, as we have as yet considered this indictment, that is not the character of the crime charged. The crime is conspiracy, by the means set forth, to defraud the government in many ways; and, as we have seen, if any act, whether criminal or unlawful, is done by either of the conspirators to make that conspiracy effectual, the crime is complete. The language of each of these counts charges that forgery was done, or a fraudulent claim was willfully and knowingly presented or paid, in pursuance of the conspiracy. How can it be said that this does not put the accused upon fair notice of the overt act they must meet? The counts charging overt acts and counts charging conspiracy are all to be construed together. It is not true, in my judgment, in an indictment of this character, as contended by the counsel for the accused, that each count must be treated as a complete and separate indictment in itself. On the contrary, if counts, which, considered separately, would not be regarded as complete, are perfected by apt references therein to averments in another or in other counts, so that there is intelligible and definite information conveyed to the accused of the accusation against them, the constitutional requirement as to an indictment is met. In the case of U. S. v. Donau, 11 Blatchf. 168, 25 Fed. Cas. 890 (Judge Benedict), is found a clear and satisfactory construction of the statute (section 5440, Rev. St.) in contemplation of which the foregoing counts are framed. Said the learned judge:

"The offense is the conspiracy. Some act by some one of the conspirators is required to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offense of conspiracy is committed when, to the intention to conspire, is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators that the agreement went into actual operation. If, then, an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes an act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although upon the face of the indictment it does not appear in what manner the act described would tend to effect the object of the conspiracy. It is sufficient if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful com-

bination charged. It is not the case of an attempt to commit crime. The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud or to commit an offense; but the object of requiring proof of some act in furtherance of the unlawful agreement is to show that the unlawful combination became a living, active combination."

It is true that in the case of U. S. v. Crafton, 4 Dill. 145, 25 Fed. Cas. 681, 682, Judge Dillon uses this language, on which the defendants strongly rely:

"Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and, to the required extent, the manner in which or means by which it was to be effected, must be averred."

An examination of that case shows that the contemplated fraud depended entirely upon the passage of a future act of congress to make it effective, and so it was held by the court to be impossible. It is true that the nature of the fraud, and, "to the required extent," the manner in which or means by which it was to be effected, must be averred; but we think that Judge Benedict has afforded an admirable statement of what constitutes the required extent to which an overt act in a conspiracy defined by this clause of the Revised Statutes must be set out.

Reliance in support of the demurrer is also placed on Cruikshank's Case, 92 U. S. 542, 23 L. Ed. 588. In that case the indictment failed to specify any particular right which the conspirators intended to hinder or prevent. This was held too vague and general. It is true, moreover, that, even in the very full statement of the court as to the essentials of an indictment in that case, it does not appear to require more than reasonable particularity of time, place, and circumstances. It is deemed superfluous to multiply precedents upon a topic so familiar. It may, however, be added that the views of Judge Benedict, above quoted, were in substance affirmed by the supreme court of the United States in U. S. v. Britton, 108 U. S. 204, 205, 2 Sup. Ct. 536, 27 L. Ed. 700. There Justice Wood declares:

"The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus pœnitentiæ, so that before the act is done either one or all of the parties can abandon their design, and thus avoid the penalty prescribed by the statute."

A careful examination of the authorities cited by counsel for the accused has afforded nothing inimical to the conclusion that the first five counts of this indictment are sufficient.

In Blitz v. U. S., 153 U. S. 315, 14 Sup. Ct. 924, 38 L. Ed. 725, the prisoner was indicted for voting under the name of another person at an election at which a representative in congress and also state officers were to be elected; but the indictment was held fatally defective, because it failed to show that the accused voted for representative in congress. The accused may have voted for a state officer at that election. The relation of that precedent to the case at bar is, therefore, not discoverable. In the case of Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, Justice Brown,

for the court, uses the following language, which is not regarded as contributory to the strength of the argument for the demurrer in this case. Said the learned justice:

"Every element of the offense being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied is described. * * * While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceeding is to convict the guilty as well as to shield the innocent, and no impracticable standard of particularity should be set up whereby the government may be entrapped into making allegations which it would be impossible to prove."

In the case of Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, we are not surprised to find that the court holds that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court, unless it appear that he knew or had notice that justice was being administered in such court.

In U. S. v. Hess, 124 U. S. 486, 8 Sup. Ct. 571, 31 L. Ed. 516, where the averment was that, the defendant having devised a scheme to defraud divers other persons to the jurors unknown by use of the mails, and did not state what the scheme was, Justice Field remarked:

"The absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner, or the party from whose possession it was taken."

These quotations will serve to make plain the general character of the precedents cited by counsel for the accused. Their soundness and controlling character is incontestable, it is true, but their kinship to the issue before the court is many degrees removed.

This brings us to the sixth count of the indictment. In appropriate language it charges that the alleged conspirators hereinbefore mentioned conspired to defraud the United States of large sums of money by means of a fraudulent scheme devised by them with the engineer officer with relation to river and harbor improvements in the Savannah district. The averments are similar to those set out in the first count, and relate in part to future contracts. They further charge that large amounts of unnecessary and useless work should be fraudulently undertaken and done under the contracts by the contractors who are alleged to be co-conspirators with Carter, the engineer officer. The count further charges that Carter, as such engineer officer in charge, would exercise the powers of his office fraudulently and corruptly in favor of the contractors in such contracts as might be so obtained by the alleged conspirators or other persons or corporation for their secret benefit, and that he would falsely and fraudulently exercise the powers, duties, and discretion of his office in the approval and acceptance of the work so fraudulently done, so that the contractors would receive payment for the construction of such works at exorbitant rates for the poorest and cheapest class of material and work. This is an additional and independent charge of conspiracy. It does not depend upon the original scheme set out in the first count of the indictment. It is,

in my judgment, a valid count under section 5440, Rev. St. It sets forth the power of Carter as an engineer officer. It charges a conspiracy to defraud the United States in the several particulars mentioned in the other conspiracy count by the fraudulent exercise of those powers. It charges also that large amounts of unnecessary and useless work would be undertaken for the same purpose. It is objected to this count of the indictment that it charges no overt act, that it does not set out a scheme to secure the contracts and obtain the money, that it is merely a charge that the accused got together and thought out this scheme to lie in wait for the government, that they would then do all the things that they are charged with having conspired to do in 1891. It is said that there is no allegation that any contracts were ever obtained under the conspiracy charged in this count, or any bidding, or any step of any character taken thereunder. It is, however, true that the seventh count of the indictment, which relates back to and includes the sixth count, charges that the conspirators on the 1st day of July, 1897, did knowingly, willfully, and feloniously cause to be presented to Carter for approval and payment a claim against the government of the United States for the sum of $345,000 for labor, material, and supplies so claimed to have been furnished to the United States during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897, for work of improving Cumberland Sound, Ga., within said Southern district of Georgia, under a prior written contract dated October 8, 1896. This count charges that this was done in pursuance of the conspiracy set forth in the sixth count. The eighth count charges that Carter issued his check for the sum of $345,000 for contract work in Cumberland Sound, and delivered the same to John F. Gaynor. A copy of the check is set out, and this, it is alleged, was done in pursuance of the conspiracy. Now, it is said that this count related wholly to the prior contracts of October 8, 1896, and the contention of counsel for the accused is fortified on this ground by that of his honor Judge Brown. This learned jurist, in passing on the question whether the accused should be removed to Georgia for trial, with regard to this count, used the language following:

"The conspiracy charged in this count relates wholly to future contracts to be let thereafter,—that is, after January 1, 1897,—while the overt acts stated in counts seven and eight relate wholly to the prior contracts of October 8, 1896. On this additional ground counts six, seven, and eight would seem to be necessarily bad."

But the supreme court has recently held in this case that a decision on removal of indicted persons from one state to another for the purpose of trial is not to be regarded as adjudging the sufficiency of the indictment in law; and therefore, even had Judge Brown pronounced this indictment bad on this point, his opinion, however great the respect to which it is entitled in an advisory sense, must be regarded as an instance of the dictum which judges arguendo occasionally pronounce, and not as authority. Since it is true, as stated by the supreme court, that a decision on such a hearing is not to be regarded

as adjudging the sufficiency of the indictment, it does not conclude the rights either of the government or the accused. To make an opinion a decision, said the supreme court of the United States, "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and therefore this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties." Carroll v. Carroll's Lessee, 16 How. 287, 14 L. Ed. 936. It would be otherwise, of course, had the indictment failed to charge an offense against the laws of the United States, or had the court here been without jurisdiction. The expression of Judge Brown, moreover, merely portrays a mental impression, and not a judicial conviction. In their respective criticisms upon the overt acts relating to contracts previous to the date of this count of the indictment it appears that both Judge Brown and the learned counsel for the accused have omitted to observe what seems to be obvious, viz., that the letting of a contract is one thing, and work done under that contract and payments received therefor are other and very different things. The one is the act of a moment. The others may extend over many years. Let us suppose it be true, as stated in this count of the indictment, that a conspiracy was actually formed on the 1st day of January, 1897, to do a great deal of unnecessary work on these improvements. Can it be insisted that this is a conspiracy beyond the reach of the law because the contract for work was long previously made? These contracts, we may judicially presume, were years in completion, and perhaps are not as yet completed, and if it be true that in pursuance of the conspiracy described in the sixth count the presentation of a claim for $345,000 by the accused and the delivery to them of a check to that amount was done in pursuance of such a new conspiracy, the offense of conspiracy would be complete, and the overt act will justify the imposition of the penalty of the law in case of conviction. We have already seen that it is not necessary that it should appear on the face of the indictment in what way the overt act would contribute to effect the object of the conspiracy. That is a matter of evidence to be determined by the jury. The famous case of People v. Mather, 4 Wend. 229, 21 Am. Dec. 122, recounts an attempt to punish an alleged conspiracy for the abduction of William Morgan, an accusation against certain Masons, which caused the formation of the anti-Masonic party in this country, and blasted the political fortunes of several renowned Americans. In that case the supreme court of New York, through the famous William L. Marcy, one of its judges, after stating that in an indictment for conspiracy the offense may be laid in any county in which it can be proved that an overt act was done by one of the conspirators in furtherance of their common design, and citing an English authority to the effect that, where a conspiracy was formed at sea, and an overt act was done in the county of Middlesex, it was held that the venue was properly laid in that county, declared:

"The law considers that wherever they act there they renew, or perhaps, to speak more properly, they continue, their agreement; and this agreement is renewed or continued as to all whenever one of them does an act in furtherance of their common design."

This is sound in principle, and is supported by abundant authority. In the count now before the court the conspiracy alleged was much broader than the act of obtaining any one contract. Taking the indictment in its entirety, it sets out a purpose not only to obtain the contracts, but to dominate and carry on for unlawful gain all of the work contemplated by the government for the improvement of some of the most important harbors and channels on the Atlantic coast. This count presents with sufficient fullness the charge of a distinct conspiracy to this end. Its averments might well have recited the details of the conspiracy with more explicitness, but we conclude (we think, safely) that there is nothing in the sixth, seventh, and eighth counts so defective as matter of pleading as to withdraw them from the liberal protection afforded by section 1025, Rev. St. Indeed, it is impossible to doubt that the accused, so far as they have been indicted in the counts heretofore discussed, are fairly and fully informed as to the nature of the accusation against them.

The ninth and tenth counts present separate charges. They are framed under section 5438, Rev. St. In the ninth the accused, who are the same parties defendant hereinbefore named, are indicted for conspiracy to defraud the government of the United States by obtaining the "allowance" and payment by the United States, through Oberlin M. Carter, engineer officer, of a certain fraudulent claim, which said fraudulent claim was then and there a claim for labor and materials said to have been furnished by the Atlantic Contracting Company under a contract entered into on the 8th day of October, 1896, for the improvement of Cumberland Sound. This amounted to $25,447.95. The overt act charges the presentation of such claim. The tenth contains the same charges with relation to a fraudulent claim for the sum of $230,749.90 for work, labor, and supplies claimed to have been furnished to the United States by the Atlantic Contracting Company for work at the Savannah harbor during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, June, 1897, and the overt act charged is that this claim was presented to Carter in furtherance of and in accordance with said conspiracy. To both of these counts the defendants demur upon the ground that the fraudulent character of the claim is not sufficiently set forth. These counts are framed under a different statute from that we have been discussing. They do not charge that Carter, as engineer officer, had any authority to approve or allow the payment of such claims. This has been held essential to an indictment framed under this statute. U. S. v. Reichert (C. C.) 32 Fed. 142. It is not charged in either count, save inferentially, that the fraudulent claims referred to have any relation to the conspiracy hereinbefore discussed. The counts fail to disclose the means or details by which the conspiracies charged were to be made effective, and no averment is made which will sufficiently apprise the accused of any facts in view of which the claims in question are denounced as fraudulent. Said the supreme court in Cruikshank's Case, 92 U. S. 558, 23 L. Ed. 588:

"The object of the indictment is: First, to furnish the accused with such description of the charge against him as will enable him to make his defense; second, to inform the court of the facts alleged, so that it may decide

whether they are sufficient in law to support a conviction if one should be had."

In the care with which we have attempted to consider these counts we have consulted precedents of such indictments afforded both by English and American text writers of high repute on criminal pleading. Archb. Pl. & Ev. (10th Ed.) 677, 678; Bish. Cr. Proc. par. 184; Loveland, Forms Fed. Proc. p. 460. In all of these precedents far greater particularity is used than in the ninth and tenth counts of this indictment. In view of these meager and defective recitals and of the well-settled right of the accused to be fairly informed these counts are not regarded as sufficient. It is true that the charge of conspiracy is made in the language of the statute, and the claims presented by the accused are denounced as fraudulent, but the important expressions in the statute, such as "fraudulent," are generic; and said the supreme court of the United States in Cruikshank's Case:

"It is an elementary principle of criminal pleading that, where the definition of the offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the specifics; it must descend to particulars." 1 Archb. Cr. Prac. & Pl. p. 291.

Since these counts do not state the particulars of the fraudulent claim, they do not, in my judgment, meet the requirements of the law.

To the ninth and tenth counts, therefore, the demurrer of the accused must be sustained, and to the first eight counts of the indictment it must be overruled.

It may be added that the district attorney offers to supply any insufficiencies of these counts by a bill of particulars setting forth the details of the alleged fraud. Such an offer is addressed to the judicial discretion (Bish. Cr. Proc. p. 644), and we are convinced the safer practice is to set out such facts to show the fraudulent character of the claim in the indictment itself, rather than in a bill of particulars, which is not a part of the record. This offer is therefore declined.

PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK v. LOEB et al.

(Circuit Court, E. D. Louisiana. June 13, 1901.)

No. 12,940.

1. BILL OF INTERPLEADER—DEMURRER.
   A bill of interpleader brought by a life insurance company to determine the adverse rights of the two defendants to the proceeds of a life policy was good on demurrer, though it also averred complainant's right to deduct a certain sum from the face of the policy for a semiannual premium, as the demurrer admitted the right to make such deduction, and therefore disclosed no interest in complainant in the controversy.
2. SAME—INTEREST OF COMPLAINANT—EFFECT.
   Even if complainant's right to make the deduction was contested, it would have the right to maintain the bill.[1]

In Equity.

The Provident Savings Life Assurance Society of New York filed its bill against Ernest M. Loeb and the widow and heirs of Robert McNamara.

[1] See Interpleader, vol. 29, Cent. Dig. §§ 12, 14.

Substantially, the bill avers that the complainant issued and delivered to one Moses Schwartz its policy of life insurance, whereby it promised to pay to Schwartz, his executors, administrators, or assigns, the sum of $10,000, less any indebtedness on account of the policy, within 90 days after acceptance by it of satisfactory proof of the death of McNamara; that McNamara died; that the proofs required by the policy were furnished, and the complainant has become indebted, because of said policy, to such person or persons as may, in accordance with the terms of the same, be entitled to be paid the same; that Loeb has furnished complainant due proofs of the death of McNamara, and claims the proceeds of the policy as the assignee of Schwartz, who was a creditor of McNamara, and in whose favor the policy had issued, as a creditor of McNamara; that due proofs of death have also been served upon complainant by a representative of the widow and heirs of the insured, McNamara, and said widow and heirs claim to be entitled to the proceeds of the policy, and have demanded of complainant payment of the same; that the adverse claims of Loeb and of the widow and heirs of the deceased are dependent upon, and derived from, the same common source; that complainant has and claims no interest in the subject-matter of the contention, to wit, the amount due under the policy; that complainant has incurred no independent liability to any of said parties, and is perfectly indifferent between them, being in the position merely of a stakeholder; that the amount due under the policy is the sum of $10,000, less any indebtedness due on account of the policy, as per the agreement contained therein; that it is also provided in said policy that any unpaid quarterly or semiannual installment of the current year's premium will be deducted in any settlement of the policy; that the policy bears date of July 24, 1889, and that the premium for the year beginning July 24, 1900, became due July 24, 1900, but was payable, according to the terms of the policy semiannually, and that the semiannual premium due upon the policy on January 24, 1901, is, under the terms of the policy, to be deducted in any settlement of the same; that said semiannual installment, after deducting dividends due upon the same pursuant to the terms of the policy, is the sum of $337.50, which, deducted from the $10,000 aforesaid, leaves $9,662.50 as the full amount of principal due under the policy. That this amount, together with interest due thereon by complainant under the terms of the policy, makes an aggregate of $9,723.75, which complainant owes on the policy, and which aggregate amount the complainant has deposited in the registry of the court, to the credit of the cause, simultaneously with the filing of the bill. The complainant prayed that the defendants be ordered to answer, and be decreed to interplead and settle between themselves their rights or claims to the money due under the policy, and deposited as aforesaid. The complainant further prayed that the defendants be restrained by a preliminary order of injunction from commencing or prosecuting any action or proceeding against the complainant concerning the matters above stated, and that in due course the injunction be perpetuated. A restraining order issued to the defendants on the filing of the bill, and subsequently, after hearing the defendants, a preliminary injunction was issued against them as prayed for. Subsequently the widow and heirs of McNamara demurred to the bill as follows: "That the said complainant hath not, in and by its said bill, made or stated such a case as doth or ought to entitle it to any such recovery or relief as is thereby sought and prayed for, from or against these defendants." This demurrer was heard, and the same was overruled.

Farrar, Jonas & Kruttschnitt, for complainant.
R. J. Maloney, for defendants McNamara.
S. Wolff, for defendant Loeb.

PARLANGE, District Judge (after stating the facts as above). To sustain the demurrer, it is contended that the plaintiff should have deposited $10,000, claimed to be the amount called for by the policy, and that plaintiff should claim no right to make any deduction; while, on the other hand, the plaintiff contends that the policy does not call

for $10,000, but for that sum less certain deductions, which, being made, leave the sum of $9,723.75 deposited in the cause. In other words, the plaintiff urges that it has deposited the full sum which the contract calls for. For the demurrer, it is further said that as Mrs. McNamara et al. may hereafter claim, by answer or otherwise, that the plaintiff had no right to make any deductions from the $10,000, a situation may develop in which the plaintiff would be asserting, and Mrs. McNamara et al. would be denying, the right of plaintiff to make any deduction from the $10,000, and that, a bill of interpleader being allowed only to one who is absolutely disinterested as to the fund deposited in court, the bill in this cause should be dismissed. Even if there were merit in these contentions, it is clear that no relief could be given on demurrer which admits all the allegations of the bill. But even if the matter were in a condition to permit the court to consider the contentions urged for the demurrer, it seems clear that the bill would still stand. Groves v. Sentell, 153 U. S. 485, 14 Sup. Ct. 905, 38 L. Ed. 785, is cited for the demurrer, where it is said:

"The general rule is that a party who has an interest in the subject-matter of the suit cannot file a bill of interpleader, *strictly so called.* [Underscoring mine.] In fact, the assertion of perfect disinterestedness is an essential ingredient of such a bill."

But the very case of Groves v. Sentell proceeds to sustain a bill in the nature of a bill of interpleader, in which Sentell was found by the court to have had a substantial interest in the litigation; the only result of this finding by the court being that Sentell was not allowed his solicitor's fees out of the fund.

11 Enc. Pl. & Prac. verbo "Interpleader," after treating of bills of interpleader strictly so called, says, at page 479:

"A bill *in the nature of a bill of interpleader* will lie *by a party in interest* [underscoring mine] to ascertain and establish his own rights, where there are other conflicting rights between third parties."

See cases there cited.

It is therefore clear that, even if all that is claimed by counsel for Mrs. McNamara et al. could be made to appear on this demurrer, it would still have to be overruled. See, also, 2 Story, Eq. §§ 813a, 824; Railroad Co. v. Clute, 4 Paige, 384; Thomson v. Ebbets, Hopk. Ch. 272; McHenry v. Hazard, 45 N. Y. 580; Bedell v. Hoffman, 2 Paige, 199.

In re FARLEY et al.

(District Court, W. D. Virginia. May 1, 1902.)

1. BANKRUPTCY—PLEADING AND PRACTICE—PARTNERSHIPS—INDIVIDUAL DISCHARGE—SEPARATE PETITIONS AND ADJUDICATIONS.

Where the members of a partnership, which files a voluntary petition in bankruptcy, desire discharges from their individual as well as firm liabilities, they should each file an individual petition, separate orders of adjudication and of reference should be made as to each partner and as to the firm, and all further proceedings should be conducted as though there were separate cases as to each partner in addition to the partnership case.

2. SAME—FEES.

Bankr. Act 1898, § 52a, provides that clerks shall receive, as full compensation for their services to "each estate," a certain fee; sections 40a and 48a provide that referees and trustees shall receive a certain fee "in each case"; and section 5, relating to partnership estates, treats of them as separate from those of the individual partners. *Held*, that where members of a partnership, which filed a voluntary petition in bankruptcy, sought and received discharge from their individual as well as firm liabilities, the clerk, referee, and trustee, respectively, were entitled to separate fees, as though there were separate and distinct cases as to each partner in addition to the partnership case, although no individual petitions were filed, and in other respects the case was improperly treated as a single matter.

Berkeley & Harrison, for bankrupts.

McDOWELL, District Judge. In this case a voluntary petition in bankruptcy was filed, form 2 being used, entitled, "In the Matter of W. H. Farley & Co., Bankrupts." After the address, the paper reads: "The petition of W. T. Farley and W. H. Farley." The petitioners are stated to have been partners under the firm name of W. H. Farley & Co. With the petition are schedules of the firm assets and liabilities, and schedules of the assets and liabilities of each member of the firm. The petition, following the printed form, prays that "the said firm" may be adjudged to be bankrupts. On the filing of this petition, the sum of $25, to cover the fees of the clerk, referee, and trustee, was paid to the clerk. The one order of adjudication is that W. T. Farley and W. H. Farley "is hereby declared and adjudged a bankrupt." Only one order of reference was made, and one bond was given by the trustee. The referee issued three certificates, one to each of the partners, and one to the firm, that each was entitled to a discharge. Two petitions for discharge, one by each of the partners, were filed, and two orders of discharge, one as to each of the partners, were made. During the pendency of the proceedings, upon demand therefor, each of the partners paid to the clerk, under protest, $25, to cover fees, thus paying $75 in fees. The partners claim that the officers are entitled to only one fee each, and move for an order requiring the repayment of the $50 paid under protest. In re Meyer, 39 C. C. A. 370, 98 Fed. 979, and In re Barden (D. C.) 101 Fed. 555, hold that the intent of the bankrupt act is to treat a partnership as an entity distinct from the individuals composing it. In the former case it is said:

"We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity, which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt. * * *"

It is true that it is also said in the same paragraph:

"The section is silent respecting a discharge of the partners individually. It does not, by terms or by implication, preclude an adjudication of the individual partners as bankrupt in the partnership proceeding, and, if there is such an adjudication, there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to it under the act."

The conclusion I reach is that when the members of a firm which files a voluntary petition desire to be adjudicated bankrupts individually, i. e., as against their individual creditors, as well as against the firm creditors, they should each file an individual petition; and that in a case such as the present, where there are two partners each desiring an individual discharge, there should be three orders of adjudication and of reference, and that in all the other proceedings the idea of the three separate "cases" should be carried out. Certainly, three separate estates are to be administered, and, in strictness, three discharges are sought. In re Langslow (D. C.) 98 Fed. 869, and In re Gay (D. C.) Id. 870, hold that in cases such as this only one fee is to be allowed. The reasoning in these cases does not seem to me as satisfactory as that in Barden's Case (D. C.) 101 Fed. 555, in which the reverse is held.

As to the right of the clerk to three fees, under the circumstances here, I can entertain no doubt. Bankr. Act, § 52a, provides: "Clerks shall respectively receive as full compensation for their service to each estate a filing fee of $10. * * *" Section 5 clearly treats as separate the respective estates of the firm and of each of the partners. The language of the act in respect to the fees of the referee and trustee is not so plain. Sections 40a, 48a. In each the language is a fee "in each case," to be deposited with the clerk at the time the petition is filed. If I am right in thinking that three petitions should have been filed in the matter in hand, it seems clear that the word "case," as used in the act, is intended to apply to the duties of these officers as to each estate; and, even if separate petitions are not necessary, it still does not follow that the proceedings as to the three separate estates constitute only one "case."

It is contended that In re Barden does not apply here, because several petitions were filed at different times in that case. But the reasoning of the court is not based on this fact; and, as before stated, in the case at bar the individual members of the firm should have filed individual petitions at the time of filing the firm petition. If only a firm petition is filed, and a discharge of the members of the firm quoad the firm liabilities only is wanted, then only one fee should be allowed to each officer. In such a case it is true that the several estates of the firm and of the partners will be involved, but only the firm estate will be administered. If, however, the partners seek discharges both as against the firm creditors and as against their respective individual creditors, it is evident that the several estates must be administered. In such cases several fees are allowable.

In the present case the discharges which have been granted apply to all provable claims against each of the partners. It follows that the officers are entitled to the fees paid under protest.

LOOP v. WINTERS' ESTATE et al.

(Circuit Court, D. Nevada. March 27, 1902.)

No. 723.

1. REMOVAL OF CAUSES—MOTION TO REMAND—PRESUMPTIONS.
The jurisdictional facts set out in a petition for removal must be presumed to be true on a motion to remand unless evidence is introduced to contradict them, or the record shows something to the contrary.

2. SAME—REMOVAL BOND—NECESSITY OF SEAL.
A seal is not essential to the validity of a removal bond, where the use of a seal is declared unnecessary by the statutes of the state.

3. SAME—ORDER OF REMOVAL.
It is not essential to the removal of a cause that an order therefor should be made by the state court; the filing of a sufficient petition and bond effects the removal without any action of the court.

4. SAME—PARTIES.
The joinder, as defendant, of the estate of a deceased person and the executor of his will, is ineffectual, and will not prevent a removal by other defendants, where the petition for removal alleges that the person named as executor has not qualified as such, and that no letters testamentary or of administration have been issued on the estate.

5. SAME—FORMAL DEFENDANTS.
Defendants sued by fictitious names will be regarded as merely formal parties, whose presence does not affect proceedings for the removal of the cause.

6. SAME.
The right of removal by nonresident defendants is not affected because one named as a defendant in the capacity of executor, and who is a citizen of the same state as plaintiff, joins in the petition for removal, where the petition shows that he is not in fact executor, and is not, therefore, before the court as a party.

On Motion to Remand to State Court.

This suit was commenced in the state court of Lincoln county, Nev., September 28, 1901, against "the estate of Aaron Winters, deceased, J. C. McClanahan, executor of the last will and testament of said Aaron Winters, deceased, Alexander Falconer, the devisee and beneficiary in and of said last will, Phœbe Hearst, F. W. Clark, John Doe, Richard Roe, John Denn, and Richard Fenn" (the last four names are fictitious, intended to represent certain defendants whose real names are unknown, and, when ascertained, to have their names substituted), to recover a one-half interest in the Green Monster mine, situated in Lincoln county, Nev., it being alleged in the complaint that this mine was located by plaintiff and Aaron Winters during his lifetime, and the assessment work done thereon by them. Among other things, it is alleged "that during the year A. D. 1898 the said plaintiff was compelled * * * to absent himself from said mining claim and its locality, and left the said mining claim in charge of said Winters, his co-owner and co-tenant, as aforesaid, who, in consideration of the work and labor theretofore done and performed on said mine and mining claim by said plaintiff for the benefit of said Winters, promised and agreed to do and perform, or cause to be done and performed, all work and labor on said mining claim during said year A. D. 1898, necessary to preserve his own and said plaintiff's interest therein, and prevent a forfeiture thereof; that, notwithstanding said promises and agreements, and without the consent of said plaintiff, and, as plaintiff is informed and believes, with intent to defraud said plaintiff, said Winters did not perform or have performed said necessary work and labor during the year A. D. 1898, but early in the year A. D. 1899, with like intent to defraud the said plaintiff, relocated said mining claim, and the whole thereof, in his own name, and with the same

name by which it was located and recorded by said plaintiff and said Winters, to wit, the Green Monster; that thereafter, as said plaintiff is informed and believes, and with like intent to defraud this said plaintiff, the said Winters bonded the said mining claim, as he had relocated the same, to the said Phœbe Hearst, or to parties representing her, for the sum of two thousand and five hundred dollars; that the parties to whom said mine was bonded well knew, as this said plaintiff is informed and believes, all of the facts in relation to said plaintiff's interest in said mining claim, and of said Winters' attempt and design to defraud said plaintiff of his interest therein; * * * that said plaintiff is informed and believes, and so charges the fact to be, that said defendants have conspired and are conspiring together to defraud this said plaintiff of his said interest in said Green Monster mine and mining claim, and to hold the title and possession thereof from him"; and that plaintiff has been damaged in the further sum of $1,000. The complaint is silent as to the citizenship and residence of the parties plaintiff and defendants. In due time after service the defendants F. W. Clark and Phœbe Hearst, and J. C. McClanahan, named as executor of the last will and testament of Aaron Winters, deceased, petitioned the state court to remove said suit into this court. This petition, after denying the allegations of the complaint, states: "That the said J. C. McClanahan never qualified as executor of the last will and testament of said Aaron Winters, deceased, and the said J. C. McClanahan has renounced any right he may have or might have had to act as such executor, as appears from the affidavit of said McClanahan, hereto annexed, marked 'Exhibit A,' and made a part of this petition for removal; that at the time of the commencement of the above-entitled action letters testamentary had not, nor had letters of administration with the will annexed, been issued upon said last will and testament to any one, nor had letters of administration been issued to any one upon the estate of said Aaron Winters, deceased; that at said time there was pending in the above-entitled court the petition of said J. C. McClanahan for the issuance to him, as such executor, of letters testamentary upon said last will and testament, but that said petition has been dismissed by the said J. C. McClanahan; that the said J. C. McClanahan and the person sued herein as 'Alexander Falconer, the devisee and beneficiary in and of said will,' are not necessary parties, nor is either of them a necessary party, to the above-entitled action, or to any controversy involved therein, nor is any cause of action stated against them, or either of them, in said complaint; that the said Alexander Falconer was, at the time of the commencement of the above-entitled action or suit, and still is, a citizen and resident of the state of California, residing in the county of San Bernardino, in said state, and a nonresident of said state of Nevada; that the matter and amount in dispute in the above-entitled action exceeds the sum or value of two thousand (2,000) dollars, exclusive of interest and costs; that the controversy or controveries in the above-entitled action or suit, and every issue of fact and law therein, is or are wholly between citizens of different states, to wit, between your petitioners, F. W. Clark, and Phœbe Hearst, defendants in said action or suit, who aver that they were, and each of them was, at the commencement of the above-entitled action or suit, and still are, citizens and residents of the state of California, residing at the city and county of San Francisco, in said state, and nonresidents of the state of Nevada, and said J. D. Loop, the plaintiff in the above-entitled action or suit, who was at the time of the commencement of the above-entitled action, and still is, a citizen and resident of the state of Nevada, residing in said county of Lincoln." Said petition alleges further facts upon which counsel claim that there is a separable controversy wholly between said Loop as plaintiff and Phœbe Hearst and F. W. Clark, which can be wholly determined between them without reference to the rights of the other defendants. Petitioners for removal filed a bond, which was approved by the judge of the state court, and the case was thereupon removed to this court. The plaintiff moves to remand the case "upon the ground that said suit and action was improperly removed to this court," the said motion being made "upon the complaint in said suit and action and the petition and bond of removal."

Geo. S. Sawyer, for plaintiff.

Henry Mayenbaum, T. J. Osborn, Page, McCutchen, Harding & Knight, and Torreyson & Summerfield, for defendants Phœbe Hearst and F. W. Clark.

HAWLEY, District Judge (orally). The contention of counsel for plaintiff is: (1) That the petition for removal was not presented to the state court, and that there is no order of removal. (2) There is no bond on removal, the instrument filed as such not being under seal; that the state court has the right to pass upon the sufficiency of the bond before it loses its jurisdiction. (3) That the petition does not show that all of the defendants are citizens of another state from that of plaintiff, nor that the cause of action is separable.

No affidavits are presented in support of this motion, and no plea interposed to the jurisdiction of the court. The jurisdictional facts set forth in the petition must, therefore, be presumed to be true, unless the whole record, upon inspection, affirmatively shows something to the contrary. 18 Enc. Pl. & Prac. 372, 377, and authorities there cited. The record shows that petitioners for removal did "make and file a petition in such suit in such state court" within the time and in the manner required by law (25 Stat. 1888, p. 435, § 3); that a bond was filed, and that the judge of the state court indorsed thereon, "The foregoing bond is hereby approved." What more was needed?

Counsel say there was no seal affixed to the paper called a bond, and that for that reason it was not a legal bond, but admit that the point is purely technical. It has been held that the omission of a seal on a removal bond is a mere formal defect, which can be cured by amendment. The omission of the seal furnishes no sufficient ground to justify the court in remanding the case. The question whether a seal is essential or not depends upon the provisions of the statute. G. V. B. Min. Co. v. First Nat. Bank, 36 C. C. A. 633, 95 Fed. 23, 33. It is not made essential by the statutes of the United States or the statutes of this state. The statutes of the United States do not, in terms, require a seal. Section 3 of the act to regulate removal of causes, approved August 13, 1888, simply requires that petitioners for removal of a cause shall file with their petition "a bond with good and sufficient sureties." 25 Stat. p. 435. The seal is certainly not essential under the statute of this state approved February 20, 1883, which expressly provides:

"The word 'seal,' and the initial letters 'L. S.' and other words, letters, or characters of like import, opposite the name of the signer of any instrument in writing, are hereby declared unnecessary to give such instrument legal effect, and any omission to use them by the signer of any instrument shall not be construed to impair the validity of such instrument." Cutting's Comp. Ann. Laws, § 2735.

The bond approved by the state court is a valid, binding, and sufficient bond, with sufficient surety, as required by the act of congress and laws of this state. As was said in Construction Co. v. Simon (C. C.) 53 Fed. 1, 3:

"The bond is regular in all respects. There is nothing to show any insufficiency or defect in it, or want of sufficiency in the sureties thereon. It

was properly executed and acknowledged, both by the obligor and its sureties, and was formally approved and accepted by the state court to which it was tendered. This court, if it could rightfully review the action of the state court in approving and accepting the bond tendered, is unable to discover from the record any error in the proceeding."

Counsel for plaintiff claims that there was no order for removal made by the state court. None is necessary. The statute provides that after the filing of a petition and bond "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in said suit." 25 Stat. 1888, § 3. No statute or rule of practice requires a defendant to give notice to a plaintiff of the filing of a petition for the removal of a cause from a state to a federal court. Chiatovich v. Hanchett (C. C.) 78 Fed. 193, 194, and authorities there cited.

In Noble v. Association (C. C.) 48 Fed. 337, 338, the court said:

"Certainly, it is the decorous practice for the moving party to present his petition and bond to the judge of the state court, and obtain the formal acceptance of the court. It is also the safer practice, because he can thereby have an opportunity to obviate any remedial objections which are suggested to their sufficiency in case the court refuses to accept them. But this is not indispensable, and when they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further, if they are sufficient. When filed, they become a part of the record in the cause, and the court is judicially informed that its power over the cause has been suspended."

In Eisenmann v. Mining Co. (C. C.) 87 Fed. 248, this court said:

"The law is now well settled * * * that, when a sufficient cause for removal is made in the state court, its jurisdiction ends, and no order of the state court for removal is necessary. In other words, upon the filing of the petition for removal, accompanied by a proper bond,—the suit being removable under the statute,—the jurisdiction of the federal court immediately attaches in advance of the filing of the copy of the record; and whether that court should retain jurisdiction is for it, and not for the state court, to determine."

See, also, Kern v. Huidekoper, 103 U. S. 485, 490, 26 L. Ed. 354; Marshall v. Holmes, 141 U. S. 589, 595, 12 Sup. Ct. 62, 35 L. Ed. 870, and authorities there cited; Lund v. Railroad Co. (C. C.) 78 Fed. 385; 1 Desty, Fed. Proc. § 110, and authorities there cited; Mecke v. Mineral Co., 35 C. C. A. 151, 93 Fed. 697, 700.

In reply to the contention of counsel that the petition does not show that all of the defendants are citizens of another state from that of plaintiff, nor that the cause of action is separable, it is sufficient to state that the record shows that the only parties in interest as defendants at the time the suit was brought and petition for removal filed were F. W. Clark and Phœbe Hearst. The estate of Aaron Winters was not legally before the court. There was no legal representative of the estate. There are no allegations in the complaint that the estate had ever been administered upon; that any executor or administrator had ever been appointed. In that condition of affairs the estate of Winters, J. C. McClanahan and Alexander Falconer were not properly before the court. If it was the intention of the pleader, in drawing the complaint, as he now claims, to sue McClanahan and Falconer as individuals, and make them co-con-

spirators in the alleged fraud and conspiracy, he should have so framed his averments. The complaint is not susceptible of that construction as drawn. It appears therefrom that both of said parties were made defendants solely on account of their official relation to the estate of Aaron Winters, deceased. This, in my opinion, is the only legal construction that can be given to the language of the complaint. The estate of Winters could not be bound unless there was in existence a legal representative. There was none. The estate of Winters is therefore a sham defendant, having no interest or standing in this suit. The joinder of such a defendant does not prevent a removal. 18 Enc. Pl. & Prac. 202, and authorities there cited. The record shows that McClanahan "has never qualified as executor of the last will and testament of Aaron Winters, deceased, nor have letters testamentary ever issued to him upon said will; that he has abandoned the application filed by him in the above-entitled court for issuance of such letters testamentary to him; and that he hereby renounces his right to apply for letters testamentary upon said will." He could not, therefore, be sued in his official capacity "as executor of the last will and testament of said Aaron Winters, deceased,"—First, because he had not been appointed as such; and, second, he had abandoned his application and renounced his right to apply for letters testamentary upon said will. Even if Falconer could be considered as a party defendant, the petition for removal shows that he was a citizen and resident of the state of California. As for the other defendants sued by fictitious names, they will be regarded as merely formal parties, whose presence on the record cannot affect the proceedings on removal. Parkinson v. Barr (C. C.) 105 Fed. 81, 82. It is the duty of the court to consider only the citizenship and residence of the parties whose real names are disclosed in the pleadings. 18 Enc. Pl. & Prac. 195, 196, and authorities there cited. From the facts appearing in the complaint and petition for removal, the only real parties defendants are shown to be citizens and residents of California, who have the right, on the ground of diversity of citizenship, to have the cause removed to this court. The fact that McClanahan unnecessarily joined in the petition does not affect their rights to have the case removed. Snow v. Smith (C. C.) 88 Fed. 657, 659.

The only controversy existing in this suit at the time of its commencement and at the time of the filing of the petition for removal was between the plaintiff, a citizen and resident of Nevada, and F. W. Clark and Phœbe Hearst, citizens and residents of the state of California, and it is therefore unnecessary to consider whether or not there would be any separable controversy between them and the estate of Winters, if said estate had been properly brought into court.

The motion to remand is denied.

STATE TRUST CO. v. KANSAS CITY, P. & G. R. CO. et al. (TEMPLE et al., Interveners).

(Circuit Court, W. D. Arkansas, Ft. Smith Division. May 2, 1902.)

1. FEDERAL COURTS—JURISDICTION.
Where suit for the foreclosure of a railroad mortgage was instituted in the federal court, and such court had appointed a receiver, and the railroad had been sold under such proceedings, the court had jurisdiction of an intervention by a creditor having obtained a judgment in a state court to determine priority of such judgment, as a lien on the property of the railroad.

2. SAME—STATE COURT—DECISION—RES JUDICATA.
Where a state court has determined that an action against a railroad company to recover a judgment, which shall be a preferred lien on the railroad's property, for injury to the property of the plaintiff, was brought within one year, as required by the statute creating such lien, the federal court will not review such question on a subsequent intervention of the judgment creditor, in proceedings to foreclose a mortgage on the railroad, to establish such judgment as a preferred claim.[1]

3. RAILROADS—INJURY TO PROPERTY—DAMAGES—LIENS—STATUTES—REPEAL.
Sand. & H. Dig. Ark. § 6251, declared that certain persons performing work, labor, and furnishing materials, machinery, or equipment for the operation of a railroad, and all persons sustaining loss or damage to person or property, for which a liability may exist at law, should have a preferred lien on the road, equipments, etc. By Act March 31, 1899, such section was amended so as to include other persons than those provided for in the original act; but that part of the statute giving a preferred lien for damages to person and property was reincorporated in the amending act in the same words as it previously existed, and by section 4 of the amending act all laws in conflict therewith were repealed. *Held*, that the latter act was only a continuation of the former in so far as injuries to property were concerned, and was not a repeal thereof in so far as rights previously accrued were concerned.

4. SAME—CONSTITUTIONAL LAW—VESTED RIGHTS.
Sand. & H. Dig. Ark. § 6251, declared that all persons who suffer loss or damage to person or property from any railroad, for which a liability may exist at law, should have a preferred lien therefor on the roadbed, etc. *Held*, that a person having a claim for damages to property, and having brought suit for the recovery thereof, before Act March 31, 1899, was passed, by which such section was amended, acquired a vested right in the lien provided by such statute, which the legislature had no power to devest by the subsequent act.

Williams & Arnold, for interveners.
Read & McDonough, for defendants.

ROGERS, District Judge. On the 2d of May, 1899, an ancillary bill in equity in the above-entitled cause was filed in this court; and on the same day Samuel W. Fordyce and Webster Withers, who had been appointed trustees by the circuit court of the United States for the Western division of the Western district of Missouri, under an original bill filed in that court on April 6, 1899, as a court of primary jurisdiction, were appointed receivers; and by the pro-

[1] Conclusiveness of judgments as between federal and state courts, see notes to Railroad Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.

visions of the sixth paragraph of the order appointing them receivers it was provided:

"Said receivers shall be authorized to pay out of any income or revenues which may come to their hands all debts which may have been lawfully contracted by the Kansas City, Pittsburg & Gulf Railroad Company since May 1, 1898, for services rendered to said company by its employés in the operation of its road, including herein reasonable salaries to its officers, and reasonable compensation for professional services rendered by attorneys; also all debts lawfully contracted during the aforesaid period for material and supplies furnished to said railway company, and used in the maintenance and operation of its road; and also all traffic balances, if there should be any, due to connecting carriers. Other claims and demands against said company shall only be paid by the receivers upon orders of court hereafter made, and the court reserves to itself the power to direct the payment of such other demands against said railway as it may deem to be of a preferential nature."

On February 5, 1900, a decree of foreclosure and sale of the property was entered in the court of primary jurisdiction upon a mortgage executed by the Kansas City, Pittsburg & Gulf Railroad, bearing date April 1, 1893; and said decree was on the 20th of February, 1900, also entered of record in this court. By the fifteenth paragraph of that decree, among other things, it was provided:

"The purchaser or purchasers of the property sold hereunder shall receive the deed therefor, and take the said property, upon the express condition that the said purchaser or purchasers, his or their heirs, executors, administrators, successors, or assigns, shall, to the extent of the property sold and conveyed, and so far as the items hereinafter mentioned may not have been otherwise paid or discharged, in whole or in part, out of the proceeds of the sale had hereunder, or out of the surplus funds or assets in the hands of the receivers herein, pay, satisfy, and discharge: * * * (4) Any unpaid indebtedness or liability contracted or incurred by said Kansas City, Pittsburg & Gulf Railroad Company in the operation of its railroad, payment whereof was provided for in paragraph 6 of the order appointing the receivers herein, and which is prior in lien or superior in equity to the said mortgage of April 1, 1893, upon its being finally adjudged to be thus prior in lien or superior in equity to said mortgage, and directing the payment thereof. (5) Any unpaid indebtedness or liability contracted or incurred by said Kansas City, Pittsburg & Gulf Railroad Company which may be finally found and decreed to be prior in lien or superior in equity to said mortgage of April 1, 1893. It is further considered, ordered, and adjudged and decreed that the purchaser or purchasers, his or their successors and assigns, as part consideration and purchase price of the property purchased, and in addition to the sum paid, take the same, and receive the deed therefor, upon the express condition that he or they, or his or their successors or assigns, shall pay, satisfy, and discharge any unpaid compensation which shall be allowed by this court to any of the officers or receivers thereof, and all indebtedness and obligations or liabilities which shall have been contracted and incurred by the receivers before delivery of the possession of the property sold, with the citizens and residents of Arkansas, and also pay any indebtedness or liabilities contracted or incurred by the said Kansas City, Pittsburg & Gulf Railroad Company and Texarkana & Ft. Smith Railroad Company, or either of them in the operation of said railroad prior to the appointment of the receivers in this case, which are prior in lien to said general mortgage, and, furthermore, that citizens and residents of Arkansas might establish their claims at any time within the period of the statute of limitations of the state of Arkansas, as provided by the terms of that order, anything appearing to the contrary in this order notwithstanding. And in the event said purchaser or purchasers shall refuse, after demand made, to pay any such indebtedness, obligation, or liability, the person holding the claim therefor,

whether established in a state court, or any other court of competent jurisdiction, may, upon fifteen days' notice to said purchasers, their successors or assigns, file his petition in this court to have such claim enforced against the property aforesaid in accordance with the usual practice in relation to claims of a similar character; and such purchaser or purchasers, his or their successors or assigns, shall have the right to appear and make defense to any claim, debt, or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree, or order made thereon."

Jurisdiction of the cause was also retained, among other purposes, for that of enforcing such demand. Under that decree the property was subsequently sold to the Kansas City Southern Railway Company, as substituted bidder for, and purchaser of, said railroads, and all their property, privileges, and franchises, of every description, and on the 29th of March, 1900, said sale was approved and confirmed; and by the terms of the decree approving said sale it was provided:

"That the Kansas City Southern Railway Company, its successors or assigns, shall pay, satisfy, and discharge [among other things] any balance remaining unpaid upon the receivers' certificates duly issued under the order of this court. Any other indebtedness or obligation or liability which shall have been duly contracted or incurred by the receivers in the discharge of their duty.. (4) Any unpaid indebtedness or liability contracted or incurred by said Kansas City, Pittsburg & Gulf Railroad Company in the operation of its railroad, payment whereof was provided for in paragraph 6 of the order appointing the receivers herein, and which is prior in lien or superior in equity to the said mortgage of April 1, 1893, upon its being finally adjudged to be thus prior in lien or superior in equity to said mortgage, and directing the payment thereof. (5) Any unpaid indebtedness or liability contracted or incurred by said Kansas City, Pittsburg & Gulf Railroad Company which may be finally found and decreed to be prior in lien or superior in equity to said mortgage of April 1, 1893."

And the right was also reserved in said order to retake and resell any of the premises so conveyed, or to appoint a receiver of said premises, if the said Kansas City Southern Railway Company, its successors or assigns, shall fail or refuse to pay any such sums which may in this cause, or by any of the courts of ancillary jurisdiction, be adjudged to be due and payable by said purchaser, its successors or assigns, under the provisions of said decree of sale of February 5, 1900, which said decree was entered of record in this court on March 29, 1900.

On the 15th day of December, 1900, the interveners, William Temple and J. G. Smithson, filed an intervention in this court in the above-named cause, and by amendment filed by leave of the court on September 26, 1901, made the Kansas City Southern Railway Company a party defendant, and to which intervention an answer was filed for all the defendants on April 16, 1902. By the intervention it is shown that the interveners on the 9th day of July, 1900, and at the July term of the circuit court of Little River county, Ark., recovered a judgment against the Kansas City, Pittsburg & Gulf Railroad Company for the sum of $275.24 and costs, taxed at $28.80, which judgment bears interest at 6 per cent. per annum from date; that said judgment was recovered for cotton destroyed by fire at Ogden on the 28th day of February, 1898 (Ogden being a station on the line of said Kansas City, Pittsburg & Gulf Railroad

Company, in the state of Arkansas). In the face of the judgment, a certified copy of which is attached to the intervention, it is recited that:

"This suit having been brought upon the claim mentioned in the complaint within one year after it occurred, as provided by law, this judgment is declared a first lien on the property of the Kansas City, Pittsburg & Gulf Railroad Company, consisting of roadbed, buildings, equipments, income, franchises, and all other appurtenances of said railroad, superior and paramount to that of all persons interested in said road, as provided by the laws of this state."

And by the terms of the amended intervention it appears that since the rendition of the judgment the property of the Kansas City, Pittsburg & Gulf Railroad Company, upon which the judgment of said interveners was declared a lien, has by the decree of this court been sold, and the same purchased by the Kansas City Southern Railway Company, and said sale approved and duly confirmed on the 20th of March, 1900, and that the Kansas City Southern Railway Company is now the owner and in possession of said property; and by virtue of its said purchase, and the terms and provisions of the order approving the sale to it, it is expressly provided that the purchasers shall become the paymasters of such claims as the court shall adjudicate to be prior liens. The interveners pray that said claim against the Kansas City, Pittsburg & Gulf Railroad Company be allowed by the court, and for an order directing the said railway company to pay said judgment, and for all other and proper equitable relief.

The answer sets up three defenses: (1) That the court has no jurisdiction to hear and determine the case; (2) that the action of the interveners was not commenced within one year from the time the same accrued, and that said judgment was not and is not a lien upon the property of said railroad; (3) that said judgment is inferior in equity and law to the claim of the mortgagees in this foreclosure suit, and that said claim is not one that is entitled to preference, and it should not be adjudged a liability against the Kansas City Southern Railway Company, the purchaser herein. These defenses will be disposed of in their order.

That the court has jurisdiction to pass upon the questions raised by this intervention, the court thinks, is settled law. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; Kirker v. Owings, 39 C. C. A. 132, 98 Fed. 499; Ames v. Railroad Co. (C. C.) 60 Fed. 967; Cohen v. Mining Co. (C. C.) 95 Fed. 580.

As to the second defense, the question is settled by the decree of the state court, and will not be inquired into in this court. The court, therefore, holds that the suit was brought within one year next after the right of action accrued.

As to the third defense, i. e., that the judgment is inferior in equity to the claim of the mortgagees in this foreclosure suit, and is therefore not entitled to preference, and should not be adjudged a liability against the Kansas City Southern Railway Company, the purchaser herein, the case involves much more importance and difficulty. As before stated, the mortgage under which the foreclosure

took place bore date April 1, 1893. On the 19th of March, 1887 (see Sand. & H. Dig. Ark. § 6251), the legislature of Arkansas enacted the following statute, which was in full force when the mortgage in controversy was executed:

"Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other thing towards the equipment, or to facilitate the operation of any railroad; *and all persons who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law, shall have a lien therefor upon the roadbed,* buildings, equipments, income, franchises, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees and beneficiaries under trusts or owners."

By the two following sections it is provided that suit shall be instituted within one year after the cause of action accrues, and that the lien shall be mentioned in the judgment rendered on the claim in an ordinary suit for the claim, and may be enforced by ordinary levy and sale under final or other process at law or in equity. Act March 19, 1887. Manifestly the mortgagee or trustee in the mortgage which was foreclosed in this case took the mortgage subject to the provisions of this statute. But on March 31, 1899, the following statute was enacted:

"Be it Enacted by the General Assembly of the State of Arkansas:

"Section 1. That section 6251 of Sandels & Hill's Digest be amended so as to read as follows: 'Every mechanic, contractor, sub-contractor, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor, or cause to be done or performed any work or labor upon, or furnish any materials, machinery, fixtures or other things towards the building, construction or equipment of any railroad, or to facilitate the operation of any railroad, whether completed or not, and every person who performs work of any kind in the construction or repair of any railroad, whether under contract with the railroad or with a contractor or sub-contractor thereof, and every person who furnishes any board, provisions or supplies for any employees, or teams of any railroad employed in the construction or repair thereof with the consent or authority of the person authorized to make such construction or repair; *and every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law,* and every person who performs any valuable services, manual or professional, for any railroad by or from which such railroad receives a benefit, shall have a lien on said railroad for said labor, materials, machinery, fixtures, board, provisions, supplies, loss, damage and services upon the road-bed, buildings, equipments, income, franchise, right-of-way, and all other appurtenances of said railroad superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees and beneficiaries under trusts or owners.'

"Sec. 2. That section 6252 of Sandels & Hill's Digest be amended so as to read as follows: 'The lien mentioned in the preceding section shall not be effectual unless suit shall be brought on the claim, or the claim shall be filed by order of court with the receiver of said railroad within one year after said claim shall have accrued.'

"Sec. 3. That section 6253 of Sandels & Hill's Digest be amended so as to read as follows: 'The said lien shall be mentioned in the judgment rendered for claimant in the ordinary suit for the claim, or in any order of court allowing such claim as a just charge against any railroad in the hands of a receiver, and said lien may be enforced by ordinary levy and sale under final or other process at law or equity.'

"Sec. 4. All laws in conflict with this act are hereby repealed, and this act shall be in force from and after its passage." Acts 1899, pp. 145, 146.

The first question, therefore, which arises, is whether or not the act of March 31, 1899, supra, section 4 of which has a repealing clause of all laws in conflict therewith, had the effect to take away from the interveners the benefits of the provisions of the act of March 19, 1887, supra. I have concluded that this question must be answered in the negative, for two reasons:

(1) The act of March 31, 1899, is not in conflict with the act of March 19, 1887. On the contrary, manifestly it was the purpose of the legislature in the enactment of the act of March 31, 1899, to give benefits to other classes of persons than those which were embraced in the act of March 19, 1887, and not to take away from any class of persons named in the act of March 19, 1887, the benefits of any of the provisions of that act. The parts of the two statutes which are in italics, and which cover the rights of the interveners in this case, are precisely the same; and therefore the act of March 31, 1899, in so far as it re-enacts the statute of March 19, 1887, is only a continuation of the latter act, and does not operate to repeal it at all, so far as the rights of the interveners are concerned. In Suth. St. Const. § 137, the author says, on page 177:

"Thus amendment is frequently made by enacting that a certain section shall be so amended as 'to read as follows'; then inserting the substituted provision entire, without specification of the change. The parts of the former law left out are repealed. This intention is manifest. There is a negative necessarily implied, that such eliminated portion shall no longer be in force. The re-enacted portions are continuations, and have force from their original enactment."

Moore v. Mausert, 49 N. Y. 332; People v. Board of Sup'rs of Montgomery Co., 67 N. Y. 109, 23 Am. Rep. 94; Goodno v. City of Oshkosh, 31 Wis. 129; State v. Ingersoll, 17 Wis. 631; Longlois v. Longlois, 48 Ind. 60.

(2) The act of March 19, 1887, was in full force and effect when the interveners sustained the loss on which their intervention is based. They, therefore, had acquired a vested right under the statute of March 19, 1887, and the legislature was without power to devest it. In Suth. St. Const. § 164, the author says:

"When a right has arisen on a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it, or an action for its enforcement. It has become a vested right, which stands independently of the statute. A contractor for grading streets was authorized by the existing law to sue delinquent abutters for unpaid assessments. This right of action was held a part of the contract, and not taken away by repeal of the law creating it. Causes of action barred by the statute of limitations are not revived by a repeal of the statute. The repeal of a statute giving a lien for advances of money for certain purposes will not affect the lien as to such advances as were made prior thereto. Rights that pass and become vested under the existing law are supposed to be beyond the control of the state through its legislature. A mere change of the law does not devest or impair rights of property acquired previously, even though the legislature intended the new law so to operate. A law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute

injustice to abolish, with a law, all the effects which it had produced. This is a principle of general jurisprudence. But a right, to be within its protection, must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or a legal exemption from a demand made by another."

The cotton for the loss of which the judgment in this case was recovered was destroyed, and the suit for its recovery begun, before the statute of March 31, 1899, was enacted. The right of action to recover for the loss of the cotton was not dependent on the statute of March 19, 1887, but the lien in favor of the interveners on the road, equipments, etc., was given by that statute; and the right to enforce the lien accrued when the loss occurred, and was a vested right, which the legislature could not take away. It might have repealed the remedy it had prescribed for the enforcement of the lien, but the lien itself was expressly given by the statute, and was as sacred as if it had been acquired by an express contract. It stands on the very same footing as if the suit had been brought by a mechanic to enforce his statutory lien under the same act for material furnished or labor performed, instead of for cotton lost or destroyed by fire by the carelessness or negligence of the company.

The interveners are entitled to have the judgment paid by the Kansas City Southern Railway Company, and it is so ordered.

UNITED STATES ex rel. KELLOGG et al. v. LEHIGH VAL. R. CO.

(District Court, W. D. New York. April 2, 1902.)

CARRIERS—INTERSTATE COMMERCE ACT—SHIPMENTS BETWEEN POINTS IN SAME STATE.

A shipment of grain over a single railroad between two points, both within the same state, is not an interstate shipment, so as to bring it within the terms of the interstate commerce act, and authorize a federal court to compel such shipment, by mandamus, at the same rates charged other shippers of a like commodity, because the line of road between the two terminal points passes through other states; nor is it rendered an interstate shipment by the fact that the grain was received at the initial point from a carrier by which it was transported from a point in another state, and was there stored in an elevator for further shipment, where it was not taken by the first carrier under a through bill of lading.[1]

Petition for writ of mandamus, under the interstate commerce act, on relation of Spencer Kellogg and another. On demurrer to petition.

George L. Lewis, for petitioners.

Bissell, Carey & Cooke (Martin Carey and James McC. Mitchell, of counsel), for respondent.

HAZEL, District Judge. It appears by the pleadings that the relators desired to ship 50,000 bushels of corn from Buffalo, N. Y., to New York City, over the railroad of the respondent, a Pennsylvania corporation operating its railroad through the states of New York, Pennsylvania, and New Jersey. The corn was purchased by the re-

[1] See Carriers, vol. 9, Cent. Dig. § 63.

lators in Chicago, Ill., and conveyed from there to Buffalo, N. Y., by lake vessels. It does not clearly appear when the grain was shipped to Buffalo. On its arrival at Buffalo, it was elevated at the Kellogg Elevator, of which the relators are the owners, and remained elevated until the relators desired to reship the same to New York City for foreign delivery. There is no allegation of a through bill of lading from the initial point of shipment. The petition shows that the relators were required and compelled by the respondent railroad company, about August 1, 1900, to pay for the reshipment of such grain from Buffalo, N. Y., to the city of New York, one-half cent per bushel more than was charged to other shippers of like grain, who sent their grain through other elevators located at Buffalo, and with which respondent had an agreement by which all elevated grain would be reshipped by it and delivered to the consignee at a specified price per bushel. Other averments in the petition show shipment at various times during the lake season of 1900, from other points in various states bordering on the lakes, to Buffalo, N. Y. The initial consignment in each instance was to the relators, and the grain, on its arrival at Buffalo, was transferred from the ship to the Kellogg Elevator, where it remained until a sale thereof was perfected. Thereupon a demand for cars and rates of shipment per bushel to New York City was made on the respondent, who exacted a greater rate for conveying the grain to New York City than it exacted or required other shippers to pay.

This proceeding is laid in the district court, and any relief granted must be obtained under the provisions of the interstate commerce act. Those provisions are claimed by the relators to have been violated by respondent in its refusal to move interstate traffic at the same rates as are charged, or upon terms and conditions as favorable as those given by respondent for like traffic, under similar conditions, to any other shipper, and therefore this court has jurisdiction to issue a writ of mandamus against the defendant common carrier, commanding it to move and transport the traffic to New York City as required by the relators. It has been held that transportation by railroad from one point within a state to another point within it, but passing during the transportation without the state, and through part of another state, is not an interstate shipment, and does not constitute interstate commerce. Lehigh Val. R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672. In the case cited, it was held that a state tax imposed upon the Lehigh Valley Railroad Company by the state of Pennsylvania, under whose laws it was incorporated, on account of the transportation of merchandise by it within the state, but passing during the transportation without the state, and through part of another state, was not a tax upon interstate commerce, and not in infringement of the provisions of the constitution of the United States. It would seem, therefore, to be clear that a shipment between Buffalo and New York, where the merchandise, while in transitu, passes without the state, and through part of another state, is not a violation of the interstate commerce act. Although shipment between two points within a single state has been held to constitute interstate commerce, yet such shipment is required to be part of a continuous carriage be-

tween points in different states. The language of the interstate commerce act expressly states that its provisions shall apply to "common carriers or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one state or territory * * * to any other state or territory of the United States."

I do not think that the shipment of the grain specified in the petition was a continuous carriage thereof between points in different states. Here the shipment sought to be enforced is one from Buffalo to New York. U. S. v. Chicago, K. & S. Ry. Co. (C. C.) 81 Fed. 783; Ex parte Koehler (C. C.) 30 Fed. 867; 17 Am. & Eng. Enc. Law, 128, 129, and cases cited; Pennsylvania Millers' State Ass'n v. Philadelphia & R. Ry. Co., 8 Interst. Com. R. 531; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047. The facts do not justify the court in issuing the extraordinary remedy sought, for the reasons above set out. It is therefore unnecessary to discuss any of the further points raised on the argument.

The demurrer is sustained, and the writ dismissed, with costs.

THE MARY C. ELPHICKE.

(District Court, N. D. Ohio, E. D. March 28, 1902.)

COLLISION—STEAMSHIPS MEETING—FAILURE TO CHANGE COURSE.

Under Article 17 of the rules for navigation on the Great Lakes it is the duty of each of two steamers meeting end on, or nearly end on, as soon as signals have been exchanged for passing port to port, to change her course to starboard, and a failure to do so, where there is nothing to prevent, is a fault; but the failure of one vessel to do so will not excuse the other for a failure to make a sufficient change in her own course to avoid danger of collision when it can safely be done, and she will be held equally in fault for a collision which she might thus have prevented, although she did in fact make such a change in her course as would have avoided the collision if the other vessel had done likewise.

In Admiralty. Suit for collision.

Hoyt, Dustin & Kelley, for libelant.
Goulder, Holding & Masten, for respondent.

WING, District Judge. On the 26th day of August, 1901, the steamer General Orlando M. Poe, owned by the libelant, having in tow two barges, was bound up the St. Clair river near Sarnia, and the steamship Mary C. Elphicke, owned by the Federal Steamship Company, claimant and cross libelant, loaded so that she would draw about 18 feet and 6 inches, was bound down the St. Clair river. The Poe, when at a distance from the Elphicke of about a mile, or three-quarters of a mile, signaled to her with one blast of the whistle. This signal was immediately accepted, by the sounding of a corresponding signal by the Elphicke. The charts introduced in evidence show that the St. Clair river, at about the point of collision, makes a bend to

the westward, so that a vessel making this bend is required to change her course to the extent of about six points. This change of course is naturally accomplished, by a vessel bound down, by a swing to starboard under a ported helm. A stream called Black river flows into the St. Clair river from the westward at about the point of the bend, which has had the effect to make what is called in the testimony the "Middle Ground," the position of which is indicated to navigators by a gas buoy opposite the mouth of Black river and a black spar buoy about 1,500 feet further down stream. The width of the river between the Canadian shore and the gas buoy is about 1,600 feet, and between the Canadian shore and the black spar buoy about 1,150 feet. The width of the channel at these points for safe navigation of vessels is somewhat less than these measurements would indicate, owing to the fact that the limits of this made ground may, from time to time, change, and that the buoys may not always correctly indicate such limits. There is considerable conflict of testimony as to the distance of the course of the Poe, at or near the point of collision, from the Canadian shore. The libelant would put it between 200 and 300 feet. The respondent would put it at least 400 feet. It does not appear, from either theory, that the course of the Poe was so near to the Canadian shore that it would have been unsafe for her to change her course, temporarily at least, further to starboard. It is shown by the testimony of the libelant, and practically admitted as a fact in the cause, that the Poe did not change her wheel at the time of exchanging signals with the Elphicke, nor thereafter, until after the collision. The rules enacted for navigation on the Lakes required her to do this, and her omission to do it was a fault which helped to cause the collision.

The more difficult question in the case is with respect to the presence or absence of fault in the navigation of the Elphicke. The witness Conniff, who was first mate of the Elphicke, was on the bridge with the master, Wilson, at and before the time of the collision, after the steamer entered the St. Clair river. The ship is described as one easily handled, and ordinarily amenable to her helm. The Elphicke was about a mile, or three-quarters of a mile, from the Poe when attention was first given to her; and at the time the signals were exchanged the position of the Elphicke was about opposite Butler street in Port Huron. Counsel for the respondent made the following inquiry of the witness: "State whether at that time (the time of the exchange of signals) you were in a usual or unusual, proper or improper, place for going down." Objection was interposed and sustained, and the question was then asked, "Where were you with reference to the ordinary course going down?" Objection was also made to this interrogatory, which was sustained by the court; and record was then made of the offer, by respondent's counsel, to prove, by the answer of the witness to the question, that he was on the ordinary course. I will assume, for the purpose of the decision in this case, that the Elphicke was on the ordinary course, and that, from such course, it was necessary to change six points to make the bend in the river. The witness, being asked further what was done after that,—that is, after the interchange of signals,—answered, "We pro-

ceeded down the river on a slow swing, with a port wheel, just to merely start, and when we reached a point a little lower down the river I put the wheel to port more,—told the wheelsman to port faster." About this time it appears from the testimony that the Elphicke gave another signal of one blast. As the mate says, "I blew one blast; seeing that the fellow was not giving me what I considered was room to pass, I gave him one blast of my whistle, which he answered." At this time the boats were four or five times the Elphicke's length apart. The ordinary and natural course of the Elphicke required her to port her helm about the time that it appears she did upon this occasion. A porting of her helm sufficient only to make this course would not have been a compliance with rule 17. The Elphicke's ordinary and natural course down the river would be a curved line. The course of the ascending vessel would be a straight line, to about the point of collision, which might intersect the curved line, or become tangent to it. When vessels are approaching each other in this manner, they are held to be "meeting end on, or nearly end on." The risk involved is of the vessels coming together at either of the points mentioned, of intersection or tangential contact or coincidence. Care should be taken, under such circumstances, by each vessel, to make its path such that it will not, at any point, coincide with the path of the other. The line of the course of either vessel should be regarded as having the width, at least, of the beam of the vessel. It is a certain fact in this case, of course, that the paths of the vessels did coincide, and that the path of the Poe was in no wise changed. The path of the Elphicke coincided with that of the Poe, or lapped over it, to the extent of at least 20 feet. It appears from this that the Elphicke altered her course to an extent sufficient only to avoid collision in the event that the Poe also performed her part, but insufficient to pass if the Poe should omit to change her course to starboard; but, as said in The America, 92 U. S. 432, 23 L. Ed. 724:

"Steamships meeting end on, or nearly end on, should seasonably adopt the required precaution; and neither can be excused from responsibility, in case of omission, merely upon the ground that it was the duty of the other to have adopted the corresponding precaution at the same time, if it appears that the party setting up that excuse enjoyed equal facility to obey the requirement with the other party, and might have prevented the disaster. Imperative obligation is imposed upon each to comply with the rule of navigation; nor will the neglect of one excuse the other in a case where each might have prevented the disaster, as the law requires both to adopt every necessary precaution, if practicable, to prevent the collision, and will not tolerate any attempt of either, in such an emergency, to apportion the required precaution to avoid the impending danger, in case where both or either might secure perfect safety to both ships and all intrusted with their control and management."

It is apparent that the Elphicke either changed her course insufficiently after she began to change, or else did not begin to make the change soon enough to avoid the collision. There was nothing to prevent her so doing, and the omission was a fault. Her excuse that she did her part, which would have been sufficient had the Poe also done hers, is insufficient to exculpate.

For the purposes of this case, the interpretation of rule 17, founded upon the authorities as I read them, requires that, when a vessel

is meeting another end on, or nearly end on, so as to involve risk of collision, she must alter her course to starboard, if there is nothing to prevent, so that she will pass on the port side of the other, even though the other maintains her course unaltered; that to omit doing this is a fault; that the failure and omission of the other vessel to change her course in a similar manner is also a fault; and that both faults, under such circumstances, contribute, as causes, to the collision.

I find both vessels to have been in fault. Order may be drawn referring the question of damages suffered by both to a master. These damages will be divided, in accordance with the ordinary rule.

CONSOLIDATION COAL CO., Limited, v. THE ADMIRAL SCHLEY.

AMERICAN MAIL STEAMSHIP CO., Limited, v. THE CHARLES F. MAYER.

Nos. 1,234, 1,246.

(District Court, D. Massachusetts. April 1, 1902.)

1. COLLISION—NAVIGATION OF TUG AND TOW—CARE REQUIRED.
   The navigation of a tug with tows at sea involves such danger of collision that the utmost care is required on the part of those in charge, and unusual maneuvers, which increase the danger, are not justified unless in case of necessity, and then extraordinary precaution should be taken.
2. SAME—MANEUVERING WITH TOWS—DANGEROUS SPEED IN FOG.
   A steamer with two coal barges in tow on a line, the whole about 2,000 feet in length, arrived at the Boston light-ship in a fog so dense as to render an attempt to enter the harbor unsafe. While waiting for the fog to clear away, the steamer moved about with her tows, making a number of turns across the usual course of vessels passing in or out of the port. As she was making such a turn, her fog signal was heard by a steamer coming out, which, coming within sight of the last tow, was misled as to the direction and course of the towing steamer until the two vessels were so near together that a collision resulted, although both then did all that was possible to prevent it. The outcoming steamer, having a full speed of 14 knots, was going at a speed of about 8 knots, which she kept until the other vessel was sighted. *Held*, that both steamers were in fault,—the first for unnecessarily moving around with her tows in a place where such maneuvers were dangerous under the circumstances, and without giving adequate warning of their position by the sounding of danger signals from all the vessels or otherwise; and the second for going at too great a speed in a fog, and for neglecting, in violation of the rules, to stop or slacken speed when the first signal was heard.

In Admiralty. Suit and cross libel for collision.

Frederic Dodge, Edward S. Dodge, and J. Walter Lord, for the Charles F. Mayer.

Carver & Blodgett, for the Admiral Schley.

LOWELL, District Judge. These were cross libels for a collision which occurred between Thieves Ledge buoy and Boston light-ship, April 5, 1900, at about 1 o'clock in the afternoon. There was very little wind,—now and then a cat's-paw from the eastward,—and an easterly swell, which had been going down since the morning. The

testimony of the witnesses on both sides was, upon the whole, honest and true. It follows that the facts are not much in dispute. The Mayer, an iron steamer about 240 feet long, carrying about 1,500 tons of coal, was towing two loaded barges. The hawser between the Mayer and the first barge was about 150 fathoms long; that between the first and the second barge somewhat shorter. One barge was destined for Boston, the other for Portland. The tow reached Boston light-ship about 8 o'clock in the morning. Capt. McLeod, of the Mayer, deeming the fog too dense to enter Boston harbor, at once turned about, and made two loops to the eastward of Boston light-ship, waiting for the fog to clear off. This did not happen, but it became less dense for a few minutes, and he then proceeded to the westward of Boston light-ship. Finding the fog still too dense to go farther, he turned about, and followed a course first east by south, and then east by north, until he could hear the whistle on the light-ship. Just how far distant he was from it cannot be precisely ascertained,—somewhere between one and two miles. He then began to make still another turn,—the sixth in all,—first signaling his intention to the barges. While making the turn, he intended also to shorten the hawsers. The Mayer proceeded under a starboard wheel until it was heading about N. E. by N. ½ N. The hawser between it and the leading barge was somewhat slack. The direction of the leading barge had been changed to the northward perhaps a point. The direction of the rear barge was practically unchanged. The Mayer was 300 or 400 feet to the north of the line of its original course. A whistle was then heard,—evidently the fog signal of a steamer,—but the Mayer continued under a starboard helm until the Schley was seen to emerge from the fog, heading for the Mayer's port side, about 500 to 700 feet away. The Admiral Schley, a twin-screw fruit steamer, plying between Boston and Jamaica, left its wharf at 10 o'clock in the morning, and proceeded to President Roads, where it anchored on account of the fog. About noon the fog lighted up somewhat, and the Schley weighed anchor, went through the Narrows, passed Boston light, and continued on toward the light-ship on an E. by S. course, leaving Thieves Ledge buoy close on the port hand. The Schley's rate of speed was in dispute. There was evidence, especially from the engine room, which would put it at nearly full speed,—fourteen knots an hour. The captain estimated it at about six knots. Capt. Jones, of the forward barge, a competent, intelligent, and honest witness, called on behalf of the Mayer, put it at about eight knots. I think his estimate of the speed at the time he saw the steamer was the most trustworthy offered. The Admiral Schley, thus approaching at a speed of eight knots or thereabouts, first heard the faint sound of a whistle nearly ahead, a little on the starboard bow. The sound was not clearly distinguished, but it was supposed to be the signal of a tug and tow. The course of the Schley was thereupon changed from E. by S. to E. Soon after, the rear barge was seen, about a point ahead of the Schley's starboard beam, and 400 or 500 feet distant. It seemed to be proceeding in the same direction as the Schley. The courses of the Schley and the barge may have differed by a point. A little later the

Schley picked up the forward barge, some four points abaft the starboard bow. The forward barge appeared to those on the Schley to be following about the same course as the rear barge, and the Schley's helm was put half way to starboard in order to clear the tug and tow. In fact, as has been said, there may have been a difference of a point between the courses of the two barges, but a difference no greater than this would hardly be noticed by those on the Schley, especially as it does not appear that the two barges were in sight at the same time, and the Schley's course was changing. Almost immediately afterwards the Schley heard the fog signal from the tug nearly dead ahead, perhaps a very little on the port bow. The Schley was then swinging to port under a starboard helm. The Mayer was perceived, immediately after its fog signal was heard, bearing almost dead ahead. The helm of the Schley was put hard astarboard, two whistles were blown, and answered from the Mayer, the port engine was reversed full speed, and probably the starboard engine put full speed ahead. The Schley, therefore, went rapidly to port. The Mayer's engines were put full speed astern, and the helm put amidships. The Mayer began to go off to starboard under the reversed engines, and came almost to a standstill. The Mayer's stem came in contact with the Schley's starboard side about amidships. The Schley was heeled somewhat to port by the blow, though the blow was not heavy. As the Schley righted, the stem of the Mayer scraped lightly along the Schley's starboard side. The two vessels were rolled apart by the swell, and then came together again, the bluff of the Mayer's port bow striking the Schley's starboard quarter about 50 feet from the stern. At the time of this last contact, the heading of the two vessels did not vary more than two points or thereabouts. After the two steamers came in sight of each other, both did their best to avoid a collision, as both captains testified, each of the other, with a frankness highly commendable. The cause of the accident must be sought in the previous actions of the two vessels.

That the Schley was proceeding at too great a speed, considering the density of the fog and that a fog signal of some sort had been heard, is plain, and counsel hardly denied it. The rate of speed adopted by Capt. Butman was doubtless that which would be adopted by many prudent captains; but, as has been determined over and over again, his speed was greater than that permitted by the rules. The Schley's lookout also was apparently defective. No lookout was stationed at the bow. The captain and second officer were on the bridge, from which they had an unobstructed view, but, considering the density of the fog, and the likelihood of meeting vessels, some man should have been stationed near the vessel's stem, charged with the sole duty of lookout. He might not have seen so much as could be seen from the bridge, though in the peculiarly variable and uncertain atmosphere of a fog, even this is uncertain. Though he had seen no more, yet he might have heard more, and the lookout's duty comprehends hearing as well as seeing. It is not necessary to determine this point, however, as the Schley was almost admittedly to blame for excessive speed. That the Mayer also was to blame there can be no serious doubt. The fault is apparent on the face of the pleadings. A tug

and tow is not a method of navigation necessarily illegal, but it is a method of navigation so dangerous that the utmost care is required in its use. The H. M. Whitney, 30 C. C. A. 343, 86 Fed. 697, and cases cited. To circle about Boston light in a fog so dense that the nearest barge is often out of sight from the tug, to cross and recross the usual course of incoming and outgoing vessels, is not to exercise that care which is required from tows. One such turn may perhaps be excused in case of necessity, if extraordinary precautions are taken. Six such turns in one morning, with no precautions other than those required for the ordinary navigation of a tug and tow, are quite inadmissible. That Capt. McLeod of the Mayer was an intelligent and competent master his appearance on the stand tended to show. His error was the adoption of a wrong theory, forced upon him, perhaps, by the wishes of his owners, or by an unlawful custom prevailing among tow boat men. The diagram, which was made with care and substantial accuracy by Capt. Jones, of the leading barge,—the man who best saw the accident as a whole,—shows that the Mayer's maneuver closely resembled the drawing of a seine about a school of fish, which school is represented on the diagram by the Schley. Had a collision been sought, no more effective maneuver could have been devised.

It is not necessary for this court to say precisely what Capt. McLeod should have done that morning. He had his choice of several proceedings. He might have anchored his barges, if not in the traveled course between Thieves Ledge buoy and Boston light-ship, then in the comparatively unoccupied waters south of the light-ship. The condition of the sea, at any rate by 12 o'clock, afforded no obstacle. He might have turned about once on having made Boston light-ship, and have stood slowly to sea until the fog lifted, or until he had gone so far beyond the congested district around the light-ship as to make turning a matter of comparative safety. Counsel for the Mayer urged that, having once found his bearings, he could not be expected to lose them again, and that Thieves Ledge buoy and Boston light-ship afforded convenient limits for his course to and fro while waiting for the fog to clear up. That these objects were marks used constantly by vessels going in and out of Boston harbor shows that they could not properly be thus used by the Mayer as turning posts. It was urged that the Mayer gave all permissible signals. The tug and tow were to blame for making the turn under existing circumstances, with or without signals; but I think that signals other than those given would have been appropriate. Had it been necessary—as it was not—for the Mayer to turn about in the place selected, not ordinary, but extraordinary, precautions should have been taken. In turning about, however slowly, the tug and tow were an object of serious danger to a vessel approaching from almost any direction. The ordinary signals which determine under ordinary circumstances the position and course of the signaling vessel would be almost sure to mislead vessels approaching, as they misled the Schley in this case. It is true that the rules prescribe no signals to declare the Mayer's maneuver, not improbably because that maneuver in a fog is deemed so dangerous as to be almost inadmissible. If it becomes necessary, those who make

it should appreciate its extraordinary nature and danger, and should give the fullest possible warning that something extraordinary and dangerous is being done. Had Capt. McLeod constantly blown danger signals from the Mayer and from both his barges at the same time, it is probable that approaching vessels would have been warned off the neighborhood, though they would not have known precisely the danger which menaced them. Some extraordinary precaution like this I believe to be required if a turn like that in question is ever to be made. To have done this would have been to proclaim that something so dangerous was being done in the place that other vessels had best keep away until the act was completed. To state this would have been, I think, to state the truth. The Mayer stretched a line 2,000 feet long across a large part of the entrance to Boston harbor, in a dense fog, without power of altering the position of the line, except by pulling it at one end.

For these reasons, there must be a decree for a division of damages.

THE JOHN F. GAYNOR.

(District Court, E. D. Pennsylvania. April 7, 1902.)

No. 64.

COLLISION—STEAMER AT REST—PASSING TUG WITH TOW.

An incoming British steamship in charge of a licensed pilot stopped off the quarantine station in the Delaware river in the usual place, which was near the western side of the channel, to undergo the customary medical inspection. She did not anchor, and it was not customary to do so. While so lying, with the quarantine flag up, and while the examination was being made, a tug came down the river with two heavily laden scows without rudders in tow on a line some 1,400 to 1,600 feet long. Each vessel saw the other when a mile distant, and the tug understood the position of the steamship and the purpose for which she had stopped. The tug was properly on the westerly side of the channel, but there was ample room for her to pass to the eastward of the steamship, so as to avoid any danger of collision. She passed so close, however, that both of the scows sheered, and struck the steamship, which had not moved, and injured her. *Held*, that the tug was solely in fault for the collision in failing to keep at a safe distance in passing.

In Admiralty. Suit for collision.

Henry R. Edmunds and Convers & Kirlin, for libelant.
James J. Macklin, for respondent.

J. B. McPHERSON, District Judge. This is an action brought to recover damages for a collision that took place about 3 o'clock in the afternoon of June 16, 1899, between the tug John F. Gaynor and the British steamship Vedra, in which the steamship was injured. The Vedra was on her way from London to Philadelphia in ballast, drawing about 10 feet of water, and was proceeding up the Delaware river in charge of a duly licensed pilot. She is a tank vessel, built of steel, 2,622 tons net register, 435 feet long, 45 feet beam, and was properly manned and equipped. As she approached the Reedy Island quarantine station,—which is upon a pier running parallel with, and

close to the western edge of, the channel,—the quarantine flag was hoisted upon her foremast, her engines were stopped, and by the time she came nearly abreast of the station her way had practically ceased, so that she was merely being borne slowly up the river by the tide, which was then nearly flood. She did not anchor, but the testimony shows clearly that it is not customary for vessels to anchor while the medical examination is going on. A government boat put out from the station, carrying a physician, and the examination was begun. While it was going on, the tug came down the river, towing two square-bowed scows tandem, each being heavily loaded with stone, and drawing 12 or 13 feet of water. The total length of the tow was from 1,400 to 1,600 feet, each scow being 30 or 40 feet wide and about 150 or 160 feet long, and having no rudder or independent means of propulsion. The day was clear, and the wind was blowing briskly from about northwest. Each vessel saw the other more than a mile away, and understood the other's character and situation. The tug did not expect the steamship to anchor, but knew that she was lying at rest upon the water, undergoing, or about to undergo, examination by the quarantine physician. The boiler of the tug was not in very good condition, so that she was not able to exert her full power, but she was proceeding down the river against the tide at a speed of 3 or 4 knots an hour. At the time she saw the steamship, the tug was on the westward side of the channel, and, under ordinary circumstances, it was proper that she should be where she was. But when she saw the steamship at rest upon the water, with the quarantine flag flying, and knew that she was obliged to interrupt her voyage until the examination should be completed, it became the duty of the tug, as the moving vessel, to take every reasonable precaution to keep out of the way. There was ample room and depth of water for the tug to pass so far from the steamship that no collision could have possibly taken place. The channel was wide at this point, and there were no vessels near enough to offer any obstruction. The tug, however, kept her course so closely that when she approached the steamship it was evident that she would be obliged to pass within a few feet. She herself managed to get by in safety, but the first scow sheered toward the steamship, and broke one of the blades of the screw, and the second scow sheered more decidedly, and with her forward starboard corner struck the ship a severe blow on the starboard bow, doing a good deal of damage.

It is argued on behalf of the tug that the steamship was at fault, because she did not anchor, because she was too far out in the channel, and because it is averred that she made certain movements with her engines that put the ship into a more dangerous position than she would have otherwise occupied. It is also argued that she did not keep a proper lookout, and therefore did not see the tug in time to move out of the way. In my opinion, none of these charges is well founded. The pilot and second officer were on the bridge, other officers and men were on the deck, and the tug was seen more than a mile away. The steamship stopped in the customary place, and was not, I think, more than 500 or 600 feet from the station. She was not obliged to anchor, in the absence of special circumstances indicating

that to be her duty. I am also of opinion that her engines were not put into motion at all while she was undergoing examination. An order to go ahead was undoubtedly given, but it was countermanded immediately, and was not carried into effect. No signals were given by either vessel, and none was required. I see no reason, therefore, to charge the steamship with any fault. As it seems to me, the collision is properly chargeable to the tug for approaching too close to the ship with so unwieldy a tow. It is well known that scows of this description are very apt to sheer, as they have no rudder or other means of guidance than the tug itself; and, as these were being towed on a very long hawser, the danger of sheering was increased. The tug was bound to take note of the position of the ship and the business upon which she was engaged, and to pass far enough to the eastward to avoid the danger of collision. Apparently she either miscalculated the distance, or put off the effort to take the tow to the eastward until it was too late.

A decree for the libelant may be entered, with costs.

BATTLE v. ATKINSON.

(Circuit Court, E. D. Arkansas, W. D. April 28, 1902.)

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
When, from the nature of the action as set forth in plaintiff's complaint, there could not legally be a judgment for the amount necessary to the jurisdiction of a federal court, jurisdiction cannot attach, though the damages are laid in a larger sum.[1]

2. SAME—DAMAGES IN UNLAWFUL DETAINER.
The law of Arkansas (Sand. & H. Dig. c. 70, § 3458) having limited plaintiff's recovery in an action of unlawful detainer to the rent due at the commencement of the suit and up to the time of rendering judgment, or the value of the occupation during the time of the unlawful detention of the premises and damages for withholding the same, a federal court in that state does not have jurisdiction of such an action when the complaint alleges that the amount due is the rent for nine months at $25 per month, though damages are also claimed in the sum of $2,500, but without showing that plaintiff is entitled to anything but actual damages.

3. SAME—ACTION OF UNLAWFUL DETAINER—AMOUNT IN CONTROVERSY.
The courts of Arkansas having settled that the action for unlawful detainer under Sand. & H. Dig. c. 70, §§ 3349-3466, is merely for the purpose of restoring possession unlawfully detained, when the relation of landlord and tenant exists, without regard to ownership, the federal court in that state does not obtain jurisdiction of such an action by virtue of the allegation in the complaint that the value of the premises unlawfully detained is $5,000, with a rental value of $25 per month; the amount in controversy not depending on the value of the premises in fee, but on the rental value for the limited time.

4. SAME—MANNER OF DETERMINING AMOUNT OF CONTROVERSY.
The federal court in Arkansas, in an action of unlawful detainer, by analogy to the requirements of Sand. & H. Dig. c. 70, § 3449, requiring as a preliminary to the issuance of a writ of possession a bond in double

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[1] See Courts, vol. 13, Cent. Dig. §§ 890 [c, j, r, rr], 897 [a, b, j, s].
Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Shoe Co. v. Roper, 36 C. C. A. 459.

the amount of two years' rent, will, in determining the value of possession as affecting its jurisdiction, regard the amount in controversy as a sum double the amount of the rent of the premises detained for two years.

On Demurrer to the Jurisdiction.

This is an action of unlawful detainer for the possession of a block of ground and dwelling house thereon situated in the city of Pine Bluff, Ark., alleged to have been rented by the plaintiff, a citizen of Alabama, to the defendant, a citizen of Arkansas, for a monthly rental of $25 from May 1, 1901, to December 1, 1901. The complaint alleges that defendant took possession of the premises under a contract of lease on May 1st, but has failed to pay any rent whatever, and that his right to further occupy the lands ended on December 1, 1901, the time of the expiration of the lease; that the defendant now unlawfully detains the premises, after legal demand; and that the value of the property is $5,000. The prayer is for possession of the premises and $2,500 damages for the unlawful detention. The demurrer challenges the jurisdiction of the court upon the ground that the amount in controversy does not exceed the sum of $2,000, as shown from the face of the complaint.

J. M. & J. G. Taylor, for plaintiff.
Rose & Coleman, for defendant.

TRIEBER, District Judge (after stating the facts as above). The damages claimed in the complaint are in excess of the amount necessary to confer jurisdiction on this court in this controversy, which is between citizens of different states; but it is now well settled that if, from the nature of the case, as stated in the pleadings, there could not legally be a judgment for the amount necessary to the jurisdiction, jurisdiction cannot attach, even though the damages be laid at a larger sum. As early as 1798 Chief Justice Ellsworth said:

"It is not intended to say that on every question of jurisdiction the demand of the plaintiff alone is to be regarded, but that the value of the thing put in demand furnishes the rule. The nature of the case must certainly guide the judgment of the court, and whenever the law makes a rule the rule must be pursued. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one: but, where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded." Wilson v. Daniel, 3 Dall. 401, 407, 1 L. Ed. 655.

This rule has been followed by the courts ever since. Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Bowman v. Railway Co., 115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Vance v. W. A. Vandercook Co., 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; Trading Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061; Bank of Arapahoe v. David Bradley & Co., 19 C. C. A. 206, 72 Fed. 867.

There is no allegation in the complaint showing any special damages suffered by plaintiff by reason of the unlawful detention of the premises by the defendant, nor is there anything alleged which would entitle plaintiff to any but actual damages, which would, in this case, be the rents accruing to her from the time the possession was given to the defendant under the lease until the institution of this suit,—nine months, at $25 a month,—thus amounting to the sum of $225. Vance v. W. A. Vandercook Co., supra, is very much in point. In

that case—which was an action for the recovery of personal property of the alleged value of $1,000—$10,000 was claimed as damages, but the supreme court held that this claim of damages was insufficient to confer jurisdiction of the case on the circuit court. Mr. Justice White, who delivered the unanimous opinion of the court, after reviewing the statutes of South Carolina on the subject of replevin, which are similar to those of Arkansas regulating proceedings in actions of unlawful detainer, says:

"As, however, by way of damages in an action of this character, recovery was only allowable for the actual damage caused by the detention, and could not embrace a cause of damage which was not, in legal contemplation, the proximate result of the wrongful detention, and such recovery was confined, as we have seen, to interest on the value of the property, it results that there was nothing in the damages alleged in the petition and properly recoverable, adequate, when added to the value of the property, to have conferred upon the court jurisdiction to have entertained a consideration of the suit. Upon the face of the complaint, therefore, the circuit court was without jurisdiction over the action, and it erred in deciding to the contrary." 170 U. S. 481, 18 Sup. Ct. 650, 42 L. Ed. 1111.

The facts in that case were even more favorable to the contention of plaintiff that he was entitled to exemplary damages than are the allegations in the complaint in the case at bar, for it was there charged "that the trespass by the defendant was malicious, and resulted in the breaking up of plaintiff's trade and commerce," while in the case at bar there is no allegation whatever to entitle plaintiff to any but actual damages.

In Bank of Arapahoe v. David Bradley & Co., supra, Judge Caldwell, in delivering the opinion of the court, says:

"But jurisdiction is not acquired by a groundless and fictitious claim, made for the sole purpose of conferring it. The jurisdiction is determined by the amount demanded by the plaintiff in good faith, and not by the damages claimed, either in the body of the complaint or in the prayer for judgment. * * * In determining whether a claim is made in good faith or is fictitious, and is made only for imposing on the court a case not properly within its jurisdiction, the plaintiff will be held to a knowledge of the well-settled rules of law; and when the actual matter in controversy is inadequate in value to confer the jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered, and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, and for which there can be no recovery, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud on the jurisdiction of the court."

To the same effect see Trading Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061.

In Thompson v. Gatlin, 7 C. C. A. 351, 58 Fed. 534, the Arkansas statute of unlawful detainer was before the court, and it was there held that the recovery of damages was limited to actual damages resulting from the dispossession. The claim for $2,500 damages made by the plaintiff must, therefore, be disregarded, except for the sum due for rent at the time of the institution of the suit, which amounted to $225, and treated as a mere attempt to give this court jurisdiction, if it does not possess it by reason of the allegation that the value of

the premises sought to be recovered in this action exceeds $2,000. The allegation of the complaint is that the value of the premises for the possession of which this suit has been instituted is $5,000 and the rental value $25 a month. What is the criterion of the amount in controversy? Is it the value of the title in fee simple to the premises, or only the rental value for a limited time? In Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895, the court say:

"By 'the matter in dispute' is meant the subject of the litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken." 130 U. S. 175, 9 Sup. Ct. 569, 32 L. Ed. 895.

In Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646, the question before the court was whether the amount involved exceeded $5,000, the amount necessary to confer at that time jurisdiction on the supreme court. The facts were that the plaintiff in error had recovered $9,725.66, while it claimed to be entitled to $12,155, or $2,429.34 more than the amount recovered. The action was one under the peculiar practice prevailing in the state of Georgia to foreclose a mortgage, but could not settle the title to the mortgaged premises, which could only be judicially determined by an action of ejectment after a recovery in an action on the debt, and it was there held that the amount involved was the difference between the sum recovered and that claimed, and that the jurisdiction of the court must be determined by the amount involved in the particular case, and not by any contingent loss which may be sustained by either one of the parties through the probative effect of the judgment, however certain it may be that such loss will occur. See, also, Troy v. Evans, 97 U. S. 1, 24 L. Ed. 941; Town of Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; Zinc Co. v. Trotter, 108 U. S. 564, 2 Sup. Ct. 875, 27 L. Ed. 828; City of Clay Center v. Farmers' Loan & Trust Co., 145 U. S. 224, 12 Sup. Ct. 817, 36 L. Ed. 685. In the last-cited case the court held that when, in an action to recover an installment of rent, the judgment is for less than $5,000, the supreme court is without appellate jurisdiction, although the judgment involved the existence and validity of the contract of lease, and thus indirectly an amount in excess of the jurisdictional limit.

The Arkansas statutes under which this action is brought contain the following provisions (chapter 70, Sand. & H. Dig. Ark.):

"Sec. 3449. The writ of possession specified in the foregoing section shall not be executed in any case unless the plaintiff or some person in his behalf, shall execute to the officer having the writ, a bond with sufficient surety to be approved by such officer, in a sum at least double the value of two years' rent of the property specified in the writ, which value shall be ascertained by the oath of one or more witnesses to be sworn and examined by such officer."

"Sec. 3452. Upon the receipt of such writ and obligation before required, the sheriff or other officer shall forthwith proceed to execute such writ by ejecting from the premises named therein the defendant or any servant, agent or employé, of his or any other person who shall have received or entered into the possession thereof after the issuance of such writ, and by delivering the possession thereof to the plaintiff or his authorized agent, and by summoning the defendant to appear and answer to the action according to the terms of such writ. Provided, if the defendant shall desire to retain

possession of such premises, he shall signify the same to the officer, who shall give the defendant five days in which to execute a bond in an amount equal to the bond given in such action by the plaintiff, with sufficient surety to be approved by such officer, conditioned that he will deliver possession of the premises to the plaintiff, if the plaintiff recover in the action, and satisfy any judgment the court may render against him in the action. If such bond be given and delivered as above required, the officer shall leave the possession of such premises with the defendant, and shall return such bond with the writ into court."

"Sec. 3458. If, upon the trial of any action under this act, the finding or verdict is for the plaintiff, the court or jury trying the same shall assess the amount to be recovered by the plaintiff for the rent due and withheld at the time commencement of suit and up to time of rendering judgment, or the value of the use and occupation or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, or the damages to which said plaintiff may be entitled on account of the forcible entry and detainer of such premises, and thereupon the court shall render judgment in favor of the plaintiff for the recovery of such premises, and for any amount of recovery that may be so assessed, and if possession of the premises has not already been delivered to the plaintiff under the writ first issued, shall cause a writ of possession to be issued commanding the officer to whom directed to deliver to the plaintiff, the possession of the premises, and to levy of the goods, chattels, lands and tenements of the defendant the amount of recovery that may have been assessed as aforesaid, together with the costs, or in case possession has already been delivered, shall award the plaintiff execution as in case of judgment in personal actions.

"Sec. 3459. In case the finding or verdict is for the defendant the court shall give judgment thereon with costs and for any damages that may be assessed in favor of the defendant and shall also issue a writ of restitution, directed to the sheriff, to cause the defendant to be re-possessed, to which shall be added a clause commanding the sheriff to levy of the goods, chattels, lands and tenements of the plaintiff the damages assessed in favor of the defendant with costs. If the finding and judgment be in favor of the defendant, but from any cause, he be not entitled to the re-possession of the premises at the time of judgment, then the writ of execution shall only be for the damages and costs that may be awarded him, and in all cases where judgment is rendered, either against the plaintiff or defendant for any amount of recovery, damages or costs, judgment shall also be rendered against his sureties in the bond given under the provisions of this act.

"Sec. 3460. In all cases of forcible entry and detainer, and forcible and unlawful detainers, when the defendant gives bond to retain possession of the lands and premises mentioned in the writ and declaration in cause as provided by law, it shall be lawful for the plaintiff to introduce before the jury trying the main issue in such action evidence showing the damage he may have sustained in being kept out of possession of said lands and premises, and the jury, if they find the issue for the plaintiff, shall at the same time assess what damages, if any, the plaintiff has sustained in being kept out of possession by the defendant, and the court shall render judgment restoring the property to the plaintiff, as now prescribed by law, and shall also render judgment against the defendant and his security in the bond for damages as found by the jury, as well as the cost of suit."

"Sec. 3463. In trials under the provisions of this act, the title to the premises in question shall not be adjudicated upon or given in evidence, except to show the right to the possession, and the extent thereof."

"Sec. 3465. Neither the judgment nor anything in this act shall bar or preclude the party injured from bringing his action of trespass or ejectment or other action against the aggressor or party offending.

"Sec. 3466. The preceding sections of this act shall extend to and comprehend all estates, whether freehold or less than freehold."

The result of this action cannot, except contingently, affect the title to the premises, as the statute expressly provides that "the title

to the premises in question shall not be adjudicated upon or given in evidence except to show the right of possession, and the extent thereof" (section 3463); the object of the statute, as construed by the supreme court of the state, being "to restore possession forcibly taken or unlawfully detained, without regard to ownership or title to the property." McGuire v. Cook, 13 Ark. 448. Nor can the action be maintained unless the relationship of landlord and tenant exists between the parties. Dortch v. Robinson, 31 Ark. 296; Necklace v. West, 33 Ark. 682; Mason v. Delancy, 44 Ark. 444; McCauley v. Hazlewood, 8 C. C. A. 339, 59 Fed. 877; Sanders v. Thornton, 38 C. C. A. 508, 97 Fed. 863. The action being one to determine merely the right of possession at the time of the institution of the suit, regardless of the ownership or title, the value of the right of possession alone must determine the amount involved, with such actual damages as the complaint shows the plaintiff can recover under the statute in this action. Bank v. Hoof, 7 Pet. 168, 8 L. Ed. 646; Transfer Co. v. Pendergrass, 16 C. C. A. 585, 70 Fed. 2; Harris v. Barber, 129 U. S. 366, 9 Sup. Ct. 314, 32 L. Ed. 697; Willis v. Banking Co., 167 U. S 76, 17 Sup. Ct. 739, 42 L. Ed. 83. How is that value to be ascertained? The lawmaking power of the state, in providing for the bond to be given by the plaintiff before the writ of possession can be executed, or by the defendant to retain the possession, of the possession a sum double the value of two years' rent of the premises in controversy. Section 3449, supra. It is true the court may require a larger bond, but that would only be done if the allegations in the complaint show that the party deprived of the possession would be entitled, as actual damages, to recover a larger amount than double the value of two years' rent of the premises. The action may be for the possession of a valuable farm with a crop on it ready for gathering, or there may be other special reasons why the rental value would not be a proper measure of damages; but nothing of the kind is alleged in this complaint. The court would, therefore, not be justified to require in this case a larger bond than double the value of two years' rent, which in this case would be $1,200, the value of the premises for two years, according to the allegations of the complaint, being $600. There is no reason why the court should not, by analogy, adopt this rule for the purpose of determining the value in controversy for jurisdictional purposes. The amount plaintiff could recover in this action, if the possession is retained by the defendant until the final determination of the cause,—which it is hardly reasonable to suppose would last in the trial court more than two years,—would be $600. Should an appeal be taken from the judgment of this court, a supersedeas bond would have to be executed by the defendant, which would cover all damages sustained while the case is pending in the appellate court. The nine-months rent claimed to be due at the time the suit was instituted would amount to $225, leaving $375 of the penalty of the bond for any other actual damages the plaintiff may suffer by reason of being deprived of the possession of the premises. In no event can it be said that under the allegations of the complaint the amount in controversy can exceed $2,000.

The demurrer to the jurisdiction of the court must therefore be sustained.

INTERSTATE SAVINGS & LOAN ASS'N OF MINNEAPOLIS v. BADGLEY et al.

(Circuit Court, D. Oregon. April 29, 1902.)

No. 2,711.

1. SAVINGS AND LOAN ASSOCIATIONS—MORTGAGES—FORECLOSURE—COMPLAINT—EQUITY.

   A complaint by a savings and loan association to foreclose a mortgage was without equity, where it appeared that in order to procure the loan the mortgagor was required to subscribe for stock, and that the withdrawal value of the stock, plus the premiums paid by the mortgagor, etc., more than equaled the face of the loan, and that the interest paid on the average balance due on the loan amounted to about 12 per cent.

2. SAME—WHAT LAW GOVERNS IN DETERMINING WHETHER COMPLAINT HAS EQUITY.

   Whether the complaint was without equity was not determinable by the laws of the state where the association was organized, but according to the law of the forum.

Carey & Mays, for plaintiff.
William Reid, for defendants.

BELLINGER, District Judge. This is a suit to foreclose a mortgage given to secure a loan or advancement made by the plaintiff company, a savings and loan corporation organized under the laws of Minnesota, to the defendants. On the 27th of January, 1893, the defendants, at Portland, Or., applied for 35 shares of plaintiff's capital stock, of the par value of $100 per share. At the same time the defendants also applied for a loan of $3,500 upon certain real property in Portland, and offered to pledge the stock applied for as an additional security for the loan. These applications were accepted, and the following note was given by the defendants to the plaintiff:

"No. 294. Nonnegotiable First Mortgage Note of the Interstate Savings & Loan Association of Minneapolis, Minn. $3,500.00.

"Minneapolis, Minn., Feb. 4th, 1893.

"In consideration of the sum of thirty-five hundred dollars ($3,500.00) this day loaned to me as a member of the Interstate Savings & Loan Association, Minneapolis, Minn., upon thirty-five shares of stock now held and owned by me in said association, as evidenced by certificate of stock No. 7,183: Now, therefore, I, the undersigned, hereby promise and agree to repay to said Interstate Savings & Loan Association on or before the maturity of said stock the sum of thirty-five hundred dollars ($3,500.00), with interest thereon at the rate of six per cent. per annum, and seven per cent. premium per annum, both interest and premium payable monthly on or before the twentieth day of each month, commencing January twentieth, 1893. It is agreed that this note is made with reference to and under the laws of the state of Minnesota, articles of incorporation, and by-laws of said association. Principal, interest, and premium payable in current funds at the office of the said Interstate Savings & Loan Association, Minneapolis, Minn. And I further agree to pay all taxes or assessments which may be levied or assessed to the holder of this note on account thereof. And in case suit or action is instituted to collect this note, or any part thereof, to pay such further sum as the court may adjudge reasonable as attorney's fees in said suit or action.

Clara Badgley.
"Clara Elbertson."

A certificate for 35 shares of stock was issued to the defendants as of February 1, 1893, and was transferred by them to the company as of February 18, 1893. The mortgage in suit was executed as of the date of the note, February 4th.

Among the conditions of the stock subscription was one by which the defendants were required to pay monthly 60 cents upon each share of stock until such shares became matured or were withdrawn. These payments were required to be made monthly in advance at the same time the monthly payments of premium and interest were made. In default of this monthly payment, the shareholders were liable to a fine of 10 cents per share. It was further provided that after 84 payments had been made the certificate holders should have the option of continuing payments until the stock reached maturity, of discontinuing payments, allowing those already made to remain until the stock matured by the accumulation of earnings, or of withdrawing from the association, receiving all payments made as dues, and all earnings credited thereto, less any indebtedness on the part of the member to the association, and less 2 per cent. required to be deducted for the contingent fund. On the argument of the demurrer it was assumed by both parties that 84 payments of interest, premiums, and monthly stock installment payments had been made. The agreement of the parties, as has been seen, required these payments to be made on or before the 20th of each month, beginning January 20, 1893; and the allegation as to default is that the defendants have failed to make any of the payments provided for "after the 1st day of March, 1900." If there was no default until after March, 1900, the monthly payments for January and February of that year must have been made, making 86 payments. The complaint alleges that the amount of the loan, less the withdrawal value of the certificate of stock, is $2,129.40; the withdrawal value of the certificate being credited at $1,370.60. To this amount there is added $14 paid by plaintiff on an insurance policy upon the property covered by the mortgage in suit.

The defendants demur to the complaint for want of equity, and upon the ground that it appears from the complaint that the amount in controversy is not sufficient to give the court jurisdiction.

One of the stipulations in the certificate is as follows:

"Shares in this certificate may be withdrawn at any time on ten (10) days' notice, and the holder shall receive all amounts paid in as dues on stock, less any indebtedness on the part of such member to the association, and interest in addition at the rate of four (4) per cent. per annum, computed on the average time of the investment, if the stock is six (6) months old; five (5) per cent. if one year old; six (6) per cent. if two years old; seven (7) per cent. if three years old; eight (8) per cent. if four years old; nine (9) per cent. if five years old; ten (10) per cent. if six years old; and all the earnings if seven (7) years old. Such interest will only be allowed up to the last pay day preceding date of withdrawal notice. All shares shall be withdrawn when matured."

By this stipulation the withdrawal value of shares is definitely fixed. In no case can such value be less than the amount paid on the stock. There is no reason why the withdrawal value of shares assigned to the company, to be applied on the loan or advancement, should be

other or less than the value to which the party is entitled under this stipulation. Without the interest computed on the average time of the investment, or anything on account of earnings, the withdrawal value of these shares as fixed, upon the basis of 84 payments, is $1,764. If there have been 86 payments, as must be assumed from the allegations of the complaint, the credit must be $1,806 plus all the earnings. This leaves a balance of $1,694 due, without taking account of the monthly premium payments, which aggregate $1,755.80, or of earnings. These premium payments are not applied in reduction of the principal of the loan. They are not interest payments, nor are they installment payments on stock, both of which are otherwise provided for. According to the conditions printed in the stock certificate, these payments are profits to be apportioned to the shares in good standing. If so, then they are made to be repaid to those who make them; yet nothing is credited to the defendants on this account. What has become of this $1,755.80, or what is to become of it? Is it to be a gratuity to the company? Is there to be no credit for it on the debt, or in estimating the value of the stock to be applied on the debt? It is apparent that the stock was to provide an additional security, or a bonus, or an exceptional rate of interest for the loan. The form of the transaction does not affect its character. The applications for the loan and stock are of even date, and are manifestly parts of a single transaction. It was a loan transaction, in which a large sum of money in excess of interest and credits was exacted from the borrowers in the guise of "premiums." The stock was subscribed for merely to qualify the defendants to become borrowers. It was transferred to the company, nominally to secure the loan, but really as a means of securing installment payments on the debt in advance of its maturity. The by-laws of the company require borrowers to pay interest at 6 per cent., and a premium of 7 per cent. per annum. The application for the loan contains this agreement: "And we agree to pay interest on said loan at the rate of six per cent. per annum, and a premium of seven per cent. per annum, payable monthly in advance." According to this, the premium was to be paid on the loan. If premiums paid by borrowers are to accumulate for division among stockholders, the stockholders must all be borrowers, to prevent unjust discrimination between them, and such is undoubtedly the fact. The stockholders in this association are borrowers, and nothing more.

It is argued that the contract in this case must be enforced, if it is a lawful contract, under the laws of Minnesota, where the complainant company is organized. But it must be remembered that the company comes into court, invoking the aid of its equity jurisdiction, and in all such cases "the court of equity refuses its aid to give to the plaintiff what the law would give him, if the courts of the common law had jurisdiction, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which the court would not otherwise enforce." This, Pomeroy says, is a universal rule governing the courts of equity in administering all kinds of equitable relief in any controversy where its application may be necessary to work out complete justice. 1 Pom. Eq. Jur. § 385. The principle of this rule is that a court of

equity should refuse its aid in the enforcement of an unconscionable demand, although the right claimed is one recognized by the law, and is one against which equity would not grant affirmative relief. The court merely refuses its aid when the relief sought is inequitable. Is the relief prayed for equitable? This question is not determined by the legislation of the state where the plaintiff company is organized. The legislation of a particular state may make that lawful which is against conscience, but it cannot make it enforceable in courts of equity without its jurisdiction. The defendants have more than paid the principal of the advancement, and they have paid interest monthly in advance at the rate of 6 per cent. per annum. If allowance is made for the advance monthly payments applicable on the principal of the debt or advancement, the average principal due during the period in question has been a fraction below $1,750, so that the interest paid on what was actually due has been at the rate of about 12 per cent. In equity, this is all the complainant is entitled to receive on the advancement made.

The demurrer is sustained, and the bill of complaint dismissed, at complainant's cost.

READING INS. CO. v. EGELHOFF (AMERICAN INS. CO. OF NORTH AMERICA et al., Interveners).

(Circuit Court, W. D. Missouri, W. D. April 5, 1902.)

No. 2,395.

1. EQUITY—FINDINGS OF MASTER—REVIEW.
   The finding of a master as to the value of a stock of goods before and after a fire, made on a careful and impartial review of conflicting evidence, will be accepted by the court unless manifestly erroneous.
2. SAME.
   Where it appears from the report of a master, which is not contradicted, that neither party requested a finding on a particular matter, but the same was virtually waived, the court will not, on exceptions to the report, refer it back to have such finding made.
3. INSURANCE—INTEREST ON AMOUNT OF LOSS—DATE OF COMMENCEMENT.
   Under a provision of insurance policies that "the loss shall not become payable until 60 days after notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required," where there has been no appraisal by arbitrators, the loss becomes "due and payable" 60 days after proofs of loss, within the meaning of the Missouri statute fixing the time from which a claim arising on a written contract shall draw interest.[1]
4. SAME—VALUATION OF GOODS—PROCEEDS OF SALE AT AUCTION.
   An insured who, pending efforts at an arbitration to determine the damage to goods by fire, against the protest of the insurance companies, proceeds to sell such goods at auction, cannot insist that the companies are concluded as to their value by the amount realized.

In Equity. On exceptions to master's report.

Fyke, Yates & Fyke, for complainant.
Frank Titus and Wallace & Wallace, for defendants.

[1] See Insurance, vol. 28, Cent. Dig. § 1494.

PHILIPS, District Judge. This cause, after oral argument by the respective counsel, has been submitted, on exceptions filed by each party to the findings of the special master. I have read with care the report of the master, and find that he has presented with singular clearness and impartiality a synopsis of the evidence, and has carefully reviewed the conflicting testimony of the witnesses; and I am unable to say that his deductions therefrom are not well warranted. In a matter of conflicting evidence, especially touching the value of a stock of goods like the one in question, before and after a fire, the conclusions thereon reached by the master should not only be entitled to great weight on review by the court, but should be accepted, unless manifestly erroneous. Especially should this rule be adhered to where it is apparent, as in this case, that the master has applied to the evidence careful consideration and an impartial judgment. Taking all the facts into consideration, his estimate of the actual damages to the stock of goods, resulting from the fire, seems well sustained by the proofs; and I am unable to discover any such false deductions from the testimony, taken in its entirety, as should demand a disturbance by the court of the master's findings.

It is urged by counsel for respondent that the master failed to make a specific finding as to which of the parties was in fault for the failure to proceed with the arbitration. Waiving any consideration of the question of law as to whether or not the terms of the policy respecting the submission to arbitration is so compulsory that a failure, or even refusal, of one of the parties to consent to an arbitration would authorize the other to proceed ex parte with the selection of an arbitrator, so as to bind absolutely the defaulting party by the appraisement of such arbitrator, it ought to be a sufficient answer to this contention of respondent to say that the master states in his report that "at the hearing and argument of the case by counsel the issues were narrowed down substantially to the question of the amount of damages sustained by the respondent, all other issues raised by the pleadings being virtually waived. Neither complainant nor respondent has asked for a report by the master with respect to the failure of the appraisement provided for in and by the policies of insurance, or a finding of fact as to whether the complainant or respondent was at fault in that matter. Neither party has asked for a ruling by the master as to the exceptions taken to the testimony of the witnesses bearing on the question of appraisement and the conduct of the parties in that connection." On the hearing of these exceptions nothing was presented to the court in contradiction of this finding by the master in such form as to warrant the court in saying it was incorrect. Furthermore, it is apparent to the court from references to, and quotations from, certain letters addressed by counsel for the insurance companies to the respondent, pending the efforts to effect an arbitration, that the complainant, up to the time of the sale of the goods at auction by the respondent, was expressing a willingness to proceed in the arbitration by selecting other appraisers after the failure of those theretofore selected to agree or proceed. It is also apparent to the court that, after a certain stage in these negotiations and efforts, the correspondence between the parties passed under

the dictation of counsel, who were seeking, by diplomatic refinement, to get the better of each other by self-serving statements in anticipation of probable litigation. After the parties thus lead the master to infer that they did not insist upon any finding upon such issue, the court does not feel called upon, in passing upon the exceptions, to refer the matter back to the master on such technicality.

At the argument on the exceptions, it was suggested by respondent's counsel that the evidence shows there were $1,200 worth of goods insured which were totally destroyed by the fire, and it is insisted that the master failed to take this fact into consideration in the estimate of damages. It is true that the master does not in his report advert directly to such evidence, if it existed. But it is obvious enough that if such fact existed the master's finding of the amount of damages necessarily includes such loss. His report shows that he made an ascertainment of the value of the goods on hand at the time of the fire, and their value after the fire; so that in this estimate the respondent had the benefit of the value of the entire stock of goods on hand just before the fire, which necessarily included the $1,200 worth destroyed; while the value of the goods actually left on hand after the fire showed the amount of loss. If the $1,200 worth of goods had not been wiped out by the fire, there would have been a corresponding greater quantity on hand to be added to the appraisement, which would, to that extent, have lessened the amount of damages to be awarded by the master, in his findings, to the respondent.

Exception is taken by complainant to the amount of interest awarded by the master on the damages assessed. The statute (Rev. St. Mo. 1899, § 3705) in force at the time of the loss in question provides that "creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made." The policy of insurance being a contract in writing, providing for the payment by the insurer of loss resulting from fire, interest is allowable thereon after the amount of the loss became due and payable. The policy itself provides that "the loss shall not become payable until sixty days after notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required."

The contention of complainant's counsel, as I understand it, is that the interest would not accrue until after an award by appraisers. This construction of the contract is not tenable. It would certainly be inconsistent with the attitude assumed by the complainant in this controversy that an appraisement was not a condition precedent to the right of action. There was no appraisement, which means an award by arbitrators; and the meaning of this provision is that the loss would become payable 60 days after notice, ascertainment, and satisfactory proofs of loss; but where the matter of loss is submitted to arbitrators, and award rendered, interest would not attach to the sum due by the insurer until after award. The master has fixed the period at which interest attaches as June 16, 1899. I take it that he estab-

lished this as the time approximately when the 60 days had run after proof of loss. The court, however, is of opinion that the master is in error in fixing the date at June 16, 1899, at which the expense account of $412.50 is to draw interest, found by the master to be owing to the respondent. As shown by the master's report, this obligation of the insurance companies does not arise upon any positive provisions of the contract of insurance, but is made to depend upon a conventional arrangement between the insured and the agents of the insurance companies after the fire. As such, it is in the nature of an account in favor of the respondent against the insurance companies, and as such, under the statute, would not bear interest until after demand. It appearing that the insured, on or about the 10th day of July, 1899, wrote a letter, making claim for the expenses incurred in and about the removal of the goods, which includes the item of $412.50 found by the master to be the just amount to be paid to the insured, and it being probable that this letter was received by the insurance companies in the due course of mail, by the 15th of July, 1899, the court fixes that date as the time of the demand, and that said sum of $412.50 should bear interest therefrom.

The conclusion reached by the master, both on the facts and the law, respecting the contention of counsel for respondent that the insurance companies should be concluded by the amount realized by the respondent on the sale of the goods at auction, is satisfactory to the court. The authorities relied upon by respondent's counsel in support of this contention are not applicable to the facts of this case.

There would be both reason and authority for the contention by the insurance companies that the insured had forfeited any right of action against them on the policies by a sale of the goods without their consent pending the efforts at an arbitration, as the sale and conversion of the goods by the insured would have rendered it impossible to make an appraisement under the arbitration. But as the master has found, and I think properly, that the insured proceeded to sell the goods at auction against the protest of the insurance companies, it is not the law that the insured can by such sale insist that the price realized thereat is binding on the insurance companies. He sold at his peril; and it would be a travesty on justice to hold that this ex parte and willful proceeding on his part should cut off the insurance companies from showing, under the issues in this case, what was the actual market value of the goods by evidence aliunde. As the master says in his report, the amount realized on this sale might be admitted as evidence for the consideration of the court, but it is by no means conclusive. The conclusion reached by the master on all the evidence respecting this issue is a reasonable one, and ought not to be disturbed by the court.

Other matters raised by the exceptions and discussed by counsel at the hearing are satisfactorily considered and determined by the master in his report, and need not be further discussed by the court.

It results that the exceptions of both parties are overruled, and the report of the master is approved, with the exception respecting the date of interest on the item of $412.50.

KEITH v. PARKER.

(Circuit Court, D. Oregon. April 29, 1902.)

No. 2,687.

NOTES—VARYING BY ORAL AGREEMENT.

A note promising to pay a certain sum at a certain time is varied by contemporaneous oral agreement that the payee and another might pay themselves that amount out of such funds as might be derived from operation of mines, which they agreed to operate if the maker did certain things.[1]

Snow & McCamant, for plaintiff.
Cotton, Teal & Minor and Butcher & Correll, for defendant.

BELLINGER, District Judge. This is an action upon a promissory note for $7,500. The defendant's answer sets out an agreement of even date with the note, entered into between the defendant as the party of the first part and the plaintiff and one Bamberger, in which it is recited that the party of the first part owns certain lode mining claims and mill sites, consisting of two groups, which claims are designated by their names; that said party expects to be able to procure, and will do so, if able, an option to purchase the right to use and work an adjoining claim, called the "Wide West," and the Wide West tunnel, and to dump at the mouth of said tunnel; and said party agrees that, if he secures such right, he will assign such option to the parties of the second part, who agree on their part to extend the Wide West tunnel to a connection with one of the said mines before mentioned, named the "La Bellevue," and will further construct a raise from the Wide West tunnel to a certain tunnel in the La Bellevue group, and make certain other improvements of like character, connecting said Wide West tunnel with others of the claims mentioned. Upon the completion of the work the first party agrees to convey to each of the second parties an undivided one-third interest in the properties mentioned, subject to a payment of $50,000 to the first party out of the net proceeds resulting from the operation of the mine or its sale. The second parties were not obliged to pay said sum otherwise than as it might be derived as aforesaid from the mine. It is alleged that, in order to induce Parker, the defendant, to enter into the agreement mentioned, the plaintiff, Keith, advanced to said defendant $7,500, for which the note in suit was given. It is further alleged that the note and agreement were parts of one transaction; that it was further agreed between the parties that the $7,500 for which the note was given should be payable only out of the first proceeds of the operation or sale of the mining claims described in the agreement, and not otherwise, and that the plaintiff acted in the transaction, and holds the note in question for himself and Bamberger jointly; that the second parties represented and promised that a sum more than sufficient to pay the note would be realized from the mines within six months from the date of the agreement, and that the note was given by the defendant only on the condition that such sum would be realized within said time. Plaintiff moves to strike out such parts of the an-

[1] See Evidence, vol. 20, Cent. Dig. § 1800.

swer as allege that the note sued on was to be paid out of the proceeds of the mines, and not otherwise, and that it is held by plaintiff for himself and Bamberger jointly.

I conclude, contrary to the opinion heretofore rendered upon this motion, that the effect of the averments in question is to vary the terms of the note upon which recovery is sought. If so, these matters are not admissible as a defense. The rule is established that a contemporaneous verbal agreement cannot be proved to vary or contradict a written contract. Burnes v. Scott, 117 U. S. 585, 6 Sup. Ct. 865, 29 L. Ed. 991. The authorities to this effect are numerous. By the written agreement the defendant promised to pay $7,500, with interest, six months after date. According to the matter pleaded, he did not promise to pay anything, but agreed that the payee and Bamberger might pay themselves that amount out of such funds as might be derived from the operation of certain mines, which the plaintiff and Bamberger agreed to operate provided the defendant performed certain conditions precedent to such operation. There was a written agreement between plaintiff and Bamberger on the one part and the defendant on the other, contemporaneous with the note, which sets forth in precise terms the obligations and the duties of the parties as to the operation of the mines and the payment of the $50,000 expected to be derived therefrom. There is a conclusive presumption that, where the parties have thus explicitly set forth the terms and conditions upon which they have agreed, they have stated what they intended, and it is inconceivable that they intended something to the contrary of what they have thus stated. Any other rule than that adopted would render written contracts and obligations worthless. In the note sued on, the maker authorizes the payee to pay the note out of the first net proceeds of the mine, and he states that when the note is thus paid the parties of the second part to the mine contract are to be credited with the amount upon the $50,000 payment which they were required to make out of net proceeds of the mine, and not otherwise. Now, if the $7,500 was to be repaid only out of the $50,000, it became, in effect, an advance payment on the $50,000, and there was no reason why the note should have been made. In such case Parker was entitled to keep the $7,500, and Keith and Bamberger were required to pay $50,000, less the $7,500 advanced. In other words, according to the averments in question, Parker was not required to repay the $7,500. He was merely entitled to receive out of the net proceeds of the mine that much less than he would otherwise receive. Under such an agreement Keith and Bamberger were required to pay $7,500 out of their own pockets and $42,500 out of the mine, although the contemporaneous written mining agreement says that the $50,000 was to be paid by the second parties out of the net proceeds of the mine, and that they were not personally obligated to pay it out of their own pockets. So that the matter alleged not only varies the obligation of the promissory note, but it operates to change the effect of the written agreement between Parker on the one part and Keith and Bamberger on the other, set out in the answer.

The motion to strike out is allowed. I see no reason to change the ruling heretofore made as to the counterclaim, and the demurrer as to that is sustained.

EVANS v. GORMAN.

(Circuit Court, E. D. Arkansas, E. D. May 9, 1902.)

No. 107.

1. COURTS—FEDERAL COURTS—JURISDICTION—INJUNCTION—RESTRAINT OF JUDICIAL SALE.

   Under Rev. St. § 720, prohibiting the federal courts from enjoining proceedings in state courts, which is declaratory of a rule of comity, a federal court has no power to enjoin a sale of estate lands ordered by the Arkansas probate court to pay judgments against the estate; such court, under Const. Ark. art. 7, § 34, being a court of record having exclusive jurisdiction of the estates of deceased persons, the lands of which estates, under Sand. & H. Dig. Ark. § 80, are estate assets, subject to the payment of debts; and this is true even though the injunction suit is ancillary to a suit to set aside such judgments for fraud, commenced after the sale has been ordered.

2. ADMINISTRATORS AND EXECUTORS—SALE OF ESTATE PROPERTY—SUIT TO ENJOIN—PARTIES.

   Judgment creditors of an estate are indispensable parties to a suit to enjoin the administrator from selling estate real property for the payment of such judgments.

3. SAME—PARTIES—MISJOINDER.

   Where the jurisdiction of the federal court to grant an injunction is based on a diversity of citizenship, the omission of a necessary party, who cannot be made a party without defeating the jurisdiction of the court, requires a dismissal of the cause.

In Equity. On application for temporary injunction.

The defendant objects to the granting of the temporary injunction upon two grounds: First, that it comes within the inhibition of section 720, Rev. St.; and, second, that the bill is demurrable also upon the ground that the judgment creditors are not made parties to this bill, although they are indispensable parties. The bill alleges that the complainant, William E. Evans, is a citizen and resident of the state of Missouri, and that the defendant, Henry P. Gorman, is a citizen and resident of the state of Arkansas; that the complainant, one of the heirs at law of Hiram Evans, deceased, heretofore filed in this court a bill of complaint against William N. Wilkerson and Thomas H. Chilton, charging that a certain judgment of the probate court of St. Francis county, Ark., allowing a claim of about $4,000 in favor of said parties against the estate of Hiram Evans, deceased, was obtained by fraud, and through conspiracy and collusion with one James Evans, the then administrator of said estate, and is therefore illegal and invalid in equity, and is a lien upon complainant's interest as heir at law of said Hiram Evans, deceased, in the real estate described in said bill, in which bill the complainant asked that the judgment of said probate court be set aside and held for naught. It is also alleged that the time in which the defendants are required to answer has not yet expired, and they have not entered appearances thereto. It is also alleged that, after the filing of the bill above referred to by the complainant, Mary E. Jackson, Nannie A. Hoshall, and Sallie J. McDaniel, who are also heirs at law of the said Hiram Evans, deceased, and equally interested with complainant in the real estate described in said bill, filed their original bill of complaint in this court against George M. Taylor and several other parties, alleging that the said defendants, by fraud, collusion, and conspiracy between themselves and with one John Evans and James Evans, administrator of the estate of Hiram Evans, deceased, procured judgments in the probate court of St. Francis county, Ark., allowing against the said estate certain claims aggregating about $3,000, which claims are alleged to have been the debts of said John Evans, and not of said Hiram Evans, deceased, and to have been contracted long after the death of said Hiram Evans; and in said bill it is alleged that

the said judgments were wholly beyond the jurisdiction of said probate court to render, and it was asked that said judgments be set aside, and declared not to be a lien on the real estate described therein, which is the same real estate described in complainant's bill above referred to; that the bill of Mary E. Jackson and others is still pending, and the time within which the defendants are required to answer has not yet expired, and they have not entered their appearances thereto. Complainant adopts the allegations of the bill last referred to, and alleges their truthfulness. The bill further alleges that the said James Evans, administrator of the estate of Hiram Evans, deceased, died on or about the 23d day of December, 1896, without having fully settled said estate, and that at the time of his death he had in his possession personal assets belonging to said estate to the amount of about $10,000; that thereupon the said probate court appointed the defendant, Henry P. Gorman, administrator de bonis non of said estate, who duly qualified, and has been acting ever since, but he has wholly failed to pursue and recover the aforesaid personal assets belonging to said estate in the hands of James Evans, administrator, at the time of his death; that about the 21st day of July, 1897, and before the matters complained of in the bills of complainant and Mary E. Jackson and others were known or discovered, the said Gorman presented his petition to the probate court of St. Francis county, wherein he erroneously averred that by reason of the judgments allowing the claims charged to be illegal and fraudulent in the bills above referred to there was not sufficient personal property in his hands to pay said judgments, whereupon the said probate court granted him an order authorizing him to sell the real estate described in the bills of complainant and Mary E. Jackson and others, which action of the probate court became by the law of the state a judgment, and beyond the control of said court after the expiration of the term at which it was rendered, and could not be altered, amended, or vacated; and that none of the heirs at law of the said Hiram Evans, deceased, being parties to said proceedings, could appeal from said judgment, or have a writ of certiorari thereon. It is further alleged that no sale was ever made under said judgment of the probate court, and on the 15th day of January, 1900, the said Gorman presented a petition asking the probate court to name another day for the sale of said real estate, and said court granted said petition, and designated Wednesday, June 4, 1902, and that the defendant is now preparing to make the sale on that day, and will do so unless he is restrained and enjoined; that the said probate court was without authority to entertain the petition or make the order of sale, for the reason that the said claims were created long after the death of the said Hiram Evans, deceased; and that the order of said probate court made on July 21, 1897, was procured wholly by false and fraudulent representations, and is, therefore, null and void. It is alleged that there is now in the hands of the defendant, as administrator, more than sufficient money, or its equivalent, to fully pay all claims and demands against said estate of Hiram Evans, deceased, other than those mentioned in the bills of complainant and Mary E. Jackson, Nannie A. Hoshall, and Sallie J. McDaniel, above referred to, which are alleged to be fraudulent, fictitious, and void, and that, if the issues of said bills be determined in favor of complainants therein, a sale of said real estate will be unnecessary, and the cost of making the sale will be a needless expense and charge against said estate, and will operate to diminish the interest of complainant in the assets thereof; and that such sale will cast a cloud upon the title of complainant and the other heirs at law in the real estate mentioned, and will hinder and embarrass them in recovering the same, and will result in a multiplicity of suits, and cause them other irreparable injury and damage, for which they can have no adequate remedy at law; and that the probate court of St. Francis county cannot, under the law of the state, entertain any complaint which the complainant may address to it. The prayer of the bill is that, pending the determination of the bills heretofore filed by the complainant and Mary E. Jackson, Nannie A. Hoshall, and Sallie J. McDaniel, the said defendant, as administrator, be temporarily enjoined from selling or attempting to sell any part of the lands in controversy under the order of the probate court of St. Francis county; and that upon final

hearing of said bills, if the issues be decided in favor of the complainants, that said temporary injunction be made perpetual and absolute.

G. B. Webster and J. R. Beasly, for complainant.
Norton & Prewitt and R. W. Nicholls, for defendant.

TRIEBER, District Judge. Under our system of government, actions in which there is a diversity of citizenship between the plaintiff and defendant may be prosecuted either in the state or national courts. While both courts are practically governed by the same rules of law, yet, having been created by different sovereignties, they are foreign to each other. These courts are of equal dignity, and possess concurrent jurisdiction. Upon principles of comity, and to prevent an unseemly conflict between these courts, the second congress of the United States, by way of amendment to the judiciary act of 1789, enacted that no writ of injunction shall be granted by a national court to stay proceedings in any court of a state. Section 5, Act March 2, 1793 (1 Stat. 335). This provision, with some amendments, which are not material to this action, has been in full force ever since, and is section 720 of the Revised Statutes. As a matter of fact, this act is merely declaratory of a rule of comity which has governed courts from time immemorial. In Peck v. Jenness, 7 How. 612, 624, 12 L. Ed. 841, the court say:

"It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity; for, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy v. Earl of Cassilis, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland, which, on more mature reflection, he dissolved, because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." 7 How. 624, 625, 12 L. Ed. 841.

Of course, it does not apply to suits commenced in the state courts after proceedings had been instituted in the national courts. Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; Fisk v. Railroad Co., 10 Blatchf. 518, Fed. Cas. No. 4,830. It is a rule of universal application, even in the absence of a statute, that, between courts of concurrent jurisdiction, the court which first acquires jurisdiction of the controversy or of the res should be permitted to retain it until the controversy is decided, and the res discharged from its control.

Mr. Justice Campbell, in speaking for the supreme court in Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028, said:

"It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same constitution, laws, and federal obligations." 20 How. 595, 15 L. Ed. 1028.

The authorities on this question are so numerous, and there is so little conflict among them, that it is unnecessary to make copious quotations from them, or cite many of them. A few, which are most in point, will suffice. Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; U. S. v. Parkhurst-Davis Mercantile Co., 176 U. S. 317, 20 Sup. Ct. 423, 44 L. Ed. 485; Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961; Phelps v. Association, 50 C. C. A. 339, 112 Fed. 453; Whitney v. Wilder, 4 C. C. A. 510, 54 Fed. 554.

Probate courts in the state of Arkansas are constitutional courts of record, with exclusive jurisdiction over the estates of deceased persons. Article 7, § 34, Const. Ark. Upon the appointment of the administrator by the probate court, all the personal estate of the intestate immediately vests in the administrator as the agent of the court, and for the payment of debts the statute specially provides that "lands shall be assets in the hands of the executor or administrator and shall be deemed in their possession and subject to their control for the payment of debts." Section 80, Sand. & H. Dig. Ark.

In Whitney v. Wilder, supra, it was sought by the legatee to enjoin an administrator, acting under the authority of the probate court of Louisiana, from distributing funds to the heirs at law, but the circuit court of appeals for the Fifth circuit, reversing the court below, held that:

"The prohibition of this statute [section 720, Rev. St.] extends to all cases over which the state court first obtains jurisdiction, and applies not only to injunctions aimed at the state court itself, but also to parties before the court, its officers or litigants therein."

In Haines v. Carpenter, supra, Mr. Justice Bradley, speaking for the court, says:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all litigated questions before the circuit court. This is one of the things which the federal courts are prohibited from doing. By the act of March 2, 1793, it was declared that the writ of injunction shall not be granted to stay proceedings in a state court. This provision is repeated in section 720, Rev. St., and extends to all cases except where otherwise provided by the bankrupt law." 91 U. S. 257, 23 L. Ed. 345.

Counsel for the complainant insist that the rule established in Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; Robb v.

Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52,—permits this court to grant the relief prayed in the case at bar, but a careful examination of these cases and those following them will show that they were all bills to annul judgments or decrees of state courts on the ground of fraud, after they had been disposed of by those courts. In none of those cases did the court violate any rule of comity, nor was an injunction allowed in any of them except Marshall v. Holmes, and in that case the injunction was to restrain the defendant from enforcing the judgments fraudulently obtained. That injunction was only granted after the state court had rendered its final judgment, and the defendant, the judgment creditor in the state court, was the only one who could have executed them. The judgments having been held void by the federal court sitting in chancery, he was enjoined from issuing execution thereon; but in the case at bar it is the court which orders its agent, the administrator, to make the sale, and the entire matter is within the jurisdiction and under the control of the probate court of St. Francis county.

But it is urged that the bill charges that the judgments of the probate court, to pay which the administrator has been directed to sell the lands, were fraudulently obtained, and without jurisdiction, and that the other bills described in this bill were filed to set aside these judgments, and that this bill is merely ancillary to prevent a sale of the lands while the other actions are pending and undetermined. All the facts now set up in this bill existed and were known to complainant at the time the original bills were filed. It is conceded that, had this injunction been asked in the original bills, it could not have been granted; but it is ingenuously urged that, this court having obtained jurisdiction on the original bills to set aside the judgments of the probate court, it may now, in this proceeding, grant the injunction as ancillary to the other bills, for unless the administrator, it is urged, is restrained from selling the lands until the other suits to annul the fraudulent judgments are determined, there will be nothing left for the complainant, if it should finally be determined that the judgments of the probate court were void, and should be set aside. Courts cannot assume jurisdiction by such indirect methods. A litigant cannot split up his cause of action in this manner for the purpose of conferring jurisdiction which otherwise would not exist. Courts of equity determine all matters known at the time the suit was instituted in one controversy, and, if no jurisdiction exists when the bill is filed, it cannot be conferred by resorting to the filing of an ancillary bill and setting up facts existing and known to exist at the time the original suits were instituted. Perhaps, if the order of the probate court, directing the administrator to sell the real estate of the intestate for the payment of these debts, had been made after the filing of the original bills in this court, and after this court had obtained jurisdiction, the result might have been different; but as the bill in the case at bar does not show such a state of facts, it is unnecessary to determine that question.

As to the other question raised by the demurrer to the bill,—that the judgment creditors, for the payment of whose judgments the lands are ordered to be sold by the administrator, are indispensable par-

ties,—that must also be sustained. The administrator is merely a naked trustee. He is the agent of the court in winding up the estate of the deceased. The judgment creditors for whose benefit this land is to be sold are the real parties in interest, and therefore are indispensable parties. How can this court pass upon their rights without having them before it? Would that not be depriving them of property without due process of law, within the constitutional inhibition? It is settled that a court of equity can render no decree without having all necessary parties before it; and if, as was admitted in the argument, those creditors cannot be made parties without depriving the court of jurisdiction on account of their citizenship, the bill must be dismissed. Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Cole Silver Min. Co. v. Virginia & G. H. Water Co., 1 Sawy. 685, Fed. Cas. No. 2,990; Alexander v. Hornor, 1 McCrary, 634, Fed. Cas. No. 169.

The demurrer to the bill must be sustained, and the injunction refused.

HAFFNER et al. v. CRANE et al.

(District Court, E. D. New York. February 18, 1902.)

1. NEGLIGENCE—PRIMA FACIE EVIDENCE—FALLING OF VESSEL IN DRY DOCK.
Where it is shown that a yacht which was very sharp in form, and others of similar construction, had been frequently and safely raised and lowered on dry docks, held in position only by blocks, without shoring, the falling and injury of such vessel as she was being lowered from a dry dock in which she had been placed for repairs, and when supported by blocking, is prima facie proof that she was negligently placed or handled by the owner of the dock, who owed the duty of ordinary care and skill in the premises; and such proof must be met by evidence of some unusual or abnormal condition existing, to exonerate him from liability for the injury.

2. SAME—EVIDENCE CONSIDERED.
Evidence considered, and *held* insufficient to support the claim of the owners of a dry dock that the falling of a vessel supported therein by blocking resulted from the giving way or springing of her plates, or to overcome the presumption of negligence arising from libelants' evidence.

In Admiralty. Action to recover damages for injury of vessel in dry dock.

James J. Macklin, for libelants.

McKenzie & Beebe (Robert D. Benedict, of counsel), for respondents.

THOMAS, District Judge. The yacht Wanda, on the respondents' sectional dry dock at Brooklyn, that she might be painted, fell to starboard, as the dock was lowered to discharge her. For the injury received, the libel is filed. The respondents' duty was to use the care that a good business man, skilled in the vocation, would observe under the same circumstances. The Wanda was very sharp in form, and the respondents' care required due consideration of the fact. The evidence shows that the Wanda and two other vessels, known as the "Glen Iris" and "Wilbur," were similar in shape, and that each of these vessels had

frequently and safely been raised and lowered on dry docks in New York, held in position only by blocks, without the additional precaution of shoring, and that, as regards the Wanda, this had been done but a few months before. Hence the first conclusion is that the use of shores was not distinctly necessary, nor customary, and that the employment of proper skill and care in blocking was sufficient to protect the vessel. The next necessary conclusion is that, inasmuch as the Wanda and similarly sharp vessels usually are protected by proper blocking, without the precaution of shoring, the fall of the Wanda in the present instance indicates that the respondents' blocking or handling failed in the result that usually skilled and careful blocking effects. From such history, standing alone, it should be inferred that the respondents were negligent. This inference may be drawn in the present case, not from the sole fact that the Wanda fell, but because she fell when she and others similarly shaped had stood safely. To stand when properly blocked and lowered is the normal condition, and indicates the result of due care and skill; hence her fall is an abnormal result, and indicates lack of due care and skill, in the absence of unusual conditions. This inference would not shift the burden of proof, for the burden does not shift. Certain facts present make a prima facie case for the libelants, which the respondents must meet, but the necessity of producing a preponderance of evidence remains with the libelants. Therefore the next inquiry is, were there other conditions present that should defeat the inference of negligence? Is the evidence in this regard produced by the respondents outweighed by the evidence of the libelants, who have the burden, as well as the benefit, of the inference above stated, and of such other evidence as sustains the charge of fault? The respondents offer evidence which tends, to some degree, to establish that the respondents used due care in ascertaining the kind of blocks that had been used in raising the Wanda by another person in the spring of the same year, when she stood safely; that they carefully and skillfully adjusted such blocks; that they used similar diligence in lowering her; and that the fall was caused by the weakness of the ship's plates which received the pressure of the blocks. Notwithstanding the evidence of the respondents' witnesses that the blocks were fitted properly, and that usual and due care was employed in handling, the fact of the fall, when she should not have fallen if due care and skill had been employed, disputes and outweighs the evidence of the witnesses that such care was used, in the absence of other proven cause. But it should be kept in mind that this conclusion is not justified if it appear that some abnormal condition was present in the ship that would not allow properly fitted blocks to be usually effective. This brings the consideration to the respondents' contention that plates gave way and caused the fall. The learned advocate for the respondents contends that the weight on the plates broke or depressed them; that this caused sufficient jar on the blocks to start them, and thereupon push them to the side of the dock; hence the fall of the vessel was permitted. The argument rests upon three premises: (1) The breaking or denting of the plates before the fall; (2) the consequent jarring of the vessel against the blocks; (3) finally, the thrusting away of the blocks by reason of such jar. Of these three premises, the last is certain, viz., the

upper blocks were pushed away towards the side of the dock; but whether this was effected in the first instance by a jar from the plate breaking or indenting, or from the giving way of the dogging on the blocks, or other cause, depends upon the inferences to be drawn from the evidence. The alleged evidences that it was caused by the breaking or yielding of the plates are these: (1) The plates were thin, corroded, and feeble in strength; (2) the depressions and cracks in the plates were at, or in proximity to, the place where the blocks had rested when the vessel was in position; (3) the blocks were not in the holes where the wounds were, as they would have been if they had been caused by the bringing up of the vessel at the end of the fall, for the diver was able to place patches over the cracks in the plates, without any raising of the vessel from the position where she brought up; (4) there were no other blocks on the dock on which the vessel fell. This argument is that feeble plates were found broken or indented at or near by the places where the blocks were fitted, but no blocks were found covering the breaks after the vessel fell, as would have been the case had the vessel fallen on the blocks.

Consider the alleged insufficiency of the plates, under the proper rule, that the respondents were entitled to assume that the plates were sufficient to withstand the pressure that would come on suitable blocking, with the vessel properly handled. The vessel had been raised with a list of the dock to port (that is, towards the gates that let in the water), and she was lowered with the list to starboard, whereupon she fell. The respondents gave evidence tending to show that the list of the dock to port was a few inches, which remained during the 48 hours the vessel was on the dock previous to the attempt to lower her, and that in lowering the port list was overcome, and that a similar or perhaps somewhat larger list was given to starboard, and that the port and starboard list was that usually present in raising and lowering. The libelants' evidence is that the starboard list was greater, by a foot or more, than that described by the respondents' witnesses. Assuming that the respondents' evidence is correct,—and it is certainly equal in probative force to that of the libelants,—the vessel was blocked upon an even keel, with an incline of the dock to port, and she was lowered with a similar incline to starboard. That is, the uneven pressure on the port blocks was changed to the starboard side, with what abruptness may only be conjectured from the nature of the maneuver and the manner in which it was done. However, it is shown that vessels are usually and safely raised and lowered with a similar or greater list. It is argued that the port plates were strong enough to withstand the uneven pressure upon them, and the starboard not, although in March or April, 1899 (the accident was on October 24, 1899), 37 new plates had been distributed on both sides of the vessel, and all deemed unsuitable by the examiner had been taken out. Yet upon the present trial he stated that the plate shown him was not a proper one to stay. Nevertheless the fact remains that in the previous March or April, with the same plates, and with what is said to be the same kind of blocking, the vessel was raised and lowered safely. In considering this question, it should be observed that the port plates were not subjected to the strain caused by the changing of the list from port to starboard. She

was raised upon the port list, and when the change was made to starboard the strain was transferred to the starboard side in such a manner that the vessel herself probably to a slight degree listed with reference to the dock. The strength of the plates, and the pressure thereon, was the subject of conflict. There was expert evidence that the plates were insufficient and improper for the purpose of raising the vessel, but there are two items of evidence that point to the truth with greater distinctness than do the mere opinions of witnesses. One of the plates was produced in court and submitted to respondents' witness Quinn, who stated that, at the request of the respondents, he had made an examination of the vessel's plates after she had been raised in position on the dock after the accident; that he made with his hammer a hole in one of her plates (that he did break through a plate over the coal bunker in strake D is established); and that her plates were generally in unsuitable condition for hauling, although, unlike respondents' other witnesses, he testified that, in the case of a vessel as sharp as the Wanda, if a dock had a starboard list of four inches, he would not have regarded bilge blocks as sufficient support, irrespective of the condition of the plates. But the opportunity was presented of testing the plate produced (Exhibit E), inasmuch as the witness had his testing hammer, and the record shows as follows:

"Q. What do you consider the size of this plate, in thickness? A. I can tell you mighty quick. Q. Do you think you could tap that with a hammer? A. Yes, sir. Q. Do it. (Handing the plate to the witness.) A. Give me two books. Have you two books here? I will show you the sound of it in a second. (Striking the plate with the hammer many times.) Q. I want you to break it? A. Oh, I can very easily do that. (Hammering the plate very hard.) That will bend there. See that? Q. Would it break it in two? A. If that was in position I would break it through, if it was fast."

The fact was that he pounded repeatedly with great vigor upon the iron, and could not break it. Thereupon he gave many blows upon the edge of the plate, and, after much effort, revealed the bright, clear edge of the steel. This attempted demonstration was a complete failure, and very unfavorable to the respondents, in view of the evidence of Lassoe, to which attention will now be called; for an important inquiry is, what pressure was brought to bear upon these plates, and how much were they able to withstand? The evidence of all the witnesses is to the effect that the principal weight comes upon the keel, even when there is a list to the extent shown in the present instance. Lassoe stated that, with a foot list to starboard, "the keel would sustain the greater part,—probably over 95 or 96 per cent. The bilge blocks would get the downward and outward pressure." Lassoe also gives the following evidence:

"By the Court: Q. Supposing the dry dock is 64 feet wide, and there is a list to starboard of 6 inches; how much would the Wanda list? A. Do you want it in degrees? Q. No; in inches. How much would she list? A. $^{9}/_{32}$ of 8 inches. Q. Suppose the Wanda was listed over on the dock, we will say, a couple inches, when the vessel was hauled out or raised, and was blocked there suitably, and in lowering the dock it tipped 6 inches to starboard. Would that shift the position from port over to starboard on the blocks? A. It will have less inclination to starboard; that is, a few inches less. First she was hauled up with 2 inches list to port; then in lowering you give her 6 inches list to starboard. Q. Give the dock 6 inches? A. Well,

the dock had 2 inches at first, and in docking the ship it will be upright there. Q. I want to know if, on a change of the dock from 2 inches to port to 6 to starboard, it will cause any misfit on the blocks? A. No; I don't see it, because the ship will follow the dock. Q. Then as she went over to starboard the ship would not change her position on the blocks? A. Not on the blocks. Q. Can you state, with the Wanda listed to starboard 2 inches, how much outward pressure it would bring on the blocks? A. I would have to know the weight of the Wanda. I suppose it is about 200 or 250 tons. If it is 250 tons, and she listed 2 inches to starboard— Her beam is 18 feet. It was 2 inches in 9 feet. Then really the diameter would be 18 feet, and the circumference 56. One-quarter of that is 14 feet. That is a quarter of a circle. And the 2 inches is 1/84 part of the weight of the Wanda, and there would come on the bilge blocks, on the 5 blocks, 1/84 part. If she was 250 tons, that will be about 3 tons,—about that. 1/84 part would come on the 5 blocks. At 45 degrees there would be only an outward pressure of one-half of that again, and at 45 degrees one-half of that would be an outward push of ½ of ⅜ of a ton on the block outward. Q. On each block? A. On each block. And that is about ⅛ of a ton. Q. So the question is whether each plate was strong enough to stand the pressure of ½ of ⅜ of a ton? A. Yes, sir. That is 3/10 of a ton. Q. Do all these blocks rest up closely against the side of the vessel? A. Yes, sir; if they fit. Q. Assuming they fit fairly well? A. Yes. Q. Then with 5 blocks what would be the pressure, supposing they are built up 5 feet,—I mean per square inch on the blocks? A. Are they 8-inch wide? Q. 8 by 12? A. It is only where they are in contact. It will be about 7 pounds to the inch. Q. In your opinion, could the plates that you saw where the break was bear that pressure to the square inch? A. The metal is what we call 'rotten.' If you put it in a testing machine, it won't show at all in places where it is pitted by corrosion, so it is hard to tell. It will give in the weakest point. If it had been a new plate, it should have been a mark exactly the size of the bilge block, if it had been a hard substance. Q. Take the weakest part; would it bear that,—take the weakest plates you found? A. You mean the plate which we have here? Q. Yes; take that plate? A. It ought to hold more. You would think so by the thickness of it, still the strength may be entirely out of it. Q. Taking it as you examined it, and the plate as you see it, the question is whether it should bear that weight at the weakest point? A. It may not bear anything. It is very hard to tell. I have had experience in testing material a good deal, and sometimes we find old material that has deteriorated that will give way without any strain, almost, on it."

If, now, the test made by Quinn be considered in connection with the pressure to which Lassoe testifies, it seems unquestionable that the plates were far more than sufficient in strength to withstand the strain put upon them. It is inconceivable that pressure so slight could have dented or cracked the plates, and the plate produced is understood to have been cut from the very place where the respondent Alfred M. Crane thought the fall was initiated; that is, the locality of the second after-bilge block. It appears from the evidence that the plates were about 3 feet wide, and that they were supported by frames 21 or 22 inches apart, and by butt straps at the ends, with the intention of making the strength at the butt equal to the usual strength of the plate at other parts. It further appears that at a point 40 feet from the stern there was a spot depressed some 6 inches, but the plate was not broken. The fact that this dent was made without the breaking of the plate itself indicates a good quality of material, as Lassee stated; and it is not believed that the slight pressure brought to bear upon that plate could have produced this result, but, rather, that it must

have been caused by the vessel bringing up on the dock. In this connection it may be said that while it is claimed by the respondents that there were no other blocks in the vicinity at the side of the vessel, except those used for the blocking, the evidence is disputed by the libelants' witnesses, who testified that there were blocks scattered about the dock, and by the undisputed evidence that there were several other dents made on the side of the vessel, where there is no pretense that the supporting blocks were; and even Crane, one of the respondents, says that there were blocks about the dock here and there, not in use, and that it was those blocks that made the dents, other than those alleged to be at the places where the blocks were placed. Moreover, the permanent or foundation block remained. The dent in the after part of the vessel, to which attention has just been called, is not entirely covered by the blocks, as shown in the photograph taken after the vessel had been raised the second time. It is true that Alfred M. Crane states that the blocks used at the time of the second hauling were not as high as those used on the first occasion, but Walter D. Crane, the other respondent, states that the blocks used on both occasions came up just the same, although he finally stated: "I wouldn't swear if we put them higher or lower. I am not quite sure, but I think they come about the same as the old blocks." Taking this evidence in connection with that of the libelants, it is not proven that the blocks on the first occasion covered this dent. Lassoe states that forward of this, and between the second bilge blocks, 2 and 3, there was a crack in the plate; that there was a dent between blocks 3 and 4, and that forward of block 4 the bilge plates had parted in the butts, the rivets being sheared; and that the plate below was cracked in the rivet hole, the crack extending in three or four inches. It is possible that the upper part of the block might have reached the crack described as extending in three or four inches,—probably more; but it is not probable that it reached the place where the plates had parted at the butts, and where the rivets were sheared. In fact, Lassoe explains that the parting of the plates above was not caused immediately by the pressure upon them, but the cause of the shearing was the strain brought on the rivets by extending the plate; that the pressure inward could not shear the rivets; that there must have been a pressure lengthwise to shear the rivets clear out; and his final statement seems to be as follows:

"Q. Then the point where the block was must have been stronger than the butts? A. Well, yes; it is hard to tell. Q. Then if the butts were $^{3}/_{16}$, re-enforced by a fish plate, that would show a pretty strong plate outside, wouldn't it? A. Yes, sir."

This evidence indicates a strength in the broken plate so considerable that a finding that it yielded under the pressure is inadmissible. This witness further said:

"There is an indentation between No. 2 and No. 3 which shows the crack in the plate in the C strake, and it shows the donkey suction above which I stated was corroded. The plate was corroded away in the strainer part of her. This photograph [A] is the same showing the same crack on a larger scale, between 2 and 3."

The witness also stated:

"This photograph [B] shows No. 4 bilge block and the parting of the plates to the right in C strake, showing that the rivets have been sheared off, and the plate below is cracked quite considerably from the rivet hole down."

His attention being called to the crack as shown in photograph C, he said there was a crack there, but that he could not identify it. The nature and direction of the wounds is shown by the photographs, and, as each of the plates is three feet in width, the relation of the blocking to the injured plates may be inferred, provided the evidence of the respondents be accepted,—that the blocks were placed in that locality. Nevertheless it is difficult, considering the depressions in one place, the directions of the cracks in others, and the pressure that was brought upon them, to conclude that they were caused while the blocking was yet against the side of the vessel, and before it fell, inasmuch as the violence of the fall was calculated to produce the same conditions. After a vessel of her weight and height of hull had fallen, the broken condition of her plates is a natural and proximate consequence; and that broken condition may not be shifted to the moment when she began to fall, so as to be assigned as a cause of such fall, without evidence more clearly pointing to the origin of the accident than has been produced by the respondents.

In reaching this conclusion, the respondents' contention has not been overlooked, that the cracked places were not covered by blocks after the falling. Such contention is not without force, even in view of the conflict of evidence; but what happened while the vessel was falling from strain, or after she fell and before she took the position where she finally lay, must be known indefinitely, and the inferences favorable to the respondents do not overcome the stronger inferences to which attention has been called. It is true that the pressure upon the blocks would be the same as the pressure upon the plates, and that pressure is shown to have been slight. It may be argued that, if the pressure were not sufficient to cause the plates to break, it would not be sufficient to push aside the blocks, dogged as they were; and it is here that the chief difficulty of solving the question is found. But if it be determined in the first instance that the plates were sufficient, then the presumption of negligence, to which earlier attention has been called, arises, and it is necessary for the respondents to meet the same. It is not obligatory upon the libelants to show that the dogging of the blocks or the fitting of the blocks was improper. The fact of the fall shows the lack of care or skill in some particular.

Pursuant to the foregoing views, the libelants should have a decree.

MILNE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. April 21, 1902.)

CUSTOMS DUTIES—CLASSIFICATION—CHARCOAL BAR IRON.

The words "bar iron," as used in paragraph 123 of the tariff act of 1897, which fixes the duty on such iron of certain dimensions, and the words "iron bars," as used in the last proviso of paragraph 124, which fixes the duty at a different and uniform rate on "all iron bars in the

manufacture of which charcoal is used as fuel," must be held to mean the same thing, in the absence of evidence showing that the term "bar iron" had a commercial meaning at the date of the passage of the act, and the two paragraphs must be construed together. As so construed, bar iron in the manufacture of which charcoal is used as fuel, of whatever dimensions, is dutiable under the proviso.

On Appeal by Importer from a Decision of the Board of General Appraisers affirming the classification for duty by the collector of certain imported merchandise.

Frederick C. McLaughlin, J. P. Tucker, and W. B. Coughtry, for importers.

Charles D. Baker, Asst. U. S. Atty.

COXE, District Judge. The merchandise in question consists of Swedish charcoal iron returned by the local appraiser as "charcoal bar iron" and "charcoal iron bars," the two terms being used interchangeably and being considered by the appraiser, apparently, as synonymous and equivalent expressions. The collector assessed duty under paragraph 123 of the act of 1897, which is as follows:

"Bar iron, square iron, rolled or hammered, comprising flats not less than one inch wide nor less than three-eighths of one inch thick, round iron not less than seven-sixteenths of one inch in diameter, six-tenths of one cent per pound."

The importers protested, insisting that duty should have been taken under the last proviso of paragraph 124 of the same act, which is as follows:

"Round iron, in coils or rods, less than seven-sixteenths of one inch in diameter, and bars or shapes of rolled or hammered iron, not specially provided for in this act, eight-tenths of one cent per pound: provided, that all iron in slabs, blooms, loops, or other forms less finished than iron in bars, and more advanced than pig iron, except castings, shall be subject to a duty of five-tenths of one cent per pound: provided further, that all iron bars, blooms, billets, or sizes or shapes of any kind, in the manufacture of which charcoal is used as fuel, shall be subject to a duty of twelve dollars per ton."

The discussion at the argument narrowed the controversy to the single proposition, namely, is the "bar iron" of paragraph 123 included in the words "iron bars" of the second proviso of paragraph 124?

The following propositions were conceded: First: That the two paragraphs must be read as one for the purposes of construction. The fact that the number 124 has, for convenience of reference, been placed before the words "round iron, in coils or rods," does not limit the proviso to those words and the words which follow them. Second: That if the second proviso had used the words "all bar iron" instead of the words "all iron bars" the position of the importers could not be successfully assailed. Third: That there is no evidence in the record to show that the term "bar iron" had a commercial meaning at and prior to the date of the passage of the tariff act.

Having in mind the natural dislike of counsel to be quoted as having conceded any statement of law or fact, it will, perhaps, be more accurate, and certainly more prudent, to say that the foregoing propositions were not seriously disputed at the argument.

Webster defines "bar iron" as "iron in long pieces, hammered or

rolled out of puddle balls which have been made out of pigs in a puddling furnace or forge." The Century Dictionary defines "bar iron" as "wrought iron rolled into the form of bars." There is no evidence in the record upon which the court can base a finding that there is a distinction in meaning between the "bar iron" of paragraph 123 and the "iron bars" of the second proviso. If such distinction existed in trade and commerce when the tariff act was passed it should have been shown by competent testimony. The ordinary dictionary meaning of words must govern in the absence of proof of commercial meaning. Starting then with the postulate that "bar iron" and "iron bars" mean the same thing in tariff nomenclature, there seems no escape from the proposition that the importers' contention is correct. They imported from Sweden iron bars made with charcoal as fuel, and the proviso says that "all iron bars" so made shall pay $12 per ton. It is difficult to perceive why they are not within the express terms of the proviso. It is thought that this construction is not only sustained by the rules of law applicable to the interpretation of statutes, but that it is consistent with the intention of congress and the previous rulings of the treasury department.

Since the argument an additional brief has been submitted for the respondent, but the court has been unable to find support in the record for many of the propositions advanced. As before stated, there is no evidence at all of commercial designation and a finding differentiating "bar iron" from "iron bars" in the language of trade and commerce would be absolutely without evidence to support it. On the contrary, the iron imported by the "Galileo" was returned by the appraiser as "charcoal bar iron, $^{6}/_{10}$c." And the identical merchandise imported by the "Consuelo" was returned by the appraiser as "charcoal iron bars, $^{6}/_{10}$c." The decision in Worthington v. Abbott, 124 U. S. 434, 8 Sup. Ct. 562, 31 L. Ed. 494, throws little light upon the present controversy. The facts were different and the law was different. The merchandise there in dispute was known in commerce as "nail rods," and was not known as "bar iron." The assumption that the court found, inferentially, that "bar iron" had a commercial meaning, does not aid the respondent, for the reason that there is no pretense that the court attempted to define that meaning. There is nothing in the Worthington Case which enables the court to say that the iron in controversy here is not described with perfect accuracy by the language of the second proviso as "iron bars."

The decision of the board is reversed.

In re CHIN ARK WING.

(District Court, D. Massachusetts. May 12, 1902.)

No. 1,323.

1. CHINESE LABORER—REGISTRATION—PROCEEDING TO DEPORT—JURISDICTION.
Under 27 Stat. 25, and 28 Stat. 7, providing that a Chinese laborer proceeded against for remaining in the United States without being registered shall be taken before a United States judge, such a laborer was first taken before a commissioner, where the testimony was taken

without objection. From his decision such laborer appealed to the judge, making no objections to the findings of facts. *Held*, that he thereby impliedly assented to a hearing before the judge on an agreed statement of facts, and the court had jurisdiction, whether it be considered an original proceeding, or as an appeal from the commissioner.

2. SAME—LABORER'S CERTIFICATE—INABILITY TO OBTAIN—MERCHANT.
Acts 1892, § 6 (27 Stat. 25) as amended by Acts 1893 (28 Stat. 7), provides that a Chinese laborer found in the United States without a laborer's certificate shall be deported on failure to obtain such certificate within a certain time after the passage of the act unless by reason of accident, sickness, or some unavoidable cause, he was unable to secure his certificate. A Chinese merchant, lawfully in the United States from 1892 to 1894, afterwards became a laborer. *Held*, that he could not thereafter be deported, since he was not able to procure a certificate within the time stated in such act; not being at the time a laborer, and entitled to a laborer's certificate.

Appeal from United States Commissioner.

Fuller C. Smith, for Chin Ark Wing.
William H. Garland, Asst. U. S. Atty.

LOWELL, District Judge. The facts in this case are found by the commissioner as follows:

"The defendant arrived in the United States in the year 1882, and was employed as a laundryman during a period of nine years thereafter. Eleven years ago he became a merchant, and was engaged in trade during a period of seven years, as one of the firm doing business in Oxford street, Boston, until the building in which the firm did business was torn down, since when, and during the last four years, the defendant has been employed as a laundryman, and was so employed when arrested on the complaint made in this case."

The defendant first objects that the proceedings before the United States commissioner were void, because the act of November 3, 1893 (28 Stat. 7), and section 6 of the act of May 5, 1892 (27 Stat. 25), provide that the Chinese laborer proceeded against shall be taken before "a United States judge." It is certainly a considerable stretching of language to hold that a United States commissioner is "a United States judge," especially as the two are differentiated in other parts of the act. But section 3 of the act of 1892 seems to contemplate that the commissioner shall have jurisdiction over all cases arising under the act. This practice is in favor of the defendant, who thus gets the benefit of two hearings, instead of one. If the commissioner holds him, he has an appeal to the judge on both facts and law. If the commissioner discharges him, he is quit altogether. This practice has always been followed in this district, and apparently in many others. To do away with it would impose an intolerable burden on the judge. It has been tacitly approved by the supreme court in Li Sing v. U. S., 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634. See, also, 31 Stat. 1093. Moreover, it is doubtful if the objection, which was not raised before the commissioner, can now be availed of. The defendant has been at last "taken before a United States judge." He has made no objection to the finding of facts by the commissioner, and thus has impliedly assented to a hearing before the judge on an agreed statement of facts. As this is not a criminal proceeding, I think this court has jurisdiction to deal with

his deportation, either as an original proceeding, or on appeal from the commissioner. It matters not which. See Chin Bak Kan v. U. S. (decided June 2, 1902) 22 Sup. Ct. 891, 46 L. Ed. ——.

We now come to the merits of the case. Prior to 1880 substantially all Chinese, laborers or others, were permitted to enter the United States and remain there. By the act of 1882, following upon the treaty of 1880, the coming of Chinese laborers to the United States was forbidden ("suspended"). Chinese laborers then in the country were not affected by the act or treaty. They might remain in the United States without more. They might depart from the United States and return thereto by going through certain formalities. Chinese, not laborers, might remain in the United States without formality, and might enter the United States for the first time by going through certain formalities. The commissioner's finding at the hearing before me was assumed to mean that Chin Ark Wing's original coming to the United States was lawful, and he must be taken to have arrived here before the act of 1882 went into effect. The act of 1892 required the registration within a certain time of all Chinese laborers then lawfully residing in the United States, and directed the deportation of every Chinese laborer who did not so register, "unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by one at least credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost." All Chinese, not laborers, having a right to remain in the United States, were permitted to register, but not required to do so. The act of 1893 extended the time during which Chinese laborers might register. At the time of the passage of the acts of 1892 and 1893 the respondent was a merchant doing business in the United States, and entitled to remain here without registration. True, he might have registered, had he seen fit to do so, but the government does not contend that any certificate he could then have obtained would have protected him in this proceeding. It would have been a merchant's certificate, not a laborer's. The government's contention is briefly this: Congress intended to exclude all Chinese labor, except that actually in the United States. He who was a laborer might register and remain; but he who was lawfully here as a merchant, or as one of the other favored classes, could remain only upon the condition that he did not, by subsequent change of occupation, increase the number of Chinese laborers. If he became a laborer, the government contends he should be deported. This is not the natural interpretation of the Chinese legislation of the last 20 years, taken as a whole. The rights of all Chinese who are lawfully in the country at any time, to remain here thereafter, are carefully preserved. That a Chinaman who had the right in 1892 to be here as a laborer might remain here thereafter as a laborer, and that a Chinaman who was not a laborer in 1892 could by no means labor thereafter in the United States, is

a conclusion so strange that it should be rejected, unless required by language the most unambiguous. Section 6 of the act of 1892, as amended by the act of 1893, provides for the deportation of any Chinese laborer found in the United States without a laborer's certificate, "unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate." If this section has any application to Chinese persons who were merchants in 1892–94, but became laborers thereafter, then such persons are within the express exception of the act, because they were unable in 1892–94 to obtain a laborer's certificate, by reason of an "unavoidable cause," viz., that they were not then laborers. The merchant's certificate, which they might have obtained, would, on the contention of the government, have done the respondent no good. Whether section 6 of the act of 1892 is in its nature wholly inapplicable to the respondent, or the respondent is saved from deportation by its express terms, need not be determined. The authorities, though neither numerous, nor, for the most part, explicit, support this conclusion. U. S. v. Sing Lee (D. C.) 71 Fed. 680, is admitted to be in point. In U. S. v. Chung Ki Foon (D. C.) 83 Fed. 143, it was held that one who had formerly been a merchant, but was a laborer in 1893, must register. The opinion of the court implies, perhaps not very strongly, that, if the respondent had changed his occupation after the opportunity for registration had ceased, he could not have been deported. In U. S. v. Moy Yim (decided in the district court for the district of Rhode Island, April 29, 1902) 115 Fed. 652, the learned judge seems to assume that a bona fide merchant in 1892–94, who has never left the United States, does not become liable to deportation by becoming a "laborer." It is not necessary now to determine if one who legally entered the country as a Chinese merchant after incoming laborers were excluded could change his occupation thereafter, and remain here as a laborer. In U. S. v. Yong Yew (D. C.) 83 Fed. 832, 838, it was intimated that he could do so, provided his original entry was made in good faith. But the supposed case is quite different from the case at bar, in which the respondent entered the United States when even laborers were admitted. U. S. v. Wong Ah Hung (D. C.) 62 Fed. 1005, decided merely that by the fact of imprisonment a "merchant" was transmuted into a "laborer," and it has no bearing on the case at bar. If a Chinaman laboring without a certificate at the time of his arrest seeks to avoid deportation by setting up that he was a merchant in 1892–94, doubtless "the facts should be carefully scrutinized." U. S. v. Yong Yew (D. C.) 83 Fed. 838. See U. S. v. Ng Park Tan (D. C.) 86 Fed. 605; U. S. v. Lee Pon (D. C.) 94 Fed. 824. Here the findings of fact made by the commissioner are not challenged.

Respondent discharged.

THE NORDFARER.

(District Court, E. D. New York. December 28, 1901.)

SHIPPING—LIABILITY OF SHIP FOR INJURY OF EMPLOYE—DEFECTIVE APPLIANCES.

The use by a steamship of an ordinary nail as a substitute for a steel pin in the machinery of a winch, the nail being much smaller than the pin which had been provided by the maker of the machinery, and also subjected to an additional strain because it did not fill the socket for which the pin was designed, was negligence which rendered the ship liable for an injury to a workman resulting from the giving way of the nail, notwithstanding the previous use of similar nails without accident for 18 months.

In Admiralty. Action in rem by John Bryan for personal injury.

Francis A. McCloskey (Peter S. Carter, of counsel), proctor for libelant.

Convers & Kirlin, proctors for claimant.

THOMAS, District Judge. The libelant seeks to recover for personal injuries sustained while acting as a rigger on the steamship Nordfarer. By means of the winch, the cargo boom was hoisting, while the libelant took in the slack of the line passing around the drum. The pin that passed through the lever and quadrant of the winch, to keep it in gear, proved insufficient. Hence the winch became ineffective, and the boom, unsustained, fell. The accident happened so quickly that the libelant's leg was caught in the running rope, and was carried against the hatch coaming, whereby it suffered a compound fracture.

The pin is alleged to have had two vices contributing to the accident: (1) It was so soft that it bent; (2) it was too small to fill the aperture for which it was intended, and hence was not sufficiently strong. The quality of the pin was not ascertainable by inspection, nor by any test other than bending or otherwise trying it. It was a mere nail, taken from many. Others of the nails could have been tried, and the probable quality of the one in question ascertained. But these nails had been used for 18 months, and no inherent defect in quality had developed. It may be that this would be a fair test of the general quality of the nails, and, if they were appropriate in other respects, this experience might be regarded as sufficient to excuse the ship from failure to make other proof of quality. But the nails were temporary expedients, not intended for the use to which they were devoted, and palpably not adjusted to the machine. The winch may be presumed to have been planned and constructed with such mechanical skill and completeness that each part coacted with the other parts, and was enabled to bear the maximum strain that might be demanded of it in use. Hence provision was made for a pin of a particular size, and that size was indicated by the aperture which it was to enter. Instead of employing a piece of steel, adjusted to and filling the place, the claimant was contented to use an ordinary nail, which did not fill the socket, but allowed the lever to work upon the pin, thereby increasing the strain upon it. The inquiry is whether the claimant could justly discard an appropriate and

intended suitably fitting pin, of a determined size, and insert an ordinary nail, in dimension less than the diameter of the hole, whereby it would be subjected to the free play of the lever and to additional burden. It is difficult to escape the conclusion that the nail was a mere convenient resource, unsuited to the duty required of it, and obviously not contemplated in the fashioning and adaptation of the parts. The claimant should have observed what was required, for the mechanism was plain to see. But it is answered that similar nails had been used for 18 months without accident. If so, this was due more to good fortune than merited immunity. Eighteen months of negligence does not establish the fulfillment of duty, but only that, until the time of accident, the burden had not been too great for the nail.

There should be great hesitation in holding that ordinary care was employed in the machinery appropriated by the ship to the use of a stevedore, where one of the technical parts of the machine was absent, and an ordinary but insufficient nail inserted for the purpose of performing the duty of such pin. The lack of duty is not in selecting a pin which was a mere nail, but in the selection of a nail which from its size was not in accordance with the plan and provisions of the winch. Had the nail fitted closely, and had it been of good quality, such as the nails in the present case usually proved to be, it might be regarded as satisfactory substitution for the pin which the maker and adjuster of the machine had thought worthy of use. The winchman was not negligent regarding any duty he owed to the libelant. Even if he joined negligently in the use of the pin, the ship is not relieved.

The libelant has been seriously injured, and while he may improve, and may be able to perform manual labor, yet he has been for some time incapacitated, and will not be normal in the future, nor will he be able to resume his service as a rigger. Certainly $2,650 is a reasonable compensation, and there will be a decree for that sum, with costs.

THE ARTHUR M. PALMER.

(District Court, E. D. New York. February 5, 1902.)

1. Collision—Steam Vessels Crossing—Agreement by Signal.
   A vessel which assents by signal that another shall cross her bows cannot urge the attempted maneuver as a fault, though it results in a collision.

2. Same—Failure to Keep Lookout.
   A steam vessel which did not have a proper lookout, as required by the rules, cannot be exonerated by the court from fault for a collision, unless it appears that she could not possibly have avoided the accident, even if the lookout had been in his place.[1]

3. Same—Passing too Close to Piers in Hudson River—Failure to Maintain Lookout.
   A tug with a large and long car float on her side was passing up the west side of the Hudson river, unnecessarily near the ends of the piers, which were only about 100 feet distant, when a collision occurred be-

[1] See Collision, vol. 10, Cent. Dig. § 148.

tween the float and another tug, which came out from a slip behind a pier which obstructed the view. The latter had no lookout except the pilot, who was in the wheel house, 30 feet from the stem, and the tug, with the tow, was not seen by him until he passed beyond the end of the pier. At that time he was in close quarters, with the tug and tow only about 150 feet away, and his attempt to cross their bows as agreed by signal, while perhaps the only nianeuver then practicable, resulted in the collision. *Held*, that the presence of a lookout in the proper position might have enabled such tug to avert the collision, and that both tugs were in fault.

In Admiralty. Suit for collision.

Benedict & Benedict, for libelant.
Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. On the 8th day of April, 1901, at about 4:50 p. m., the tug A. C. Cheney, passing from the slip on the north side of the Delaware & Hudson coal pier, on the west side of the Hudson river, collided with the port corner of a heavily loaded car float, projecting some 75 feet from the starboard bow of the tug Palmer. The Cheney was about 116 feet long, the Palmer about 95 feet in length by 22½ feet beam, and the float was 175 feet in length by some 30 feet in width. The Cheney had been coaling at the pier, about 450 feet from the outward end thereof, and upon starting outward, under one bell, she blew a long whistle for the space of 10 seconds. The pier is very much closed in, so that those in charge of the Cheney could not see the vessels approaching from down the river, and at a point 150 feet inward from the face of the pier it is substantially closed. At a point about 417 feet east of the face of the pier are shad stakes, and it is customary for steamships coming up the river, bound from and to points on the western shore, to keep to the west of such line of stakes. The Palmer started from Morris Canal basin, and made her way, at the rate of three or four miles per hour, against a strong ebb tide. She was bound for the West Shore dock, which is directly above the West Shore ferry, and that is immediately above the slip from which the Cheney was coming.

From the great mass of conflicting evidence, one salient fact is easily selected, and becomes a starting point for further discussion, and that is that the collision occurred about on a line with the north side of the pier, in any case not more than 25 feet northward thereof. Several of the important witnesses on each side put it about on the line. Willmot, assistant foreman for the Delaware & Hudson Coal Company, stood on the end of the pier, where he had the best opportunity to view the situation, and he placed the point of collision about 12 feet to the northward of the north line of the pier. It is also undisputed that four coal boats lay on the north side of the pier, approaching to within 5 or 6 feet of the end thereof. Each boat was 92 feet long and 14 feet wide, so that they covered a lateral space of 56 feet. The evidence of the captain and pilot of the Cheney is to the effect that in coming out of the slip, which was bounded on the north by an ice breaker, about 150 feet to 100 feet from the north side of the pier, the Cheney kept to the north of the pier about 75 feet, and, considering the space occupied by the coal boats, such a distance seems to have

been necessary. The captain and the pilot of the Cheney place the port side of the Palmer's float 100 feet off from the face of the pier. The pilot house of the Cheney was 30 feet aft of the stem, and the pilot states that he did not see the Palmer until his pilot house was out from under the pier, and that at that point he gave two short whistles, to which the Palmer did not respond, although the evidence of the Palmer is that she did respond immediately to such whistles. In any case, the Cheney proceeded to cross the bow of the Palmer's float, which was on the Cheney's starboard hand, with the result that the port corner of the bow struck the Cheney about amidships. Hence it appears that the Cheney amidships, while traveling about 100 feet, the distance of the float, plus some 28 feet, the distance the point of contact on the Cheney was within the pier, in all 128 feet, went about 75 feet southward, or at least 1 foot southward to 2 feet eastward, carried down the stream by the force of the tide. The pilot of the Cheney states that the float, at the time the two whistles were blown, was not more than 150 feet south of the Cheney's projected course. Hence the Cheney, in going 128 feet, went down nearly half the distance the courses of the vessels were apart. If no excuse for this shall appear, the Cheney should be found in fault for this maneuver. It is obvious, and should have been apparent to the navigators of the Cheney, that this attempt to pass across the bow of the float was absolutely impracticable, and it appears to the court to have been justified by no safe rule of navigation, if there was feasible alternative.

But it is alleged by the libelant that this attempt was the only maneuver possible for the Cheney, for it is urged, and the contention is supported by the preponderance of evidence, that there was not room for the Cheney to break around the canal boats and the end of the pier, and go under the stern of the float, and it is alleged that, had she attempted to reverse and back, the tide would have swept her against the coal boats, or the end of the pier, or that her bow would have struck the Palmer or the float. It is undoubted that, if the Palmer and her float were not farther off from the end of the pier than the distances testified by the libelant's witnesses, the Cheney was in very close quarters; and while it seems to the court, knowing what did happen and the necessity of its happening, that an attempt to reverse and back could not have been more dangerous, yet the preponderance of evidence does not show that the course pursued by the Cheney indicated such lack of judgment in her extremity as to demand condemnation, provided that she was not in other respects negligent, and provided, also, that the Palmer was not farther off than heretofore indicated. However, the contention of the Palmer is that she was just nicely clearing, by 10 or 12 feet, the shad stakes, 417 feet to the eastward of the pier. While the quantity of the libelant's evidence is greatly disproportioned to its quality, the claimant's evidence is not more acceptable in its quality, and its quantity is comparatively diminutive. The libelant produces some 14 or more witnesses, who testify of the distance that the float was out, while the claimant supports his contention by the evidence of some four witnesses, all of them in the claimant's employ. It is recalled that all the witnesses for the libelant were in the employ of the libelant, except Willmot, who

was the assistant foreman of the Delaware & Hudson coal dock, and he had no relation to the libelant other than that as an employé of the company that was furnishing the coaling facilities.

It would not be a fair judicial conclusion to disregard the preponderance of evidence given by the libelant, and hence it is decided that the float was not in her proper position in the channel. Moreover, as the Palmer immediately assented to the steering signals of the Cheney, she may not complain if the indicated maneuver was attempted, although the Palmer's evidence shows that the signals were not given until the Cheney was so far out that the maneuver could not, even in the opinion of the pilot of the Palmer, be safely executed; for, whatever its value may be, the fact should be kept in mind that it appears from the evidence of the libelant that she gave a long whistle and received no response, and her claim is that she had a right to consider that there were no vessels approaching in the channel. Those connected with the Palmer say that they heard no long whistle, although it appears from their evidence that whistles should have been heard, if given.

Up to this point there would be no difficulty in finding that the fault must rest alone with the Palmer, unless the further fact is of importance, that there was no competent and sufficiently diligent lookout on either vessel. The duty of the lookout seems to have been left entirely to the pilots of the tugs. The arrangement of the deck hands on the Cheney does not show that any of them was keeping watch, or that any of them was in a position to see or did see, and the same is the case with the Palmer. It is probable that the Cheney would answer that, hearing no response to her long whistle, she had a right to believe that the channel was clear, and that no lookout was required in that regard, and that in any case a lookout would not have aided in preventing the collision. This contention implies that a tug, running for 450 feet along an inclosed pier, shutting off all view of vessels approaching from down stream, may dispense with the services of a lookout, other than a pilot placed 30 feet aft of the stem, upon the inference that the channel is clear, because the long whistle has not been answered. Such claim does not seem to be justified. But assume that a properly vigilant lookout had been placed in the bow of the Cheney, what would have happened? If the approach of the Palmer had been properly announced, could not the Cheney have starboarded and drawn to the northward, which was her proper course, and have avoided the accident? It appears that when the pilot of the Cheney did see the Palmer he starboarded, and did in fact carry his vessel somewhat to port, but to what extent does not appear. But he was 30 feet aft of the bow, occupied with his wheel. He was not a proper lookout nor suitably located. It is not for the court to indulge in speculations as to what would have happened had the Cheney done her duty. The fact is that she did not have the proper man in the proper place to meet the demand, which the rule of navigation made upon her, and it seems possible, if not probable, that prompt notification from a lookout would have enabled her to swing to port in such a way as to avoid the head-on blow which she received from the float. Such a course was preferable to what was done, or to at-

tempts to pass under the stern of the Palmer, and there was a possibility of success. Unless it should appear to the court that the accident could not possibly have been avoided, even if the lookout was in his place and doing his duty, the Cheney should be regarded as contributing to the accident. Under such a rule, it is considered that the Cheney was culpably negligent. If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if a lookout had been in his place, doing his duty, when a collision occurred.

The damages will be ascertained, and divided between the two vessels.

In re WIESSNER.

(District Court, E. D. New York. April 3, 1902.)

BANKRUPTCY—PREFERENCES—DISCOUNT OF DEBTOR'S NOTE.

Where a note given upon an account has been discounted before maturity in the usual course of business, even with the indorsement of the payee, and the proceeds thereof have been applied to the debtor's account, it should be regarded as a payment of money by the debtor as of that date, provided it does not appear that the note thereafter came back to the payee for failure of the maker to meet the same; and the amount so received through the discount of the note constitutes a preferential payment, which the creditor is required to surrender before he can prove against the estate of the debtor in bankruptcy other items of indebtedness created prior to the discount, but does not affect his right to prove those created thereafter though before the note was paid to the transferee.

In Bankruptcy. In the matter of the claim of the Ansonia Manufacturing Company.

Louis Levy, for bankrupt.
Kenneson, Crain, Emley & Rubino, for trustee.
Frederick W. Holden, for Ansonia Mfg. Co.

THOMAS, District Judge. In the claim of the Ansonia Manufacturing Company it appears that on October 19, 1899, the bankrupt was indebted to the claimant for merchandise sold; that on November 20, 1899, he gave a note therefor for the sum of $174.75, which was transferred in the usual course of business to the Ansonia National Bank, on December 1, 1899, and was paid at maturity, March 20, 1900. At the time of such transfer of the note to the bank, the bankrupt was indebted to the company, for merchandise sold and delivered, as follows: November 3, $63.70; November 18, $63.70; November 27, $67.20,—$194.60. The delivery of the note to the company was not a payment; but when it was discounted and transferred to the bank, the company parted with all title therein, and stood in relation of surety to the note, and while the bank held the note the company had, and could have, no claim for the amount represented thereby against the bankrupt. Nevertheless, until the note was transferred to the bank, to wit, on December 1st, it was part of an indebtedness owing by the bankrupt, and when claimant received the money from the bank it was equivalent to a payment liable to be defeated by the

bankrupt's failure to meet the note at maturity; and as there was at the time of transfer an indebtedness only for the items above mentioned, such payment received through the bank would not be regarded as a preference, except as to them. Therefore, if nothing else appeared, it would be necessary to return the amount of the note before the above items, aggregating $194.60, could be proved. But on January 22, 1900, the bankrupt gave to the company a note for $343.40, payable four months after date, to meet the sum of $194.60, made up as above, and the sum of $149.80, amount of merchandise sold on December 2, 1899; the total amount being $344.40. The trifling difference between the note and the amount of the bill arose from some adjustment of the account. This note was paid at maturity, to wit, May 22d. The note was discounted to the Ansonia Bank on the 22d of January, 1900; and this discount liquidated, in case the note were finally paid, the sum of $344.40, and must be regarded as a payment of that sum as of January 22d. So that we have any preference created by the payment of the first note obliterated by the fact that all indebtedness previous to the second note was paid by its discount, except the sum of $46.80, incurred on January 18th. Hence the sum of $46.80 cannot be proven without the return of the amount of the second note. Between the sales of January 18th, inclusive, to February 22d, inclusive, the bankrupt purchased goods aggregating $348.75, for which he gave his note for $348.04 on March 19th. At the time the note was given there had been a further sale, to wit, on March 6th, of $54.60, and March 14th of $69.33. Another note was given on April 26th, $279.71, at which time there was not only the first note and the merchandise represented by it unpaid, but other goods had been bought, and thereafter goods were bought until to and including May 18th. These notes were never discounted or paid, and do not enter into the present contention.

It is intended to hold here that, where a note given upon an account has been discounted, even with the indorsement of the payee, and the proceeds thereof have been applied to the debtor's account, it should be regarded as a payment of money by the bankrupt as of that date, provided it does not appear that the note thereafter came back to the payee for failure of the bankrupt to meet the same. What the rule would then be it is not necessary to decide at present. But when a negotiable note is sold to a bona fide holder in due course of business and before maturity, it ceases to be an indebtedness to the original creditor, and if paid by the bankrupt to a transferee cannot become or represent again any transactions between the original parties.

It is concluded that the item of $46.80, of January 18, 1900, cannot be proved without the return of the amount of the second note, and that all items thereafter, beginning February 3d, may be proved without the return of any sum.

UNITED STATES v. SMITH.

(District Court, M. D. Pennsylvania. April 19, 1902.)

No. 1.

1. INTERSTATE COMMERCE—ACT REGULATING SHIPMENT OF GAME—INDICTMENT FOR VIOLATION.

Act May 25, 1900 (31 Stat. 187, c. 553), which (section 3) makes it unlawful for any person to deliver to any common carrier, or for such carrier to transport from one state or territory to another, "the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the state, territory or district in which the same were killed," and which (section 4) requires all packages containing such dead animals, birds, or parts thereof, when shipped by interstate commerce, "as provided in section 1 [3?] of this act," to be plainly and clearly marked on the outside to show the name of the shipper and the nature of the contents, and prescribes a fine for each violation or evasion of the act, relates solely to game which has been killed in violation of the local law; and in a prosecution thereunder, whether for a violation of the act by shipment of game or for an evasion by a failure to mark the packages containing the same, the fact that it was so killed must be averred in the indictment and proved.

2. SAME.

It is essential, to constitute an offense under either of said provisions, that the prohibited game should either have been shipped or delivered to a carrier for shipment, and an indictment which charges the defendant with having prepared certain described game with intent to ship it by interstate commerce, or having concealed the same in unmarked packages for the purpose of such shipment, in evasion or violation of the act, without alleging delivery to a carrier, is insufficient.

3. SAME.

It may be difficult to define just what in every instance will amount to an evasion of the act; but it must at least be something contrived or done in connection with a shipment actually entered upon, and not one that is in mere contemplation.

Criminal Prosecution. On demurrer to indictment.

The following is a copy of the indictment:

United States of America, Middle District of Pennsylvania—ss.

In the District Court of the United States, in and for the Middle District Aforesaid, at the November Term Thereof, A. D. 1901.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present that N. S. Smith, on the 21st day of October, in the year 1901, in the said division of said district, and within the jurisdiction of said court, N. S. Smith, yeoman, did knowingly, willfully, and unlawfully prepare for transportation by interstate commerce, with intent to ship the same out of the state of Pennsylvania, certain packages containing the bodies of dead animals, birds, or parts thereof, to wit, a certain package containing the body of one deer, certain other packages containing the bodies of fifty English pheasants, and certain other packages containing the bodies of fifty native pheasants (all of which said animals had been taken and killed in the state of Pennsylvania), which said packages so prepared for shipment, and with intent to ship by interstate commerce from the state of Pennsylvania to the state of New York, were not plainly and clearly marked, so that the name and address of the shipper and the nature of the contents of the said packages could be readily ascertained on inspection of the outside of said packages, contrary to the provisions of section 4 of chapter 553 of a certain act of con-

gress approved May 25, 1900, entitled "An act to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws and for other purposes"; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States. And the grand jurors aforesaid, on their oath aforesaid, do further present that the said N. S. Smith, yeoman, on the 20th day of October, in the year 1901, in the said division of said district, and within the jurisdiction of said court, did knowingly, willfully, and unlawfully, for the purpose of evading the act of congress in the foregoing first count particularly mentioned and described, place and conceal certain dead animals, birds, or parts thereof, in trunks, boxes, dressing cases, satchels, and packages then and their in his possession at Glen Eyre station on the Erie Railroad, in Pike county, Pa., with the intent thus to carry over said railroad by interstate commerce from the state of Pennsylvania into other states, in violation of the provisions of section 6 of an act of the general assembly of Pennsylvania approved June 4, 1897, entitled "An act for the better protection of game and game mammals, game birds, song and insectiverous birds, limiting the number of game birds and game mammals to be killed by any one person in one day or in one season, prohibiting the sale of the game and the shipment thereof out of the state, and providing penalties for the violation thereof" (Laws 1897, p. 123), the said dead animals, birds, or parts thereof, so placed and concealed as aforesaid; the said trunks, boxes, dressing cases, satchels, and packages containing the said dead animals, birds, or parts thereof, to wit, one deer, fifty English pheasants, and fifty native pheasants (all of which said animals had been taken and killed in the state of Pennsylvania), not being clearly marked, so that the nature of the contents could be readily ascertained on inspection of the outside of said trunks, dressing cases, boxes, satchels, and packages, and the said dead animals, birds, or parts thereof, being so placed in the various receptacles aforesaid for the purpose of enabling the defendant above named secretly to carry the same by interstate commerce over the said railroad beyond the limits of the state of Pennsylvania, in violation of the aforesaid act of the general assembly of Pennsylvania, and in evasion and violation of the act of congress in the foregoing first count particularly mentioned and described; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. And the grand jurors aforesaid, on their oath aforesaid, do further present that the said N. S. Smith, yeoman, on the 20th day of October, in the year 1901, in the said division of said district, and within the jurisdiction of said court, did knowingly, willfully, and unlawfully prepare for shipment by interstate commerce, and did have in his possession with intent to ship by interstate commerce, certain packages containing dead animals or birds, to wit, a certain package containing the body of one deer, a certain package containing the bodies of fifty English pheasants, which had been killed in violation of the game laws of the state of Pennsylvania, and a certain package containing fifty native pheasants (all of which said animals had been taken and killed in the state of Pennsylvania), which said packages so prepared for shipment and intended to be shipped by interstate commerce from the state of Pennsylvania to the state of New York were not then and there plainly and clearly marked, so that the name and address of the shipper and the nature of the contents thereof could be readily ascertained on inspection of the outside of the said package, contrary to the provisions of the act of congress in the foregoing first count particularly mentioned and described, etc., contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

W. S. Kirkpatrick and C. S. Bull, for demurrer.

S. T. M. McCarrell, U. S. Atty., John S. Wise, and Robt. Snodgrass, contra.

ARCHBALD, District Judge. This indictment is framed under the third and fourth sections of the act of May 25, 1900 (31 Stat. 187,

c. 553), commonly known as the "Lacey Law." Aside from the question of the validity of that statute or the exact purpose to be attained by it, it is to be observed, as a matter which lies on the surface, that the game that is there prohibited from being shipped from one state or territory to another is that, and only that, which has been killed in violation of the local law. Omitting matters of verbiage, the act in substance declares that it shall be unlawful for any one to deliver to any common carrier, or for any common carrier to transport from one state or territory to another, "the dead bodies or parts thereof of any wild animals or birds where such animals or birds have been killed in violation of the laws of the state, territory or district in which the same were killed." As a necessary consequence of this, there is no violation of the act unless the game shipped or sought to be shipped has been so killed, and the fact that it was is of the essence of the offense, and must be averred and proved. While the federal courts will no doubt take notice of the statute laws of the different states with respect to the killing of game within their respective borders, this does not do away with the necessity for declaring, as well as showing, that they have in fact been violated. If this be so, the first and second counts of the indictment are fatally defective. There is no averment whatever as to where the game there spoken of was killed,—whether in Pennsylvania or elsewhere; or that when and where killed it was killed in violation of the local law. All that we have is the bald statement in the one count that the defendant had prepared for shipment by interstate commerce out of the state, certain packages of dead game, without having them clearly marked with the name and address of the shipper and the nature of the contents, as required by the act; and in the other that he had concealed the game spoken of in trunks, satchels, etc., without having them so marked, with the intent to carry them out of the state into other states, in violation of the act of the general assembly of Pennsylvania approved June 4, 1897, and in evasion and violation of the act of congress in question. But there was no necessary vice in any of these acts by themselves. The game may have been innocently killed, and we must presume that it was until it appears otherwise. For all that we know, it may have been killed in Canada, or some other equally irrelevant place, with which the facts charged are just as consistent as they are with anything which is prohibited. It is true that these counts deal with alleged evasions of the law, which, by the terms of the statute, are punishable equally with direct violations of it. But that does not affect the question. Whether it be an evasion or a violation that is charged, neither can exist, except the game which is the subject of it was killed in disregard of the local law, the prohibition of the statute being predicated wholely upon that circumstance.

Nor is the second count helped out in this regard by the reference there found to the act of the general assembly of Pennsylvania entitled "An act for the better protection of game," etc. (P. L. 1897, p. 123). All the use made of this reference is to declare that the acts of the defendant complained of were done with the intent to carry the game out of the state, contrary to the provisions of that statute. But with this by itself the act of congress has no concern. It does not make it

unlawful to ship out of a state dead game which the laws of that state prohibit from being taken beyond its limits, but only such game as has been killed in violation of those laws. The distinction is important and material, and must be observed. Nor have I failed to note in this connection the last clause of the third section of the act, which provides that nothing therein shall prevent the transportation of any dead birds or animals killed in season, "the export of which is not prohibited by law in the state, territory or district in which the same are killed." This, it is to be noted, is not prohibitive, but permissive. It is a proviso introduced out of extra caution to limit and explain the extent to which the preceding clause is to go, and cannot, therefore, be held to enlarge it. Or, in other words, we cannot reach out by virtue of it, and say that, because the export of game which is not prohibited by the state law is thereby allowed, that which is prohibited is not; on the contrary, we must strictly adhere to what the statute in express terms forbids and punishes, and that, as we have seen, relates solely to game which has been unlawfully killed. This disposes of the first two counts, and we need concern ourselves no further with them.

The third count, however, remains. That charges the defendant, in substance, with having prepared for shipment by interstate commerce, and having in his possession with intent to so ship, certain packages, one containing the body of a deer, and the other the bodies of 50 English pheasants, which had been killed in violation of the game laws of the state of Pennsylvania. It also speaks of a third package of 50 native pheasants, but, as it does not state where or how they were killed, under the views already expressed no charge can be predicated upon them. But the count goes on to declare that the packages referred to were prepared for shipment, and were intended to be shipped, by interstate commerce from Pennsylvania to New York, without having been plainly and clearly marked with the name and address of the shipper and the nature of the contents, so that the same could be readily ascertained by inspection of the outside, as required by the act of congress under discussion. Does this charge an indictable offense within the meaning of that law? Passing by the question whether it is a sufficient description of the offense supposed to be charged to aver that the game spoken of was killed in violation of the state law, without specifying just what were the provisions of that law, or in what respect it was violated, the important thing to observe is that all that is, in any event, charged is that the defendant prepared the packages described for shipment, or with intent to ship, by interstate commerce from Pennsylvania, where the game was killed, to New York, its intended destination, without having them marked as required by the statute. It is very clear that this does not bring the case within the law. It is the shipment or delivery for shipment which the act forbids and punishes; not the intent to do so, nor the preparation for it. Or, in other words, it is the complete, and not the inchoate, act which it undertakes to control; and we have no right to carry it a single step further. I do not mean that the game or packages must have been actually put into the vehicles by which the shipment is to be accomplished. A delivery to a common carrier for that purpose is made

unlawful, as well as the actual transportation of it. And interstate commerce has clearly begun, so as to bring the case within the power of congress to regulate, when there has been such a delivery. But anything which stops short of this not only would seem to be beyond the authority of congress to direct, but, what is more to our present purpose, does not fall within the terms of the act by which that body has spoken, which does not assume to punish the intent or the preparation, or in fact anything else than an actual delivery to the common carrier for intended interstate transportation.

It is contended, however, that evasions of the act are made punishable equally with direct violations of it, and that is undoubtedly the case. "For each evasion or violation of this act" it declares (section 4) "the shipper shall upon conviction pay a fine," etc. It may be difficult, and it is not necessary, to define just what, in every instance, will amount to an evasion; but of this much we can be sure, and that is that it must be something contrived or done in connection with a shipment actually entered upon, and not one which is in mere contemplation. The statute itself suggests and seeks to guard against some which it assumes will be attempted by requiring in the section just quoted that "all packages containing such dead animals, birds or parts thereof, when shipped by interstate commerce, as provided in section one [three?] of this act, shall be plainly and clearly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages." A delivery to a common carrier of packages not so marked would be an evasion of the act, and punishable by it, but the mere preparation of them, without more, is not; and that is all that we have here. The count declares that the defendant "did knowingly, willfully, and unlawfully prepare for shipment by interstate commerce, and did have in his possession with intent to ship by interstate commerce, certain packages [describing them], which said packages so prepared for shipment and intended to be shipped by interstate commerce from the state of Pennsylvania to the state of New York, were not then and there plainly and clearly marked," etc. The whole subject of complaint is thus seen to be the preparation and the intent. Had the preparation gone on, and the intent which it manifested been carried out, we should have undoubtedly had an evasion, or an attempted evasion, of the act, if not a direct violation of it. But the most that can be made out of what is so stated is an intent to evade, or the beginnings of an attempt, as we might say, of which the preparation would be evidence, but would not in itself amount to an actual evasion, which is alone prohibited. It required some further step to be taken, by which, if carried out, the party would evade or escape the restrictive provisions of the act. The packages, as it is expressly declared, were still in the possession of the defendant, and therefore under his control, and out of due regard for the law, and a final consideration of his duty in the premises, he might never have let them go; and yet, according to the contention of the government, although the final step had not been taken, he might be arrested and punished as though it had. This would cut off the locus pœnitentiæ which is always supposed to be open until the forbidden act has been actually committed, and this no con-

sideration of the statute, or the purpose to be effected by it, requires us to do. Could we even go so far as to hold that an attempt to violate the act might be considered an evasion of it, we should still be met by the fact that here at most there was nothing but a preparation and an intent, and, according to all the authorities, to constitute an attempt there must be something more. 1 Whart. Cr. Law, § 181. It is to be observed that the first and second counts are open to the same criticism in this respect as the third, each of them merely charging the preparation or concealment of the game in packages for the purpose of shipping it, without more. It may be assigned as an additional and substantial reason for holding as before determined that they set out no case.

According to the views so expressed, I am therefore clearly of the opinion that no evasion or violation of the act is disclosed in the indictment, and that the demurrer must be sustained. The larger question whether the act is a legitimate exercise of the power given to congress by the constitution to legislate with regard to interstate commerce, or is merely, as charged, a national game law, thinly disguised, which it had no authority to pass, although fully discussed at the argument, I do not feel called upon to decide. Neither do I the further question whether—assuming the act to be valid—dead game carried in the hands, or as part of the personal luggage of the party who has killed it, must be regarded as falling within the terms of the act when transported under such conditions from state to state. These are interesting and important, but I prefer to dispose of the case upon others, which are much more obvious.

The demurrer is sustained, the indictment is set aside, and the defendant is discharged from his recognizance.

BRAISTED v. DENTON.

(District Court, E. D. New York. January 4, 1902.)

1. ADMIRALTY JURISDICTION—SUIT FOR WHARFAGE—DOMESTIC VESSELS.
   A suit to recover wharfage from the owner of a domestic vessel is maritime in its nature, and within the jurisdiction of a court of admiralty.

2. WHARVES—LIABILITY FOR WHARFAGE—ANCHORING IN PRIVATE SLIP.
   Vessels which enter and use a slip or basin belonging to a private person, and used for the purpose of storing vessels, cannot escape the payment of wharfage to the owner by disregarding the dock provided by him for mooring vessels therein, and either anchoring or tying to another dock that has no right to receive vessels floating in such basin, where the owner of the vessels has notice that wharfage will be charged.

3. SAME—VESSEL SUBJECT TO WHARFAGE—OYSTER FLOAT.
   A float used as a receptacle for oysters unloaded from other boats, which has the form of a boat and is navigable, is subject to a charge for wharfage.

4. SAME—RATES OF WHARFAGE—NEW YORK STATUTE.
   The penalty of double wharfage rates imposed by Laws N. Y. 1897, c. 378, § 859, on a vessel leaving a wharf or slip without paying the dues therein fixed, when the same are demanded, does not apply to vessels in the clam or oyster trade, which are separately provided for by section 860.

In Admiralty. Suit to recover wharfage.

Foley & Wray, for libelant.
Louis Ehrenberg, for respondent.

THOMAS, District Judge. This action is brought to recover for storing vessels in libelant's slip or basin. The libelant on July 6, 1893, became the owner in fee of certain land situate in the town of Flatlands, on Jamaica Bay, and more particularly described in the deed executed by Bernard J. York, as referee, to Garrett S. Braisted, and recorded in the register's office of the county of Kings, in Liber 2187 of conveyances, at page 46. Thereafter the libelant applied to the commissioners of the land office, and received from them a grant of land under water in front of and adjoining his upland, which is more particularly described in letters patent dated July 14, 1896, executed by the commissioners of the land office to Garrett S. Braisted, and recorded in Book of Patents No. 50, at page 64. On the land received from York the libelant constructed a dock, at which he was accustomed to receive vessels for mooring, and for which service he was entitled to compensation. A dock, owned by some other person and herein known as the "Pearsall Dock," was constructed, the westerly face of which bordered upon the land under water granted to the libelant, as above stated, but such dock was not entitled to the use or privileges of such water. The respondent at the times hereinafter mentioned stored certain vessels in the waters thus owned by the libelant, either by anchoring the same, or by making them fast to the Pearsall dock, thereby avoiding the use of the libelant's dock established as stated.

The use of the libelant's property for which wharfage is claimed is as follows: A vessel designated "old boat" from January 1 to January 20, and from January 20 to January 31, 1900, inclusive, period of 30 days, for which libelant claims compensation at the rate of 12½ cents per day, amounting in all to $3.75; a vessel designated "new boat," from January 1 to January 31, 1900, inclusive, 31 days, at 12½ cents per day, $3.87; a structure called a "float," from January 1 to January 31, 1900, inclusive, 31 days, at 25 cents per day, $7.75,—the entire claim amounting to $15.37. The boats were about 22 feet over all, and about 5 feet in width, the "new boat" being 1¾ tons, and the "old boat" 1½ tons. The float was 29 feet 7 inches long, 18 feet wide, and about 22 inches deep, and the tonnage was approximately eight tons. It was built with openings in the bottom to admit water, and sank only when filled with oysters from the other boats. The float was attached to the Pearsall dock by lines so as to give it sufficient opportunity to rise and fall with the tide, and lie on the bottom at low tide, and it was the custom of the other boats loaded with oysters to come in and lie on the outside of the float, when the oysters were culled and unloaded into the float, which having been done, at times the boats would lie off from the float on libelant's waters, cast anchor, and sometimes a line ran from the outlying boats to the float; at other times this stern line was omitted, and the boats were held alone by anchors. All the boats, including the float, were used

in the oyster trade. The cullings from the oysters were thrown into libelant's waters, and accumulated on the land underlying the same.

The libelant, previous to the times herein involved, fixed notices on the surrounding property, in such a manner as to come to the attention of the respondent, showing that full wharfage would be charged by the libelant for the services herein involved, and demand by the libelant for payment of wharfage was made in February, 1900.

It thus appears that while the libelant was endeavoring to secure patronage for his own wharf for mooring purposes, and for the use of the waters in front thereof, this respondent, during the times stated, anchored his small boats in such waters, or tied the same to the float, from which a line ran to the Pearsall dock. The obvious intention was to secure the use of such waters by the respondent without making compensation to the libelant, and, so far as the float was concerned, by making the same fast to a dock which had no rights in the water where such boats and float were. The respondent persisted in the use of the basin after due notice that compensation would be demanded, and should make compensation therefor, recoverable in this court, if jurisdiction thereof exists. It was decided by this court in Robinson v. The C. Vanderbilt, 86 Fed. 785, that wharfage furnished to a domestic vessel was maritime in its nature, and the authorities there marshaled may be consulted. Hence this court has jurisdiction in the present action in personam.

The question remains whether boats may enter a slip or basin belonging to a private person, used for the purpose of storing vessels, disregard the bulkhead or dock provided for mooring vessels, and either anchor in the basin, or tie to a dock that has no right to receive vessels floating in such basin, and all this in view of notice that charge would be made for such occupation. There should be no doubt of the right of the owner to recover for such service. The vessels were moored in the libelant's basin. A vessel may be moored in a slip without being made fast to the dock, which is a part thereof. It is an unreasonable assertion that a private basin or slip may be used for storing vessels, and compensation therefor escaped by the fact that the vessels were anchored rather than tied to the dock, or that the detaining line was carried across the water to the premises of a third person, where it was made fast, and this, too, in the face of notice that full charges would be demanded. In the present case the small boats were anchored a portion of the time, but at other times they were tied to the float, which in turn was made fast to the Pearsall dock. It is immaterial whether the vessels were tied to the libelant's dock, or anchored, or made fast to the float, or immediately to the Pearsall dock. It was all an occupation of the libelant's slip, and a mooring or docking of property therein.

May this court award compensation for storing the float? The float had the form of a boat. She rode upon the water and was navigable. There were apertures in the bottom that permitted her to fill when loaded, and she was used as a receptacle for the oysters from the smaller boats. Nevertheless she was a floating object, used for the reception of freight, and compensation should be rendered for the facilities furnished her, under the holding of Woodruff v. One Covered

Scow (D. C.) 30 Fed. 269. As has already been stated, the fact that she was made fast to the Pearsall dock does not permit her owner to escape payment for the use of the basin.

The final question relates to the compensation. The state of New York, by chapter 378, Laws 1897, as amended in 1898 and 1899, has fixed wharfage and dockage rates. Although section 859 is invoked by the libelant as illustrating the charges that may be made, section 860 relates to vessels in the clam or oyster trade, and provides:

"Vessels of two hundred tons burden and under, which shall be actually engaged in the clam or oyster trade, and which shall make fast to any pier, wharf or bulkhead within the city of New York, shall pay one and one-half cents per ton per day, and every such vessel which shall make fast to another vessel lying at any such pier, wharf or bulkhead, or to any vessel lying outside of such vessel, or that shall anchor within any slip or basin in said city, shall pay one cent per ton per day: provided, however, that no vessel shall pay less than twenty-five cents nor less than one day's wharfage, nor shall more than one day's wharfage be charged unless for a continuous use of the pier, wharf, bulkhead, slip or basin of more than twenty-four hours."

Section 859 provides:

"Every vessel that shall leave a pier, wharf, bulkhead, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee or person in charge of the vessel, shall be liable to pay double the rates established by this section."

The provision for the penalty was not carried into section 860, and should not be interpolated by construction. This section plainly permits a minimum charge of 25 cents per day. But the court is not constrained to make the full allowance, nor does the libelant demand it. The sum charged by the libelant is reasonable, and should be allowed. Hence the account should be stated as follows:

For "old boat" for period of 30 days, at 12½c	$3 75
" "new boat" " " " 31 " " "	3 87
" "float" " " " 31 " " 25c	7 75
	$15 37

For this amount a decree will be entered for the libelant, with costs.

CLEVELAND & B. TRANSIT CO. v. INSURANCE CO. OF NORTH AMERICA.

(District Court, S. D. New York. April 15, 1902.)

MARINE INSURANCE—CONSTRUCTION OF POLICY—INCHMAREE CLAUSE.

A time policy of marine insurance on a new lake steamboat contained the Inchmaree clause, providing, inter alia: "This insurance also specially to cover loss of, or damage to, the hull or machinery, * * * through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners." The vessel was constructed by builders of the best reputation, under competent supervision, and no expense was spared by the owners to make her reasonably perfect. At the end of one of her first voyages the engine bedplate was found to be cracked, and it subsequently became necessary to replace it. The injury was due to a latent defect in the casting, not discoverable until it was broken up, which the evidence tended to

show was brought to the surface, fracturing the plate, by an unusual shock to the engine caused by a small quantity of water getting into the cylinders. *Held*, that such defect, while it existed when the policy was written, was not one which rendered the vessel unseaworthy in the ordinary sense, to prevent the attaching of the policy, and that under its provisions the insurer was liable for the damage.[1]

In Admiralty. Suit on policy of marine insurance.

Wing, Putnam & Burlingham, for libelant.
Black & Kneeland, for respondent.

ADAMS, District Judge. This is an action brought to recover a loss under a marine insurance policy dated May 13, 1896, issued by the respondent to the libelant on its steamboat City of Buffalo and covering the period of one year from its date. The risk was for $25,000, on a valuation of $200,000. The policy, inter alia, provided:

"This insurance also specially to cover loss of, or damage to the hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breaking of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. * * *

"General average, and all claims hereunder, payable as per American Lake Adjustment, if so claimed."

It was originally alleged by the libelant that on or about the 19th day of May, 1896, as the steamboat was proceeding from Cleveland to Buffalo a crack was discovered in the bedplate of the engine; that on arrival at Buffalo temporary repairs were made and later, at the close of the season, the vessel was taken to Detroit, where upon a survey and examination made after taking the engine apart, it was found and determined that the bedplate had fractured because of a latent defect which could not be discovered by any practicable means short of breaking up the casting; that the libelant duly proceeded to repair the damage and replace the broken bedplate and thereafter made a demand upon the respondent for $1,037.68 which it appeared was due per American Lake Adjustment under all the policies in force upon the vessel; that the respondent refused to pay the said demand.

The respondent admitted the demand and refusal but denied any liability under the terms of the policy and the facts of the case, and specially pleaded that any crack or damage to the bedplate of the engine was due to its defective condition, which existed at and prior to the inception of the risk and that by reason thereof the vessel was unseaworthy at the time and the policy never attached.

After the case was submitted for decision, it appeared that certain proofs on the part of the libelant with respect to water having been admitted to the cylinders while the steamer was in service, causing an unusual shock to the engines, were in the case but had not been pleaded nor controverted. An opportunity was then given counsel to supply any omissions or further testimony in the matter but after consideration they concluded to let the proofs stand as they were.

[1] Marine insurance, see notes to The Dunbritton, 19 C. C. A. 465; Pacific Mail Steamship Co. v. New York, H. & R. Min. Co., 20 C. C. A. 357.

I thereupon granted a motion on the part of the libelant to amend the libel as follows:

"Fourth. After the said policy had attached, and in the afternoon of May 13, 1896, the City of Buffalo made a trial trip near Detroit, and began running on May 14th in the service between the ports of Cleveland and Buffalo. Between that day and May 19th her boilers had primed, admitting water into the cylinders, which caused a shock and overstrain to the engines and to the cylinder supports. On the 19th day of May, 1896, while said boat was proceeding from Cleveland to Buffalo, or after arrival there, a crack was discovered in the bedplate of the engine underneath the low-pressure cylinder, followed afterwards by two other cracks extending towards the sides of the bedplate. Temporary repairs were made, and later, at the close of the season, the boat was taken to Detroit, where, upon a survey and examination, made after breaking up the bedplate, it was found and determined that the bedplate had fractured because of a latent defect in the casting, known as a 'cold shut,' which could not be discovered by any practicable means short of breaking up the casting. The libelant is informed and believes that this shock by water in the cylinders brought out this interior defect, and then caused it to be outwardly manifested in the surface cracks aforesaid."

The facts in the case appear to be that the steamboat was built during the year 1895–96, and was delivered to the libelant at Detroit on the 5th day of May, 1896. After spending the intervening time fitting out, she went into commission on the 14th of May and on that day sailed for Cleveland, where she arrived in the evening and proceeded immediately to Buffalo, where she arrived the next morning. She then made two trips between Buffalo and Cleveland and after arriving at Buffalo May 19th, at the end of the second trip, the engineer discovered a crack in the under side of the bedplate of the engine at about the middle of the casting and at the fore end of the channel way leading from the condenser to the air pump. It was detected while the vessel was at rest at Buffalo. The engineer in making his daily examination heard some water running down, and went in under the bedplate, in the middle of which he found a very fine hair crack, 6 or 8 inches long, about a foot or 18 inches from the high-pressure cylinder on the port side of the ship. Experts were at once called in and it was concluded that the injury was a permanent one, rendering the substitution of a new bedplate necessary, but, to avoid the loss of time incident to a change at that important time of the year, it was determined that temporary repairs could be made which would carry the boat through the season. A patch was put over the crack to make it air and water tight and short girders were put under the patch for the purpose of strengthening the bedplate. The vessel then pursued her business but new cracks developed within a few weeks of the first one and additional girders, with strengthening bars, were put in, running fore and aft the whole length of the bedplate. The vessel ran through the season in this way and was laid up at Detroit for the winter of 1896–97. In March, 1897, a survey was called on the vessel for the purpose of ascertaining the damage sustained through the cracking of the bedplate and it was recommended that a new one be obtained, which was done. The old one was taken out and broken up for the purpose of determining the cause of the cracks. It was found that in the casting of the bed-

plate there had occurred what is known as a "cold shut," which is described by one of the experts as being made "by two currents of molten metal coming to a place in the mold—if the molten metal of the two currents is of equal temperature, they will fuse and become one current of equal consistency, if I may use that word. Sometimes it so happens that a current is stopped perhaps at a place in the mold, chilling it slightly; when the current coming from the other direction reaches that point, the fusion of the two currents is not complete; forming in that case what is commonly known in technical words as a cold shut."

It was testified that cold shuts occasionally appear in castings though there was no evidence of one having been before found in a bedplate and that they may be caused by some negligence in the casting through failure to provide sufficient orifices into which the metal is to be poured, or to have enough metal sufficiently heated, on hand to make the casting. It is probable that something of the kind happened here, because there can be no doubt that a defect existed in the casting from the beginning and that it was at least a partial cause of the subsequent condition of the bedplate, requiring its replacement. Nor can there be any doubt that the defect was latent and while it existed when the risk was accepted by the underwriters that it might never have manifested itself at the surface without some supervening cause. The weather was fine during the few trips the boat made prior to the discovery of the crack and nothing occurred out of the ordinary after the vessel went into service to cause it to develop, except that the engines were under unusual pressure at one time and the boilers then "foamed a little and we got a little water in the cylinder," as was stated by the engineer. Experts testified that such an entry of water into the cylinders would produce an overstrain or shock upon the whole engine very much greater than the ordinary vibrations, and it is argued by the libelant that as the cylinder was over the cold shut, which was in the weakest part of the bedplate, the shock brought out the weakness causing it to extend to the under surface and become patent in the fine crack seen May 19th. While the testimony is meager with respect to the shock to the engine, it must be regarded as established that something out of the ordinary did occur in the way of a shock and I think that the libelant was not required to go further in order to show the cause of the water getting in the cylinder.

There is further expert testimony tending to show that the subsequent cracks were the result of the development of the cold shut through the first crack.

Upon these facts, the question arises whether the respondent is liable under the clause of the policy quoted.

This clause was unknown in marine insurance policies prior to the decision of the House of Lords in 1887, in Insurance Co. v. Hamilton, 12 App. Cas. 484. That was an action on a time policy on the steamship Inchmaree, which provided with respect to the risks insured against:

"And touching the adventures and perils which the capital stock and funds of the said company are made liable unto by this insurance, they are

of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof."

The facts were stated in the opinion as follows:

"On the 2d of March, 1884, the Inchmaree was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey pump and engine, in the usual way. A pipe led from the donkey pump to the boilers, and at its junction with one of the boilers there was a check valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had become salted up when the donkey pump was set to work off Diamond Island, so that the water could not pass into the boiler. The consequence was, that when the donkey pump was set to work the pipes and water chamber in the donkey pump, and the air chamber therein, became overcharged, and the water was forced up into the air chamber, which, in consequence split, and the pump was thereby damaged."

"It was admitted, for the purposes of the case, that the check valve was either allowed to remain closed or become salted up, by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up, and accident, were not due to ordinary wear and tear."

It was there held, reversing the Court of Appeal, that the loss, though accidental or due to the negligence of the engineer and not due to the ordinary wear and tear, did not fall under the policy, though within the words thereof in their widest sense, because of the rules of construction, (1) that words, however general may be limited with respect to the subject-matter in relation to which they are used, and (2) that general words may be restricted to the same genus as the specific words that precede them, and, further, because of a third consideration, that where the same words have for many years received a judicial construction, it is reasonable to suppose that they would be understood in the accepted sense by the parties using them and the courts would resort to such sense in reaching the meaning of the parties. Applying these rules to the case in hand, in connection with established authorities on the law of marine insurance, and in view of the fact that the parties had used the old familiar insurance words relating to marine risks, the court concluded that it was not the intention of the parties that the insurance should cover losses not ejusdem generis with the ordinary perils insured against and found that there was nothing in the contract to enlarge the ordinary words so as to cover perils whose only connection with the sea was that they arose from machinery which gave motive power to ships.

The immediate practical consequence of this decision in England was the invention of the special clause in question here, subsequently called the Inchmaree clause, the use of which has become universal there in policies on steamers, particularly in time policies. Gow, Ins. 119; 2 Arn. Ins. (7th Ed.) p. 973, note. The clause was evident-

ly designed to cover, at least, the kind of a risk which was regarded by the House of Lords as not included in the policy in the Inchmaree Case (Insurance Co. v. Hamilton). In that case the Court of Appeal, Lord Esher dissenting, (17 Q. B. Div. 195, 203) adopted the language of Lord Selborne in West India & P. Tel. Co. v. Home & C. Marine Ins. Co., 6 Q. B. Div. 51, where he said:

"What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure on the boiler, or from defect of safety valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of winds and defects or mismanagement of a ship's sails or tackle."

This case was expressly disapproved by the House of Lords in deciding the Inchmaree Case and it is reasonable to conclude that it was the intention of the designers of the clause to create a form of contract which would have the effect of reinstating the liability on the part of the underwriters existing under Lord Selborne's decision, which was followed in the reversed case.

It would seem that under the English rule, recovery would be allowed in a case of this kind, and when the origin of the clause is considered and its adoption in this country, without alteration in any particular, that a similar liability would follow, unless there is something in the policy of our law which would create a difference. It is urged by the respondent that as a matter of fact the vessel was unseaworthy when the policy issued and there can be no recovery for that reason, unless it appears that the parties intended to abrogate or modify the implied warranty of seaworthiness which the law prevailing here reads into the ordinary policies of marine insurance. Insurance Co. v. Smith, 124 U. S. 405, 427, 8 Sup. Ct. 534, 31 L. Ed. 497. I do not think it necessary to decide whether the clause has such effect because I find that the vessel was seaworthy in the ordinary sense. No pains or expense were spared to make her reasonably perfect. She was constructed, both with respect to hull and machinery, by builders of the best reputation under competent supervision. When the bedplate was completed it was subjected to the usual examination and tests to determine its fitness for the work it would be required to perform. Notwithstanding all proper precautions, a defect remained. It was not, however, incumbent on the assured to furnish a perfect vessel but merely one that was in a reasonably safe and proper condition to meet the ordinary contingencies of the business in which she was to engage. The fact of water getting into the cylinder was but a slight accident and indicates that the loss was principally due to the inherent weakness caused by the cold shut. Nevertheless, as I find that the policy attached, it seems clear that the loss is directly within its terms, providing that the insurance should cover loss or damage to the hull or machinery through any latent defect.

Decree for libelant for $1,037.68 with interest.

VICKREY v. CITY OF SIOUX CITY et al.

(Circuit Court, N. D. Iowa, W. D. April 22, 1902.)

1. MUNICIPAL BONDS—BONDS ISSUED AGAINST SPECIAL ASSESSMENTS—LIABILITY OF CITY.

   Bonds issued by a city in Iowa of the first or second class, under and in conformity with Acts 25th Gen. Assem. c. 9, which authorizes such cities to issue bonds payable only out of special assessments that have been levied to pay the cost of street improvements, in an aggregate amount, which, with interest, shall not exceed the amount of the special assessment, and which, further, requires that the bonds shall express on their face that they are issued under such act, and that they are payable only out of the special assessments levied for the improvement of certain streets, do not constitute obligations binding the city as the original debtor, but the liability of the city is limited to the proper collection and application of the special assessments pledged for their payment.

2. SAME—STREET IMPROVEMENT BONDS—IOWA STATUTE.

   Acts 20th Gen. Assem. Iowa, c. 20, which authorizes cities of the first class to improve streets and assess the cost upon abutting property, and also to issue bonds to defray such cost in the first instance, contains no provision that such bonds shall be payable only out of the funds realized from such assessments; and where neither the bonds themselves, nor the ordinance authorizing the same, contain such a declaration, but the bonds purport to be obligations of the city, it is bound for their payment at maturity, regardless of the condition of the special fund which the act requires it to create for their payment from the special assessments made.

In Equity. Suit on municipal bonds. On exceptions to master's report.

Wright, Call & Hubbard, for complainant.

John N. Weaver and Bevington & Kennedy, for defendants.

SHIRAS, District Judge. This suit is based upon two classes of bonds issued by the city of Sioux City, the one class being issued under the authority conferred by the act of the 20th general assembly of the state of Iowa approved March 15, 1884, and the ordinance of the city adopted May 19, 1886, and the other class being issued under the provisions of the act of the 25th general assembly of the state approved April 24, 1894, and the ordinance of the city adopted June 24, 1894. The general purport of the bill filed is set forth at length in the opinion of this court upon demurrer to the bill, which will be found in 104 Fed. 164. The issues having been joined, the case was sent to J. H. Quick, Esq., as a special master to take the evidence and report his findings of fact and law thereon, and, his report having been filed, it has been excepted to by the defendants, and upon these exceptions the case is now before the court. The master finds that the subject-matter of the suit consists of two classes of bonds known as "district improvement bonds" and as "refunding improvement bonds," and holds, as a conclusion of law, that the district improvement bonds constitute general obligations of the city, for the payment of which the city is unconditionally liable, but that the refunding bonds do not impose an absolute liability on the city, the liability of the city being confined to the duty of levying, collecting, and properly accounting for

the special tax provided for in the act of the general assembly, under the authority of which this class of bonds was issued.

The act under which the latter class of bonds was issued, being chapter 9 of the Acts of the 25th General Assembly, declares that the city council of any city of the first or second class shall have power to issue bonds payable only out of special assessments that have been levied to pay the cost of street improvements, in an aggregate amount which, with the interest thereon, shall not exceed the amount of the special assessment; it being further provided that the bonds shall express on their face that they are issued under the provisions of this act, and that they are payable only out of the special assessments levied for the purpose of paying for street improvements in certain streets. The bonds of this class, sued on in this case, recite on their face that they are issued under the provisions of chapter 9 of the Acts of the 25th General Assembly of the State of Iowa, the act being printed in full upon the back of the bond, and that they are payable only out of the special assessments levied for the purpose of paying for street improvements upon certain streets and alleys named in the bond. Under these circumstances the master rightly held that bonds of this class did not constitute obligations binding the city for the payment of the bonds as original obligations issued by the city, but that the liability of the city was limited to the proper collection and disposition of the special assessments pledged for the payment of the indebtedness represented by the several bonds.

With respect to the class of bonds denominated "district improvement bonds," the face of which reads as follows:

"United States of America, State of Iowa.

"County of Woodbury, City of Sioux City. Improvement Bond Series ———, District No. —.

"The city of Sioux City, in the state of Iowa, for value received promises to pay to ——— or bearer, at the Chemical National Bank in the city of New York, on the ——— day of ———, A. D. 18—, the sum of ——— dollars, with interest at the rate of six per cent. per annum from date, payable semi-annually on the ——— day of ———, and ——— day of ——— in each year, on the presentation and surrender of the interest coupons hereto attached. This bond is issued by the city of Sioux City under and in conformity with the provisions of chapter 20, Acts of the 20th General Assembly of the State of Iowa, approved March 15, 1884, and under and by virtue of the ordinance of the city of Sioux City passed May 11th, 1886, and approved May 19, 1886, empowering said city to pave, curb, or otherwise permanently improve its streets, highways, avenues and alleys, and a resolution of the city council of said city of Sioux City passed ———, 18—, and approved ———, 18—, and for the purpose of defraying the cost of ———, a portion of ———, in district No. —, which is chargeable to the property abutting thereon; and the last four installments of the special taxes and assessments assessed and levied, or to be assessed and levied, as authorized by the aforesaid statute and ordinance, on the lots and lands abutting on the aforesaid, ——— shall be and constitute a sinking fund for the payment of this bond and interest thereon, and to be used and appropriated to no other purpose until this bond, with interest thereon, shall have been paid and fully discharged, copies of which said act and of said ordinance, and the resolution authorizing this bond to be issued, are printed on the back of this bond. In testimony whereof, the city council of the city of Sioux City has caused this bond to be signed by the mayor thereof and attested by the city auditor, with the seal of said city affixed, this ——— day of ———, A. D. 18—.

"————, Mayor of City of Sioux City.

"Attest: ————, City Auditor."

—The solution of the question whether they constitute original obligations on part of the city, binding it primarily for the payment of the sum called for on the face of the bond, must be sought in the construction to be given to the provisions of the act of the 20th general assembly of Iowa which authorized the issuance of the bonds in question.

The first section of the act confers upon cities of the first class power to open and improve the streets, alleys, and other highways, and to levy a special tax on the lots and lands abutting on the portion of the street or highway so improved to pay the expenses thereof. In section 3 it is declared that, for the purpose of effectuating the objects named in the first section, the city shall have power to create, by ordinance, improvement districts, and that the cost of the street improvements within each district, except the spaces in front of city property and any other property exempt from special taxes, and except spaces in front of alleys and the street intersections, and the cost of paving between and about the rails of railroads and street railways, shall be assessed upon the abutting property in proportion to the front feet abutting on the improvement made, the special tax thus levied to become delinquent, one-fifth in 90 days after such levy, one-fifth in 2 years, one-fifth in 4 years, one-fifth in 6 years, and one-fifth in 8 years after the date of the levy. It is further provided that in case of omissions, errors, mistakes, or in case of deficiencies, it shall be competent for the council to make a supplemental assessment and levy to make good the deficiencies, such supplemental tax to be payable in the same manner and in the same installments as the original levy; it being further declared that said taxes shall constitute a sinking fund for the payment of the costs of the improvement and of any bonds issued to pay the cost thereof.

There is not to be found in the act any express declaration that the bonds issued are payable only out of the funds realized from the special assessments provided for in the act, nor is such declaration to be found in the language of the bond itself. According to the terms of the act, the series of bonds authorized to be issued must be made payable within the time limited therein, the last series not to extend beyond eight years from its date. With respect to the taxes, the installments forming the sinking fund become delinquent in two, four, six, and eight years from the date of the levy thereof; but it is a matter of common knowledge that these special assessments are never fully paid at the date of maturity, but quite a percentage thereof is not paid until the property liable is advertised for sale, and another percentage is not realized until after the sale thereof has been had; and, further, the supplemental assessment provided for in the act cannot be made payable except as is provided in case of the original assessment, and the final collection of the last series of the supplemental tax may not be possible for fully eight years after the maturity of the bonds issued under the act.

It cannot be well held that the legislature, in authorizing the issuance of bonds and limiting the time for their maturity and payment to a period not to exceed eight years for the last series thereof, nevertheless intended to limit the source of payment to a levy of a tax which could not be collected in whole within the period fixed for the maturity

of the bonds, but which might exceed that period by many years. If that had been the intent of the legislature we should expect to find in the act language in terms similar to that found in the act of the 25th general assembly, wherein it is expressly declared that the bonds to be issued under that act are payable only out of the funds realized from the special assessments. In the absence of such express declaration, the case is ruled by the doctrine laid down by the supreme court in U. S. v. Ft. Scott, 99 U. S. 152, 25 L. Ed. 348, wherein it is said:

"The agreement is that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessment upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. * * * If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the statute of March 2, 1871, requires an explicit avowal of such purpose in the bond itself, or in some other form, by language brought home to the purchaser, which could neither mislead nor be misunderstood."

There is not to be found either in the act of the 20th general assembly, or in the ordinance of the city based thereon, or in the terms of the bonds themselves, any declaration to the effect that the holders of the bonds can look only to the funds realized from the special assessments for the payment of the bonds, and the express promise to pay on part of the city which is set forth in the bonds cannot be limited by the inferences sought to be drawn from the fact that the act of the legislature provides for the creation of a sinking fund, consisting of the funds derived from the special assessments, to be used only for the payment of the costs of the improvements, including the bonds issued to meet the cost.

The exceptions to the report of the master are therefore overruled, so far as the same present the questions passed upon in this opinion, it having been agreed at the hearing that all other matters arising in the case should be heard hereafter.

THE ANSGAR.

THE PHILADELPHIA.

(District Court, E. D. Pennsylvania. April 18, 1902.)

COLLISION—STEAMSHIP AND PILOT BOAT—FAILURE OF SHIP TO STOP HEADWAY TO TAKE ON PILOT.

A pilot boat in approaching in the night a steamship which has signaled her desire for a pilot is justified in acting on the supposition that the ship has stopped her headway, as it is her duty to do, in order that the pilot may be put on board with safety and convenience, and where a collision results wholly from the fact that the ship has not done so, although she has had sufficient time, she will be held solely in fault.

In Admiralty. Suit for collision.

Horace L. Cheyney and John F. Lewis, for the Philadelphia.
Henry R. Edmunds, for the Ansgar.

J. B. McPHERSON, District Judge. The collision in controversy occurred under the following circumstances: About 2 o'clock in the morning of August 21, 1901, the steam pilot boat Philadelphia was cruising outside the capes of the Delaware river, looking for incoming vessels that might need the services of a pilot. She was properly manned and supplied with the required lights, set and burning, and was maintaining an efficient lookout. The night was dark, but clear, and lights could be seen several miles away. The Norwegian steamship Ansgar was approaching the capes upon a westwardly course, the course of the pilot boat being about east, and soon after sighting each other the two vessels exchanged the signals that indicated the Ansgar's desire for a pilot. At this time the Philadelphia was to the north of the Ansgar, and each vessel, therefore, was showing its green light to the other. After the interchange of signals it became the duty of the Ansgar to stop her engines and her headway, in order that the operation of putting the pilot on board might be safely and conveniently conducted. It was the duty of the pilot boat to approach the Ansgar as near as might be safe, and to put the pilot on board by the use of a small skiff. The wind was blowing lightly from the southwest, so that the starboard side of the Ansgar was the lee side, and upon that side it was proper and customary that the pilot should be taken on board. Accordingly the pilot boat put her helm hard a-port, and began a turning maneuver that was intended to bring her slightly above the bow of the Ansgar, from which point she intended to drop the skiff to the steamship. This maneuver was in accordance with the established practice, and was entirely proper. As already stated, the night was clear, but dark, and, while the lights of the vessels were clearly visible to each other, it was not easy for the pilot boat to distinguish whether the Ansgar was moving through the water or not. In fact, although the steamship's engines were stopped when the vessels were about a quarter of a mile away, she did not stop her headway by reversing, and therefore continued to move through the water under the momentum already acquired. The pilot boat approached under the belief, which she was justified in entertaining, that the Ansgar had stopped her headway, and only discovered that the fact was otherwise when she was too near to avert the collision. Her engines were promptly reversed, and her helm put hard a-port, but in spite of all that could be done the port bow of the pilot boat struck the steamship upon the starboard side near the bow, a second collision taking place immediately afterwards between the starboard quarter of the steamship and the port quarter of the pilot boat.

Under these circumstances, it seems to me that the Ansgar was solely at fault, her fault consisting in not stopping her way in time, so that the pilot might be put aboard with safety and convenience. The point seems to me to be expressly decided in The City of Washington, 92 U. S. 31, 23 L. Ed. 600; that case deciding, also, that the action of a pilot boat in taking a station in front of the vessel to be boarded is justified by custom and supported by good reasons.

Decrees may be entered in accordance with this opinion.

THE MAGGIE ELLEN.

(District Court, E. D. New York. February 5, 1902.)

1. COLLISION—SAILING VESSELS ANCHORING IN CHANNEL — UNNECESSARY OBSTRUCTION.

Sailing vessels have no right to anchor in thick and stormy weather so as to obstruct a channel used by passenger steamers, and create danger of collision, where it can be avoided by reasonable effort on their part; and, where it cannot, they should display such lights as will be effective, under the conditions, to give warning of their position.

2. SAME—STEAMER AND SAILING VESSEL—INSUFFICIENT LIGHTS.

A schooner which was lying with three others, anchored at intervals across a channel three-quarters of a mile wide, during a snowstorm, creating a dangerous obstruction, owing to the thick weather and its insufficient lights, when all could have found safe anchorage grounds at the side of the channel, *held* solely in fault for a collision with a passing steamer which exercised due care.

In Admiralty. Suit for collision.

William J. Kelly, for libelant.

Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. On December 21, 1900, at about 9:30 o'clock in the evening, the steamer Shinnecock, bound from Providence to New York, collided with the schooner Maggie Ellen, anchored about a quarter of a mile off the east shore of Dutch Island, in Narragansett Bay. Between the island and west shore, the distance is about three-quarters of a mile; and in this space were the Maggie Ellen and three other schooners, separated one from another by a distance of about 500 or 600 yards. These schooners were anchored in the usual course of several large steamers and other vessels. To the eastward, in Dutch Island harbor, was a safe anchorage ground; and there was opportunity to anchor on the west side of the channel, without the way of passing vessels. The weather was thick, by reason of a severe snowstorm; and navigation was so difficult that the Shinnecock had been obliged to turn back on her course shortly before reaching the schooner, and it was after resuming her voyage that the collision happened. The persons on the schooner admit that they saw the lights of the steamer, and allege that they had a white anchor light set in the fore rigging, about 15 feet from the deck. Both vessels were injured by the collision. The present action involves damage to the steamship. It is alleged on the part of the libelant that the Maggie Ellen, as well as the other schooners, was a dangerous obstruction to navigation, and so it seems to the court. The schooners menaced navigation to a degree that indicates great disregard of the passing vessels, carrying many passengers and much property. Although it is claimed that they anchored under stress of weather, there was no extremity that required this blockade of the thoroughfare. It comes frequently to the attention of this court that sailing vessels place themselves in the way of large passenger steamers, displaying, if any light, only a small lantern, capable of being seen under favorable circumstances, but so obscured or hidden on nights like the one in question that its presence furnishes no warning. The witnesses for the

schooner urge that the light was present. The witnesses for the steamer state that it was not displayed or produced until after the accident happened. However that may be, the schooners were where they had no right to be, and, if they ventured to obstruct the channel, they should have used measures to forewarn the passing steamships, other than were employed upon this occasion. It is quite time that some check should be put upon the indolence of sailing vessels in protecting themselves and others, and that what has come to be a habitual disregard of the safety of the multitude of people traveling by water should receive more positive condemnation of the courts. It may be that cases will arise where schooners are anchored in places where they have no right to be, and yet that passing vessels may be negligent in not discovering their presence. Such is not the case at bar. The conduct of the Shinnecock, by her officers, indicates great solicitude for the welfare of those aboard, and that careful lookout was maintained.

There should be a decree for the libelant for damages and costs.

LADOW v. NORTH AMERICAN TRUST CO. et al.

(Circuit Court, D. Oregon. April 29, 1902.)

GUARDIAN'S SALE—ILLEGAL OBJECT—TITLE OF PURCHASER.

A purchaser at a guardian's sale who pays nothing for his deed, but takes with an understanding that he will mortgage the property and reconvey it subject to the mortgage,—the object of the transaction being to circumvent the law prohibiting the mortgaging of a minor's property,—cannot hold the property as against the minor, nor can his grantees with notice.

See 113 Fed. 13.

Charles Carter and J. J. Balleray, for plaintiff.

George Stout and Pipes & Tifft, for defendant Letitia Lombard.

BELLINGER, District Judge. The defendant Letitia Lombard now moves for a decree, upon the pleadings, that she is the owner of the interest in the premises in controversy claimed by her. The ground of this motion is "that the amended bill of complaint shows on its face, as does the answer of the said defendant, that she deraigns her title by mesne conveyances from the purchaser at the guardian's sale under the decree of a probate court, regular on its face, and having jurisdiction of the subject-matter, and that the allegations in the complaint attacking the validity of said decree are a collateral attack thereon, and cannot be made in this suit." It is argued in support of the motion that this suit is a collateral attack upon the judgment of the county court ordering the sale under which Lombard claims; that the proceedings in the county court were in rem, and are conclusive upon all the parties in interest; that the judgment rendered therein imports absolute verity; and that so long as it remains unimpeached the title of Mrs. Lombard is unassailable.

I do not deem it necessary to consider the question of collateral attack. The judgment of the county court ordering the sale may

remain. It does not follow that the title derived through the sale is unassailable. There may be a valid order of sale, and a valid sale under the order, and yet the circumstances of the sale may be such that the purchaser acquires no beneficial interest in the purchase; nor does it follow that the invalidity of the mortgage renders the proceedings operative to effect a sale. That is this case. The so-called purchaser at the sale paid nothing. He purchased, if we may call it a purchase, with the understanding that the purchase was not a purchase, but a mere form; that he was to mortgage the property and reconvey it subject to the mortgage,—the object of the proceeding being to circumvent the law which prohibited the mortgaging of the minor's property. Could this so-called purchaser be heard to say that he had a good title against the minor? Could he take refuge in the absolute verity of the judgment which authorized a sale to repudiate the understanding on which the purchase was made? Concede that the order was valid; it does not follow necessarily that the sale was valid; and, if the sale was valid, it might be attended with such circumstances that a trust would result in favor of the minor. The purchaser at this sale, paying nothing, agreeing to mortgage and reconvey, took nothing; and those to whom he conveyed, having notice, took nothing. Under the allegations of the bill which permitted such evidence, Isaacs, the purchaser, testified that he purchased the property at the guardian's sale at the request of the guardian; that the guardian's sale was a mere form; that he did not purchase the property, but went through the form of a purchase, "just for the purpose of putting that mortgage on it"; that it was understood beforehand that he was not to pay anything, and that he did not pay anything,—"never paid a cent"; and that he was to turn the property back to the complainant. Howard took from Isaacs without the payment of any money, and upon the same understanding as to reconveying to the complainant. Contrary to his duty, he dickered with B. M. Lombard, the real party in interest, who took with notice, and who paid little, if anything, and who concluded that they could "fix matters" with the minor by giving him some back lots. Lombard assumed a part of the mortgage debt, and then escaped the liability so assumed on the identical ground now urged against his own title,—on the ground that the proceedings under the order of sale were intended to effect a mortgage of the minor's property. The validity of the mortgage necessarily depended upon the validity of the sale. If there was a valid sale, Isaacs, through whom Lombard claims, had a good title, and his mortgage constituted a valid lien. In other words, if Isaacs could lawfully convey to a purchaser with notice, he could lawfully mortgage. There was as much to be said for the mortgage which Lombard defeated as for the sale through which he claims. Both are valid, or neither is.

The motion is denied.

In re GORDON.

(District Court, D. Vermont. May 12, 1902.)

BANKRUPTCY—JURISDICTION—HOMESTEAD.

Under Bankr. Law 1898, § 70, passing to the trustee property which might have been levied on and sold under process against the bankrupt, and V. S. § 2186, which makes the homestead subject to attachment and execution on causes of action existing at the time of acquiring the homestead, the bankruptcy court has jurisdiction to sell so much of the homestead, subject to the mortgage thereon, as will satisfy such prior debts, without, however, the costs of suits thereon.

In Bankruptcy.

Aldrich & Reirden, for trustee.
May & Simonds, for bankrupt.

WHEELER, District Judge. The bankrupt appears to have a homestead of the appraised value of $750, subject to a mortgage of about $250, and to owe debts that accrued prior to his acquiring the homestead to the amount of about $350. These creditors sued their claims and attached the homestead, and have proved their claims as unsecured debts. The referee, against the protest of the bankrupt that the court of bankruptcy has no jurisdiction over the homestead because it is exempt property, has granted leave to sell so much of the homestead as is not exempt from these prior debts subject to the mortgage, and this is a review of that order.

By the laws of the state the homestead is "subject to attachment and levy of execution upon causes of action existing at the time of acquiring the homestead" (V. S. § 2186); and by the bankrupt law property "which might have been levied upon and sold under judicial process against" the bankrupt passes to the trustee (section 70). These provisions bring so much of this homestead as is not exempt from these debts within the jurisdiction of these bankruptcy proceedings. Whatever is left must remain to the bankrupt as an interest in the homestead, for there is no law to compel taking money for an interest in the homestead where the whole does not exceed $1,000 in value. V. S. §§ 2193, 2194. According to the appraisal, the bankrupt has an interest of the value of about $150, or of about three-tenths of the whole, subject to the mortgage, that is exempt from these and all debts. This may not be near the exact interest, and there may not turn out to be any interest exempt from these debts, but if there is any it must be saved to him in the homestead. This court can only sever the rest from it, and deal with the rest according to the rights of the creditors. As the mortgage covers the whole, this can be done only by sale of fractional parts of the whole, or the whole if necessary, to satisfy the amount of these prior debts. The state statutes put the mortgage upon the part outside the exemption. V. S. § 2181. But, as there is no exemption from these debts, that provision does not apply. The rights of all will be preserved by selling such fractional part of the homestead subject to the mortgage as will bring enough to satisfy these prior debts. Costs of the suits on these claims are not such a part of the debts as to belong to the priority, and only

the amount of the naked claims is to be reckoned in determining the part of the homestead not exempt.

The proof of the claims as unsecured is relied upon to defeat the priority. But this right to follow the property is not a lien; it arises from a limitation of the exemption merely in favor of this class of creditors, whomsoever they may be. The attachments created no right under the bankrupt law. This is not contrary to the cases cited by the bankrupt, that hold waivers of, or liens upon, exemptions to be outside the jurisdiction of the courts of bankruptcy, for here what is reached is not within the exemption. Woodruff v. Cheeves, 5 Am. Bankr. R. 296, 105 Fed. 601. Bankruptcy courts have nothing to do with exemptions but to set them out. Here, as to these prior claims, there is no exemption in this homestead to set out.

The order is said to authorize a sale of the homestead and the transfer of the bankrupt's interest in it to the avails. It does not seem to mean that. If it does, it should be so modified as to only authorize the sale of such a share of the homestead subject to the mortgage as is necessary to satisfy the prior claims.

Order modified, if necessary, so as to authorize sale of such share of the homestead subject to the mortgage as is required to satisfy prior claims, and as modified affirmed.

THE SANTO DOMINGO.

(District Court, E. D. New York. February 11, 1902.)

WAR—SUIT FOR ADJUDICATION OF NAVAL PRIZE AND BOUNTY—PUBLICATION OF MONITION.

In a suit by the United States for the adjudication of a prize of war captured by a naval vessel and the rights of the captors to bounty under the laws, in which the court acquires jurisdiction by designation of the secretary of the navy, although the publication of the monition has been made in technical compliance with the rules and practice of the court, a further publication will be ordered on application of the government, where it appears necessary to bring notice to all those who may be entitled to be heard, to be made not only in a local paper, but in such other as appears calculated to accomplish its purpose.

In Admiralty. On application for republication of monition in prize case.

George H. Pettit, U. S. Atty.

Harriman & Fessenden, for captors.

THOMAS, District Judge. The libel herein was filed by the United States attorney for the Eastern district of New York, who "libels for the United States and for all parties in interest, against the Spanish steamer or vessel Santo Domingo," and alleges her capture during the Spanish War by the United States ship of war Eagle. The secretary of the navy has designated the Eastern district of New York as the district within which proceedings for the adjudication of the prize and of the rights of the captors to bounty under any law of the United States shall be commenced. The libel was filed April 26, 1899, and the monition was issued May 17, 1899, and service of the same was

made by publication in the Standard-Union, a newspaper published in the borough of Brooklyn. The United States has deposited to the credit of this court the sum of $1,174.91, which it claims is the total amount that should be distributed, while the persons who have appeared and allege themselves to be the captors and entitled to the bounty state that the value of the Santo Domingo and her cargo was $1,000,000. The jurisdiction of this court depends upon the designation of the secretary of the navy, above stated, or the possession of some portion of the proceeds of the res, or both. On December 5, 1901, an order was entered amending the libel, and all pleadings and proceedings, and directing that they should be entitled "The United States of America, Libelant, against the Spanish Steamer Santo Domingo, Her Tackle, Apparel, and Furniture." It is urged on the part of the United States that, in view of this amendment, there should be a republication of the monition.

It is considered that within the authority of The Palmyra, 12 Wheat. 11, 6 L. Ed. 531; Benton v. Woolsey, 12 Pet. 27, 9 L. Ed. 987; Jecker v. Montgomery, 18 How. 125, 15 L. Ed. 311,—the practice was technically correct, and in that regard republication is not obligatory. However, the jurisdiction of this court is obtained in the manner above stated, and the publication, although following the practice of the court, is entirely insufficient, under the circumstances, to bring notice to those who may deem themselves entitled to be heard; and for this reason, and this alone, a republication of the monition is ordered, not only in the local paper, but also in a newspaper whose place of publication or circulation is calculated to bring notice to interested parties. Therefore it is directed that such republication be had, not only in the Standard-Union, but also in the Washington Star, a newspaper published in the District of Columbia.

THE EMPEROR.

(District Court, E. D. New York. February 7, 1902.)

1. COLLISION—SAILING VESSEL AND TUG WITH TOW—IMPROPER MANEUVER.
   Evidence considered, and *held* to show that a collision in East river between a sailing lighter and a car float, projecting ahead of the tug by which it was being towed, resulted from the lighter's going about on the other tack nearly in front of the tug and tow, and, failing to fill at once, being drifted by the tide against the float, which had stopped, and was making sternway at the time, and that the lighter was in fault for such maneuver, and contributed to her injury.

2. SAME—VIOLATION OF STATUTE.
   A tug navigating with her tow too near the Brooklyn shore, in passing down East river, in violation of the statute, where its observance was possible, though not convenient, must be held in fault for a collision there occurring, although she was not otherwise in fault.

In Admiralty. Suit for collision.

James J. Macklin, for libelant.
Carpenter & Park, for claimants.

THOMAS, District Judge. The sailing lighter Carrie, loaded, navigated by two men, was going up the East river on a flood tide, running two and a half or three miles per hour, with the wind shifting from northeast to northwest, between 8 and 8:20 o'clock a. m. She was on the port tack, somewhat below Jay street, Brooklyn, when she went about on the starboard tack, and was pointing across the river, when her bow was struck by car float No. 6, projecting about 150 feet from the starboard bow of the tug Emperor, bound for Jersey City. The master of the Carrie states that the collision occurred about 300 feet off the Brooklyn shore; that at the time the Carrie started to go about she was 200 feet from that shore; that the car float and tug were 100 feet farther in, and about 100 feet upstream. Hence the Carrie, in length over all about 100 feet, went into the wind, so as to move her bow on a flood tide, in the direction of a long and loaded car float, 100 feet upstream and 100 feet inshore. The Emperor's evidence is to the effect that the Carrie went about in front of her, and that the tug had stopped some minutes before, and was backing and making sternway at the time of the collision. If the Carrie's claim be true, the float must have traveled out of her course the alleged distance of 100 feet that separated the vessels, plus the greater part of the length of the Carrie, straightened across the river, in order to bring the float in collision with the Carrie's bowsprit. It is more credible that the Carrie went about more nearly in front of the float, and not filling at once, as appears, was carried by the flood tide upon the float. She contributed to the injury. The Emperor was not at fault, save as she was navigating too near the Brooklyn shore, in volation of the statute, whose observance was possible, but not convenient or advantageous. The court is bound by the statute, and will enforce it. If it should not exist, let the legislature repeal it; it should not be abrogated by the courts. This statute was not involved in The Bayonne (D. C.) 110 Fed. 462.

The damages will be divided.

GREEN v. DANIELS, Sheriff.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1902.)

No. 1,628.

EXECUTION—PROPERTY SUBJECT TO SALE—INTEREST IN LAND UNDER COLORADO STATUTE.

The owner of the title to mining claims made a deed for the same to B., who at the same time made a deed conveying the claims to a company which had contracted for their purchase. Both deeds were placed in escrow, to be delivered to the company in case certain payments were made; otherwise to be delivered to B. The company went into possession under the contract. *Held*, that under Mills' Ann. Codes & St. Colo. § 2582, providing that "every interest in land legal and equitable shall be subject to levy and sale under execution," B. had an interest in the property which was subject to levy and sale, since under the escrow agreement the deed to B. was, in any event, to be delivered and to become effective; making B., in legal effect, a vendor retaining title until payment of the purchase money by the purchaser.

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

Ralph Talbot, John H. Denison, and William H. Wadley, for appellant.

Charles D. Hayt (John W. Wegner and Ernest Knaebel, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a bill for specific performance, or, in other words, a bill exhibited by Ernest L. Daniels, sheriff of Lake county, Colo., the appellee, against Harrison S. Green, the appellant, to compel the latter to accept and pay for certain property, known as the "Gordon & Bengal Tiger Lode Claims," situated in mineral survey No. 7,557, Twin Lakes mining district, Lake county, Colo., which property the appellant bought on July 3, 1901, at an execution sale under an execution in favor of one John T. Keegan and against S. P. Brown, Constance H. Brown, George H. Brown, Charles L. Brown, Mamie Niles, Hattie Berry, and Laura Swindler. The execution in question was issued upon a judgment which was recovered against the defendants in the execution on April 2, 1901, for the sum of $27,039.78. The case seems to have been tried below on the bill, answer, and annexed exhibits, no testimony having been adduced by either party; and a decree was rendered in favor of the complainant below. From this source we extract the following facts, which are undisputed: On and prior to April 9, 1900, the property in controversy appears to have been owned by the above-named persons, against whom the execution aforesaid was issued. On that day S. P. Brown entered into a contract for the sale of the property to Daniel E. Murphy, and to a corporation which the latter was to organize, for the price of $200,000, which sum was to be paid in a manner therein specified. In pursuance of this agreement, and for the purpose of carrying it into effect, S. P. Brown, Constance H. Brown, George H. Brown, Charles L. Brown, Mamie Niles, Hattie

Berry, and Laura B. Swindler executed a deed conveying the property to Daniel E. Murphy; said conveyance being duly recorded. At the same time Murphy executed a deed conveying the property to Constance H. Brown, and she, in turn, executed a deed conveying it to the Gordon Tiger Mining & Reduction Company, which was the corporation that Murphy had organized to succeed to his rights, and acquire and work the property. The two deeds last mentioned (that is to say, the deed from Murphy to Constance H. Brown, and her deed to the mining company) were delivered in escrow at the date of their execution to John H. Denison, to be delivered to the aforesaid mining company when it had paid for the property in accordance with the agreement of date April 9, 1900, above mentioned, and had produced receipts, signed by S. P. Brown or Constance H. Brown, showing that the property had been paid for. The directions contained in the written instrument by virtue of which said deeds were placed in escrow were that if the mining company should be in default over 90 days in making payment of the purchase price of the mine in the manner agreed, or in the payment of one-half of the net profits of the mine, to S. P. Brown, which portion of the profits it had agreed to pay to him until the purchase price of the mine was fully liquidated, then the deeds held in escrow were to be delivered to Constance H. Brown, or to her order. By the terms of the agreement of date April 9, 1900, the mining company had the right to relinquish all its interest in the property, and to surrender its claims to the deeds held in escrow, without liability for damages, if it should determine at any time that it could not work the property profitably. It seems that at the time the judgment aforesaid was rendered against the above-named defendants in the execution, under which the appellant became the purchaser of the property, the mining company was still in possession of the property, and had made some payments on account of the purchase price, and had not at that time elected to surrender its rights as a purchaser.

Counsel for the appellant, at the commencement of their argument, say that:

"The only question presented is, was the interest of the Browns, as shown in defendant's answer and the exhibits thereto attached, subject to levy by execution? If the land was not subject to sale, the levy and sale are void, and the purchaser is not bound."

We accept that as a correct statement of the point to be determined, and shall confine our attention thereto; assuming, as we do, that it was the only question considered by the circuit court.

A statute of Colorado (Mill's Ann. Codes & St. § 2582) provides that:

"Every interest in land, legal and equitable, shall be subject to levy and sale under execution; and the claim or possessory right of any defendant in execution, in or to any public lands, may be levied upon and sold under execution, in the same manner as if the same were held by such defendant in fee simple."

See, also, Barnes v. Beighly, 9 Colo. 475, 479, 12 Pac. 906.

It follows, therefore, that if any of the defendants in the execution had an interest in the land, legal or equitable, the execution was

properly levied, and a sale thereunder passed that interest. Looking at the situation as disclosed by the record, we are of opinion that Constance H. Brown, one of the defendants in the execution, had a vendible interest in the property, under the provisions of the aforesaid statute. It will be observed that all of the defendants in the execution joined in the conveyance of the property to Murphy, which conveyance was delivered and recorded. Murphy then conveyed the property, by a deed duly acknowledged, to Constance H. Brown, and she, in turn, conveyed the property to the mining company; but these latter deeds are held in escrow. In no event, however, can the title or interest which was conveyed by Murphy to Constance H. Brown ever become revested in him (Murphy), since, if the mining company fails to complete its purchase, the deeds held in escrow are not to be delivered to him, but to Constance H. Brown, when she will become vested with the entire estate. While it is a general rule of law that deeds delivered in escrow only take effect as of the date of the second delivery,—that is to say, when the condition on which they are to be delivered has been fulfilled (Bish. Cont. §§ 357–361),—yet there are well-known exceptions to this rule, to which the case at bar belongs, since Murphy, when he executed his deed in favor of Constance H. Brown, and placed it in escrow, did not expect to regain the title, even if the mining company did not pay the purchase price, but intended to vest the title in her, to the end that she might be in a situation, by a mere delivery of her deed to the mining company, to vest it with the legal title, provided it paid the purchase money. Her situation, therefore, when the levy was made, is entirely analogous to that of a vendor who has sold land, and placed the vendee in possession, retaining the title to be transferred when the purchase money is paid. The statute which was originally adopted in the state of Colorado, defining what shall be included by the term "real estate," as used in the section authorizing the sale of such property on execution, was borrowed from the state of Illinois; and the original statute is not substantially different from the statute which is now in force in the state of Colorado, except that the latter statute is, if anything, more comprehensive, in that it authorizes the sale of all interests in land, whether they be legal or equitable. In the state of Illinois it is the rule that a vendor of real property, who has sold land and put his vendee in possession, but has not executed a conveyance, has an interest in the land, which, under the statute of that state, may be sold under execution. McLaurie v. Barnes, 72 Ill. 73, 75, 76. There is no decision to the contrary in Colorado, as the only case from that state to which our attention has been directed that is at all in point is the case of Fallon v. Worthington, 13 Colo. 559, 22 Pac. 960, 6 L. R. A. 708, 16 Am. St. Rep. 231, where an attempt was made to sell a vendor's interest in real property, who had sold and conveyed the same, but had not received all of the purchase money, and who, for that reason, could only claim a vendor's lien, which was held not to be an interest in land. The situation of a vendor who has not made a conveyance of the thing sold is, as a matter of course, very different. So long as he retains the legal title, he has an interest in the res, and this interest must

be held to be vendible, under the Colorado statute above quoted. One who purchases at a sale of the vendor's interest takes, of course, subject to all the rights of the vendee of which he has notice; but, on the other hand, he succeeds to all the interest of the vendor, including his rights as against the vendee.

We conclude, therefore, that Constance H. Brown did have an interest in the property which was vendible on execution; and as this is the only question argued, and as it was rightly decided below, the decree below is affirmed.

GREAT NORTHERN RY. CO. v. COATS.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,601.

1. RAILROADS—FIRE FROM LOCOMOTIVE—EVIDENCE—BURDEN OF PROOF.
   Where fire is shown to have started from sparks from a passing locomotive, the burden is on the company, in an action for damages, to show that the locomotive was properly constructed, equipped, and operated.

2. SAME—SUFFICIENCY OF EVIDENCE—JURY QUESTION.
   Where it clearly appeared that a fire was started on the right of way of a railroad by a passing locomotive, which extended to and destroyed adjoining property, and the company, on the trial of an action against it, produced testimony, which was not directly contradicted, tending to show that the locomotive was properly constructed, equipped, inspected, and operated, *held*, that it was the province of the jury to determine whether the presumption of negligence, created by the starting of the fire, was overcome, since the jury had the right to weigh the testimony and to determine whether the witnesses for the company were credible.

3. SAME.
   The engineer and fireman, who were the principal witnesses for the company in an action for fire started by sparks from their locomotive, testified that, at the time or immediately after the locomotive passed the place where the fire was set, the front and rear dampers were closed; that the former had not been opened; that the screen netting in the smokestack was in place; that there was no opening in the ash pan through which fire could escape; that the steam was shut off; and that it was running on acquired momentum at the rate of 15 miles an hour. Plaintiff's evidence tended to show that, before reaching the place where the fire started, the locomotive was climbing a grade under forced draft, and that it had acquired such a momentum that it could run a quarter of a mile up grade with steam shut off and dampers closed, which was contended to be negligent on a windy day, when in proximity to combustible materials. *Held*, that the court could not say, as a matter of law, that the locomotive was properly operated.

4. SAME—INSTRUCTIONS.
   Where there was no evidence in an action against a railroad for setting a fire by its locomotives that the fire started on plaintiff's land, outside of furrows plowed by him on the margin of the right of way, and where he had directed defendant's sectionmen not to burn grass outside the furrows, it was not error to modify an instruction requested by defendant, that plaintiff could not recover if the fire caught outside of the furrows, by the additional requirement that it must also appear that the train was properly managed.

5. SAME—DIRECTIONS TO SECTIONMEN.
   A direction by the owner of land adjoining a railroad right of way to railroad sectionmen not to burn grass on his land, but which does not

direct them not to remove the grass in some other way, does not relieve the company from liability for setting fire thereto by its locomotives.

6. SAME—INSTRUCTION—VELOCITY OF WIND.
An instruction in an action for fire started by sparks from a locomotive that the velocity of the wind might be taken into consideration was not erroneous, in failing to state how and in what manner the velocity of the wind could be considered.

Sanborn, Circuit Judge, dissenting.

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

W. E. Dodge (A. B. Kittredge, C. Wellington, and Charles S. Albert, on the brief), for plaintiff in error.

C. S. Palmer (Frank R. Aikens and H. E. Judge, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Clark G. Coats, the defendant in error, against the Great Northern Railway Company, the plaintiff in error, to recover the value of certain property, consisting of a dwelling house, two barns, and a quantity of farming utensils and machinery, which, as he alleged, were destroyed on April 26, 1899, by a fire which was set out on the defendant company's right of way by sparks, cinders, and coals which were emitted by one of the defendant company's engines. The complaint charged, in substance, that the defendant company carelessly and negligently permitted grass, weeds, bushes, hay, stubble, and other combustible materials to grow and accumulate upon its right of way at the place where the fire originated, and on the day last aforesaid, by its servants, agents, and employés, in running and operating its engines and trains over its railway at said place, carelessly and negligently set fire to said grass and other combustible materials there permitted by said defendant to accumulate, by said engine emitting and discharging sparks, cinders, and live coals, thereby igniting said grass and other combustible materials, which said fire was, through the defendant's carelessness and negligence, set upon its right of way, and, being so set, was, through the defendant's carelessness, permitted to extend from its right of way to the plaintiff's premises, and, by so extending, consume a large quantity of the plaintiff's property, which was situated on a tract of land adjoining the right of way. We quote the above from the complaint, using substantially the language of the pleading. There was a verdict below in favor of the plaintiff for the sum of $11,000, and the case is before this court for review, various errors having been assigned.

At the conclusion of the case the defendant company moved the court to withdraw from the jury the issue as to the manner in which the engine that occasioned the fire was operated and managed, for the reason, as stated in the motion, that the uncontradicted evidence tendered by the defendant company relating to the management of the engine "is so clear and circumstantial that no reasonable person can doubt its verity." The court overruled the motion, and its action

in that behalf is the first alleged error to which our attention is directed.

Preliminary to a discussion of this point, it should be observed that the testimony for the plaintiff below showed that the fire started on the defendant's right of way about 1:30 p. m., and not over a minute or two after the engine and train which is supposed to have kindled the fire had passed the place where it was discovered; that at that point on the right of way there were some dry weeds and grass, which extended all the way to the plaintiff's buildings; that a high wind was blowing in the direction of the buildings, and that the fire, after it had caught on the right of way in the grass and weeds, ran very rapidly to the plaintiff's barns and dwelling house, and destroyed them before much of the contents could be removed. In view of the testimony, it is manifest that the fire was kindled by coals, sparks, or cinders which were emitted or dropped by the defendant company's engine; and there was sufficient evidence to warrant the jury in finding that some combustible material, such as dry grass and weeds, had been permitted to accumulate on the defendant's right of way, and that the fire started therein on the right of way. It follows, therefore, that the testimony in question not only created a presumption of negligence on the part of the defendant company, but, in so far as it showed that the company had allowed combustible material to accumulate on its right of way, it established a specific act of negligence, to which the injury complained of might well be attributed. McCullen v. Railway Co., 41 C. C. A. 365, 101 Fed. 66, 70, and cases there cited; Eddy v. Lafayette, 1 C. C. A. 441, 49 Fed. 807; Id., 163 U. S. 456, 466, 16 Sup. Ct. 1082, 41 L. Ed. 225; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (decided at the present term) 114 Fed. 133.

Learned counsel for the railroad company do not controvert these propositions, but they assert that the trial court should have told the jury, in substance, that the engine was properly managed, and that the company was guilty of no negligence in that respect, and that a reversible error was committed in not eliminating that issue from the case.

We think that these propositions are untenable. The testimony introduced by the plaintiff, that his property had been destroyed by a fire kindled on the right of way of the railroad by coals, cinders, or sparks emitted by a passing locomotive, if the jury believed such to be the fact, as they must have done, cast on the defendant company the burden of overturning the presumption of negligence thus raised; that is to say, the burden of showing that the locomotive was properly handled or operated, and that due care had been exercised in the construction and equipment of the same and in keeping it in repair, so as to prevent the emission of cinders and sparks, so far as that end could be attained without impairing its efficiency. McCullen v. Railway Co., 41 C. C. A. 365, 101 Fed. 66, 70. This presumption could only be overcome by testimony, and, unless we apply to this class of cases a rule different from that which is applied in other cases, it was the province of the jury to determine the weight that should be accorded to the testimony which was introduced for that purpose, and

also to determine the credibility of the witnesses who testified on that subject. It was well said by the supreme court of Minnesota in Karsen v. Railroad Co., 29 Minn. 12, 15, 11 N. W. 122, when construing a statute of that state which makes the scattering of fire by a locomotive engine prima facie evidence of negligence:

"Neither is a jury necessarily bound to accept as conclusive the statement of a witness that an engine was in good order or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the facts and circumstances in evidence bearing upon the condition or mode of operating the engine, and upon the accuracy of witnesses."

It was further said, in substance, in the same case, that the statute under consideration creates a disputable presumption of negligence on the part of a railroad company, when it appears that one of its locomotive engines has set out a fire which has destroyed adjoining property; that the effect of the statute is (this latter fact being shown) to cast upon the company the burden of proving affirmatively that it has done its duty, and was not in fact guilty of any negligence; that it must do this by satisfactory evidence, as in any other case where one holds the burden of proof; and that if a jury finds against the company, deciding that the presumption of negligence has not been overcome, it is within the power of the trial court, and its right and duty, as in other cases, to set aside the verdict, if it is of the opinion that it was not justified by the evidence. We cannot well understand upon what theory the statement of persons, who were in charge of a locomotive when it occasioned a disastrous fire, that it was properly and prudently managed, etc., must be accepted by a court as conclusive, and as overturning, as a matter of law, the presumption of negligence raised by other testimony. It would seem, rather, that the triors of the fact ought, in such a case, to consider how far the interest of such witnesses—their natural desire to absolve themselves from all blame—may have colored their evidence, and how far their statements are consistent with other facts and circumstances which have been proven. If a court undertakes to weigh such evidence, and say that the witnesses are credible, and also to decide as to the effect of the proof, it plainly assumes the functions of the jury, or at least a function which is discharged by the jury in other cases.

Our attention has been called by learned counsel for the plaintiff in error to the case of Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176, 179, where the reporter says in the syllabus that the inference of negligence arising from the fact that a fire was set by sparks from a locomotive is overcome by undisputed evidence that the engine was properly constructed and equipped, and was carefully inspected the day before the fire, and found to be in proper order, and was properly managed. But it is important to note that in that case the court said that the manner in which the fire was occasioned was not observed by any one, but was wholly a matter of inference, and that in that respect the case before it differed from other cases decided by the same court, namely, Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co., 84 Wis. 171, 53 N. W. 850, and Stacy v. Railway Co., 85 Wis. 225, 54 N. W. 779, in which latter

cases it was expressly decided that it was erroneous to withdraw from the jury the question respecting the negligent construction and operation of an engine, where it appeared that a fire started on the track shortly after an engine passed, although the company did produce witnesses who testified that the engine was provided with the most approved appliances to prevent the escape of fire, and was properly handled. If we should adopt the doctrine of the Wisconsin case first above cited (Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co.), it would not fit the case in hand, because in this case the fire originated on the defendant's right of way, in the weeds or grass, and was discovered not over a minute, as the plaintiff below said, after the train passed, and was evidently occasioned by sparks or cinders dropped by the locomotive. According to the Wisconsin decisions, therefore, the issue as to the skillful operation of the locomotive on the occasion of the fire was properly submitted to the jury.

In addition to the considerations aforesaid, which are ample, in our judgment, to show that the trial court committed no error in the respect now claimed, it will be profitable to refer to the testimony bearing upon the issue concerning the operation of the train.

The defendant company relied principally upon the testimony of its engineer and fireman, who testified, in substance, that, about the time or immediately after the engine passed the point where the fire was kindled, both the front and the rear dampers of the engine were closed; that the front damper had been closed from the time the train left Yankton; that the screen netting in the smokestack was down or in place; that there was no opening about the ash pan from which fire could have escaped; that the steam was shut off; and that thereafter the train was running on its acquired momentum at the rate of about 15 miles per hour, which was sufficient to carry it up an incline beyond the point where the fire occurred, and down the other side into the city of Sioux Falls. On the other hand, counsel for the defendant in error direct attention to evidence which shows that, for some distance before reaching the place where the fire was set, the train had been climbing an up grade on a curve, under a forced draught, and that by so doing it had acquired such a momentum that, with the steam shut off and all the dampers closed, it was able to run more than a quarter of a mile beyond the place where the fire was set, on an up grade, before reaching the crest of the hill. It is claimed that these facts tend to show that the train was not operated with the degree of care that ought to have been exercised on a very windy day, past a place where there was considerable combustible material on the right of way, and buildings near by. We refer to this testimony, and the contentions made with reference thereto, mainly for the purpose of saying that in the light thereof the trial judge was not bound to decide, as a matter of law, that the trainmen had told the truth, that the engine was skillfully handled on the occasion of the fire, and that no negligence could be imputed to the defendant company in that respect. This was a question for the jury to determine in the light of all the circumstances of the case, as well as the question whether the defendant company had permitted combustible material to accumulate on its right of way. The burden being on the defendant company, as before shown, to

prove affirmatively that it had operated its engine in a proper manner, we are not able to say that the proof relied upon to establish the skillful management of the engine was so clear and circumstantial as to remove all doubt on that point in the mind of a reasonable person. But even if this issue had been eliminated from the case, it was still the province of the jury to determine, as counsel for the plaintiff in error are compelled to concede, whether the defendant company had not been guilty of negligence which occasioned the injury, in permitting combustible material to accumulate on its right of way. It is most probable, we think, that the defendant company was held responsible for the fire for that reason.

Counsel for the plaintiff in error argue two other assignments of error relating to the instructions, which are all that require special notice.

There was some evidence at the trial that on one occasion before the fire the plaintiff below plowed certain furrows east of the railroad track, and along the margin of that part of the right of way where the fire originated, telling the defendant's sectionmen at the time not to burn the grass and weeds east of these furrows, as he had sown some tame grass east of them, which he did not care to have destroyed, or words to that effect. In view of this testimony, the defendant company asked the court to instruct the jury, in substance, that if the plaintiff plowed these furrows on the east side of the railroad track, and forbade the sectionmen to burn east of them, and if they found that the fire originated east of the furrows, then the plaintiff could not recover. The court gave this instruction, with the modification that, on the state of facts supposed, the plaintiff could not recover, provided the engine and train were carefully and properly managed. Counsel for the plaintiff in error complain of this modification of their request, but we are of opinion that no error was committed in this respect—First, because there seems to have been no testimony that the fire originated in the grass east of the furrows; and, second, if there had been such evidence, and if it also appeared that the fire was occasioned by the negligent handling of the engine, we perceive no reason why the defendant should not have been held accountable. Because the plaintiff ordered the sectionmen not to burn the grass outside of the furrows and on his own land, where he had sown tame grass, it does not follow that the company had the right to kindle a fire east of the furrows by the negligent operation of one of its trains. Besides, even if he did give the sectionmen orders not to destroy the grass outside of the furrows by burning, he appears to have made no objection to their removing such grass or weeds in any other way,—as by cutting them down. There is no merit in this assignment, nor is it one of any importance.

Furthermore, the lower court instructed the jury that, in determining whether the defendant company exercised ordinary care on the occasion of the fire, "the velocity of the wind may be taken into consideration," and this latter excerpt from the charge is criticised. If we fully comprehend the nature of the criticism, it is that the statement, as made, was too general; that the jury should have been advised exactly how and in what manner they might take the velocity of the wind into account; and that, because this was not done, the

defendant was prejudiced. We are not able to concur in that view. Jurors, as well as judges, are presumed to know that railroad trains do and that they must run on windy as well as on other days, and that a railroad company is not negligent merely because it operates a train in a high wind. We have no reason to suppose that the jury failed to comprehend what was in the mind of the court, namely, that more care ought to be exercised in handling fire on a windy day than on a calm day, and that, in determining whether the defendant had exercised due care on the occasion in question, they might very properly take into account the force of the wind on that day.

Upon the whole, we have failed to find that the trial court committed any error on the trial of this case which would warrant a reversal of the judgment below, and it is therefore affirmed.

SANBORN, Circuit Judge (dissenting). The serious question in this case is whether or not it was the duty of the court to withdraw from the jury the issue whether or not the company failed to exercise ordinary care in the management and operation of its locomotive, because the evidence that it was not guilty of such want of care was so clear and circumstantial that no reasonable person could doubt its verity.

There was evidence from which the jury might properly infer that the fire was set by sparks or coals from the locomotive. It is a general rule of evidence, which has been adopted by this court and by the supreme court of South Dakota,—the state in which this case was tried,—that the scattering of coals or sparks of fire by a locomotive raises a presumption that there was either a defect in the engine, or negligence in its operation. Kelsey v. Railway Co. (S. D.) 45 N. W. 204, 207. But this is not a conclusive presumption of law. It is only a disputable legal or artificial presumption of fact which has been adopted by the courts, ab inconvenienti, for the purpose of changing the burden of proof, because it was so difficult for the plaintiffs to establish in the first instance defects in the locomotives, or negligence in the operation of the engines of railway companies. In Smith v. Railroad Co., 3 N. D. 17, 22, 53 N. W. 173, the supreme court of that state announced the real reason and the true legal effect of this rule in these words:

"But to prevent a denial of justice some of the courts have created an artificial presumption of negligence, to the end that the defendant may be compelled to produce the witnesses who are familiar with the facts on which the issue of negligence depends, that they may be subjected to full and searching cross-examination on all the phases of the case,—on all the possible grounds of negligence. Some courts have refused to go so far. To extend this presumption of negligence beyond the reason for its existence would be irrational. It summons defendant to show that there was no negligence, and the evidence must fully meet every possible ground of negligence under the circumstances and the pleadings. But when the whole case, independently of this artificial presumption, shows that there was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury. It has fully served its purpose, and can have no other effect. We therefore establish it as the rule in this state that the court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overthrown."

The rule that the scattering of fire raises a presumption of defect in the engine, or negligence in its operation, was subsequently enacted into a statute in the state of North Dakota. Rev. Codes N. D. § 2984. But even when embodied in that imperative form the supreme court of that state adhered to its rule. It said:

"Setting the fire is made presumptive evidence of such defects or negligence. But this court is fully committed to the principle that whether or not such statutory presumption is overcome by evidence introduced by the defendant is, in the first instance, a question of law for the court (Smith v. Railroad Co., 3 N. D. 17, 53 N. W. 173), and also to the further position that when the proper employés of the defendant railroad company have gone upon the stand, and testified that there were no defects in the construction or equipment of the engine, and no negligence in its operation, making their testimony at all points as broad as the presumption, then, as matter of law, such presumption is overcome. Evidence of that character was introduced by the defendant in this case." McTavish v. Railway Co., 79 N. W. 443, 446.

The same rule prevails in the state of Minnesota, under a similar statute. Thus, while in the Karsen Case, cited in the opinion of the majority, the supreme court of Minnesota held that the evidence for the defendant in that particular case had not satisfactorily overcome the presumption, it as clearly declared that it was a question of law for the court whether or not the evidence had done so, and that whenever it had that effect there was no question left for the jury, and it was the duty of the court to withdraw the issue from their consideration. That court said:

"We do not think or hold that the mere fact that the fire was set by an engine has such an effect as direct evidence of negligence, if the otherwise uncontradicted evidence on the part of the railroad company showed satisfactorily that it had fully performed its duty in the premises. And if a jury should so find, it would be the right and duty of the court to set aside the verdict, as in any other case where it was not justified by the evidence." Karsen v. Railway Co., 29 Minn. 14, 15, 11 N. W. 122.

To the same effect are Spaulding v. Railroad Co., 30 Wis. 110, 123, 11 Am. Rep. 550; Id., 33 Wis. 582; Huber v. Railway Co., 6 Dak. 392, 43 N. W. 819; Koontz v. Navigation Co. (Or.) 23 Pac. 820; Railroad Co. v. Talbot, 78 Ky. 621; Railroad Co. v. Packwood, 7 Am. & Eng. R. Cas. 584; Railroad Co. v. Reese, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66.

Nor is this rule variant from that which ordinarily obtains when uncontradicted evidence meets a disputable presumption of fact. Lawson, in his Law of Presumptive Evidence, at page 661, says:

"Primarily, the rebuttable legal presumption affects only the burden of proof; but, if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption."

In Bryant v. Railroad Co., 4 C. C. A. 146, 53 Fed. 997,—an action for negligence resulting in death,—it appeared at the first trial that the deceased was riding on a passenger car of the defendant on its railroad when he was killed, and there was no rebutting testimony. This court held that the fact that he was riding on the passenger car upon the railroad raised a presumption that he was a passenger,

and reversed the court below because it directed a verdict for the defendant. The same fact was proved at the second trial, and the same presumption arose, but it was then rebutted by uncontradicted evidence that a yard master who was without authority to do so was operating the passenger car without the knowledge of the railroad company when the deceased was killed. At this second trial the court below had submitted the case to the jury, and the railroad company was met in this court by the proposition that, since the presumption had once arisen in the case that the deceased was a passenger, it remained and constituted some evidence for the consideration of the jury, and therefore prohibited the court from taking the issue from them. But this court said:

"A presumption of fact, like that which the counsel for the defendant in error here invoke, is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose. Possession of real estate raises a presumption of title, but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another, and that the possessor secretly took him from his owner without right, raises so conclusive a presumption of ownership in the latter that the court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny."

And we reversed the judgment below, and held that it was the duty of the trial court to take the question whether or not the deceased was a passenger from the jury, notwithstanding the fact that the presumption that he was so arose from the plaintiff's evidence. Railroad Co. v. Bryant, 13 C. C. A. 249, 256, 65 Fed. 969, 975, 976. The presumption of negligence in the operation of a locomotive which arises from the fact that it scatters sparks or coals or sets a fire is neither more sacred nor more conclusive than the presumption of ownership which arises from the possession of property, or the presumption of the relation of one riding in a car to a carrier which arises from his riding on its railroad in its passenger car, or from any other disputable presumption of fact; and it ought to receive no different measure of consideration.

The supreme court of the state of South Dakota (the state in which the case at bar arose, and in which it was tried) has adopted the rule which prevails in North Dakota, Minnesota, and many other states, —the rule that it is always, in the first instance, a question of law for the court whether or not the presumption of defects in a locomotive, or of negligence in its operation, arising from the setting of a fire or the scattering of sparks or coals, is overcome by the testimony of due care introduced by the defendant, and that if the uncontradicted evidence of its proper employés is that there were no defects, or that there was no negligence in the operation of the locomotive, and that testimony is as broad as the presumption, the presumption is overcome, as a matter of law, and it is the duty of the court to withdraw the issue from the jury. Thus, in Kelsey v. Railway Co., 45 N. W. 204, 207, that court said:

"The plaintiff, by proving that the defendant's locomotive engine had set fire to dry grass or other combustible matter along its roadbed, made a prima facie case of negligence; and, had defendant failed to introduce any proof, the plaintiff would have been entitled to a verdict in his favor, under the direction of the court. But the defendant did introduce its employés who were engaged in running the train at the time, and the master mechanic having charge of the repairs of the engines of the road for that division, who testified that this particular engine was in good order, and had the modern appliances attached to it to prevent the emission of sparks and the dropping of live coals of fire, and that the engine was run with the usual care and caution at the time the fire started. This evidence rebutted the presumption raised by the plaintiff's proof, and, had there been no other evidence of negligence, the defendant would have been entitled to a verdict from the jury under the direction of the court."

This rule that the presumption of negligence from the setting of a fire is, as a matter of law, overcome by the uncontradicted testimony of witnesses that due care was exercised, is a rule of evidence, a rule of practice, a rule which simply measures the force and effect of a disputable presumption of fact in the trial of fire cases in the states of South Dakota, North Dakota, Minnesota, and perhaps in other states; and in those states it ought to and does obtain in the federal courts, as well as in the state courts, because it is a just and rational rule, and because the act of congress provides that the practice, forms, and modes of proceeding in actions at law in the national courts shall conform, as near as may be, to the practice, forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which the federal courts are held. Rev. St. § 914.

The result is that it was, in the first instance, a question of law for the court below in this case whether or not the presumption of negligence in the operation of the defendant's locomotive, which arose from the scattering of the sparks or coals and the setting of the fire, was overcome by the testimony for the defendant; and if the testimony of its proper employés that there was no negligence in the operation of the engine was uncontradicted, and was as broad as the presumption, then that presumption was overcome, as a matter of law, and it was the duty of the trial court to withdraw this charge of negligence from the consideration of the jury on the motion of the defendant.

Turning to the evidence, and testing it by this established rule, the testimony of the engineer and fireman that the engine was carefully and properly managed and operated is found to be as complete and as broad as the presumption; and, unless it can be said to be contradicted in some material part, it entitled the defendant to a withdrawal of this issue from the jury. Where was the contradiction? The only evidence that is claimed to have any such effect is testimony that, "for some distance before reaching the place where the fire was set, the train had been climbing an up grade on a curve, under a forced draught," and that "by so doing it had acquired such a momentum that with the steam shut off, and all the dampers closed, it was able to run more than a quarter of a mile beyond the place where the fire was set, on an up grade, before reaching the crest of the hill." But to my mind there is nothing in this evidence which tends in the least degree to prove that this locomotive was not operated with reason-

able care; nothing to show that this method of operation was not more reasonable and careful than it would have been to have driven it puffing slowly up the hill past the property of the plaintiff, thus giving longer time and more opportunity for fire to escape and ignite the combustible material in the vicinity. The locomotive was attached to a train. The defendant had the right to draw this train around the curve and up the grade with its engine, and to use the necessary draught and fire to accomplish this purpose. The legal presumption is that it operated the locomotive and used the draught and the fire in a careful and proper manner. This presumption is strengthened by the uncontradicted testimony of its employés. No witness comes to say that it did not do so, nor that its engine was not driven up the hill with ordinary and reasonable care. The suggestion that it was not so driven comes, not from the testimony of any witness, but from the mere argument of counsel, with no witness to support it. In this state of the case, the testimony of the proper employés of the company seems to me to have been uncontradicted, and to have overcome the presumption of negligence in operating the locomotive which arose from the setting of the fire, so that this charge of negligence ought to have been withdrawn from the jury.

McCARTNEY et al. v. EARLE.

(Circuit Court of Appeals, Third Circuit. April 21, 1902.)

No. 6.

1. JURISDICTION OF FEDERAL COURTS—SUIT BY RECEIVER OF NATIONAL BANK.
   A suit brought by the receiver of a national bank, by direction of the comptroller of the currency, to enforce a liability due to the bank, and to secure a sale under the order of the court of pledged securities, constituting a considerable part of its assets, is one for winding up the affairs of the bank, within the meaning of the proviso to section 4 of the federal judiciary act of 1888, and within the jurisdiction of a circuit court of the United States, without regard to the citizenship of the parties.[1]

2. FRAUDULENT CONVEYANCE—NECESSITY OF RECORDING — CONVEYANCE IN TRUST UNDER PENNSYLVANIA STATUTE.
   The provision of Act Pa. March 24, 1818, requiring all assignments in trust by debtors on account of inability at the time to pay their debts to be recorded within 30 days, and declaring them to be void if not so recorded, does not apply to a transfer made directly to a creditor for his benefit alone; and the transfer of property to the receiver of a national bank to secure a debt due to the bank is, in effect, one to the bank itself, and not in trust, and is not within the statute.

3. SAME—PREFERENTIAL CONVEYANCE—FRAUDULENT INTENT.
   No presumption of a fraudulent intent to hinder and delay other creditors arises from a transfer of property as security to a bona fide creditor, whose debt is due, although it is understood by the parties that the effect of the transfer will be to give such creditor a preference; nor can such an intent be inferred from a provision of the instrument of transfer that the property shall be returned in case a certain contemplated adjustment of the affairs of the debtor shall be made, which provision is favorable to other creditors.

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[1] See Banks and Banking, vol. 6, Cent. Dig. § 1059.

4. SAME.

Evidence *held* insufficient to establish the invalidity of a transfer of property by an insolvent debtor to the receiver of a national bank by way of security for a debt due the bank, either on the ground of undue influence, duress, a fraudulent intent to hinder and delay creditors, or the insanity of the debtor.

5. RECEIVER OF NATIONAL BANK—DEALINGS WITH PLEDGED SECURITIES.

An instrument assigning certain shares of stock and bonds to the receiver of a national bank to secure a debt from the assignor to the bank, subject to certain prior pledges of a portion of the stock and bonds, in terms vested the receiver with "the rights of an owner, so far as regards sale, disposition, and management." *Held*, that dealings with the stock and bonds by the receiver after the assignor's death, with the approval of the controller, by which a forced sale was prevented by prior pledgees, and all parties in interest were benefited, could not be attacked in equity by the assignor's administrator because he did not assent to the same.

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

For opinions below, see 109 Fed. 13, 112 Fed. 372.

George Tucker Bispham and J. Howard Gendell, for appellants.

Austin Lynch, John G. Johnson, Charles Biddle, and Asa W. Waters, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This was a suit in equity in the circuit court for the Eastern district of Pennsylvania. It was brought in February, 1899, by the receiver of an insolvent national bank, by direction of the comptroller of the currency, to enforce a liability due to the bank, and to dispose of a considerable part of its assets. It was of the class of "cases for winding up the affairs of any such bank," which is excepted from the operation of section 4 of the act of August 13, 1888 (25 Stat. 433); and as it was commenced by an officer of the United States, in pursuance of the direction of another officer thereof, the circuit court was unquestionably right in taking and retaining jurisdiction of it. Armstrong v. Trautman (C. C.) 36 Fed. 276; Stephens v. Bernays (C. C.) 44 Fed. 642; Yardley v. Dickson (C. C.) 47 Fed. 835; Fisher v. Yoder (C. C.) 53 Fed. 565; Ex parte Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782; Auten v. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. The cause was so proceeded with that on March 7, 1900, a master was appointed, with instructions which were not then objected to, and are not now complained of. The proceedings in the master's office conformed to those instructions, and the decree of the circuit court was based on his report. The specific averments of error all go to the dismissal of the exceptions of the administrator of William M. Singerly's estate to that report; and upon the questions raised by them, as condensed in the brief submitted on his behalf, the appeal to this court is now for decision.

The decree appealed from was admittedly erroneous, if, for any reason, George H. Earle, Jr., as receiver, did not, under and by virtue of a certain instrument of writing, acquire title to the equities of

William M. Singerly in and to the shares and bonds of the Record Publishing Company, therein referred to. That instrument is as follows:

For value received, I, William M. Singerly, of the city of Philadelphia and state of Pennsylvania, do hereby sell, assign, set over, and transfer unto George H. Earle, Jr., receiver of the Chestnut Street National Bank, all my right, title, and interest of, in, and to all and every share of the capital stock and bonds of the Record Publishing Co., whether now pledged or unpledged, and subject only to the lien of debts where the same has been pledged as collateral security, upon the following terms and conditions:

The purpose of this assignment is to further secure my indebtedness to the Chestnut Street National Bank; but it is made upon the express condition and reservation that can a plan of reorganization of the affairs of the Chestnut Street National Bank, the Chestnut Trust and Saving Fund Co., and of myself, and allied interests, be drafted and put in force, similar in its provisions and to the same general effect as the Singerly plan so called, and only deviating therefrom in such particulars as shall obtain the approval of the counsel of the said bank and said Trust Co., said counsel being John G. Johnson, Esq., William H. Addicks, J. Howard Gendell, and P. F. Rothermel, or the survivors of them, whether said proposed plan be a new one, or an amendment of the said Singerly plan, then and in that case, and in that case only, the Chestnut Street National Bank shall be bound to relinquish the additional security hereby transferred, upon the receipt, in substitution and lieu thereof the proposed shares of Record stock coming to it under the said proposed plan. Said amount of stock, however, in no case to be of a par value less than my total indebtedness to said bank, nor shall the whole exceed the total indebtedness of William M. Singerly, as passed and approved by said counsel.

The assignee is to be clothed with the fullest powers to join in all sales or assignments of said stock, and to participate in any scheme or reorganization and sale of said stock, taking in return shares of stock in any new company, or whatever else may be deemed advisable and proper. He is to have the rights of an owner, so far as regards sale, disposition, and management of said shares thus transferred to him.

And I do hereby constitute and appoint George H. Earle, Jr., receiver, etc., his assigns, successors, and substitutes, my attorney and attorneys, with full power to receive in his or their names or name certificates for the said shares; hereby obliging myself at his or their request to do all necessary actions or things for the same, effectually transferring the said shares and bonds to him or them.

Witness my hand and seal this tenth day of February, A. D. 1898.

[Signed] William M. Singerly. [Seal.]

Witness: [Signed] S. W. Reeves.

Acknowledged before me as a notary public for the commonwealth of Pennsylvania, this tenth day of February, A. D. 1898.

[Signed] S. W. Reeves, Notary Public.

The validity of this document is assailed upon several grounds. It is said to be, in effect, an assignment for the benefit of creditors, which became invalid because not recorded; that its execution and delivery constituted a fraud upon creditors; that it was procured by constructive fraud; and that Singerly was of unsound mind when he executed it. These points will be severally considered in the order in which they have been stated.

The law of Pennsylvania provides that:

"All assignments in trust by debtors on account of inability at the time to pay their debts, to prefer one or more creditors, shall be held and construed to enure to the benefit of all creditors in proportion to their respective demands" (P. L. 1843, p. 273); and that "All assignments as aforesaid to be made and executed, which shall not be recorded in the office for recording

deeds, and within thirty days, shall be null and void against any creditor of said assignor" (P. L. 1817–18, p. 287).

Was the transfer of February 10, 1898, an assignment in trust? We are of opinion that it was not. We cannot adopt the suggestion that the words "receiver of the Chestnut Street National Bank," as they occur in its first paragraph, are simply words of description. We think it is manifest that they were not so intended. The sole purpose of the transfer, as expressly stated, was to secure an indebtedness to the bank; and it seems to be clear that for this reason it was made to Mr. Earle in his capacity as receiver, and not otherwise. Consequently he took for the bank, and as the bank. He stood in the place of the bank. As its receiver, he unquestionably was a trustee for it and its creditors. But the assignment itself imposed no trust whatever. It therefore does not purport to be an assignment in trust, and we have not been convinced that it must be so regarded merely because the law of the United States required that it should be made to the receiver of the bank, instead of to the bank itself. If it had been solvent, and such an assignment had been made directly to it, it certainly would have been entitled to hold for its own exclusive benefit; and surely this right was not forfeited by its insolvency, and the consequent appointment of a receiver, to whom, subject to the direction of the comptroller, there passed the power, theretofore vested in its directors, to secure and collect its credits and other assets. We have examined the several Pennsylvania decisions to which our attention has been directed, but it is unnecessary to discuss them. They determine, at least, that an assignment by a debtor directly to his creditor is not within the statutory provisions relied on by the appellant; and, in our opinion, the transfer now in question was, in substance and legal contemplation, a transfer to the creditor bank itself. Rev. St. § 5234; Kennedy v. Gibson, 8 Wall. 506, 19 L. Ed. 476; First Nat. Bank v. Pahquioque Nat. Bank, 14 Wall. 383, 20 L. Ed. 840; Price v. Abbott (C. C.) 17 Fed. 506.

The contention that it was intended to hinder, delay, and defraud the other creditors of Singerly is not supported by anything that appears on its face, nor by the extrinsic evidence. When a debt is actually due, a fraudulent intent cannot be inferred from the mere fact of transfer (Werner v. Zierfuss, 162 Pa. 360, 29 Atl. 737); and this instrument, though undoubtedly preferential, displays no badge of fraud. It reserves nothing to Singerly, and its provision for the relinquishment of the property transferred, in case the plan of reorganization to which it refers should be drafted and put in force, was not opposed, but favorable to the interests of his other creditors. It may safely be assumed that Mr. Earle was aware that the effect of the transaction would be to postpone them, but this is immaterial. "The criterion is not the effect, but this fraudulent intent" (Werner v. Zierfuss, supra); and, as respects the existence of such intent, our independent examination of the evidence has brought us to the same conclusion as was reached by the master and by the court below. It was not shown that the transfer to the receiver was either made or taken to hinder, delay, or defraud other creditors, but simply, as it

declares, for the indisputably lawful purpose of securing Singerly's indebtedness to the bank.

Courts of equity, when exercising jurisdiction over the dealings of persons standing in fiduciary relation, will not permit the one in whom, by reason of such relation, confidence is reposed, to retain an advantage obtained at the expense of the confiding party, by exertion of the influence which naturally grows out of that confidence. This salutary rule has been frequently enforced both in England and in this country, but the facts of the present case do not call for its application. Mr. Earle, it is true, was prominently and actively concerned in an attempt to bring about an adjustment of Singerly's affairs, and a reorganization of the associations and interests which their entanglement involved. He was, too, a receiver of one of those associations, and one of the assignees of another of them; but in no sense was he a trustee for Singerly. The latter entertained the hope that the "plan of reorganization" which was suggested by Earle and Cook would inure to his benefit, and he freely co-operated with them in their earnest but unsuccessful efforts to consummate it. We have, however, searched this record in vain to find any evidence which would have justified a finding that with respect to this plan, or anything else, Earle's connection with Singerly was a fiduciary one. Moreover, any confidence which, notwithstanding the nonexistence of such relation, Singerly may have reposed in Earle, does not appear to have been abused. It was the desire of both of them that this transfer to the receiver of the bank, as well as that which was made to Earle and Cook as assignees of the trust company, should be made; but that any undue influence was exercised to procure them does not appear. They were executed and delivered upon the advice of Singerly's separate counsel, and the fact that this advice was based "mainly, if not altogether, upon the ground that their execution was desired by Earle," is not material. Whatever may have been Singerly's motive for making them, or the prevailing consideration in the mind of his counsel when advising them, no advantage seems to have been taken of Singerly; nor does Earle's position, such as it was, appear to have been in any way used either to coerce or allure him.

We have attentively examined the voluminous testimony which was adduced upon the question raised as to the sanity of Mr. Singerly. It could not be reviewed at length without unduly expanding this opinion, or be better summarized than it already has been in the report of the master. We concur with him, and with the learned judge of the court below, in holding that, as a whole, it did not establish that Singerly was insane when he executed the transfer to Earle. Whatever room there might be for controversy upon any more general aspect of the subject, there can, we think, be no reasonable doubt as to the capacity of Singerly to rationally contract as and when he did contract; and the existence or nonexistence of such capacity at that time was and is, of course, the precise question for determination. Upon that question we approve and adopt the findings, reasoning, and conclusion of the master, and, without restating them at length, deem it enough for the present purpose to say that we are

entirely satisfied of the correctness of the following statements which we extract from his report:

"In this case the testimony clearly establishes that the matter of these preferential assignments was, prior to their execution, the deliberate, conscious, and voluntary action of Mr. Singerly; that he gave the necessary instructions for their preparation, and that their substance and import was explained to him by his own counsel, who then believed, and does not now question, in his testimony, that Mr. Singerly fully understood the nature of his act; and that Mr. Singerly, after the execution of the assignments, was conscious of what he had done, and at no time repudiated his solemn act during his lifetime. * * * Of those who were present, all testified, except Mr. Addicks and Mr. Singerly, both deceased; and all of them, including Mr. Singerly's counsel and the present counsel for the respondent, agree that his mental responsibility and sober condition was never questioned by them."

The administrator of Singerly's estate had no just ground for complaint of the exchange which was made of Record stock and bonds for Traction stock, as collateral to the notes of Singerly which were originally held by the Pennsylvania Company for Insurances on Lives and Granting Annuities, and were purchased from it by the Finance Company of Pennsylvania, the Guarantee Trust & Safe Deposit Company, and the Pennsylvania Warehousing & Safe Deposit Company. The Traction stock had been borrowed by Singerly to be used by him to secure the loan which he afterwards obtained upon those notes, and it was so used. To protect its owners, Singerly transferred to a trustee for them the shares and bonds of the Record Company. After Singerly's failure and death, it became evident that the Traction stock was liable to sale by the pledgee thereof, and that, upon such sale being made, the trustee who held the Record shares and bonds might and would sell them to liquidate the loss of the owners of the Traction stock. The situation was a serious and menacing one for Singerly's estate, as well as for the bank's receiver. A sacrifice of valuable assets was imminent, and this Mr. Earle was anxious to avoid. Accordingly, and with the approval of the comptroller of the currency, he procured the surrender of the Traction stock to its owners, and the acceptance in its place of the stock and bonds of the Record Company. By this arrangement no harm was done to the estate of Singerly. Manifestly, it was to its advantage. It prevented a forced sale of the Record stock and bonds, and extinguished the obligation which Singerly had assumed to those who had loaned him the Traction stock; and this it accomplished without imposing any lien or charge upon the Record stock and bonds to which they were not already, in substance, subject. It was not only a fair and honest transaction, it was an eminently discreet and proper one. It was one to which the assent of the appellant, if requisite, might reasonably have been expected. It is insisted, however, that, because he did not in fact assent to it, he is entitled to take these stocks and bonds free and discharged of and from any lien whatever. In assuming this position, he, no doubt, has been actuated by a sense of duty to the interests he represents, but to us the demand itself seems to be too plainly inequitable for possible allowance in a court of conscience. Even, however, if the assent of the representative of Singerly's general estate to the arrangement in question might otherwise have

been necessary, it was, we think, rendered unnecessary by the assignment of February 10, 1898; for by it Mr. Earle was "clothed with the fullest powers to join in all sales or assignments of said stock," was vested with "the rights of an owner, so far as regards sale, disposition and management" thereof, and was empowered to demand further assurances for "effectually transferring the said shares and bonds to him." Consequently he was, in our opinion, amply authorized to deal with them as he did, and no action on the part of the administrator was needful.

Having, we believe, sufficiently stated our views upon all the points presented for our consideration by the learned counsel of the appellant, it remains but to say, as to the whole case, that the decree under review is, in our judgment, in no respect erroneous. It is therefore affirmed, and the cause will be remanded to the circuit court for such further proceedings as may be requisite or proper to be there taken in pursuance thereof or in conformity therewith.

GARTH et al. v. ARNOLD et al.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,599.

1. STATUTES—VALIDITY—AUTHORIZING SALE OF INFANTS' LANDS.
   It is the settled law of Missouri that, prior to the adoption of the constitution of 1865, it was competent for the general assembly, by special act, to authorize the sale of lands belonging to minors or persons non compos mentis; and the law had been so well established, and so many titles had been acquired on the faith thereof, as to constitute it a rule of property in the state.

2. APPEAL—QUESTIONS REVIEWABLE—ACTION TRIED TO COURT.
   Where, by stipulation, an action at law is tried in a circuit court without a jury,—a part of the facts being stipulated, and others specially found by the court,—in the absence of a bill of exceptions the only question open for consideration by the appellate court is whether the judgment is warranted by the pleadings and sustained by the facts stipulated and found by the trial court.

3. INFANTS—EXERCISE OF POWER TO CONVEY LANDS OF MINORS—BURDEN OF PROOF TO SUSTAIN TITLE.
   Power conferred by legislative act upon persons to sell and convey the interests of certain minors in lands must not only be strictly exercised, but, since the donees have no title to the interests they are authorized to convey, one who sets up a title in virtue of the exercise of such power must furnish the evidence to support it; and, where the validity of the deed under which he claims depends upon acts in pais, he must prove the performance of such acts,—the fact that he was an innocent purchaser, claiming through mesne conveyances, affording him in such case no protection.

4. SAME—CONSTRUCTION OF POWER.
   Where an act of the legislature conferred power upon persons to sell and convey the land of certain minors "for cash or on credit," a conveyance of the land in exchange for personal property was void, and did not devest the title of the minors.

5. SAME—EXPIRATION OF POWER—INFANT REACHING MAJORITY.
   A power conferred by the legislature on persons to sell lands of minors, being dependent on the fact of minority, terminates as to any one of such minors when he reaches majority and becomes sui juris.

6. DEEDS—CONSTRUCTION—ESTATES CREATED.

Rev. St. Mo. 1855, c. 32, § 5, provided that when a conveyance or devise was made whereby the grantee or devisee should become seised, in law or equity, of such an estate in land as, under the statute of entails, would have been held to create an estate tail, "every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in such premises, and no other, as a tenant for life thereof would have by law, and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs." *Held*, that by virtue of such statute a deed conveying land to a mother "and to the heirs of her body" gave to her a life estate, and to her children living at the date of the conveyance a vested remainder in fee, which would open up to let in after-born children, if there were any.

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

For opinion below, see 106 Fed. 13.

This is an action of ejectment to recover certain lands situated in Clay county, Mo., described as the N. E. ¼ of section 20, township 51 N. of range 31 W., except a part thereof which lies south and west of a public road running from Liberty, in said county, to Liberty Landing. Both parties claimed title under Joel Turnham, a common source of title, who was seised and possessed of the land in question on and prior to January 17, 1855. The case was submitted on an agreed statement of certain facts, and the trial court found specially other facts, a jury having been waived. From the facts so agreed and found we extract the following, which are all that are deemed essential to the present decision: On January 17, 1855, Joel Turnham conveyed the property in controversy to his married daughter, Ann R. Arnold, by a deed which granted the same to her "and to the heirs of her body"; the latter words being words which at common law, as is well known, would have created an estate tail. The deed, however, was governed by section 5, c. 32, Rev. St. Mo. 1855, which provided that, after the passage of the act, when a conveyance or devise was made whereby the grantee or devisee should become seised, in law or equity, of such an estate in land as under the statute of entails would have been held to create an estate tail, "every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in such premises, and no other, as a tenant for life thereof would have by law, and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common in fee, and if there be only one child, then to that one, in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs." On March 12, 1859, the general assembly of the state of Missouri was induced to pass a special act, which, after reciting that the land in controversy was given by Turnham to his daughter for and during her natural life, and at her death to her children in equal portions, "without any moneyed consideration and wholly from paternal affection," declared "that Joel Turnham and Ann R. Arnold are hereby authorized to sell and convey all the right, title and interest, contingent or otherwise, of Joel T. Arnold, David D. Arnold, Charles B. Arnold, Edward C. Arnold, Allen K. Arnold and Louisa E. Arnold, of, in and to" the land in controversy, and that "they, the said Joel Turnham and Ann R. Arnold, may make such sale privately or publicly for cash or on credit," and that "the proceeds of such sale shall be trust funds in the hands of the said Joel Turnham and Ann R. Arnold, to be held or reinvested by them subject to the same uses and limitations as the land is now held." On January 1, 1862, Joel Turnham and Ann R. Arnold executed a bond for a deed to the

land in controversy in favor of one William Austin, of Clay county, Mo. In this bond the obligors described themselves as residents of Milam county, Tex., and further recited therein that they had derived their authority to sell the land by an act of the legislature of the state of Missouri "made about three years ago, which is contained in the acts of that session." On February 1, 1862, Turnham and his daughter, Ann R. Arnold, executed a power of attorney in favor of one J. T. Downing, whereby they appointed him their true and lawful attorney "to bargain, sell, alien, and convey unto William Austin a certain tract of land situate, lying, and being in the county of Clay and in the state of Missouri, and containing one hundred and sixty acres, and is described in annexed bond for titles made by unto said William Austin, and to make to said Austin a warranty deed to the same, and do all acts in reference to the same in as full and complete a manner as" they could do themselves if they were personally present. On June 2, 1862, J. T. Downing, acting under the aforesaid power of attorney, executed and delivered to said William Austin a deed to the land in controversy. This deed contained a full recital of the special act of the general assembly of the state of Missouri of date March 12, 1859, above referred to, also an appropriate reference to the aforesaid power of attorney in favor of Joseph T. Downing, and, in terms, conveyed to William Austin, and to his heirs and assigns forever, the tract of land in controversy. The defendants below, Susan C. Garth, William Portwood, Hugh Portwood, Ed Portwood, June Portwood, and Abraham Portwood, who are the plaintiffs in error, claim title to the land in controversy by regular mesne conveyances from William Austin, and are vested with all of the title which was conveyed by the deed of Joel Turnham and Ann R. Arnold, which was made by their attorney in fact, Joseph T. Downing. On March 12, 1859, when the aforesaid act authorizing the conveyance of the land in question was passed, Ann R. Arnold was the mother of the following children, then living: Robert H. Arnold, who was then over 21 years of age; Joel T. Arnold, who was born March 11, 1839; David D. Arnold, who was born April 11, 1841; Charles B. Arnold, who was born in 1846; Edward C. Arnold, who was born in 1848; Allen K. or Allen W. Arnold, who was born in 1850; Louisa E. Arnold, who was born in 1853. Of these children, Robert H. Arnold died in 1868, Charles B. Arnold died in 1873, and Edward C. Arnold died in 1874, without leaving any lineal descendants, as the record recites. Ann R. Arnold, the mother of the aforesaid children, died in 1896, leaving surviving her, as the heirs of her body, the two plaintiffs in this action, namely, Joel T. Arnold and David D. Arnold; also Allen K. or Allen W. Arnold and Louisa E. Arnold, who had intermarried with one Dan Leavell. The trial court found, as a matter of fact, that when Ann R. Arnold and her children were on their way to Texas, in the fall of 1861, they overtook William Austin, who was on his way to Texas with some race horses, and was afterwards engaged in racing horses in Texas; that at the time the title bond in favor of Austin, and the power of attorney in favor of Downing, were executed, Joel Turnham and Ann R. Arnold and said William Austin were living near Milam, in Texas; and that Ann R. Arnold received from said Austin, as the sole consideration for the conveyance of the land in controversy to said Austin, a negro man and some horses. It further found that neither Joel T. Arnold nor David D. Arnold received any part of the consideration which was received on account of the sale of the land to Austin. Joel T. Arnold and David D. Arnold, who were the sole plaintiffs below, claimed that, by virtue of the facts aforesaid, they had not been devested of their title to the land; and the court below adopted that view, rendering a judgment in favor of each for an undivided one-fourth part of the tract of land heretofore described. The defendants below brought the case to this court upon a writ of error.

J. M. Sandusky (B. P. Finley, D. B. Holmes, H. F. Simrall, F. H. Trimble, and S. G. Sandusky, on the brief), for plaintiffs in error.

Henry D. Ashley and William S. Gilbert (L. C. McBride, Monta J. Moore, and Denton Dunn, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

A considerable portion of the argument with which we have been favored deals with the question whether the act of March 12, 1859, supra, which authorized Joel Turnham and Ann R. Arnold to sell and convey the interests of Mrs. Arnold's six minor children in the land in controversy, was a lawful exercise by the state of legislative power. Concerning this question it is only necessary to say that it may be conceded to be well settled in the state of Missouri that, prior to the adoption of its constitution of 1865, it was competent for the general assembly, acting as parens patriæ, to authorize by special laws the sale of lands belonging to minors and persons non compos mentis. The power in question had been repeatedly exercised and upheld. Indeed, the doctrine was so well established by local decisions, and so many titles had been acquired on the faith thereof, as to constitute it a rule of property. Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148; Gannett v. Leonard, 47 Mo. 205; Shipp v. Klinger, 54 Mo. 238; Cargile v. Fernald, 63 Mo. 304; Clusky v. Burns, 120 Mo. 567, 25 S. W. 585. In one of these cases (Shipp v. Klinger) the supreme court of the state declined to go into the question of the right of the legislature to exercise such a power, or to consider it as open for further discussion.

We are also disposed to concede, for present purposes, but without expressing a definite opinion thereon, that the validity of the act in question was not affected by the fact that the legislature did not require the persons who were authorized to sell the interests of the minors in the land to give a bond conditioned for the faithful management and reinvestment of the proceeds of the sale, and that the validity of the act would not have been affected, even if the deed of Joel Turnham to Ann R. Arnold, of date January 17, 1855, supra, had had the effect of creating contingent remainders in favor of Mrs. Arnold's children. As the legislature had the power to authorize a sale of the interests, it may well be argued that such a power included the right to determine whether, in view of all the circumstances of the case, a bond ought to be exacted from those in whom the power of sale was vested. Gannett v. Leonard, 47 Mo. 205, 207. And inasmuch as the courts of Missouri seem to have abandoned the common-law doctrine that a contingent remainder is inalienable until it has become a vested estate (Godman v. Simmons, 113 Mo. 122, 130, 20 S. W. 972; Sikemeier v. Galvin, 124 Mo. 367, 27 S. W. 551; Lackland v. Nevins, 3 Mo. App. 335), it may be argued with some force that the legislature, prior to 1865, could authorize the sale of the interests of Mrs. Arnold's children in the land in controversy, although such interests were contingent, and not vested. We would not be understood, however, as expressing a definite opinion on either of the latter questions, because a decision of the same, upon the present record, is unnecessary.

As above shown in the statement, the learned trial judge found specially that the land in controversy was not sold for cash or on credit, as the act authorizing the sale provided, but was traded for "a negro man and some horses"; and such finding must be accepted as

conclusive by this court, and the case decided accordingly. Counsel for the plaintiffs in error challenge this finding, and the competency of the evidence by which it was established, but neither of these contentions can be noticed. This case was tried before the court without a jury; a part of the facts being stipulated, while others were found specially by the court. No bill of exceptions was filed to bring any of the testimony upon the record, and, so far as we are advised, no exceptions were taken to the admission of any testimony. All the knowledge that this court has concerning the testimony is derived from certain excerpts therefrom found in the opinion of the trial judge; but that does not make the testimony a part of the record, or present for review the question whether the testimony was competent, because the opinion of the court, not being embraced in a bill of exceptions, forms no part of the record. North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co., 28 C. C. A. 88, 95, 83 Fed. 796; Association v. Du Bois, 29 C. C. A. 354, 85 Fed. 586. Tried as this case was, the only question open for discussion in this court is whether the facts, as stipulated and found by the trial judge, sustain the judgment. Searcy Co. v. Thompson, 13 C. C. A. 349, 66 Fed. 92; Walker v. Miller, 8 C. C. A. 331, 59 Fed. 869.

Assuming, therefore, as we must, that the land in controversy was traded for personal property, and not sold "for cash or on credit," as the statute directed, the questions arise whether the title of the plaintiffs below, which was acquired by virtue of the deed to their mother that was executed by Joel Turnham on January 17, 1855, was devested by the conveyance to William Austin of date June 2, 1862, and whether the defendants below, claiming by mesne conveyances under Austin, and presumably without knowledge that he traded for the land, are entitled to protection. We are of opinion that both of these questions must be decided in the negative. It is clear that Joel Turnham and Ann R. Arnold were vested by the statute with merely a naked power, as respects the right to sell the interests of the minor children in the land in controversy, and not with a power coupled with an interest. Under such circumstances, the rule is not only that the power must be strictly exercised, but that one who sets up a title in virtue of the exercise of such a power must furnish the evidence to support it; and, where the validity of a deed under which he claims depends upon acts in pais, he must prove the performance of such acts. Neither Turnham nor his daughter, Mrs. Arnold, was vested with the legal title to the interests of the minor children of Mrs. Arnold, which they were authorized to convey. They simply had a power to sell the children's interests, without being vested with the legal estate, and they could convey the legal title only by a sale made in strict accordance with the power. They are not in the position of one who, while holding the legal title to property in trust for another, conveys it to an innocent purchaser for value in violation of the trust. Not only Austin, but all subsequent purchasers of the land, were bound to ascertain, and, in an action like the present, are required to offer sufficient proof showing, that the power was properly exercised. Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518; Morrill v. Cone, 22 How. 75, 82, 16 L. Ed. 253; Ransom v. Williams, 2 Wall. 313, 319, 17 L. Ed. 803;

Deputron v. Young, 134 U. S. 241, 256, 257, 10 Sup. Ct. 539, 33 L. Ed. 923; Pettis Co. v. Gibson, 73 Mo. 502.

We conclude, therefore, as above intimated, that the interests of the plaintiffs below were not devested by the attempted sale to Austin; and this is true as respects the interest of one of the plaintiffs, Joel T. Arnold, for another and entirely different reason. He became of full age on March 11, 1860, nearly two years before the trade with Austin was negotiated. As the power of the general assembly to authorize the sale of the children's interests depended solely upon the fact that they were minors, this power, when conferred, only continued so long as they were under age, and terminated when they respectively attained their majority, if it had not theretofore been exercised. The power to sell Joel T. Arnold's interest in the land expired, therefore, on March 11, 1860, when he became sui juris. Clusky v. Burns, 120 Mo. 567, 574, 25 S. W. 585.

The question which remains to be considered concerns the amount of the recovery. Only two of the children of Mrs. Arnold have joined in the present action, and, as the extent of their interest in the land depends upon whether the children of Mrs. Arnold took vested or contingent remainders under the deed of Joel Turnham, it is necessary to consider that question. This is, perhaps, the most disputable question in the case. The effect to be given to the deed of Joel Turnham, dated January 17, 1855, depends on section 5, c. 32, Rev. St. Mo. 1855, supra, which was in force at the time of its execution, and is the section applicable to its interpretation. The statute of Missouri abolishing entails appears to have been construed first in Farrar v. Christy's Adm'rs, 24 Mo. 453, and underwent at that time careful consideration. In that case separate tracts of land were conveyed by the same instrument to each of two brothers. The conveyance was "upon condition that, should either of the grantees herein named die without leaving legal heirs of their body, the survivor shall inherit the whole of the property hereby conveyed." It was held that at common law each of the brothers would have been seised in fee tail of the tract conveyed to him, but that the operation of the statute abolishing entails (Rev. Laws 1825, p. 216) was to cut down the estate of each brother in the tract assigned to him to a life estate, and that the other brother immediately took the remainder thereof in fee, which was subject to be devested, on the birth of issue to him who had the life estate. The court said that on the execution of the deed the whole estate passed at once from the grantors in fee, each brother taking a remainder in fee in the land of the other brother, which was only subject to be defeated on the birth of issue. The authority of that case as a construction of the statute abolishing entails has never been denied, and the statute as then written is not so far different from section 5, c. 32, Rev. St. 1855, as to warrant a different interpretation. In Clarkson v. Clarkson, 125 Mo. 381, 386, 28 S. W. 446, the conveyance was to the grantee "and his bodily heirs." It was held that this language created an estate tail, which was operated on by section 5, c. 32, Rev. St. 1855; the effect being to give to the grantee a life estate, and a "remainder in fee to his children." To the same effect was the case of Phillips v. La Forge, 89 Mo. 72, 1 S. W. 220.

So, also, in Waddell v. Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575, where the conveyance gave to the grantee a life estate, and provided that on the death of the grantee the title should "go and vest in the children * * * [of the grantee] equally to be divided * * * as tenants in common," it was held that this gave to the children living at the date of the conveyance a vested remainder in fee, which would open up and let in after-born children, if there were any. This latter decision is in strict accordance with a well-established doctrine of the common law,—that where there is a devise or conveyance of a remainder to a class (as, for example, to children), all of whom are equally the object of the testator's bounty, the remainder so created is regarded as vested, although all of the persons who are to take or who may take are not in esse. If other children are born before the estate takes effect in possession, it opens and lets them in. 2 Washb. Real Prop. (5th Ed.) p. 599; Tied. Real Prop. § 402, and cases there cited. Now, the deed of Joel Turnham, read in the light of the statute, gave the land in controversy to Mrs. Arnold for and during her natural life, and upon her death to her children, as tenants in common. Mrs. Arnold had seven children at the date of the conveyance, and never had any more, so that the remainder, as it first took effect, was never disturbed. It is true that the statute says that "upon the death of such grantee the said lands and tenements shall go and be vested in the children of such grantee," but in view of the local decisions on the question, and the general rule of law last above referred to, it cannot be held that this language means that the estate shall not become vested in interest in the children (that is, in the remainder-men) until the death of the first taker, and hence that the remainder created by the operation of the statute is a contingent remainder. On the contrary, the statute simply postpones the children's right of possession or enjoyment until the life estate ends. In the meantime they have a vested interest. There is only one local decision which seems to be relied upon to show that the children of Mrs. Arnold took contingent, rather than vested, remainders under the deed of Joel Turnham, and that is Emmerson v. Hughes, 110 Mo. 627, 19 S. W. 979. A careful examination of that case satisfies us, however, that, when properly interpreted, it contains nothing in opposition to the views heretofore expressed. The conveyance in that case expressly limited the estate of the first taker to a life estate, with a remainder "to the heirs of her body"; and the court held that, as the word "heirs" did not necessarily mean "children," it would apply the old rule that the heir cannot be known until the death of the ancestor, and hence that the remainder was contingent until the termination of the life estate. Besides, the court in that case treated the conveyance as governed by section 8838 of the Revised Statutes of 1889, which was enacted to abolish the rule in Shelley's Case, rather than by the statute abolishing entails, which is plainly the statute which is applicable to the decision of the case at bar. We conclude, therefore, that Mrs. Arnold's children took vested remainders in the land in controversy under the deed of Joel Turnham.

It results from what has been said that the plaintiffs below each took an undivided one-seventh part of the land in controversy under

the deed of Joel Turnham, and as their brothers, Robert H. Arnold, Charles B. Arnold, and Edward C. Arnold, took like vested interests, and died childless and intestate prior to Mrs. Arnold's death, the plaintiffs inherited a part of the interests of those brothers, as did their mother. We are of opinion that the part so inherited by the mother from her deceased sons inured to the advantage of the defendants by virtue of her warranty deed to Austin of date June 2, 1862. A calculation which we have made shows that, including the interest in the land which the plaintiffs took by inheritance from their deceased brothers, they are not respectively entitled to recover an undivided one-fourth interest, and in that respect only the judgment below was erroneous. The calculation which we have made shows that each plaintiff is entitled to recover $^{8}/_{35}$ of the land, but as we may have made some error in the calculation, and as it can be made from the agreed facts without the necessity of hearing further testimony, we deem it proper to remit the record to the lower court, so that the computation may be carefully gone over, with directions to modify the existing judgment by allowing to each of the plaintiffs below, in addition to his undivided one-seventh interest, the interests which they respectively inherited from their deceased brothers.

As thus modified, the judgment below is affirmed.

MERCANTILE TRUST CO. v. PITTSBURGH & W. RY. CO. (LAKE, Intervener).

(Circuit Court of Appeals, Third Circuit. April 25, 1902.)

No. 2.

1. EQUITY—PETITION AGAINST RECEIVER FOR TORT—PLEADING.
   Proceedings on a petition of intervention filed in a suit in equity against a receiver therein, asserting a claim for damages for the death of an employé, alleged to have resulted from negligence in the operation and management of a railroad by the receiver, are equitable in character, and the petitioner is entitled to have the receiver plead in conformity to the rules and practice in equity.

2. MASTER AND SERVANT—DUTY TO WARN SERVANT OF SPECIAL RISKS.
   The duty of informing a servant of special or extraordinary risks connected with his service is a primary duty of the master, when they are known to him and the delegation of such duty to any other servant, whether higher or lower in the scale of employment than the one exposed to the peril, cannot relieve him of the responsibility imposed on him by the law.

3. SAME—STORM CAUSING DAMAGE TO RAILROAD TRACK—FAILURE TO WARN TRAINMEN.
   A brakeman on the second section of a fast freight train on a railroad operated by a receiver was killed in a wreck at night, caused by a landslide. There had been heavy rains during the day along that portion of the road, and a storm in the evening, of unusual, if not unprecedented, violence, causing a number of landslides and washouts, which were known to the train dispatcher; and he notified the conductor and engineer of the first section of the train, on leaving the last station, to look out for slides at various places specified, but which did not include the place where the wreck subsequently occurred. Those in charge of the second section, which left 20 minutes later, received no notice or warning at all. *Held*, that the failure to give such notice

of the general dangerous condition of the track was culpable negligence, which was a proximate cause of the accident, and rendered the receiver liable for the death.

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

Charles Koonce, Jr., and James H. Wilson, for appellant.
John McCleave, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. On the 18th day of March, 1899, Mattie Lake, by leave of the court, filed her intervening petition in the case of the Mercantile Trust Company v. the Pittsburgh & Western Railway Company, then pending in the circuit court of the United States for the Western district of Pennsylvania, in equity. In her petition, she claims in behalf of herself and infant son, damages from the receiver of said railway company for the death of her husband, which she alleges was occasioned by the negligence of said receiver in operating said railway.

The decedent, John R. Lake, was, on the 22d day of March, 1898, and for some time prior thereto had been, in the employ of the respondent, as a freight brakeman. On the day mentioned, Lake and his fellow members of the crew of trainmen, at De Forrest Junction (a station on respondent's road about 12 or 14 miles north of Youngstown, Ohio), took charge of a through fast freight train running between Chicago and the East, for the purpose of running it to Bennett (a station on respondent's road near the city of Pittsburgh, Pa.). Between these points, near Carbon station, on the road which respondent was operating as receiver, the main track ran along the southern base of a range of hills which are parallel with said track, and at the point referred to, said track cuts the base thereof so as to form an embankment on the north side of said track about 12 feet high. From said railroad, the hills retreat northward at a steep degree of inclination. On the hillside facing the track are gullies and ravines, which drain about 75 acres. Through the center of it runs a slight embankment, built to support a tramway to the top of the hill, where was an abandoned limestone quarry. This embankment, on one side thereof, deflected the direction of the waters draining the hillside, and on the night of the accident, helped to cause such a concentration of water as made a washout and carried clay and gravel over the tracks of respondent's railroad. The accident, in which decedent lost his life, was caused by this obstruction. One of the allegations of intervener's petition is, that respondent was guilty of negligence, in not appreciating the danger of a washout at the place in question, and in not guarding against it, it being charged that the ditch to carry the water off which came down the hillside, was insufficient, and the culvert through which it was discharged, was much too small.

On the 22d of March, it had rained a great portion of the day, and in the evening there occurred a very heavy rain storm, washing away bridges and causing landslides to occur on respondent's tracks, which interrupted traffic over his road from a station about 8 miles south

of Youngstown to Pittsburgh, which included the place of the accident. Between these places are Hazelton and New Castle Junction, about 15 or 16 miles apart, and between them, some 5 or 6 miles east of Hazelton, is Carbon station, near which the accident took place. The chief dispatcher on the day in question was at New Castle Junction. Fast freight train No. 94, coming from the west, was run in two sections, the first section arriving at Hazelton in time to leave there at 8:02, the second section 20 minutes later. The rain of all day and heavy storm of the evening had by that time worked great havoc along the line of the road east and west of New Castle Junction. All admit that it was a heavy rain in the evening, and respondent's witnesses declare that it was a storm of unusual violence. The master reports that there was evidence to show that the amount of rain falling throughout that section of the country, including the place of the accident, was very great, if not unprecedented.

The chief dispatcher at New Castle Junction had learned by 7:30 o'clock that at many places between Lowellville and Allegheny City, including points between Hazelton and New Castle Junction, the tracks had been obstructed by washouts, and that a bridge over Herron's creek was washed out by the flow, thus cutting the main line of the road, and making a detour by a branch road necessary for all trains. The master also reports that there was evidence by the witnesses called in behalf of the petitioner, that there had been obstructions, caused by rain storms, on the track at the place of the accident, at times prior to the date thereof, but that this was denied by the witnesses called in behalf of the respondent. With this knowledge of the serious character of the storm possessed by the dispatcher at New Castle Junction, no notice was given to section 2, although a notice was communicated to the conductor and engineer of the first section, to proceed with caution and look out for washouts and landslides at certain named points. Section No. 1, leaving at 8:02, passed the point of danger safely, but section No. 2, leaving Hazelton 20 minutes later, proceeded at its usual speed, until it reached the obstruction at a point a little distance west of Carbon station. The engine and several cars were thrown from the track, and the petitioner's husband so injured that he died before he was taken from the wreck.

On this general statement of facts, the petitioner complains of negligence on the part of the respondent on three distinct grounds, which are briefly stated as follows:

(1) Ordering the train on which decedent was, to leave Hazelton for New Castle Junction—a distance of 16 miles—without in any manner notifying him, or those in charge of the train, of the dangerous conditions prevailing along the road at that time.

(2) Inadequate provisions for the carrying away of surface water accumulating at the place of the accident.

(3) Failure and omission to furnish sufficient employés to inspect and watch the condition of the track and roadbed at the place of the accident, under the circumstances in this case.

No answer or other pleading was filed to the intervener's petition, and no appearance having been entered by respondent, the intervener, on the 17th of November, 1899,—nearly nine months after the filing

of her petition, asked that her petition be taken pro confesso. The court overruled this motion, and ordered respondent to file his answer to the intervener's petition "instanter." At the same time, the intervener moved the court to order the issues of the case to be tried by a jury. This the court declined to do, and ordered that the case be referred to a special master. On the 30th of January, 1900, the parties appeared before a special master, in pursuance of said order, and respondent, by his counsel, offered to file a plea of "not guilty," to which objection was made for the reason that it was not a pleading in accordance with the practice of the federal courts, in a case of this character, which was equitable in its form and character, and should be governed by the rules and practice in equity.

The special master did not pass upon this objection or admit the pleading, at that or any other time during the hearing before him. It was filed, however, on the 7th of April, 1900. At the commencement and close of respondent's testimony, an objection was made by the intervener to the introduction of any evidence on the part of the respondent, for the reason that no issue was made to which evidence could be adduced by him. This objection was overruled de bene esse, but neither the master nor the court below, at any time thereafter, passed upon these questions, although they were raised by the intervener in her exceptions to the master's report. Notwithstanding this imperfect state of the pleadings, the master proceeded to hear the case, and on the 7th of April, made his report, in which, after sundry findings of fact and conclusions of law, he recommended that the intervener's petition be dismissed. To this report, exceptions were filed by the intervener, and argued by counsel to the court below. On the 24th of November, 1900, a decree was entered by the court below, in favor of the respondent and dismissing the petition of the intervener.

Upon this statement of the proceedings had subsequent to the filing of her petition, the intervener, in addition to the grounds of recovery urged in her petition, makes the point "that a plea of 'not guilty' is not a sufficient answer in an equity case, to raise issues entitling the respondent to adduce evidence contradictory to that of complainant, except as to the amount of damages, where damages are claimed."

It is clear that the proceeding instituted by the intervener's petition was one in equity. It was addressed to the equity side of the court, in an equity suit there pending. The receiver of the railroad company, as the officer and hand of the court, had control and management of the said railroad, and possession of all its funds and assets. The intervener sought by her petition for an order upon the receiver, that he should recognize and pay out of these funds a claim for unliquidated damages, accruing on an alleged liability incurred by the said receiver in the operation and management of the road. Under the circumstances, we think the case was one of equitable cognizance, and should have been proceeded with in accordance with equity rules and practice, and that the petitioner was entitled that the respondent should either demur to the complaint of her petition, or should file an answer thereto, admitting or traversing every material allegation of the petition, and stating with sufficient particularity every

substantive defense. The plea of "not guilty," while appropriate to a trial at law, we think was inadmissible in the proceedings below. The plea was a nullity. No proper issue was raised thereby. We cannot say that she was not injured by the want of an answer—specific answer—to the averments of her complaint. She was denied that which was the right of every complainant in a court of equity.

But though of opinion that the proceedings below in this respect were grossly irregular, we place our determination of the case upon its merits, and therefore turn to what seems to us the most serious charge of negligence made by the intervener. This is, that under the conditions which obtained along the respondent's tracks, on the night of the accident, it was his duty to give intervener's decedent, or those in charge of his train, notice thereof, and that his failure so to do was the proximate cause of the accident. It was undoubtedly the duty of the receiver to notify his employés of any unusual danger to which they might be exposed in the performance of the service in which they were engaged, of which he was informed and they were not, or of which the master was better informed than the servant could be. To give such notice to the employé, is the exercise of that proper and reasonable care for the safety of the servant, which the law imposes as a duty upon the master.

Recurring to the facts disclosed by a careful reading of the record, and as found by the master: It appears that it had been raining all through the day of March 22d, and that at its close a storm of unprecedented violence set in throughout the region in which that part of the railroad of respondent, with which we are here concerned, was operated. The chief dispatcher at New Castle Junction, 16 miles east of Hazelton, had full information as to the character of the storm and the havoc it was creating on certain portions of the road, at 7:45 on the evening of the accident. At that time, he sent a dispatch to Hazelton, which in substance annulled train No. 5, being the Chicago Express, going west, which would have occupied the road between Hazelton and New Castle Junction about that time. This order was communicated to those in control of the first section of No. 94 fast freight. A notice was also given to the conductor and engineer of said first section, to run cautiously and look out for washouts at certain specified places between Hazelton and New Castle Junction. It is true that this notice did not include the point near Carbon station, at which the accident afterward happened. Section No. 1, as we have seen, left Hazelton at 8:02 in the evening, passed the point of the accident, some five or six miles west of Hazelton, in safety, and arrived at New Castle Junction at 8:45. Section No. 2 of the same train, and upon which was decedent, left Hazelton at 8:22, having received the notice that the Chicago Express had been annulled and that it had a clear track before it to New Castle Junction. As this was a fast freight, this notification gave it the right of way, and must necessarily have had the effect of measurably relieving the mind of the engineer from anxiety as to the speed of his train. There was no notice, however, given to the conductor or engineer, or any other person on the train, such as was given to those on the first section, warning them of possible dangers along the road result-

ing from the storm then raging. As to this important fact, the finding of the master is as follows:

"It further appears that on the evening of the accident the conductor and engineer of the first section, as was the custom in such cases, had received notice to look out for slides on account of the amount of rain that had fallen at various places specified in the notice, to wit, at Himrod, at Struthers and at Sand Cut, but said notice did not specifically warn these employés on the first section to look out for obstructions at the place where the accident subsequently occurred. The conductor and engineer of the second section received no such notice, nor any notice at all."

It is urged by respondent, and his argument is accepted by the master, that as the notice given to the first section was to look out for washouts or dangers at certain specified points, and as these did not include the place of the accident, therefore, such a notice to the second section would have been unavailing to prevent the accident that afterwards occurred. It would seem obvious, however, that any notice of special dangers, such as that given to the first section, would have served as a caution to those in control of the train, and so impressed upon them the necessity of careful running of the train, as would have prevented the accident that actually occurred. The argument of respondent and the view taken by the master overlook the fact, that the charge of negligence here is, not that the precise notice given to section No. 1 was not given to section No. 2, but, that no notice of any kind calculated to warn or caution those in control of section No. 2 of special dangers resulting from the storm, was given to them. Under the circumstances, the neglect to give such warning was a culpable breach of the duty owed by the respondent to his servants engaged in running section No. 2. As we have already said, the storm was of unusual and extraordinary, if not unprecedented, violence, and that it had already wrought havoc and obstruction along the line of the road to be traversed by decedent, was known by those to whom the duty of watching and observing such conditions, and of caring for the safety of those exposed to their special dangers, was delegated. No valid excuse is interposed by respondent for the nonperformance of this duty. No custom dispensing with such a notice, or practice of omitting it, as to which its employés were informed, was attempted to be proved. On the contrary, the testimony of the respondent's dispatcher was to the effect that it was always expected that warning should be given in case of storms, even of those much less violent than that of the night in question. Besides, that there was necessity on this occasion for such a notice, even in the opinion of those in charge of the railroad, is evidenced by the fact that special warning was given to section No. 1, and that the chief dispatcher testified that he thought and believed that he had sent a notice to those in control of section No. 2.

It is intimated that as the engineer and conductor, and those on board the trains, were exposed to the storm, they knew of its violence and were thereby warned of its dangers. But this is not true, in the sense in which it must be true to relieve the respondent from liability; that is, in the sense that the peril was an obvious one, and those exposed to it were bound to observe it and guard themselves against it. The violence of the storm immediately around themselves,

did not necessarily give those on the train the information as to the results of that storm along the line of the railroad, which was possessed by the dispatcher who was in telegraphic communication with the whole line. It was the fact that the storm had produced and was producing landslides and washouts at various points, that constituted the ground for apprehension, and created the necessity for extraordinary care and caution. That the storm was of this character, could not be known by those in control of section 2, unless the information was conveyed to them by those who had received the telegraphic reports concerning the same. This, then, was not the case of a servant assuming the risk of a known and obvious peril.

We are compelled to the conclusion, therefore, that the neglect to give those in control of section No. 2 any notice whatever, which would serve to caution them against the results of this extraordinary storm, was a proximate cause of the accident, by which decedent came to his death, and was culpable negligence for which the respondent is liable. Such conclusion is strengthened by the fact which appears in the record, that after the first section had left Hazelton, but before the second section had left, the dispatcher was in possession of additional information as to the severity of the storm and the havoc caused by it. This fact serves to increase the burden of responsibility resting upon the respondent, with respect to notifying those on section No. 2 of the general dangerous condition of the road.

The duty of informing a servant of special or extraordinary risks connected with his service, is a primary duty of the master, and the delegation thereof to any inferior servant, cannot relieve him of the responsibility imposed upon him by law. Whether the servant, to whom such duty is delegated, be higher or lower in the scale of employment, makes no difference. By whomsoever performed, the duty is that of the master, and he is always responsible to the servant for its due performance.

This view of the case makes it unnecessary that we should consider the other charges of negligence contained in the petition, although one of them, touching the inadequate provision for carrying away the water accumulating from the hillside at the place of the accident, impresses us with its importance.

The decree of the court below is therefore reversed, with directions to the said court to enter a decree in favor of the petitioner, and to assess her damages by reason of the premises by such mode as it shall determine.

GERMAN INS. CO. OF FREEPORT, ILL., v. DOWNMAN et al.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,093.

1. EQUITY—RETENTION OF JURISDICTION ACQUIRED—DETERMINATION OF ENTIRE CONTROVERSY.

A court of equity in which cross suits have been brought, one for the reformation of an insurance policy and to enforce payment of a loss thereunder, another for a cancellation of such policy, and a third to enjoin the further prosecution of an action at law thereon pending in

the same court, on the consolidation and trial of such suits together, including all questions at issue between the parties, has jurisdiction to determine all such issues, and to render judgment against the insurer on the policy for the loss.[1]

2. INSURANCE—CONTRACT—EXECUTORY AGREEMENT TO INSURE.
The manager of a large lumber plant, previously uninsured, agreed on behalf of his principal to place insurance on certain of the properties, aggregating $70,000, with a firm of insurance agents representing a number of companies. The amount to be written on each of the designated properties was fixed, the premiums agreed to, and that the policies should be written to go into effect on the 1st day of the ensuing month, but the companies were not agreed upon, nor the amounts or specific properties which should be insured by any particular company. The manager requested that not more than $5,000 be placed in any one company, but the matter was left to the discretion of the agents; the policies when written, however, to be subject to approval by the manager or owner of the property. *Held*, that such agreement did not constitute a contract of insurance binding any of the companies in which policies were afterwards written, which became bound only when their policies had been delivered and accepted, and in accordance with their terms.

3. SAME—ACCEPTANCE OF POLICY.
The policies, 18 in number, were written, and included one for $15,000, covering a drying shed and contents, in defendant company, which at the time of the agreement the agents did not represent, but the agency for which they had in the meantime acquired. All were by their terms to take effect at 12 o'clock noon on the day designated. During the forenoon of that day, and before the policies had been delivered or accepted or the premium paid thereon, the drying house burned. The owner subsequently secured possession of the policies from the agents, as they claimed, by representing that none of the property covered by such policies had been injured by the fire, but refused to accept any of them except the one covering the drying house, on the ground that they were for too large amounts, although that was the largest, and only one other was for an amount exceeding $5,000. *Held*, that the acceptance of defendant's policy under such circumstances did not create a contract of insurance covering the loss, even conceding the claim of plaintiff that under the previous agreement by the agents the insurance should date from the first moment of the day specified.

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

During the month of April, 1898, William Cameron, the testator of the appellees, owned a large lumber manufacturing plant at Bowie, La., consisting in part of a sawmill and machinery; two patent dry kilns; two large dry-shed buildings, with elevated covered cooling platforms, with car tracks thereon connecting the dry kilns with the dry sheds; a large planer building and machinery, adjoining one of the sheds; a store building and contents; with a large stock of upper grades of lumber, such as finish, stored in the dry sheds, and a very large stock of common grades of lumber, which go to the yard without passing through the dry kilns,—the plant and accumulated stock amounting in value on April 12 and 16, 1898, to an aggregate of about $500,000, and on which during the whole of the month of April, 1898, the owner had no insurance. It does not appear whether any part of this large property had ever been insured, or whether the owner up to that time had carried the risk thereon himself. One T. Gordon Reddy, Jr., was then the general manager for the owner of all this property. At that time, and for some years previously, J. J. Craig was and had been engaged in business as a local insurance agent at New Iberia,

[1] See Equity, vol. 19, Cent. Dig. § 104.

La., and was then associated with Craig, Cage & Suberbielle as partner in the business of such agency. Beginning in February, 1898, and continuing from time to time until the 12th of April, Craig visited Bowie to solicit for insurance of Cameron, or his general manager, Reddy, and to inspect the properties and their respective risks. On April 12, 1898, Reddy agreed to place with Craig an order for insurance amounting in the aggregate to $70,000 on certain designated properties, of which amount $15,000 was to cover the long dry shed and its contents, involved in this litigation. The amount to be written on each of the designated properties was fixed, the rate of premium on each was agreed to, and that the insurance should be written to begin on May 1, 1898. At this time Craig represented 15 or more different insurance companies, but did not have authority to represent the appellant. Of this Reddy was informed. He was also informed that Craig expected soon to receive authority to represent several other companies, including the appellant. On April 26th Craig did receive authority to represent the appellant as its local agent in a district including Bowie, and on that day his firm sent a wire message to Manager Reddy, addressed to him at Bowie, which, having been forwarded to him at New Orleans, he answered by the letter of date April 27th, embodied in the opinion. Reddy requested Craig not to place more than $5,000 in any one company, on which Craig assured him that if he would leave the matter to them (the agents) they would fully protect Mr. Cameron's interests. Policies to the number of 18, distributed according to the disposition made by Craig among his constituent companies, were written up and duly authenticated by 10 o'clock a. m., May 1, 1898, each bearing date on that day, and stipulating that it "does insure William Cameron for the term of one year from the first day of May, 1898, at noon, to the first day of May, 1899, at noon, against all direct loss or damage by fire," etc. These policies, with the letter of advice stated in the body of the opinion, were put in a package, and about 10 o'clock a. m., May 1, 1898, were placed by Craig with the agent of the express company at New Iberia, to be shipped to William Cameron at Bowie. Before it was shipped, and about 1 o'clock the same day, Craig reclaimed the package, and retained possession of it until a little after midnight on the morning of May 2d, when it was surrendered to the agents of Cameron under circumstances fully stated in the opinion. A little after 11 o'clock a. m., May 1, 1898, it was discovered that one of the dry kilns in the lumber yard of William Cameron at Bowie was on fire, and by this fire the dry shed and contents, described in the appellant's policy, were destroyed.

On May 17, 1898, the appellant brought its suit against William Cameron in the circuit court for the Northern district of Texas, alleging the issuance of the policy; "that by its terms it provided for insurance against all direct loss or damage by fire to the following described property [describing it] that might happen to the same from noon of the 1st day of May, 1898, to twelve o'clock noon on the 1st day of May, 1899"; that the premium had not been paid; that the company had received no consideration for the issuance of the policy; that prior to the time when it was to take effect the property to be insured was destroyed by fire; that the policy is in the possession of the defendant, who refuses to deliver it to the plaintiff, but seeks to vex and harass the plaintiff by withholding it and claiming rights thereunder; that the testimony by which it can establish the fact that the property was destroyed by fire before its policy took effect is oral; that the witnesses reside in different localities; that some of them are of migratory habits and of uncertain habitations, and that if delay occurs in the hearing of this cause the testimony of these witnesses will become wholly inaccessible to plaintiff and irreparable injury will ensue to it,—concluding with the prayer that upon final hearing the policy of insurance be canceled, and for general relief. This suit was entered on the law docket at Dallas, and numbered 2,133. Cameron moved to transfer the proceeding to the Waco division of the court, and, not waiving that motion, answered the petition by general demurrer and general denial.

Some time in August, 1898, William Cameron instituted in the state court a suit against the appellant on the policy. This suit was duly re-

moved into the circuit court, where an order was made for the plaintiff to replead; and in obedience to this order the plaintiff did, on December 21, 1898, file his bill in the circuit court at Waco, numbered on the docket of that court No. 154, in which, besides allegations not necessary to recite, he made the following averments: "And it was expressly stipulated, understood, and agreed that said insurance should be written to become effective with the beginning of the month of May, 1898,—that is, that said insurance should become effective immediately on the termination of the last day of April, 1898; * * * but that, instead of writing said policy of insurance to begin with the 1st day of May, 1898, in accordance with said understanding and agreement, the said agents by mistake issued said policy of insurance to begin at 12 o'clock noon on said 1st day of May, 1898. * * * It is further shown that immediately after said fire respondent repudiated said policy of insurance, and refused to pay your orator the said sum of $15,000 stipulated therein, but respondent is now claiming that said loss occurred before said policy went into effect by its terms; and your orator shows to the court that respondent, having issued said policy in violation of said parol agreement, is seeking to take advantage of its own wrong in setting up and pretending that said policy was not in full force and effect. Your orator shows to the court that said policy did not come into his hands until after said fire and after said loss had occurred, and he did not know until after said fire that said policy had not been issued in accordance with the parol contract and agreement hereinbefore set out,"—concluding with the prayer that the court reform said contract so as to speak the true intent and meaning of the parties thereto with reference to the time said policy should begin; "and he further prays that upon hearing hereof he have a decree against respondent for the sum of $15,000, and all interest due thereon; and he further prays for all such general, special, and equitable relief," etc.

On March 29, 1899 (Cameron having died on February 6th), the appellees brought against the appellant an action at law on this policy in the circuit court at Waco, and on April 11th took judgment by default thereon, which was set aside on April 18th on motion of the appellant, who on that day filed its bill, No. 534, against the appellees to enjoin the action at law just mentioned, and to procure, on the allegations therein made, a decree compelling the appellees to surrender the policy, and to declare the appellant discharged from any liability thereunder. On this bill the circuit court granted a temporary injunction, and decreed that "no action shall be taken in said cause No. 724 until the final judgment and determination of said equity cause No. 154."

It seems that by proceedings not questioned all these suits, except the action numbered 724, were consolidated, the parties were required to replead, and repleadings were filed, on which repleadings the final hearing was had, and resulted in the passing of the following decree:

"No. 534. German Insurance Company v. William Cameron, Consolidated with 154, William Cameron v. German Insurance Company.

"In Equity, May 1st, 1901.

"This cause having been submitted at the last term of this court, and having been taken under advisement, and the court having considered the same, orders, adjudges and decrees as follows: First. The court being of opinion that the evidence in behalf of complainants is insufficient to warrant a reformation of the contract, the petition of complainants for a reformation of the contract is refused and denied. Second. The court also being of opinion that the evidence is insufficient to warrant a rescission of the contract as prayed by respondent, the prayer of respondent for a rescission of the contract of insurance herein is also refused and denied. Third. It appearing to the court that there is a suit at law pending in United States circuit court at Dallas wherein complainants herein are plaintiffs and respondent herein is defendant, and that respondent has heretofore procured an injunction herein restraining the further prosecution of said suit until the termination of this suit, which suit at law is upon the policy of insurance in controversy herein, and the court herein having determined the

matters in controversy in said suit at law, it is ordered and adjudged that said injunction be made perpetual. Fourth. And the court being of opinion from the testimony that the policy of insurance sued on herein went into effect at 12 o'clock noon, May 1, 1898, and that the property covered by said policy of insurance was destroyed by fire after said policy went into effect, it is therefore considered, ordered, adjudged, and decreed by the court that complainants, Flora B. Cameron, Wm. W. Cameron, R. H. Downman, and F. A. McDonald, executors of the estate of Wm. Cameron, deceased, do have and recover of and from respondent, the German Insurance Company of Freeport, Ill., the sum of sixteen thousand six hundred and eighty-eight dollars ($16,688), principal and interest, with interest thereon from this date at the rate of 6 per cent. per annum, and all costs, for which let execution issue."

Numerous errors are assigned by the appellant, a number of which, in various forms, submit that the circuit court sitting in equity did not have jurisdiction to give judgment against the appellant on the policy of insurance. The other assignments, in various forms, submit that the court erred in holding that the appellant had completed any contract of insurance with the appellees' testator which had attached to the property consumed, or which was binding on the company at the time the property was destroyed by the fire.

Geo. Carden and E. G. Senter, for appellant.

H. N. Atkinson for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

The appellant applied to the circuit court for equitable relief against the enforcement of one of its outstanding policies of insurance in the hands of William Cameron. Cameron applied to the state court for the reformation and enforcement of the policy. His suit was removed into the circuit court, where he repleaded by bill seeking equitable relief. These suits were duly answered by the respective respondents. Cameron having died, the appellees brought, in the same circuit court, their action at law on the policy. Thereupon the appellant exhibited its second bill in equity for the purpose of enjoining the action at law and of having the whole controversy between the parties settled in the equity proceedings. The court ordered a consolidation of these equity suits and that the parties replead. The parties did replead in the consolidated cause, in which the appellees appear as complainants and the appellant as respondent, and in which the whole controversy was embraced and sought to be settled. The proof taken covered every feature of the controversy. The final hearing was full and exhaustive of all the issues, and the final decree passed disposed of the whole case. The right of a court of equity in such a case as this to proceed to a final determination of all the matters in issue is now fully established. Therefore the assignments of error which raise the question of the jurisdiction of the court in equity to make full and final disposition of the whole cause are not well taken.

Had the parties contracted before the fire occurred? The manager, Reddy, testifies:

"On April 12, 1898, in our office at Bowie, I placed an order with Mr. Craig for insurance amounting to $70,000, of which amount $15,000 was to cover on the dry shed and contents. Mr. Craig said he would like for us

to grant him a few days so he could consult with some of his companies and be able to place the full line to our best mutual advantage. At that time we had no insurance at Bowie. I agreed to the delay, and it was then understood and agreed that the insurance should be written to become effective, beginning May 1st."

He testified further:

"I requested the agents not to place more than five thousand dollars in any one company, but they assured me that if I would leave the matter to them they would fully protect our interest."

The witness Craig says:

"I had a conversation with T. Gordon Reddy, Jr., Cameron's manager, on April 12, 1898, about insurance, and agreed on that day to place $70,000 of insurance on property of Wm. Cameron. We agreed as to the premium rate, but there was nothing said, either by Reddy or myself, as to what company or companies would be the insurers, except that there was an understanding that if the companies were not satisfactory he would not accept the insurance. Nothing was said about the German Insurance Company of Freeport, Ill., or any other particular company. I represented fifteen or sixteen companies, and Reddy knew this, but I did not at that time represent the German Insurance Company of Freeport, Ill. Reddy's instructions to me were to write the insurance on May 1, 1898. The property to be insured was designated. The term the insurance was to run was not agreed on. I told him what the annual rate was, and it seemed to be satisfactory to him. The time for which he wanted the insurance was not discussed, though I supposed he wanted it for a year from 12 o'clock noon, May 1, 1898, as that was the date he designated, and as it is the universal custom of fire insurance companies to have all policies begin at 12 o'clock noon. There was no understanding between Reddy and myself as to how much insurance should be placed in any one company, nor on what particular property any certain company was to be placed."

In another deposition, on cross-examination, Craig testified, in substance:

"It is a fact that in my agreement with Reddy about insurance, before the policy was issued, the amount of insurance on various properties was agreed on, the rate of premium was agreed on, the time was agreed on, and it was further agreed that I [Craig] was to select the companies in which the insurance was to be written, except that the policies and companies, when the policies were written, were to be written subject to the approval of Mr. Reddy."

On April 12, 1898, neither Craig nor his firm had authority to represent the appellant, but he was expecting soon to obtain that authority, and did obtain it on the 26th of that month, on which day he sent a wire message to Reddy (the exact contents of which the record does not disclose), which Reddy answered the next day by letter, as follows:

"New Orleans, La., April 27th, 1898.

"Messrs. Craig, Cage & Suberbielle, New Iberia, La.—Gentlemen: Your wire message of the 26th instant, addressed to me at Bowie, has been forwarded here for my reply. As you know, this war matter come up since we discussed the matter of insurance. It seems to be the common impression that this war business is going to make money matters very tight. In the event of any mishaps to our navy, I am afraid there will be a money panic. The premium covering the insurance which we contemplated placing on the Bowie plant will amount, as you know, to considerable money, and it seems to me if you could make some arrangements by which the insurance could be effected, say May 1st, and premium paid Aug. 1st, without interest, it would make us feel easy in the matter. Please

let me have your views on this matter, for Mr. Cameron has written from Texas on the lines mentioned above.

"Yours truly, T. Gordon Reddy, Jr., Manager.

"I will return to Bowie to-night. Address me there."

Mr. Craig, having previously arranged with the Hibernia National Bank of New Orleans to discount Cameron's note so that the proceeds could be turned into his several companies, consented that the premium for the insurance to be written by Craig, Cage & Suberbielle should be paid by a promissory note given by William Cameron, in their favor, to be dated May 1st, and payable August 1st, amounting to $2,327.50, in which amount was included $600, covering premium on the policy of the German Insurance Company, which policy covered the dry shed. The appellees now insist that the agreement had between Reddy and Craig, as shown by the evidence just recited, embraced all the elements of a completed insurance contract, to which a written policy would add nothing save better evidence of the terms on which the minds of the contracting parties had met. This insistence does not take account of the fact that on April 12th Craig had no authority to represent the appellant, nor of the pregnant language of the letter of April 27th addressed by Reddy to Craig's firm, nor of Craig's testimony that the policies and companies when the policies were written were to be written subject to the approval of Mr. Reddy, nor of the testimony of Mr. Reddy that he had requested the agents not to place more than $5,000 in any one company. At some time before 10 a. m., May 1, 1898, the policies, eighteen in number (including the one in controversy here), were written up, duly authenticated by Craig, who was authorized to issue the same, done up in a package, addressed to Wm. Cameron, Bowie, La., and placed with the agent of the express company at New Iberia for shipment. Besides the 18 policies the package contained the following letter:

"Craig, Cage & Suberbielle, General Insurance.

"New Iberia, La., April 30th, 1898.

"Mr. William Cameron, Bowie, La.—Dear Sir: Herewith we beg to hand you policies covering your saw and planing mills, lumber shed and contents, commissary and boarding house, amounting to $70,000, which we trust will meet with your approval. The civil engineer will be down either Tuesday or Wednesday. Thanking you for your kind favor, we are,

"Yours respectfully, Craig, Cage & Suberbielle,

"Per Craig."

About 1 o'clock on that day Craig learned that a fire was burning in the Cameron properties at Bowie, and he immediately went to the express office, and reclaimed the package of policies and letter of advice which he had delivered for shipment, as above stated. During these midday hours manager Reddy was strenuously engaged on the fire-line at Bowie. When the fire alarm whistle blew a few minutes after 11 o'clock he answered the call promptly, and had the trained corps of men who were on duty under him, with not less than 200 other men, at work in 15 minutes after the fire broke out. His facilities for fighting it consisted of a Fred M. Prescott force pump, size 14x7x12, 7" suction, 5" discharge, upon which was carried from 80 pounds to 120 pounds pressure upon water mains. There were

three main pipes, all leading to or in close proximity to the fire; also three double hydrants convenient to the fire, upon which were coupled two lines of hose from each one, and from other hydrants more remote were fetched three more lines of hose, and at one time there were nine streams of water bearing on or around the fire. To help the pressure, later four of these were taken off, but five streams played continually upon the points most available, under the direction of the manager of the plant. The hose was 2½" hose, previously tested at 100 pounds pressure, opening of nozzles 1¼". All connections in and around plant used for fire purposes were and are 2½". W. E. Fall, an employé in the wholesale department of William Cameron & Co., at Waco, Tex., was in Bowie on that day. He, too, did his utmost until he became overheated, and at 12.30 p. m. had to get into the planer shed to cool off. Every man and boy in Bowie who was able to do any work was pressed into service, besides a good many laborers who were sent over to assist by neighboring planters. The town of Thibodeaux, on request, promptly sent by special train all the hose in that town that could be spared. All connections were cut away between the dry shed and planer and between the mill and kilns. Besides, several hundred feet of dolley ways were torn up and carried off a safe distance or used as shields or fenders for the nozzle men to stand behind. Mr. Reddy, the manager of the plant, organized a fire crew, and, after the fire had communicated with the yard, decided that it would be better to draw the forces back to a certain intersection of dolley ways, and make a stand at that particular point. The fire was arrested just as he intended. About 6 o'clock Mr. Reddy was able to telegraph Mr. Cameron:

"Fire originated in dry kilns at noon to-day. Kilns, lumber shed, and about seventy-five piles of lumber on yard destroyed. Fire still burning, but apparently under control."

In his deposition filed September 12, 1898, Mr. Reddy testifies in reference to the policies mentioned above:

"These policies were delivered to me by Mr. Craig in the presence of W. E. Fall. The circumstances attending the delivery of these policies are these: On the evening of May 1, 1898, after the fire which originated in our dry kilns, a risk which was uninsured, and worth to us about $16,000, had spread to the large lumber shed and to piles of lumber on the yard, I asked my bookkeeper if the policies from Craig, Cage & Suberbielle had reached our office. I had a telegram sent to them at New Iberia asking them if the policies covering insurance as per our order had been forwarded, and, if not, would they send them to us by the next train, which was due to pass Bowie on Monday morning. Receiving no reply to this message, I grew apprehensive, and went that night at 10 o'clock to Raceland Station, one mile distant from Bowie, where there was a night telegraph office, and from which place I made inquiry by wire of the agent at New Iberia in telegraph office whether any package addressed either to Mr. Cameron or myself was there to be forwarded to us on the morning train. Being informed there was no such package there, I boarded the train at Raceland about 10:20 p. m., and, in company with Mr. W. E. Fall, who is connected with the office of William Cameron & Co., at Waco, Texas, and who was on that day on a visit to me at Bowie, and we together went to New Iberia for the purpose of finding out why these policies had not been sent by Craig, Cage & Suberbielle, and why I did not receive any answer to my telegram of that evening. Mr. Fall and myself set out to find some member of that insurance firm, when about one o'clock Monday morning

we located Mr. Craig in a saloon. Mr. Craig informed us that he was sitting up to catch the early morning train for Bowie to bring our policies to us. He stated that the policies had been made out on Saturday, April 30, 1898, but by an oversight they had not gone forward until Sunday, when he discovered them in the office. He then took the package to the express office at New Iberia, and placed it there to be forwarded to us. While at the depot he learned that there was a fire then burning * * * at our place at Bowie, * * * and he concluded to withdraw the package from the express office, which he did. He then informed us that he had the package in his pocket at that time, and he produced it. The package was all intact, done up, sealed, and addressed to William Cameron, Bowie, La. I explained to Craig that my business there was to get the policies, because we had had a fire that day, and desired to get the policies, and had grown apprehensive for the reasons above stated. I broke open the package, and found it to contain about eighteen policies, aggregating $70,000, together with a bill for the premiums on said policies, together with a letter addressed to William Cameron, date April 30th, 1898. The premiums for this insurance, as per special agreement had and entered into between myself and Mr. Craig, was to be paid by promissory note to be signed by Mr. William Cameron, dated May 1, 1898, and payable August 1, 1898, without interest. Mr. Craig had previously arranged with the Hibernia National Bank of New Orleans to discount this note, so the proceeds could be turned into his several companies. I explained to Mr. Craig that in view of this fire I did not want any hitch, if there could be any hitch, to arise on the question of premium, and I told him I would waive my previous agreement, and tendered him payment. This Mr. Craig said made no difference, and this ended the matter."

In his deposition filed November 18, 1899, Mr. Reddy says:

"When Fall and myself left Bowie for New Iberia, I wrote out an order on Craig, Cage & Suberbielle, directing that they deliver to Fall our policies. I did so because we intended to go in different directions when we got to New Iberia, looking up one of the firm of Craig, Cage & Suberbielle, and Fall had an order so he could explain himself when he met either of them. I did not intend remaining in New Iberia except between trains, as I had to return to Bowie, and, if we failed that morning to find Craig or his partners, Fall was to remain and get our policies, but it so happened that we found Craig shortly after our arrival at New Iberia. Craig had the policies, and offered no protest at all. He stated he was waiting up then to catch the train for Bowie, and that he intended to bring the policies in person to us."

Craig in his deposition filed December 15, 1899, being asked to attach to the interrogatories and mark "Exhibit B" a communication addressed to "Craig, Cage & Suberbielle, Agents," dated May 1, 1898, signed "T. Gordon Reddy, Jr., Manager," and being further asked: "Was said paper delivered to you? If so, by whom, and whose signature is to the same? Explain said paper fully. If it relates to insurance, then state in what companies and in what amounts, and by whom issued,"—answered:

"Yes; delivered to W. E. Fall, and signed by T. Gordon Reddy, Jr., and the original is hereto attached. It relates to the insurance ordered by T. Gordon Reddy, Jr., of me in various companies, of which the policy sued on is one. * * * Said paper was presented to me by W. E. Fall. I inquired of Fall what he wished to do with the policies. He replied that he was on his way to the Waco office, and desired to take the insurance policies issued by me, together with those issued through the Pescud agency, to the Waco office. I inquired of him whether he had had a fire at Bowie or not, and whether he had any claim under my policies or not. He replied that they had had a small blaze, but there was no claim under my policies. After some questions, I concluded to deliver him the package of policies.

It was in the saloon owned by C. P. Moss, in New Iberia, La., about the hour of 1:30 a. m., on May 2, 1898. * * * I saw T. Gordon Reddy, Jr., immediately after the delivery of the package to Fall. It was in the saloon of C. P. Moss. Clarence Colgin was present. Reddy said, 'Well, Craig, you just owe us about $14,000;' and I replied, 'Well, the jig is up; it is a pretty slick trick on your part.'"

The appellees took the deposition of W. E. Fall, but did not question him as to this transaction, and the appellant did not cross the interrogatories. The appellant took the deposition of Clarence Colgin, the only person present at the interview between Fall, Reddy, and Craig, who, in answer to pertinent interrogatories, said:

"The conversation between Fall and Craig was in the Moss restaurant, adjoining the Moss saloon, separated by a wall with opening in same building. Their conversation was after midnight. The conversation between Craig and Fall was in reference to insurance papers. Fall wanted Craig to deliver him some insurance policies. * * * It related to insurance on a dry kiln shed. * * * At the time of the conversation between Fall and Craig, as stated, I saw Reddy on the outside of the Moss saloon building."

In answer to a part of the interrogatory requesting the witness to "state whether or not Reddy said anything about the delivery of certain insurance policies by Craig to Fall, and what he said," Colgin testifies, "Reddy told Julian J. Craig that he wanted the policies, and must have them." In answer to cross interrogatory 4, by the appellees, "State whether the said Craig appeared to be frightened or terrified by the words or manner of Reddy and Fall," he answered: "Yes; Craig did appear to me to be frightened, which is one reason why my attention was attracted so closely. It appeared they insisted strongly on having the policies from Craig."

The order to which the witnesses Reddy and Craig refer is in the following words:

"Bowie, La., May 1st, 1898.

"Craig, Cage & Suberbielle, Agents, New Iberia, La.—Dear Sirs: If you have not already mailed or expressed us the insurance policies covering on our risk here at Bowie, will you then please hand same to the bearer, Mr. W. E. Fall, of our Waco office. Mr. Fall will give you necessary receipt for same. Yours truly, T. Gordon Reddy, Jr.,

"Manager."

It was in the possession of Craig at the time he testified, and he attached the original to his deposition. It appears from Reddy's testimony that it was written at the time he and Fall left Bowie on the night of May 1st. He says that he left Bowie and went to Raceland at 10 o'clock p. m. At that time the long shed and its contents had been utterly consumed, and was a vast mass of superheated ashes and burning coals. Reddy's mind was then supremely intent on getting possession of the insurance policies. He was just about to start to New Iberia, 83 miles away, to hunt up some one of the members of the firm of insurance agents in the middle of the night to obtain the policies. To aid him in this extraordinary effort, he was taking with him a member of the Waco home office then present in Bowie, and gave the above written order to that companion of his quest to enable him to explain matters to whichever member of the firm he might find. It contains not the slightest reference to the fire that

had so intensely engaged Reddy's attention for so many hours on that day. We refrain from making those further suggestions which this testimony must excite in the minds of all intelligent readers, certainly of all readers who are lawyers. It seems to us to be too clear for controversy that the position of Mr. Cameron was not bettered by this acquisition of the manual possession of the policies, and that the method of acquisition pursued and effected by Mr. Cameron's manager, with whom the negotiations for the insurance had been conducted, casts a white light along the whole track of those negotiations. But we proceed. In one of his depositions Craig was asked:

"State whether or not you had any conversation with William Cameron after the fire with respect to his surrender of the policy of insurance attached to complainant's bill. State whether or not you demanded of said Cameron said policy of insurance. State whether he acceded to or refused this demand, if any, and state what he said, if anything, with respect thereto."

Answer:

"Mr. Cameron and Mr. Shumard, in my presence, had such a conversation on or about May 5, 1898, and during the progress of this conversation Mr. Cameron, turning to me, criticised me for placing so much insurance in one company, and said he would not take the policies I had written up for him, and returned them to me, with the exception of the policy herein sued upon, which he claimed the German Insurance Company was liable under. Mr. Shumard demanded this policy, and Mr. Cameron refused to turn it over to him."

It appears from the bill rendered to Cameron, which was inclosed in the package with the policies, and Craig's letter of April 30, 1898, that of the 18 policies written up by Craig the one in suit was for the largest amount, and that of all the other 17, amounting in the aggregate to $55,000, only one exceeded in amount the sum of $5,000. That one was for $10,000, in the appellant company, on the sawmill.

It is to be observed that in Reddy's letter of April 27, 1898, the previous communications between him and Craig were referred to as the matter of insurance "we discussed," and, again, as "the insurance which we contemplated placing on the Bowie plant." It made mention also of the changed and changing condition of general affairs, and expressed the apprehension that, "in the event of any mishaps to our navy, * * * there will be a money panic." He suggested that the premiums covering the insurance "will amount to a considerable sum of money," and that if Craig could make some arrangements by which the insurance could be effected, say May 1st, and premium paid August 1st, without interest, "it would make us [Cameron & Co.] feel easy in the matter." On this matter he desired to have Craig's views, "for Mr. Cameron has written from Texas on the lines mentioned above." This letter was written at New Orleans, four days before the fire occurred, and addressed to Craig's firm at New Iberia, where it could hardly have arrived before some hour on the next day, or three days before the fire. Craig, having first arranged with a New Orleans bank to discount Mr. Cameron's note for the amount of the premiums, consented to the arrangement suggested in the letter. On the day before the fire Craig was at Bowie, for in his deposition he says, "I returned from Bowie on April 30, 1898;"

but it does not appear that while at Bowie on that visit he saw either Reddy or Cameron, or any one authorized to act for them. And Reddy deposes: "The last conversation prior to the fire we had with Craig was on April 12, 1898." It does not appear that Reddy had authority to make Mr. Cameron's note in favor of Craig's firm for the amount of the premium. It is not claimed that such a note was ever made by Cameron himself or by Reddy for him. In the letter addressed to Mr. Cameron accompanying the policies Mr. Craig, referring to them, says, "which we trust will meet with your approval." In one of his depositions Craig says: "There was nothing said either by Reddy or myself as to what company or companies would be the insurers, except that there was an understanding that if the companies were not satisfactory he would not accept the insurance." And in his other deposition he says: "The policies, and companies when the policies were written, were to be written subject to the approval of Mr. Reddy."

It is seen that these negotiations were pending for nearly 20 days, during the whole of which time there was no insurance on any of the large properties held by Cameron at Bowie. There is no proof that any part of it had ever been insured. It is manifest that Cameron was not anxiously solicitous to effect insurance on the property there. The nature of the property, and the hazard on account of its situation and respective exposures, were such that, of necessity, the owner was compelled to carry a large, if not the larger, part of the risk, and, to get it covered to any extent, would be compelled to pay a high rate of premium; and the length of the line of insurance necessary to relieve him to any desirable extent was such as required that he should insist on having it distributed among a large number of the safest insurance companies, with lines in each to such a limited extent as to afford the least temptation to the companies to litigate in case of a loss. His property and business and employés practically constituted the town of Bowie. His best insurance against fire was the care he was able to exercise in preventing its occurrence, and in arresting it should it occur, for both of which purposes he had made most ample provision. He was a man of large and successful experience,—a masterful man in all matters affecting his own business. It seems to us to be clear from the proof that it was never in the mind of either Craig or Reddy or Cameron that a contract for insurance between Craig's companies and Cameron should become complete until the policies, showing by what companies written and on what terms, had been submitted either to Cameron, or to Reddy and Cameron, and approved and accepted by them. We cannot doubt that if the fire had not occurred on May 1st, and before Cameron had after that date received and examined the policies, he would have disapproved and rejected the one here involved, not because it was written to cover the risk from 12 o'clock noon instead of from the previous midnight (because then that provision would have become immaterial or would be 12 hours in his favor), but because it was for an amount three times as large as he was willing to have written by any one company on the property covered. From a thorough examination of the proof, and due deliberation thereon, we are con-

vinced that the negotiations between the appellant and the testator of the appellees never matured into a contract for insurance.

It follows that the decree of the circuit court must be reversed, and we will here render the decree which that court should have rendered. Exercising the discretion inherent in a court of equity in awarding costs, in view of the numerous suits filed and the unnecessary issues presented, we conclude that it will be most consonant with justice in this case to require that each party shall pay the costs by them respectively incurred in this cause in this court and in the circuit court, including the enjoined action at law in the circuit court. It is therefore adjudged and decreed that the appellees are perpetually enjoined against prosecuting any action at law on the purported policy of insurance in question; that the appellant never became liable to the testator of the appellees under that instrument, is not now liable to the appellees in any amount on account thereof, and is now fully acquitted and discharged from all claim of the appellees thereunder; and that the parties hereto pay the costs by them respectively incurred in this cause in this court and in the circuit court, including the costs in the action at law.

COVERT v. COVERT.

(Circuit Court of Appeals, Second Circuit. April 8, 1902.)

No. 89.

PATENTS—ANTICIPATION—WAGON JACKS.

The Emons patent, No. 463,599, for a wagon jack, is void for anticipation, especially by the device of the Baillie patent, No. 310,973, which contains all the elements of the Emons device, the only material change made in the latter being that the fulcrum rod of the lever is pivoted upon the base of the standard instead of upon a ring frictionally secured to the standard itself, which was an obvious mechanical modification, and was, moreover, disclosed by the prior patents to Bratschie & Epperson.

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

This cause comes here upon appeal from a decree of the circuit court, Western district of New York, dismissing the bill. 106 Fed. 183. The suit is for infringement of letters patent No. 463,599, granted November 17, 1891, to Charles Emons for a wagon jack.

Chas. G. Coe, for appellant.

Chas. H. Duell, for appellee.

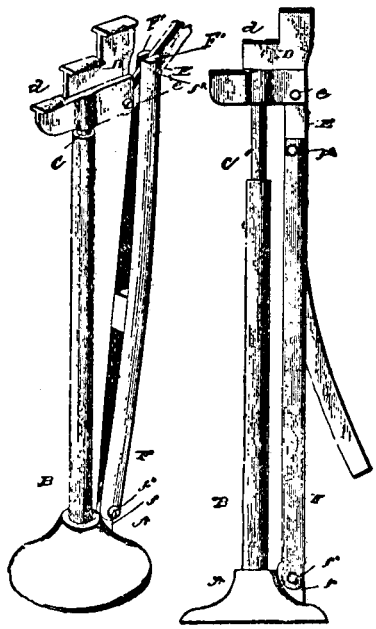
Before LACOMBE and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The specification states that the invention relates to wagon jacks, and

—"Has for its object to provide a simple and approved device of this character, of such construction as to dispense with the necessity for the provision of special locking means for retaining the jack in elevated position. A further object of the invention is to provide a simple and improved jack

of this character, which will possess advantages in point of inexpensiveness, durability, ease of operation, and general efficiency. * * * Fig. 1 is a perspective view in position for use. Fig. 2 is a side elevation, illustrating the jack as it appears in its extended position.

Fig. 1 Fig. 2



"Referring to the drawings, A designates a base plate of approximately conical shape, and from which projects a vertical tubular standard, B. The base plate is preferably cast of metal, and the standard formed of piping screwed or otherwise secured therein. Disposed within the standard, B, is a vertically movable member formed by a rod or tube, C, carrying at its upper end a head block, D, which may be provided with a series of steps, d, upon one of which the axle of a vehicle is adapted to rest. The head block is further provided with a slot, d' (not lettered in Figs. 1 and 2), at its lower rear corner, within which is adapted to be pivoted the inner end of a lever, E, by a pin or bolt, e. At about one-third the length of the lever from its inner end the same is bent at an angle to said inner portion, as shown, the purpose of which will hereafter appear. F represents a fulcrum bar or rod formed of two strips, F', F', and pivoted at its lower end to a lug, f, projecting from the base plate by a pin or bolt, f'. The upper end of this fulcrum bar is pivoted by a pin or bolt, f^2, to the inner straight portion of the lever, preferably at or near the center of said portion. By supporting the fulcrum bar upon the base plate in lieu of supporting it upon the standard, it will be obvious that the weight is supported by the base plate, and greater steadiness is thus insured when the jack is in use. * * * To elevate the head block, the lever is pressed downward and then inward, until the inner portion thereof assumes a position at a contrary angle to the fulcrum to that which it normally occupies, the angle of the lever abutting against the upper end of the standard, and held there against displacement by pressure upon the head block."

The claims are as follows:

"(1) A wagon jack comprising a base plate, a standard projecting upwardly therefrom, a vertically moving bar working in said standard and carrying a stepped head, a lever pivoted to the latter, and a fulcrum bar or rod pivotally bearing upon the base plate and pivoted at its upper end to the lever, substantially as set forth.

"(2) A wagon jack comprising a base plate, a standard projecting upwardly therefrom and of tubular form, a vertically moving bar working in said standard and carrying a stepped head, an angular lever, substantially as described, pivoted to the latter, and a fulcrum bar pivoted to the lever between the angle thereof and the inner end, and pivotally supported upon the base plate, substantially as set forth.

"(3) A wagon jack comprising a base plate provided at one side with an upwardly projecting lug, a standard projecting centrally from the base plate and tubular in form, a vertically working bar disposed in said standard, and carrying at its upper end a head provided with a series of steps, an angular lever pivoted at the rear of said head, and a fulcrum bar pivoted to the lever between its inner end and the angle thereof, and to the lug projecting from the base plate, substantially as set forth.

"(4) As an improved article of manufacture, a wagon jack constructed of metal, and comprising a base plate provided at one side with a lug, a tubular standard secured to the base plate and projecting upwardly therefrom, a bar working in the standard and carrying at its upper end a stepped head provided at its rear lower corner with a slot, a lever pivoted at its inner end in the latter, and having its handle portion bent at an angle to the inner pivoted portion, for the purpose described, and a fulcrum bar pivoted at its lower end to the lug upon the base plate, and at its upper end to the lever between the angle thereof and its inner end, substantially as and for the purpose shown and specified.

"(5) In a wagon jack, the combination of a base, a standard secured thereto, a vertically movable member carried by the standard, a lever pivotally connected with said vertically movable member, and a fulcrum bar or rod pivotably mounted upon the base and pivotally connected with the lever, substantially as and for the purpose set forth.

"(6) In a wagon jack, the combination of a base, a standard secured thereto, a vertically movable member carried by the standard, a lever pivotally connected with said vertically movable member and formed with an angle below its inner pivoted end, and a fulcrum bar or rod pivotally mounted upon the base and pivotally connected with the lever at a point above the angle thereof, substantially as and for the purpose set forth."

The device of the patent is well described by complainant's expert as—

"A jack comprised in substantially four parts, namely: A base having a standard permanently secured thereto, and projecting upwardly therefrom; a stepped head or head block, which is placed under the axle of the wagon to be raised or jacked up, to which is permanently secured a stem called in the patent 'a vertically moving bar' adapted to slide in said standard, which is made tubular in form to receive such stem; a lever pivoted at its upper extremity to the head block, and also pivoted at a short distance from the end to an upright fulcrum bar or rod, which rod is pivotally connected with the aforesaid base."

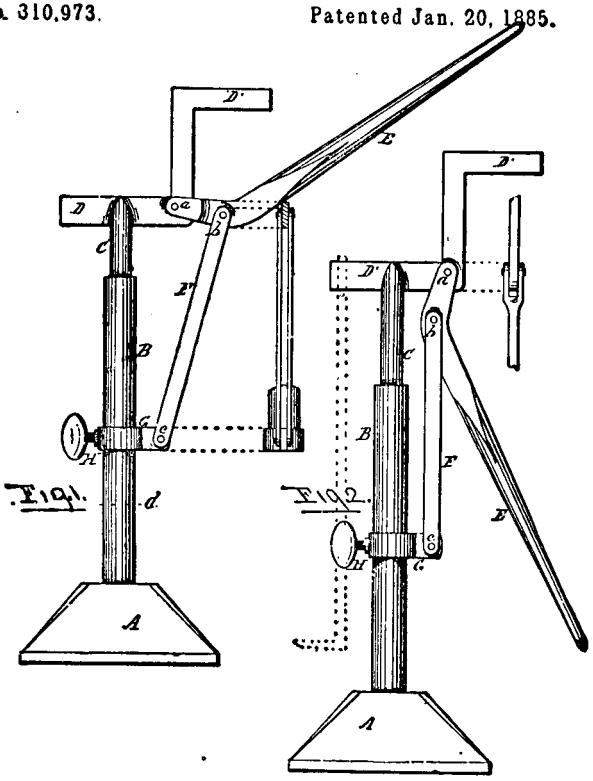
The record shows that Emons was not the first to devise a four-part wagon jack. Of the numerous patents which have been put in evidence, it will be sufficient to consider one only, that to John D. Baillie, No. 310,973, January 20, 1885. It will be best described by reproducing the drawings, Fig. 1 being a side view of the jack, lowered

partially down, and Fig. 2 the same partially raised. The dotted lines in Fig. 2 refer to a proposed attachment, which is not material to the present cause.

J. D. BAILLIE.

LIFTING JACK.

No. 310,973. Patented Jan. 20, 1885.



Inspection of these drawings shows that with the exception of the adjustable supporting collar, G, the device is practically a Chinese copy of the four-part jack of the patent in suit. A and B make up "a base having a standard permanently secured thereto, and projecting upwardly therefrom"; D D' and C make up a "stepped head or head block, which is placed under the axle of the wagon to be raised or jacked up, to which is permanently secured a stem or vertically moving bar adapted to slide in the standard, which is made tubular in form to receive such stem"; E is a "lever pivoted at its upper extremity to the head block, and also pivoted at a short distance from the end to the fulcrum bar," and which has also an angle which subserves the same purpose as in Emon's device; F is an "upright fulcrum bar or rod, pivotally connected with the lever," but which is also pivotally connected with the collar, G, instead of with the base.

Looking at the Baillie structure, it is apparent that the collar, G, which is held in position by frictional contact with the standard under

pressure of the set screw, H, is not as rigid a pivotal connection for the fulcrum rod as the base would be, or as the collar itself would be if it rested on the base. It is also apparent that by sacrificing a part of the range of elevation, secured in Baillie's device by the movable collar, such increased rigidity can be secured by merely lengthening the fulcrum rod, F, till the collar rests on the base. We are clearly of the opinion that this simple and obvious modification discloses no patentable invention, especially as the art already contained devices differing in other respects from the two we have considered, but in which a fulcrum bar or its equivalent was pivoted to the base. See the patents to Bratschie and to Epperson.

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

WEBSTER & D. ST. RY. CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, First Circuit. April 23, 1902.)

No. 375.

Rehearing denied.

For former opinion, see 113 Fed. 756.

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

COLT, Circuit Judge. In denying this petition for rehearing it is sufficient to observe that in the printed argument accompanying the petition no reference is made to the main ground upon which the court based its limitation of claim 4 to the detachable counterpart coils described in claims 1 and 2. This ground may be summarized as follows:

This broad claim cannot be sustained, because the Eickemeyer patent is not for two distinct inventions,—a novel coil and a new method of double-layer winding,—but is for a novel coil, or a series of such coils, which may be collected on the armature core in several types of winding. There is no suggestion in the specification that Eickemeyer was the inventor of a new method of double-layer winding. This method is referred to in the specification simply as "one of the arrangements" in which "it is sometimes desirable" to make such a disposition of the two sides of the coil; and, to make his meaning perfectly clear, the patentee adds these words: "These coils have the same general characteristics of those previously described." There is no doubt that all the patentee intended to cover by claim 4 was an alternative arrangement of his novel coil in a particular type of double-layer winding. If the claim is to be read in connection with the specification, or any significance is to be attached to the words "substantially as described," it plainly must be limited to the coils of the patent. To hold that the claim is a valid claim not only for the detachable counterpart coils of the patent, but for all forms of coils which are detachable and counterpart when placed on the armature core in the double-layer winding described, would be to extend the

patent far beyond its original scope and purpose, as is manifest by the clear and oft-repeated statement by Eickemeyer of his invention in the specification.

Petition for rehearing denied.

CIMIOTTI UNHAIRING CO. et al. v. AMERICAN UNHAIRING MACH. CO.

(Circuit Court of Appeals, Second Circuit. April 9, 1902.)

No. 23.

1. PATENTS—ANTICIPATION—FUR SKINS—MACHINE FOR REMOVING HAIRS.
   The Sutton patent, No. 383,258, for a machine for removing water hairs from fur skins, claim 8, which consisted of a rotary brush whereby fur was pushed down away from the knife of the machine, was not anticipated by the Lake and Covert machines, both of which were commercially unsuccessful.
2. SAME—INFRINGEMENT.
   The Sutton patent, No. 383,258, consisting of a machine for the removal of water hairs from fur skins, was infringed by defendant's machine, which embodied the essential features of the machine described in plaintiff's patent, notwithstanding the brushes in the two machines by which the fur was pushed down away from the knife are not the same.
3. SAME—VALIDITY.
   Where the claim of a patent for an unhairing machine covered a stiff sectional brush operating in a rotary motion, together with a motion upward and forward in front of the skin at the narrow edge of the bar over which the skin was passed, followed by the backward and downward motion, it could not be contended, in a suit for infringement, that the claim was void for lack of novelty, on the ground that the brushes were old, as it was not the brush that gave patentability to the claim, but the novel motion.

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

This is an appeal from an interlocutory decree sustaining the eighth claim of letters patent No. 383,258, granted May 22, 1888, to John W. Sutton for a machine for plucking furs, and adjudging said claim to be infringed by the appellant. The opinions of Judge Townsend, in the court below, will be found in (C. C.) 95 Fed. 474, and (C. C.) 108 Fed. 82. The opinion of Judge Wheeler will be found in (C. C.) 98 Fed. 297. The errors assigned present all the questions relating to the validity and infringement of the patent.

Frederic H. Betts, for appellant.

Louis C. Raegener, for appellees.

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

COXE, District Judge. The issues involved in this appeal have received unusual consideration in the circuit court. Two judges have passed upon the questions directly involved in the case at bar and two judges have granted injunctions in other actions involving similar issues. Every opportunity has been accorded all of these defendants to present their defenses and it is safe to assert that nothing bearing,

even remotely, on the controversy has been omitted. The decree at bar was entered by Judge Townsend after a reargument and a full and careful consideration of all the testimony brought into the case since the original hearing. The attack upon the patent has been persistent, uncompromising and ably conducted, the decision sustaining it has been reached after the most mature deliberation and has been acquiesced in and followed by Judges Lacombe, Wheeler and Thomas. It must be admitted, therefore, that the presumption always existing in favor of the rectitude of a decree is enhanced when the decree is entered after such thorough and patient investigation and is sustained by such a weight of authority.

The first commercially successful brush machine for unhairing pelts was made by John W. Sutton. He accomplishes the desired result, as shown in his patent, by dispensing with the blast fan and other forcing devices, theretofore in use, and by substituting therefor mechanical means by which the water hairs are removed.

The invention consists of a power machine which comprises—First: A stretcher-bar. Second: Means for stretching and intermittently feeding the skin over the stretcher-bar. Third: A fixed card above the stretcher-bar near the edge of the same for straightening the hair and fur, holding down the fine fur and permitting the stiff hairs to stand up between the teeth of the card while the skin is fed forward. Fourth: A rotary separating brush below the stretcher-bar and intermittently moved up in front of the bar. Fifth: Mechanism for moving the brush up in front of the stretcher-bar. Sixth: A rotary cutting knife and a vertically reciprocating cutting knife, working in conjunction, for cutting off the stiff hairs. Seventh: Other auxiliary devices designed to facilitate the unhairing operation.

The eighth claim, which is the only one involved, is designed to protect a combination of the first five elements as stated above. It is as follows:

"The combination of a fixed stretcher-bar, means for intermittently feeding the skin over the same, a stationary card above the stretcher-bar, a rotary separating brush below the same, and mechanism, substantially as described, whereby the rotary brush is moved upward and forward into a position in front of the stretcher-bar, substantially as set forth."

The prior art is within unusually circumscribed limits. It is conceded on all sides that nothing found there affects the patent in suit, except the English patent to Lake of 1881, the United States patent to Covert of 1884 and the machine made by Covert in 1886 and introduced in evidence as the "Covert machine."

That both Lake and Covert had in mind an automatic brush machine is evident, but it is equally clear that neither succeeded in embodying his idea in a practical working mechanism. It was not contended in the court below and it is not now contended that the Lake patent is an anticipation, but it is argued that it so limits the claim that appellant's machine is not within its provisions. The circuit court decided that the mode of operation of the machine of the Lake patent is not clear, that it does not show the essential feature of the patent in suit and does not seriously affect the meritorious invention of Sutton. In this we concur. The Lake patent is entitled to scant

consideration and contributes little to the controversy that is not described and shown more clearly in the Covert patent and machine. In view of the radical disagreement between the appellant's counsel and expert as to the way the machine operates and of the additional fact that the interpretations presented for consideration are almost as numerous as the individuals who have sought to aid the court either from the witness stand or the bar, we are unable to reach a definite and satisfactory conclusion as to the modus operandi of the Lake machine. Indeed, there is nothing in the record to show that the Lake machine could successfully unhair a pelt. No one ever saw it operate. It began and ended its uneventful career in 1881. For nearly 20 years it remained nothing but an ambiguous description of incomprehensible drawings. It emerged from oblivion solely to meet the exigencies of this litigation. Were it not for the drawings the specification might be understood and were it not for the specification the drawings might be understood; but united they form a document which demonstrates that its author was either ignorant of the English language or of the essentials of a successful unhairing machine. The Lake patent antedates both Sutton and Covert; since its date the unhairing of pelts has assumed enormous proportions and fortunes have been made in the business, and yet we are asked to believe that here was a machine which could successfully do the work and thus levy an enormous tribute upon the entire art. The inquiry is pertinent, why was it that this machine was permitted to remain unused?

Since the success of the Sutton apparatus every effort has been made by infringers to evade it by introducing specious changes of form and yet, if we are to accept the contention of the appellant, there is an operative machine in existence doing the work as well as the Sutton machine and free to any one who desires to use it. Even within the last few years, when infringers have been in desperate straits and have resorted to every conceivable device, it seems to have occurred to no one that the Lake machine might furnish the necessary means of escape. Is not the presumption almost conclusive that it was not used because it was not usable?

The appellees insist that the Lake device was a failure, that it never worked and is incapable of working. The inferences to be drawn from its desertion almost at its birth and its subsequent abandonment not only by the authors of its being but by everybody else, are strongly in corroboration of this position of the appellees.

The Covert patent and the machine built under it are unquestionably the appellant's best references. In approaching the consideration of these defenses it is important to keep in mind the distinguishing feature of the Sutton mechanism, the change from the prior art which made it successful and produced results which no other device is capable of producing. Covert had all the elements of a workable machine before him, but he did not know how to put them together. Sutton possessed this knowledge. He discarded the revolving metal plate, which Covert thought would operate to carry down the fur out of reach of the cutters, and changed the location and function of the revolving brush so that it permits the water hairs to spring up against the blades while brushing down the soft fur flat on the pelt, out of

harm's way. It is said that these changes were obvious; whether this be so or not will be considered later on; it is enough for present purposes to point out what the features are that appear for the first time in Sutton's device, for to them is due its success.

The essence of the invention is the arrangement of the rotary brush so that it will separate the fur from the undesirable stiff hairs, permit the latter to stand up on the keen edge of the stretcher-bar and brush the former down on the off side of the bar where it will not be cut or injured by the action of the knives. No previous machine had this feature. In the Covert patent an attempt is made to accomplish this result by a combination of a stationary cutter, a revolving brush and a revolving metal wiper. The cutting blade holds the fur and hair down on the "on side" of the stretcher-bar. The brush was probably intended to make a "part" on the edge of the bar and permit the stiff hairs to stand up alone, but in this it failed. It does not brush the fur out of the way of the revolving knife; this is done by the wiper, which is kept damp, and has a tendency to mat down the fur. The brush does not and cannot brush down the fur on the off side of the bar. The fur as left by the brush is almost at right angles with the position which it should assume to escape being injured by the moving blade. After the brush sweeps over the fur it is left standing in the path of the knife. The wiper is expected to save the fur from mutilation. If the wiper does not do this it is not done at all. Remove the wiper and there is no brushing over "out of reach of the cutting blades." Both of these instrumentalities were necessary to do that which Sutton does with the brush alone; and there is the further difference that the Covert brush and wiper do badly what the Sutton brush does well. On this subject Mr. Benjamin testifies:

"I have carefully experimented with a brush acting in coaction with a pressure or guard-plate as does the Covert brush G and the Sutton brush D2, and I find that it is, as matter of fact, a 'part' destroyer, just as I have said, and that instead of carrying the fur over as Covert apparently supposed it to do, it leaves the fur standing upright. Therefore I think I am quite safe in saying that it was altogether likely that Mr. Covert having made a similar experiment with the machine of his patent, found his brush to be inoperative as a separating and parting device, just as I did, and that thereupon when he came to construct the Exhibit 'Covert Machine' he abandoned the fixed knife blade acting as a pressure plate and likewise the brush and retained only the wiping contrivance f, merely substituting therefor the equivalent form of a felt covered roller. * * * The Covert machine is like a great many of the crude efforts which appear at the beginning of every art and which denote some progress although not the progress which culminates in success."

That the Covert machine would unhair pelts after a fashion is established, but it was a commercial failure and after a short and precarious existence the entire business was abandoned. Nothing was done by Covert after 1885, except, perhaps, to experiment with the "Covert machine," in the spring of 1886. But two machines were built. The first was built in 1883 and was afterwards broken up and destroyed. The second was completed in April, 1886, and is in evidence as Exhibit "Covert Machine." The total number of pelts unhaired by Covert did not exceed 200.

The rotary brushing device of the Covert machine in evidence consists of a cloth (felt or carpet) covered cylinder, which is wholly incapable of doing the work of Sutton's rotary brush. Regarding this machine Covert testifies as follows:

"It was not perfect, I cannot tell you in what respects. In a great many respects. * * * It could not do the work properly in its present state or in the state in which I left it in December, 1885. It was not in a condition to run commercially. It never was in a condition to work commercially. It was in a constant state of progress, improving like every other machine."

Of the exhibit Judge Wheeler says:

"The use of it was open; and mechanically, but not commercially successful, and was on the latter account abandoned."

This finding is fully justified by the proof. It is this abandoned failure, covered with the dust of 14 years of oblivion, which is relied on to defeat the appellees' patent. If it had been able to unhair pelts successfully it meant untold wealth to its owner. Covert knew that the 14 years referred to was a period of great activity in the unhairing business. Do not the same presumptions hold as in the case of the Lake patent? If the Covert machine were of any practical use is it conceivable that during all this period of activity it would have remained unused or that it would remain unused to-day? Covert came nearer than any one else to a successful machine. He had but one more step to take and here he became bewildered and went astray. He missed the apparently simple arrangement of the rotary brush which alone was necessary. It will not do to say that the prior art showed such a brush. Every element of the combination in controversy was unquestionably old, but there was nothing in the prior art to suggest a rotary brush working in the environment shown in the Sutton patent. There was nowhere a rotary brush making a "part" on a keen edged stretcher-bar and brushing the fur down and out of reach of the cutting knives during the moment necessary for the removal of the stiff hairs. It is the presence of this element in the combination which produces the new result and entitles its originator to protection. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. An admitted success should not be destroyed by an admitted failure.

Entertaining the opinion that the Lake and Covert machines were incapable of unhairing pelts successfully, that they were commercial failures, unrecognized by the trade and abandoned by their designers, and having reached the conclusion that Sutton was the first to discover the important change which assured a perfect machine, it follows that he is entitled to a construction of his claim which will permit him to hold what he has actually contributed to the art.

The appellant's machine is made under the Mischke patent of January 2, 1900. It has a stretcher-bar, means for feeding the skin over the bar, a stationary card above the bar, a rotary separating brush below the bar and mechanism whereby the stretcher-bar is moved towards and along the brush so that a parting is effected and the fur is brushed down on the "off side" of the bar. In short, there is in the

machine every element of the combination of the eighth claim, the first three being identical, the fourth substantially so, and the fifth being a well-known equivalent. The only difference between the two machines, so far as the combination of the claim is concerned, is that in one the brush moves and the stretcher-bar is stationary, while in the other the stretcher-bar moves and the brush is stationary. The result is identical. The "part" is made and the fur is brushed down away from the knives by the appellant's device precisely as it is by that of the appellees. Both Judge Wheeler and Judge Townsend regarded the appellant's mechanism as the equivalent of the mechanism shown in the patent. It is not easy to see how this proposition can be disputed in the light of the Lake patent, where the two methods of accomplishing the same result are spoken of as identical in principle. Lake's specification says:

"It will be readily understood that the bar B may be fixed or stationary, and the portion of the frame that carries the cutters and brushes may be caused to vibrate with the same movements as those above described, without departing from the nature of the said invention."

The appellant's expert testifies:

"I also find the same arrangement of the fixed stretcher-bar B of the Sutton patent in conjunction with the reciprocating cutter blade C and rotary cutter D is an equivalent for the movable stretcher-bar B of the English patent to Lake, taken in conjunction with the stationary cutter E' and the rotary cutter E. * * * The only difference in the action of these two brushes is that whereas, in the English patent to Lake, the stretcher-bar, with the pelt exposed on its edge, is moved along the brush, in Sutton machine the carding brush D2 moves along the edge of the stretcher-bar, which is in fixed position. This, however, is merely a change of location; the result of the actions is in both cases the same."

The one perspicuous statement which the Lake patent has contributed to this controversy is that a movable bar and fixed brush are the equivalent of a movable brush and fixed bar.

Again, it is urged that the fourth element of the combination must be limited to a rotary separating brush having soft bristles; it must be a cylindrical brush and not a sectional brush. It is said that Sutton describes and claims a brush absolutely incapable of doing the contemplated work and that if a sectional brush having stiff bristles be used, no novelty is shown because such brushes were old. In other words, the claim must be limited to a brush which "is an impossibility."

If construed to cover an operative combination it must at the same time be held to be void for lack of novelty. This proposition is somewhat startling. Whatever may be said of the claim the argument is certainly not open to the criticism that it is lacking in novelty. A new rule will be established in patent law if claims for combinations of old elements are held not to cover those elements as they were known in the prior art because the patentee may have used inappropriate language in describing them. But even if the claim were limited to the precise mechanism described and shown, infringement could not be avoided by such inconsequential changes as the appellant has introduced. It certainly cannot be seriously contended that a rotary brush ceases to be such because the bristles are put on in sections. It is true that the drawings show no longitudinal spaces between the

bristles, but there is nothing in the description indicating that the patentee intended to limit himself in this respect to a brush of any particular pattern. The specification says that the brush is made of "soft bristles" and it is immediately assumed that he meant bristles so soft as to be inoperative and that the bristles now in use on the machines of both parties are not soft but are hard, stiff bristles. The word "soft" in this connection is a relative term. The bristles used by the appellant are soft when compared with the "card clothing or teasels" of the Lake patent, and stiff when compared with the bristles of a hat brush. It is probably true that there are hard and soft bristles, respectively, regarding which no question can arise, but between these extremes there must be a wide debatable territory where the category in which a given brush is placed depends upon a variety of circumstances. Soft bristles may produce a stiff brush, depending upon their length, number and manner of setting; and hard bristles, for similar reasons, may produce a soft brush. Where shall the court look for the standard of comparison in this particular art? Where is the line of demarcation which separates the soft from the hard? Where is the evidence which permits the court to say that the appellant is not using the bristles described and shown by Sutton?

These considerations are suggested to illustrate the impracticability of permitting infringement to depend upon such attenuated distinctions. The question, however, is one that can hardly arise in the case at bar in view of the testimony of Mischke himself, which is as follows:

"I thought that hard bristle brushes were the only brushes that I could use; since then I have found out that I can also use softer brushes, and I do use different brushes, soft and hard, for different kinds of work."

Here is a direct admission of infringement even under the strictest construction advocated by appellant. But, as before stated, such a construction is not required by anything in the patent, the testimony or the law. The appellees are entitled to a fair range of equivalents and it cannot be contended that the appellant's brush is not an equivalent for the brush of the claim.

The argument that the claim is void for lack of novelty if construed to cover a stiff sectional brush, because such brushes were old, loses sight of the distinction, which we have endeavored to point out, that it is not the brush alone which gives patentability to the claim, but the novel motion of the brush, namely, the rotary motion plus the motion upward and forward in front of the skin at the narrow edge of the bar, followed by the backward and downward motion. It would be better to hold the patent invalid at the outset than to destroy it by the illiberal construction for which the appellant contends. Few patents can survive if such criticisms are allowed to prevail.

When the court is convinced that a meritorious invention has been made it should not permit infringers to evade the patent on narrow and technical grounds. "The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material or whether the omission is material, but whether what has been taken is the substance of the invention."

Proctor v. Bennis, 36 Ch. Div. 740. See, also, Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; Reece Buttonhole Co. v. Globe Buttonhole Co., 10 C. C. A. 194, 61 Fed. 959; Blanchard v. Reeves, 1 Fish. Pat. Cas. 103, Fed. Cas. No. 1,515.

We do not lose sight of the appellant's contention that the Sutton patent describes and claims an inoperative structure, that there is no proof that a machine was ever built in accordance with the patent and that the features which made the machine successful were subsequently added and are the subjects of later patents. We canot accede to these propositions; the evidence shows the direct contrary to be true.

The decree is affirmed, with costs.

WALLACE, Circuit Judge. I concur in the result reached in the prevailing opinion, because I am satisfied that the eighth claim of the Sutton patent embodies the essential parts of an unhairing machine which was an improvement upon its predecessors in the prior art, and because I am satisfied that the machine of the defendant embodies essentially the combination of the claim, and contains equivalent devices, so arranged as to perform their combined functions in substantially the same way. I do not think the machine of the Sutton patent a prodigious advance upon that of the prior Covert patent, and I think a higher degree of merit has been attributed to it than it deserves; but it was enough of an advance to be patentable and to deserve protection against an infringing machine which appropriates it.

Sutton's machine was designed for unhairing "seal skins and other furs," and was a failure for unhairing seal skins, the only kind which he specifically mentioned, and the kind which he had prominently in view. He equipped his rotating cutting blade with a carding brush, which he evidently considered an important feature of his machine, as he includes it in the general statement of the essentials of his invention; but the carding brush in operation defeated the utility of his machine. He provided his machine with a stationary card having a comb or set of teeth, the different functions of which he set forth fully in his specifications, but which was practically only useful as a pressure device, and as such no improvement upon the pressure guard of the Covert patent. The improvements upon his machine for which he obtained subsequent patents show that originally it was unnecessarily complex, and to an extent which seriously impaired its efficiency. Indeed, with the carding brush, it was not a more useful machine than Covert's.

In a patent applied for by Sutton in 1894, covering improvements on the patent in suit, No. 536,742, he states that the important feature "is the substitution for the stationary card above the stretcher-bar of a rotary brush," and he makes this statement in the specification:

"When the car which is supported back of the rotary knife in my prior machine [the carding brush with which the rotary knife is equipped] passed the edge of the stretcher-bar it drew out from under the stationary card all the fur and hair on that section of the pelt that were on the edge of the bar. Some of the fur, however, was only partly drawn out, owing to the varying thickness of the pelts, and this partly drawn out fur lay in

the form of a loop which stood out far enough to be reached by the knives, but not far enough to be drawn in by the rotary brush below the stretcher-bar, and so was cut off by the knives. With the rotary brush in place of the stationary card heretofore used by me this looped fur is drawn back and laid down before the knives reach it, so that the cutting of the fur is prevented and only the stiff hairs are removed."

It is fair to say that this later patent does not appear in the record in this action, but appears in the record of the action of the complainant against Derbohlaw; but it is a public record, and as the declaration of the patentee himself it is much more persuasive evidence than any given by the experts for the complainant to exhibit the merits of the original machine of the patent in suit. The machine seems to have had the same imperfections for which the machine of the Covert patent had been condemned. Nevertheless, upon the testimony of the record, it must be accepted as true that with changes which were soon discovered to be desirable, and which did not involve invention, the machine became a commercially successful one.

Although Sutton regarded his carding brush as an essential part of the machine, the eighth claim is for a subsidiary combination in which that device is not included, and as it was not essential in fact it need not be read into the claim by implication, especially in view of some of the other claims of which it is a constituent.

I do not think the Covert patent has been accorded the consideration which it deserves. It has never been considered by the courts below except incidentally by Judge Townsend, in the Bowsky Case (C. C.) 113 Fed. 698, in considering the question whether the omission of the carding brush in the claim of the patent in suit rendered the claim one for a nonoperative combination, and in the present case for the purpose of showing that the Lake patent did not anticipate the patent in suit. The machines built under it by Covert were operative machines, probably about as efficient as was the original Sutton machine. Covert experimented in improving his machine, but he was a man of small means, the machines were expensive, and he became discouraged. In any view which can be taken of this patent, however, it does not anticipate the eighth claim of the patent in suit, or so limit its construction as to permit the defendant to escape the charge of infringement.

CIMIOTTI UNHAIRING CO. et al. v. NEARSEAL UNHAIRING CO.

(Circuit Court of Appeals, Second Circuit. April 9, 1902.)

No. 115.

PATENTS—INFRINGEMENT—UNHAIRING MACHINES.

The Sutton patent, No. 383,258, for a machine for removing the hairs from fur skins, claim 8, *held* infringed on the ground that the mechanism of defendant's machine, while operating in a somewhat different manner, was the substantial equivalent of that described in the claim, performing the same functions, in substantially the same manner, and producing no better or different results.

Wallace, Circuit Judge, dissenting.

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

Appeal from an order granting a preliminary injunction restraining the appellant from infringing the eighth claim of letters patent No. 383,258, granted to John W. Sutton, May 22, 1888, for a machine for plucking furs.

Albert M. Austin and William A. Redding, for appellant.

Louis C. Raegener, for appellees.

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

COXE, District Judge. Infringement is the only question involved. The appellant contends that it does not infringe for two reasons, which are stated in the brief as follows:

"First. Because it has no 'mechanism substantially as described, whereby the brush is moved upward and forward into a position in front of the stretcher-bar.' Second. Because the defendant's machine does not contain a 'separating' brush."

The proof of the prior art is substantially the same as in the American Unhairing Mach. Co. Case, 115 Fed. 498. The only difference worthy of comment is that in the case at bar the worthlessness of the machine of the Lake patent is affirmatively established. It now appears that in 1881 over $2,000 was expended by parties in New York to build a working machine under the Lake specification and secure a United States patent therefor. After several months of unsuccessful effort the whole project was abandoned, the promoters not deeming the patent of sufficient value to warrant the payment of the final fee of $20. An attempt was made to unhair pelts with the machine, but holes were cut in them and they were badly damaged. Instead of receiving profits the owners of the machine had to pay damages for the skins they had spoiled.

The court has already decided that Sutton, having made the first commercially successful brush machine, is not confined to the precise mechanism described and shown and is entitled to a fair range of

equivalents. We have held that a stationary brush is the equivalent of the brush of the eighth claim, provided it accomplishes the identical result. Sutton reaches this result by the so-called "planetary motion" of the brush, Mischke by the movable stretcher bar and the appellant by a large segmental brush which is revolved upward and forward into a position in front of the stretcher-bar. The bristles come in contact with the hair and fur on the narrow edge of the bar, form a "part" there and then move downward. The action of the brush permits the stiff hair to stand up and bends down the fur on the off side of the bar away from the knives or plucking jaws. The brush is 9½ inches radius and is mounted on a rotary shaft in fixed bearings, about 5½ inches below the plane of the stretcher-bar, it works intermittently like the patented device, and before the bristles revolve and again contact with the fur, the plucking jaws have done their work in removing the stiff hairs.

The argument that the appellant does not use a "separating" brush proceeds upon lines similar to those discussed in the American Company Case. The Sutton specification contains the following description of this brush:

"The soft bristles allow the stiff hairs to stand, while the quick motion of the brush bends the soft hair in downward direction and brushes it below the stretcher-bar. The rotary separating brush is then quickly moved upward and forward and revolved in front of the skin at the edge of the stretcher-bar, so as to separate the fur from the hairs, brushing down the former and leaving the stiff hairs standing out. The rotary separating brush is then quickly moved backward and downward, so as to carry with it the separated fur."

The appellant contends that this language must be construed literally, that it describes a brush endowed with almost human attributes, a brush capable of selecting the stiff hairs with unerring judgment and permitting them to stand while at the same time it brushes down the soft fur. It requires no technical knowledge to perceive that such a brush never did exist and never can exist. The stiff hairs are much longer than the fur and it is impossible for any rotary brush, hard or soft, to reach the latter without bending down the former. Sutton knew this and every one connected with the unhairing art knew it. He intended to describe the actual operation of the brush as he saw it in practice and not some visionary and untried theory. He was dealing with an actuality, not an absurdity. He intended to say, what is the exact truth, that when the work of the brush was finished the hairs were left standing ready for the action of the knives and that the fur was brushed down away from the knives during the cutting operation. Neither the Covert brush nor any other brush of the former art did this. Not that these brushes were inherently incapable of doing the work, but because no one had perceived the necessity of locating them in such a position in relation to the stretcher-bar that they would not only form the "part" but brush down the fur on the off side of the bar.

Conceding that the description of the action of the separating brush is inaccurate there can be no doubt whatever as to the brush itself, how

it operates and what it accomplishes. This being so it is immaterial that manifestly impossible qualities are attributed to it. In any view the two brushes are equivalents. As pointed out by Judge Thomas:

"Whether the long hairs remain in place awaiting the knife, or spring into place to meet the knife, is non-essential; but that the fur shall be pressed down sufficiently long to allow the knife to meet the long hairs and escape the fur is all essential, and this is effected by the brush." (C. C.) 113 Fed. 588, 591.

Although not argued in the brief the point was made at the argument that the appellant does not have the third element of the claim, namely, "a stationary card above the stretcher bar." The appellant, in place of the card E of the patent, uses an emery covered roller which revolves so slowly that for all practical purposes it may be called stationary. This roller by stretching the pelt gives additional resiliency to the hair, permitting it to spring up while the fine fur continues to be pressed down, to some extent, as it is fed over the edge of the bar. In short, it does what the Sutton card does and in substantially the same way. It certainly performs one of the functions attributed to the card E at line 21 of the third page of the specification, as follows:

"The card is set back from the edge of the stretcher-bar to a distance a little more than one-half of the length of the fur for the purpose of holding the fur and preventing it from moving forward until the forward motion of the skin takes place."

The same considerations which induce the court to hold that the appellant's brush is an equivalent for the brush of the patent, lead to the conclusion that the appellant's emery covered roller is an equivalent for the card of the patent.

Criticism is made of the phraseology of the injunction order. It may be that in endeavoring to describe the appellant's brush and its operation, language has been employed which is unnecessarily broad. There is, however, no doubt as to the machine, the use of which the court intended to forbid. Read in the light of the opinion of the circuit court it is not easy to see how the appellant could have been misled as to the scope of the order, and certainly there can be no misconception in the future regarding its proper interpretation.

The order is affirmed, with costs.

WALLACE, Circuit Judge. I dissent from the prevailing opinion in this case, because I think the defendant's machine does not infringe the eighth claim of the patent.

It does not have the stationary card above the stretcher-bar, which is an element of the claim. The patent describes the stationary card, E, as provided with a comb or carding teeth. It is set back from the edge of the stretcher-bar, and the points of the teeth are close to, but do not touch, the skin. The specification describes its teeth as performing three functions before the pelt reaches the edge of the stretcher-bar. They straighten out the hair and fur as the skin is fed

forward, they permit the stiff hairs to stand up between the teeth, and they hold back the fur and prevent it from moving forward until the forward motion of the skin takes place. The pressure plate of the defendant's machine is not an equivalent of the stationary card of the claim. It has no comb or teeth, is not stationary, and performs the single function of the pressure plate of the Covert patent. The patent industriously makes the stationary card "substantially as described" an element of the claim.

It would seem also that the defendant's machine does not have the separating brush of the Sutton patent, or mechanism for moving it upward and forward into a position in front of the stretcher-bar. The defendant's machine has a carding brush which cards the hair and the fur, and which in operation and effect is analogous to the carding brush of Sutton, which is not an element of the eighth claim, and which he subsequently discarded because in his combination it practically destroyed the efficiency of his machine. The three operations of the Sutton separating brush are these: First, the separation of the fur from the hair; second, the making of a part; and, third, the brushing of the fur downward on the off side of the stretcher-bar. The brush of the defendant's machine does not perform these functions. The machine is so arranged that the hairs are caused momentarily to separate themselves by reason of their resiliency from the fur, and spring back to their natural position more quickly than the fur. It seems unnecessary to discuss in detail the differences between the defendant's machine and the machine covered by the eighth claim of the patent in suit, because it escapes the charge of infringement by the absence of the stationary card.

It will be observed that the order granting the preliminary injunction, which in the prevailing opinion is approved, forbids the defendant from using any unhairing machine containing a combination of five specified elements which are so described in the order as to include a machine made strictly in conformity with the Covert patent.

CIMIOTTI UNHAIRING CO. v. DERBOHLAW.

(Circuit Court of Appeals, Second Circuit. April 9, 1902.)

No. 118.

PATENTS—INFRINGEMENT—UNHAIRING MACHINES.

The Sutton patent, No. 383,258, for a machine for removing the hairs from fur skins, claim 8, is not infringed by a machine which does not contain either of the last two elements of the combination of the claim, which are a rotary separating brush, constituting the essential and novel feature of the invention, and mechanism for moving the same, nor anything which can fairly be called an equivalent therefor, but employs, instead of a brush, a metallic comb, which does not revolve, but remains in a fixed position.

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

This is an appeal from an order granting a preliminary injunction restraining the appellant from infringing the eighth claim of letters patent No. 383,258, granted to John W. Sutton, May 22, 1888, for a machine for plucking furs.

Arthur v. Briesen, for appellant.

Louis C. Raegener, for appellees.

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

COXE, District Judge. We are constrained to hold that the machine which is the real subject of this controversy and to which the testimony of the experts on both sides is confined, does not infringe the eighth claim of the Sutton patent. This conclusion is based principally upon the ground that the machine does not contain the last two elements of the combination. It has no rotary brush or anything that can be called an equivalent for such a brush, unless the doctrine of equivalents is stretched beyond all reasonable limits. In place of a rotary brush the appellant employs a stationary rake or comb, composed of two rows of teeth made of fine stiff wire one and one-fourth of an inch in length and arranged so close together that there is practically no space between them. In view of the explicit statements of the specification attributing to the action of the rotary brush the essential and novel features of the invention, and in view of the express limitation of the claim to such a brush, it seems clear that the defense of noninfringement must prevail.

The appellant does not use a brush of any kind, much less a rotary brush. He uses a fixed metallic comb which cannot revolve on its axis, for it has no axis on which to turn; in this sense, therefore, his comb is immovable. That the machine is able to unhair pelts is immaterial. The appellees cannot include such a machine in a claim for a combination two elements of which relate explicitly to a rotary separating brush.

The order is reversed.

GALVIN v. CITY OF GRAND RAPIDS.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 967.

1. PATENTS—INVENTION—IMPROVER.
   An improvement of a patented combination, which consists merely in carrying forward the old idea by a mechanical change in the form of one of the elements so as to produce a better result, but without changing the mode of operation, does not amount to patentable invention.

2. SAME—IMPROVEMENT IN VALVES.
   The Lynch patent, No. 392,961, for a valve embodying an improvement on the valve of the Galvin patent, No. 283,479, which consists merely in

changing the form of the wedges employed to close the disks, is void for lack of invention, the improvement being one involving only mechanical skill.

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

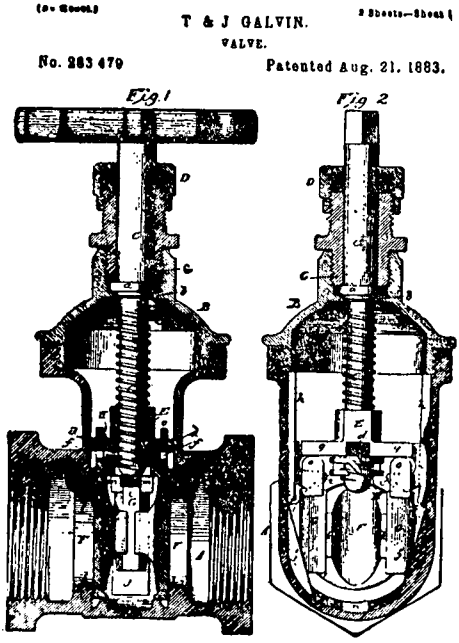
This was an appeal from a decree adjudging invalid for lack of patentable invention letters patent No. 392,961 for a valve, issued to Charles Lynch, November 13, 1888.

Franklin L. Lord and T. E. Tarsney, for appellant.

R. A. Parker, for appellee.

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

DAY, Circuit Judge. This action seeks an injunction and accounting because of alleged infringement of letters patent of the United States No. 392,961, granted November 13, 1888, to James Galvin, assignee of Charles Lynch. The patent purports to be for an improvement upon the valves covered by letters patent of the United States issued to T. and J. Galvin for a valve. To understand Lynch's improvement, it is necessary to examine the Galvin patent. The Galvin valve is described by the inventors as consisting primarily of a novel arrangement of wedges acting in a plane parallel with the faces of the gate, and serving to force the latter to their seats. The drawings accompanying this patent serve to show the construction.



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T. & J. GALVIN

VALVE

No. 283,479 Patented Aug. 21, 1883

Fig. 3

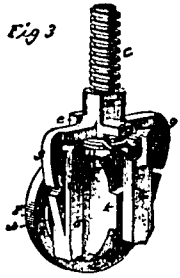
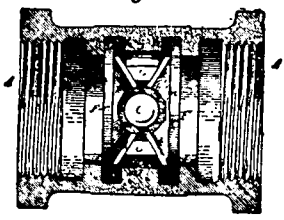


Fig. 4



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T. & J. GALVIN

VALVE

No. 283,479 Patented Aug. 21, 1883

Fig. 5

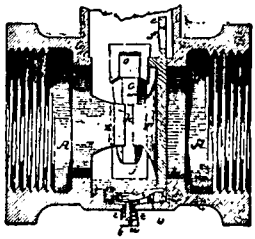
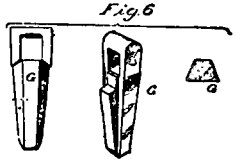


Fig. 6



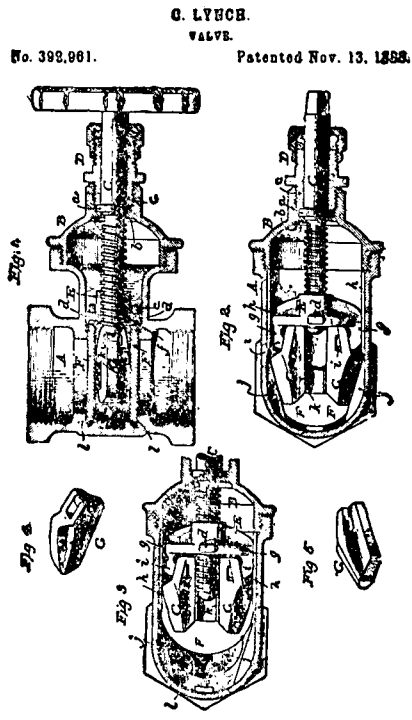
In the accompanying drawings, Fig. 1 represents a longitudinal vertical section of a valve constructed in accordance with this invention; Fig. 2, a vertical transverse section of the same; Fig. 3, a perspective view, showing the working parts of the valve, one of the disks being removed; Fig. 4, a horizontal longitudinal section through the body of the valve; Fig. 5, a sectional view, showing certain details, and in which one disk only is employed; Fig. 6, a view of one of the wedges detached.

The construction of this valve and its method of operation is described by the complainant's expert as follows:

"The valve comprises a casing of the usual substantially T-shape form; the cross of the T forming the waterway, and the stem the chamber in which the gate is withdrawn in the open position of the valve. This chamber is provided with a cap in which is swiveled the operating stem of the valve, the latter being provided with a collar engaging with shoulders in the cap, whereby endwise movement of the stem is prevented. The inwardly projecting movement of the stem is screw threaded, and engages with a correspondingly screw-threaded aperture formed in a head or nut, carrying the disks of the valve. This head or nut is provided with two pairs of oppositely projecting arms or lugs, arranged, respectively, in planes at right angles to each other, one pair of thread lugs being employed for connecting the valve disks, which latter are provided with elongated apertures, formed in upwardly extending portions thereof, and through which said lugs project,—the other pair of lugs are provided with inwardly extending portions,—forming supports for a pair of swinging wedges arranged between the inner faces of said disks. The wedges are so tapered as to have their larger diameters arranged outward, and the disks are provided with oppositely tapered bearing faces. The valve casing is provided on its sides with cams or inclines against which said wedges would be forced in the inward movement of the head, the arrangement being such that when, by the turning of the stem, the head, together with the disks and wedges carried thereby, is forced inward or across the path of the waterway, said wedges will strike against the cams on the side of the casing, which will force the wedges together or towards each other, and will thereby cause the spreading apart of the disks. The proportion of the parts is such that the gate has nearly completed its inward movement before the wedges come in contact with said cams on the casing, and in the remainder of said inward movement the operation of said cams and the spreading of the disks will be accomplished. In order that it may not be necessary for said disks to move or slide upon their seats during the operation of the wedges, the elongated slots in the upward extensions of the disks, before referred to, are provided, whereby, after said disks have come into frictional contact with the seat faces, they may remain stationary during the further movement of the head in operation of the wedges."

It is claimed that this construction was defective in operation in the fact that when the valve is placed horizontally the upper wedge has a tendency to fall by gravitation between the disks before the same were in place, thereby causing the disks to separate prematurely, and before they were in full position across the waterway. The object of the Lynch patent is to remedy this defect in the Galvin valve, and he states the object of his invention to be an improvement upon that patent, and to consist of a novel form or construction of the wedges for the purpose of preventing them from falling down from gravity. And, he says, "in all particulars except the form and proportion of the wedges, the valve may be of the same construction as set forth in the patent above referred to; but instead of making the

wedges as shown in said patent their inner face is filled out and made straight to form bearing surfaces to rest upon the inner edge of the screw stem, and prevent the wedges approaching each other, except when the nut or yoke passes sufficiently far down upon the screw to carry the wedges clear of its end, which will occur only at the time the valve disks begin to bear upon the stops which arrest their action." This is the full scope of the discovery and alleged invention of Lynch. It is accomplished by so widening the wedges or providing them with inward projections that they will bear upon the valve stem so long as that is between them, and only begin to spread the disks when the stem is withdrawn, which occurs just as the disks are in place and ready for the wedging process.



In the accompanying drawings, Fig. 1 is a longitudinal sectional view of a valve embodying the improvement; Figs. 2 and 3, transverse sections of the same, the former showing the valve closed and the latter showing it partly open; and Figs. 4 and 5, perspective views of one of the wedges.

The Lynch patent, which is illustrated by the accompanying drawings, has two claims, which are as follows:

"(1) In combination with a shell or casing, a screw stem swiveled therein, a nut or yoke threaded to receive said stem, disks carried by said yoke, and wedges also carried by said yoke and located between the disks, said wedges having their inner or opposing faces extended inward to bear against

the sides of the screw stem, whereby the wedges are prevented from approaching each other, and consequently from forcing the disks to their seats until the screw stem is withdrawn from between them.

"(2) In a valve such as shown, the combination of a casing provided with a waterway, disks to close said waterway, wedges located between the disks and adapted to force the latter to their seats, bearing faces for the wedges, and a stem of a diameter corresponding to the distance between the inner faces of the wedges when the latter are separated, said stem being arranged to enter between the wedges as the valve is opened, and to withdraw from between as the disks reach their seats, whereby the wedges are prevented from acting upon the disks before the latter reach their seats."

It is thus made evident that the advance made by Lynch upon the Galvin patent is the use in his combination of the "novel form of wedge." He has taken the wedges shown in the Galvin patent, and, by adding to them or "extending inward their opposing faces," he has wedges which are supported upon the screw stem until the withdrawal thereof permits the same to approach each other as the wedging process begins. This is practically the same operation as that of the Galvin valve when carried through successfully. The trouble with it was that the upper wedge sometimes approached the lower one prematurely, causing the wedging to begin before the valve was seated. Lynch, the patentee, was a traveling salesman for the manufacturers of the Galvin valve. While upon the road he learned of the defective operation of the valve from customers, and made or caused to be made a model embodying his invention, which he assigned to James Galvin. Is there patentable novelty in this improvement? An improvement to justify the granting of a patent, and the consequent protection of a monopoly of the right to use and sell the same, must be the result of the exercise of the inventive faculty, as distinguished from the mere advance which a mechanic skilled in the art may make. It is true that it has been said upon high authority that in the law of patents it is the last step that wins, but this stride must be made by the inventor, who originates, and not by the mechanic, who merely improves. It is also true that the cases recognize the fact that an improvement when made is not to be deprived of the protection of the law because it seems simple after it is accomplished. There are cases where many have been striving to reach a given result without success, when there comes upon the scene the inventor who solves the difficulty in a manner which makes strange the want of earlier discovery of a thing so simple, but who is, nevertheless, entitled to the protection of the patent law. But the fact remains that it is only original invention which the patent law is designed to protect. A combination of old elements, producing a new and useful result, has frequently been held patentable. In the Lynch patent there is no new element. The form of the wedge is not the subject of the patent. This form, it may be, secures a more uniformly good result, but that is the extent of the advance. The Galvin patent does not limit its combination to any specific form of wedge. Its merit consists in having the wedges so arranged that they will be operated upon by the projections in the casing so as to force the wedges inwardly and the disks apart as the same are seated. The Lynch improvement affords a better means of doing this by enlarging the wedge

so that it will be held up by the face of the screw stem. This is rather the mechanical improvement of one element of the combination than a new combination. In the specifications of the Lynch patent it is suggested that the same effect—keeping the wedges apart—may be had by providing the end of the screw stem with a block for that purpose, which, the inventor says, "I consider merely the inferior equivalent of the plan above described, and shown in the drawings." Such a device would clearly be but a mechanical improvement, more obvious perhaps than the advance under consideration. It seems to us that a mechanic skilled in the making and using of such valves, observing the difficulty, could not have failed in the normal progress of improvement to have hit upon the device shown in the Lynch patent. In the Galvin patent the wedges are not limited in construction to any particular form. It is true that at first they were made with recessed faces so as not to contact with the stem, but the proof also shows that as sometimes made they came into contact with the screw stem. On Lynch's attention being called by customers to the occasional falling of the wedge, he made or caused to be made a model showing a wedge "built out" so as to contact the stem, and thereby be kept in place until the stem was out of the way. This seems to us a change in degree only of the width of the wedge, and not to arise to the dignity of invention, although it is true that this very method was not hit upon promptly by the inventors and manufacturers of the Galvin valve. Lynch carried forward the old idea by a mechanical change in one of the elements which produced better results. Such a change is not patentable. Guidet v. Brooklyn, 105 U. S. 550, 26 L. Ed. 1106. "Structural changes of form and proportion, although they improve the operation without changing the mode of operation, and produce a much better result, although one of the same kind, are only different and better forms of embodying the same idea, and illustrate the difference between mechanical skill and inventive genius." Rob. Pat. § 238, note 1. "The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, to give patentability." Reckendorfer v. Faber, 92 U. S. 347-356, 23 L. Ed. 719. The wedge in the Lynch device performs the same function as that in the original patent. It does the same work in the same combination in effecting the result decided. By the change in form it does it better than the wedge first used. This change does not, in our judgment, amount to that invention which it is the design of the patent law to protect.

Decree affirmed.

SIMPLEX RAILWAY APPLIANCE CO. v. WANDS et al.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1902.)

No. 1,597.

1. PATENTS—CONSTRUCTION—QUESTION FOR COURT—PAROL EVIDENCE.
While the construction of a patent, and the proper limits which should be imposed on the claims, is a question for the court, to be

determined from the patent itself and the language of the claims, yet parol evidence is admissible to show the state of the art, and as bearing on the manner in which the doctrine of mechanical equivalents should be applied to aid the court in such construction.

2. SAME—PLEADING—DEMURRER.

Where a bill alleges in positive terms an interference between patents, and on demurrer to the bill and profert of the patents it does not appear that they are so dissimilar that no evidence as to the state of the art or mechanical equivalents can be introduced to show their identity, the demurrer should be overruled.

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

The Simplex Railway Appliance Company, the complainant below and the appellant in this court, is the owner of letters patent No. 565,481, issued August 11, 1896, to Waldo H. Marshall, as assignor to William V. Kelley, and is also the owner of letters patent No. 593,410, issued November 9, 1897, to Carl E. Bauer, assignor to William V. Kelley. John C. Wands and the American Steel Foundry Company, the defendants below and the appellees here, are the owners of letters patent No. 624,276, dated May 2, 1899, issued on that day to John C. Wands. All of these patents relate to improvements in car truck bolsters. The appellant exhibited its bill of complaint against the appellees under the provisions of section 4918, Rev. St. U. S., charging, in substance, that claim 1 of patent No. 624,276 (hereafter termed "Wands' Patent") was for substantially the same mechanical device as that invented by Marshall, and patented by claims 1 and 2 of patent No. 565,481 (hereafter termed the "Marshall Patent"); also that claim 9 of Wands' patent was for substantially the same mechanical device as that invented by Bauer, and patented by claim 3 of letters patent No. 593,410 (hereafter termed the "Bauer Patent"); and that said claims 1 and 9 of Wands' patent were wrongfully granted. Claims 1 and 2 of Marshall's patent are as follows: "(1) In a truss for car truck bolsters, the combination with a commercial rolled channel-iron compression member, and a flat-plate tension member bent up at each end of said compression member, and passing between the flanges of the same, of a support for separating said compression and tension members at a point between their ends, arranged and combined substantially as shown and described. (2) In a bolster for car trucks, the combination with a commercial rolled channel-iron compression member of a flat-plate tension member and a king post, said tension member being bent up at each end of said compression member, after passing between the flanges of the same, in a manner substantially as shown and described." Claim 1 of Wands' patent is as follows: "(1) The combination with a commercially made compression member of channel-beam form of a tension member bent at its ends to engage the ends of the channel-beam compression member and a strut, substantially as described." Claim No. 3 of the Bauer patent is as follows: "(3) In a bolster, the combination with its compression member, tension member, and middle support of a strengthening piece arranged between the end of the compression member and the bent-up portion of the tension member, and having its ends projecting out over the flanges of said compression member, substantially as described." Claim No. 9 of Wands' patent, which is alleged to cover the same mechanical device as claim 3 of Bauer's patent, is as follows: "(9) The combination with the compression member of head blocks arranged at the ends thereof, and which extend outwardly beyond said compression member, a tension member whose ends are bent around said head blocks, and thence extend inwardly and overlap the ends of the compression member, and rivets for securing the ends of the tension and compression members together, substantially as described." Cuts taken from the specifications of the several patents appear on the following pages. Fig. 1 represents a section of the Marshall device. Fig. 2 represents a

section of a car bolster made in accordance with the Bauer patent. Figs. 3 and 4 represent sections of a car bolster made in accordance with the specification of Wands' patent. The defendants below, who are the appellees here, demurred to the bill for the reason, in substance, that it appeared from the face of the bill and an inspection of the several patents, of which profert was made, that claims 1 and 9 of Wands' patent, which was junior in point of date to the other patents owned by the complainant, did not cover the same mechanical device as the Marshall and Bauer patents, and that there was no interference, as alleged in the bill. The trial court adopted that view, and dismissed the bill. The complainant has appealed from that order.

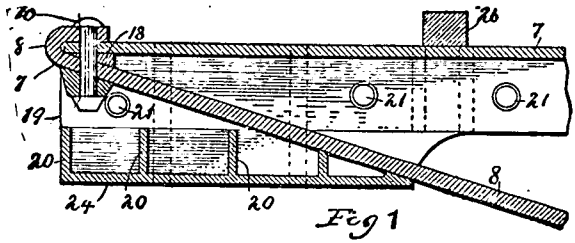


Fig 1

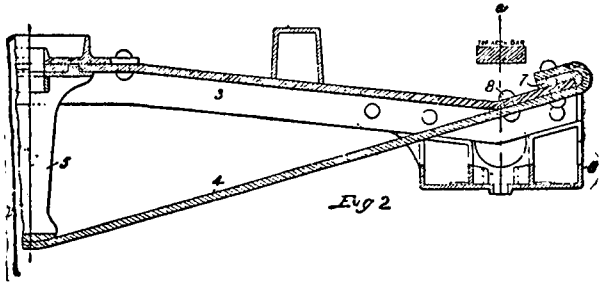


Fig 2

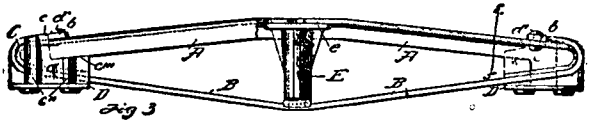
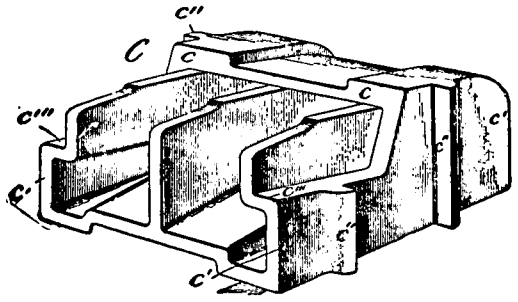


Fig 3

Fig 4



Charles C. Linthicum and Otto R. Barnett (George S. Grover, Charles K. Offield, Henry S. Towle, and James H. Raymond, on the brief), for appellant.

Paul Bakewell and Frederick R. Cornwall, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

Counsel for the respective parties agree upon the following propositions, which are well established by authority, namely: That upon a bill of this character, filed under section 4918 of the Revised Statutes of the United States, the first question to be determined is whether the patents involved are interfering patents, since the right to relief is grounded on the fact of interference; that patents do not interfere, within the meaning of the patent law, unless the claims of the respective patents, or some of them, cover the same mechanical device or combination; that it is the claim of a patent, and the claim only, when properly construed, which determines the thing patented; and that it may happen that the structure described in one patent will infringe the claims of another patent, although the patents are not interfering patents, within the meaning of the statute. Gold & Silver Ore Separating Co. v. United States Disintegrating Ore Co., 6 Blatchf. 307, 10 Fed. Cas. 539 (No. 5,508); Manufacturing Co. v. Craig (C. C.) 49 Fed. 370, and cases there cited.

The important question in the case, and the one concerning which there is a real controversy, is whether a court can or ought to say, as a matter of law, on an inspection of the Marshall, Bauer, and Wands patents, that the claims of those patents, quoted above, do not cover the same invention, and that there is and can be no interference between the patents, although the bill of complaint contains an express averment to the contrary. The invention or combination covered by the claims is to be ascertained, as a matter of course, by a proper construction thereof, and it may be conceded to be the province of the court to construe the claims, giving to each its due scope and effect. But when the court enters upon the discharge of that duty it is not necessarily limited to the language of the claims and specifications, but may take into consideration certain extraneous facts. For example, it may have recourse to the testimony of experts to ascertain the meaning of technical words or phrases, if any such are employed, or to ascertain the difference between or the identity of the devices, or to obtain a better understanding of a drawing or model or the character and operations of the devices; and, generally, a court may avail itself of the testimony of experts to acquire a knowledge of all the facts pertaining to an art to which a given patent belongs, and a full understanding of the progress that had been made therein at the time the patent was issued. Winans v. Railroad Co., 21 How. 88, 100, 101, 16 L. Ed. 68. Such testimony frequently has an important influence upon the construction of the claims of a patent, either enlarging or restricting their scope. The adjudged cases afford many illustrations of the fact that proof of the state of the art has an important bearing upon the manner in which the doctrine of mechanical equiva-

lents is applied, and also in determining to what extent, if any, limitations should be placed upon the mere wording of a claim. McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Machine Co. v. Lancaster, 129 U. S. 263, 274, 9 Sup. Ct. 299, 32 L. Ed. 715; Miller v. Manufacturing Co., 151 U. S. 186, 187, 14 Sup. Ct. 310, 38 L. Ed. 121; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 561, 106 Fed. 693; Railway Co. v. Godehard, 19 U. S. App. 360, 400, 8 C. C. A. 265, 59 Fed. 776; McClain v Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Walk. Pat. (3d Ed.) § 184.

Moreover, it is a well-known fact that proceedings taken in the patent office, while an application for a patent is under consideration, sometimes have much effect in determining the scope which shall be given to the claims of a patent. Sutter v. Robinson, 119 U. S. 530, 7 Sup. Ct. 376, 30 L. Ed. 492; Sargent v. Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67; Brill v. Car Co., 33 C. C. A. 213, 90 Fed. 666. While it is true, therefore, that it is the function of the court to construe patents as well as all other written instruments, yet it cannot be gainsaid that many facts dehors the patent, of which the court cannot take judicial notice, may with great propriety be proven to enable it to reach a right conclusion. In the construction of any contract a court is generally entitled to be advised, by testimony, of the situation and the relation of the parties thereto when it was executed, to enable it to decide with more certainty what was the real purpose and intent of the agreement. It is sometimes said that a court should aim to place itself, as nearly as possible, in the situation which the parties to an agreement occupied when it was entered into, and, if this is so as respects the construction of ordinary written instruments, with much greater truth may it be said that, in construing the claims of a patent which deals with mechanical devices with which courts are often unfamiliar, they ought to be very sure, not only that they have a clear comprehension of the language and meaning of the claims and the operation of the patented device, but that they are well advised of the state of the particular art at the time the patent was granted. Evidence which throws any light on this subject ought not to be excluded when the scope to be given to the claims of a patent is the subject for consideration, except in those cases, which may sometimes arise, where the device is very simple and easily comprehended, and the art to which it relates is well understood, so that the introduction of evidence of the kind above indicated would be a work of supererogation. In most cases, therefore, the question whether patents interfere or contain interfering claims is a mixed question of law and fact, because the parties have the right to introduce testimony to enable the court to correctly determine what mechanical device or contrivance is in fact comprehended by the claims, and what are the legal rights thereby granted.

Turning to the Marshall and Wands patents, it will be observed that there is a marked similarity in the mechanical structures described in the two patents. Each is a car bolster consisting fundamentally of a truss. Each has a compression member, a tension member, and a support intermediate the ends of the compression member, in the

Marshall patent termed a "support" and a "king post," and in the Wands patent a "strut." In each structure the tension member bends around the ends of the compression member so as to receive the thrust of the compression member and relieve the bolts, by which they are held together, of the shearing force that would otherwise be exerted. It is true that in Wands' patent head blocks are provided, against which the ends of the compression member abut, and around which the ends of the tension member are bent before they are bolted to the compression member; but it will be observed that, with the improvement added by Bauer to the Marshall structure as at first conceived, "strengthening pieces," so termed (vide Fig. 2), were placed on each end of the compression member so as to overlap them, against the shoulders of which the ends of the compression member likewise abut, and around which the ends of the tension member are bent, and then bolted to the compression member. It requires but a glance to see that there is a marked resemblance between these structures. Indeed, the resemblance is such as to excite grave doubts, on a superficial examination, whether the alleged conflicting claims are consistent and each valid. The lower court held that claim 1 of Wands' patent does not conflict with claims 1 and 2 of the Marshall patent, because Marshall expressly limits himself to a flat tension member, which passes, as it nears the ends of the compression member, between the flanges of the latter member, which is made of channel iron, while Wands does not thus limit his claim. But, if we look carefully at Wands' specification and drawings, it will be seen that his head block has, on the underside, a depression or channel along which the tension member passes, and that this groove or channel holds the tension member in place precisely as the flanges of the compression member hold it in the Marshall structure. Now, it may well be that the state of the art to which this patent appertains, when fully developed, will prove to be such that Wands must be limited to the precise construction indicated in his specifications and drawings, notwithstanding the broad language of his claim, especially as his claim contains the words "substantially as described." And in that event the further inquiry would be pertinent, whether the two combinations claimed and patented, the one by Marshall and the other by Wands, are not substantially the same. It is manifest that Wands, in constructing his car bolster, has merely cut off a section of the compression member and inverted it, and termed it a head block, making a channel for the tension member on the bottom of the head block, instead of utilizing the flanges of the compression member for such a channel.

In his comparison of claim 3 of the Bauer patent with claim 9 of the Wands patent, the learned trial judge was forced to conclude that by the use of the head block Wands attained the same result which Bauer attained by his "strengthening piece," and that conclusion is inevitable, since the object of both patentees appears to have been to prevent the end of the compression member from splitting or giving way under an excessive load, and at the same time to lessen somewhat the convexity of the tension member where it is bent to engage the ends of the compression member. The lower court was of the

opinion, however, that the means employed by Wands to attain the desired result were essentially different from those employed by Bauer, and in that respect it called attention to the fact that Bauer placed his "strengthening piece," which is wider than the web of the compression member and extends over the flanges, on the top thereof, and also constructed it with a shoulder overlapping the end of the compression member to receive its thrust, while in Wands' device the compression member rests on the top of the head block and abuts against its shoulder. Attention is also called to the fact that the compression member rests on three vertical ribs in the head block instead of upon a solid block (vide Fig. 4). This constitutes the sole difference in the means employed to attain the same object. It will be observed, however, that claim 9 of Wands' patent does not specify a head block having three vertical ribs, and if the head block was made solid it would respond to the language of the claim as well as if made with ribs. Counsel for the appellees further lay some stress on the fact that claim 9 of Wands' patent makes no mention of a "middle support" to the bolster, such as Bauer specifies in his third claim, but as the bolster, to which Wands likewise refers, is fundamentally a truss, it would seem that a "middle support" for the truss, which he terms a "strut," ought to be implied. The result is that if Wands' head block, in view of the state of the art and the functions which it performs, be regarded as the mechanical equivalent of Bauer's "strengthening piece," the two claims now under consideration cover substantially the same combination, and hence interfere.

We would not be understood, however, as expressing a definite opinion upon the question whether the claims of the patents in question do in fact interfere. That is a question which does not arise, necessarily, on this appeal, because the case passed off on a demurrer to the bill which expressly alleged interference. Its contention in this court is that by sustaining the demurrer and denying its right to introduce evidence as respects the state of the art and other facts which it deemed material to a correct construction of the claims of the patents the trial court erred. For reasons which have been sufficiently indicated by what has already been said, we feel constrained to concur in that view. The case, in our judgment, does not belong to the class of cases where, notwithstanding an express allegation that certain claims of patents interfere, a trial court can say, on an inspection of the patents, that it is impossible to sustain the allegation by any evidence which can be adduced, and unless such was the case the demurrer should have been overruled. The averment that certain claims of Wands' patent cover substantially the same inventions previously patented to Marshall and Bauer was a statement of an ultimate conclusion of fact, such as is permissible in good pleading, and in the present instance the complainant was entitled to substantiate the charge, if it could, by other evidence besides the patents of which it made profert.

The decree below, dismissing the bill of complaint, is accordingly reversed, and the cause is remanded to the circuit court, with directions to overrule the demurrer to the bill.

CIMIOTTI UNHAIRING CO. et al. v. COMSTOCK UNHAIRING CO. et al.

(Circuit Court, S. D. New York. April 10, 1902.)

1. PATENTS—ANTICIPATING PATENT—OBSCURITY OF LANGUAGE.
A patent so obscure in its terminology that two conflicting theories as to its meaning may be deduced therefrom and supported by equally plausible arguments is too indefinite to be utilized as an anticipation.
2. SAME—INFRINGEMENT—UNHAIRING MACHINE.
The Sutton patent, No. 383,258, for a machine for removing the hairs from fur skins, was not anticipated by the Lake English patent, and is valid. Also *held* infringed.

In Equity. Suit for infringement of letters patent No. 383,258, issued to John W. Sutton, May 22, 1888, for a machine for removing the hairs from fur skins. On final hearing.

Louis C. Raegener, for complainants.
Marcellus Bailey, for defendants.

COXE, District Judge. The circuit court of appeals has passed upon every issue presented by this record upon facts which differ in no essential particular. An extended discussion of the questions debated at bar is therefore unnecessary.

The only new evidence is the French patent to Lambert & Kokesch, the patent to Lake being the English patent for the same machine. It is conceded that the drawings of the two patents are identical and the description substantially similar. The differences are due mainly to the translation from the one language to the other; they are insignificant and indeterminate and fail to add anything of importance to the controversy. If the English patent does not constitute a defense to the Sutton patent it is manifest that the French patent does not do so. The two will hereafter be referred to as the Lake patent.

It is now argued for the first time in the history of the litigation over the Sutton patent that the Lake patent is a complete anticipation; that the experts for complainants and defendants have heretofore misunderstood the patent and that now for the first time ambiguities which in the past have puzzled witnesses and counsel are made clear. That the patent has not been understood in the past will probably be conceded on both sides. Whether all doubt is now removed is a question upon which there are still two opinions.

Indeed, the new theory as to the path of travel of the stretcher-bar in a curve "concave to the roll" injects an additional complication into the controversy and renders uncertain propositions upon which the experts up to this time were agreed. It is enough that it is impossible to formulate any definite explanation of the working of the Lake machine. A document so obscure in its terminology that two conflicting theories may be deduced therefrom and supported by equally plausible arguments is too indefinite to be utilized as an anticipation. Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Cohn v. Corset Co., 93 U. S. 366, 370, 23 L. Ed. 907; Brill v. Railroad Co. (C. C.) 103 Fed. 289.

It is admitted that the machine as illustrated in the drawings will not operate as the expert for defendants insists it is intended to operate, but it is argued that a mechanic reading the specification would, in 1881, have been able to construct an operative machine. One answer, and a sufficient one, to this contention is that the inventors themselves, with plenty of money at their disposal and every incentive to make the machine work, were unable to do so. If the inventors could not succeed it is safe to assume that a mere mechanic would fail also.

The fact that Mr. Shaw, a lawyer, was unable to describe the details of the machine is immaterial. He and his associate had invested over $2,000 in an effort to exploit the Lake machine. The work was done under the personal supervision of Mr. Lambert, one of the inventors, every opportunity was given to make the enterprise a success, but it proved a disastrous failure. The suggestion that this may have been some other machine than that of the Lake patent because a lawyer who saw it 20 years ago is unable to describe it in detail seems to require too extended an excursion into the domain of conjecture. The presumption is conclusive that Lambert & Kokesch were trying to make the Lambert & Kokesch machine operate and not some other machine. It is also manifest, if the machine they described in the Lake specification was capable of doing the work, that they would not have spent $2,000 in constructing a machine which, after all their labor upon it, was incapable of doing the work. If the change necessary to make the Lake machine operate successfully was so simple and obvious those men certainly would have known enough to make it.

The defendants' machine contains each element of the combination of the eighth claim of the patent in suit, or a well-known equivalent therefor. It has the stretcher-bar and means for stretching and intermittently feeding the skin over the stretcher-bar. This is admitted. It has an equivalent for the third element of the claim, namely, "a fixed card above the stretcher-bar." This proposition if not admitted is, certainly, not seriously disputed. Indeed, in defendants' brief "a stationary card" and "a pressure plate or guard device" are spoken of as synonymous terms and are treated as well-recognized equivalents.

That the defendants have appropriated the last two elements of the eighth claim was, in effect, decided by the circuit court of appeals in American Unhairing Mach. Co. Case, 115 Fed. 498. In the defendants' machine the rotary brush is stationary, and the stretcher-bar moves back and forth from the brush to the cutters. This is precisely the action of the machine held to infringe in the case referred to. In short, every question mooted regarding infringement has already been passed upon adversely to the defendants by the decisions of the circuit court of appeals.

The complainants are entitled to the usual decree.

JOHN R. WILLIAMS CO. et al. v. MILLER, DU BRUL & PETERS MFG. CO.

(Circuit Court, S. D. New York. February 11, 1902.)

1. PATENT—TERM—LIMITATION BY FOREIGN PATENT.
The fact that an applicant for a patent assigned his right thereto to another before applying for and obtaining a foreign patent for the invention, which was issued before the one in this country, will not prevent the latter from being limited to the term of the foreign patent under Rev. St. § 4887, as such section stood in 1885.

2. SAME—MACHINE FOR CUTTING CIGAR WRAPPERS.
The Hammerstein patent, No. 315,408, for a machine for cutting cigar wrappers, expired with the British patent, No. 6,311, granted February 19, 1884, to the inventor for the same invention, to run for 14 years.

In Equity. Suit for infringement of letters patent No. 315,408, issued April 7, 1885, to Oscar Hammerstein, for a machine for cutting cigar wrappers. On rehearing.

For former opinions, see 107 Fed. 290; 108 Fed. 967.

Charles C. Gill, for plaintiffs.

E. M. Marble and E. E. Wood, for defendant.

WHEELER, District Judge. The term of patent No. 315,408, dated April 7, 1885, and granted to Oscar Hammerstein, assignor to William Eggert, trustee, is affected by British patent No. 6,311, dated February 19, 1884, and granted to him for the same invention. He had made application for this patent July 10, 1883, and assigned his right to it to Malvina Hammerstein, July 17, 1883; and this right was outstanding at the time when the British patent was applied for, and when it was granted. This outstanding right is relied upon to defeat the effect of the British patent upon the term of this one. The statute then in full force provided (section 4887, Rev. St.) that:

"Every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

A patent granted under this statute would be limited in time to the expiration of a previous foreign patent, as if that was written in for its term, although on its face it should appear to be for 17 years. Refrigerating Co. v. Hammond, 129 U. S. 151, 9 Sup. Ct. 225, 32 L. Ed. 645. The outstanding assignment was of a mere equitable title to such a patent as the assignor might obtain, which turned out to be one that would expire with the British patent. No case is cited or known that holds this statute applicable only to an inventor who has always kept the whole title, legal or equitable, to his invention. The strongest one in favor of the plaintiff, and most relied upon, is Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. That merely holds that an intermeddler claiming the invention adversely to the inventor could not limit the true inventor's United States patent by obtaining a foreign patent. The change in the law since does not authorize any

change in the construction of the law as it existed before on account of any supposed hardship of the former law.

Bill dismissed as to this patent.

AUSTRALIAN KNITTING CO. v. WRIGHT'S HEALTH UNDERWEAR CO.

(Circuit Court, S. D. New York. February 19, 1902.)

PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Kinsey patent, No. 424,314, for a burr wheel for knitting machines, *held* not anticipated, valid, and infringed.

In Equity. Suit for infringement of letters patent No. 424,314, for a burr wheel for knitting machines, granted to Peter S. Kinsey March 25, 1890. On final hearing.

W. P. Preble, for plaintiff.

George A. Mosher, for defendant.

WHEELER, District Judge. This suit is brought for alleged infringement of patent No. 424,314, dated March 25, 1890, and granted to Peter S. Kinsey, assignor to the plaintiff, for a burr wheel for knitting machines. The improvement is in having cams on the sides of the blades for closing the barbs of the needles to cast off stitches in making particular patterns of goods, instead of having separate blocks between the blades for that purpose. The claim is for:

"The combination, with a hub having obliquely extended slots upon its periphery, and provided with a recess in its upper face, of blades made to enter said peripheral slots and said recess in the hub top, certain of said blades each having thickened portions or enlargements upon one of its sides, and a cap constructed to be passed down over the hub and upper ends of the blades and secured to the hub, substantially in the manner as and for the purposes set forth."

The defenses relied upon in the brief and argument are, principally, patent No. 240,008, dated April 12, 1881, and granted to Swits Conde, for a burr for knitting machines, which is said to show such a cam on some of the blades for that purpose; lack of adequate proof of infringement; and laches.

The Conde patent is said to show some blades with such cams upon them, by the drawings. There are drawings of blades which might, if set out by corresponding description, be understood to show such cams upon, and as a part of, them. But the description says, "One of said burrs being of the ordinary construction, and filling every needle with thread, while the other has a certain number of the interstices between its thread-lifting teeth or wings filled with a block which presses against and closes the beards of certain needles, and thus causes its thread to skip over the said needles, carrying the single thread applied thereto by the other aforesaid burr"; and the claim includes "the filling blocks, c, arranged between the said two series of wings." What are shown in the description and claim are interstices filled with blocks between, not a part of, the blades or wings. What the patent shows is what it sets forth as a whole; and what appears

on a drawing that might be what is described, or something else, would well be taken to be what is described, especially as that was a thing well known. This invention cannot, therefore, be justly said to be described or shown in that patent. The date of use shown by the parol evidence is not sufficiently clear as having been before Kinsey's invention to overthrow a patent, and appears to have been properly omitted from the defendant's points.

The proof of infringement is a stipulation in the record that the defendant "has at one time since the date of the patent in suit, and prior to the filing of this bill, used burrs or loop wheels like the one offered in evidence." This is said not to show use of the combination of the claim; but as the pith of the invention is the use of blades with the cam, or enlargement, as the claim calls it, on one of their sides, in a hub, the use admitted is considered to be the hub of the patent, or its equivalent, for the purposes of the patent.

The suit is brought within the life of the patent, according to the plaintiff's right; and there is nothing showing that this right has been lost, or that this exercise of it is too inequitable to be allowed.

Decree for plaintiff.

BOWKER v. HILL.[1]

(Circuit Court, D. Maine. September 5, 1879.)

No. 58.

1. CORPORATIONS—DISSOLUTION—ACTIONS AGAINST OFFICERS AND STOCKHOLDERS—PARTIES.

   Trustees of a dissolved corporation can only pursue such claims against third persons, such as its officers and stockholders, as are of a general nature, accruing to all the creditors,—as, for example, general assessments on the shares of stock, or at least such as accrue to a distinct class of creditors; and if the remedy depends on the equities of particular creditors, or upon the date when their claims were contracted, they must necessarily enforce their own rights.

2. SAME—RECOVERY OF DIVIDENDS IMPROPERLY PAID—JURISDICTION OF FEDERAL COURTS.

   Rev. St. Me. 1857, c. 46, § 34, giving judgment creditors of a corporation a bill in equity in the supreme judicial court of the state to reach dividends improperly paid, was not intended to exclude the jurisdiction of a federal circuit court, where the allegation as to the citizenship of the parties was sufficient to give the latter jurisdiction.

3. SAME—LIMITATIONS.

   The cause of action given by Rev. St. Me. 1857, c. 46, § 34, does not accrue until execution against the corporation is returned nulla bona, and limitations do not run until such time.

In Equity.

Bill in equity alleging that the Piscataqua Fire & Marine Insurance Company was duly incorporated by certain statutes of Maine, originally as a mutual company; that afterwards a provision was made for a guaranty capital; that in 1865 the plaintiff insured his steamer Russia with the com-

[1] This case has not been heretofore reported, and is now published in this series, so as to include therein all circuit and district court cases which have been inadvertently omitted from the Federal Reporter or the Federal

pany in the sum of $5,000, and that the vessel was totally lost, of which due notice and proof was given to the company; that the loss has not been paid; that in 1866 the plaintiff brought an action against the company, and April 4, 1868, recovered judgment for $5,016.44 debt and $82.77 costs; that execution issued thereon April 8, 1868, and was placed in the hands of a deputy sheriff, who on the 8th of July, 1868, returned the same, wholly unsatisfied, and no part thereof has been paid; that by an act of the legislature of Maine approved February 28, 1867, the charter of the company was surrendered, and trustees were afterwards appointed by the supreme judicial court to wind up the affairs of the company, but that the trustees had no funds with which to pay the plaintiff's judgment. The bill charged that the company, before its dissolution, made an unlawful distribution of its property to the defendant Hill, who was a stockholder and treasurer of said company, and paid him dividends on his stock, when the company, to his knowledge, was insolvent; that in 1866, the company being insolvent to the knowledge of the defendant, he surrendered and canceled a large number of shares held by him, and received instead thereof property of the company specifically described in the bill; that in the same year the company transferred to the defendant choses in action and assets belonging to them (specifically described) to the value of about $94,000, as security for a debt of $59,000; and that he has received from said assets more than enough to pay his debt. The prayer was for satisfaction of the plaintiff's judgment from the property so divided, transferred and delivered to said Hill, or from the proceeds thereof, and for general relief. The trustees of the company were made parties to the bill. The trustees answered, admitting their appointment, and that there were no assets in their hands with which to satisfy the plaintiff's judgment, and, as to the other matters, averred their ignorance. The defendant Hill demurred.

Edwin B. Smith and William L. Putnam, for complainant.
Cornelius Sweetser and John Q. Scamman, for respondents.
Drummond & Scamman and Rufus Tapley, for trustees.

LOWELL, District Judge. This bill is founded on the general equity of creditors to reach and apply dividends made to stockholders when the corporation is insolvent, on the equity to reach corporate assets fraudulently concealed, and on Rev. St. Me. 1857, c. 46, § 34, giving a judgment creditor a bill in equity in the supreme judicial court to reach dividends improperly paid. In so far as the allegations are that the defendant Hill is indebted to the corporation itself, I am much inclined to think the objection is well taken that the trustees are the only persons who can bring him to an account. It has been held by many respectable courts that, if the trustees or assignees of a bankrupt will not interpose, the creditors themselves may file a bill. But this notion has been entirely exploded in England, and at the last session of the supreme court the English law was followed. It is undoubtedly a sound proposition that the assignees have the sole right to prosecute demands against third persons; and, if they will not do so, the remedy is either to have them removed, or to obtain leave to file a bill in their name. Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Rochfort v. Battersby, 2 H. L. Cas. 388; Beck v. Parker, 65 Pa. 262, 3 Am. Rep. 625; Cook v. Rogers, 31 Mich. 391; Tanqueray v. Bowles, L. R. 14 Eq. 151; Collins v. Burton, 4 De Gex & J. 612. The creditors may sometimes bring a bill against the assignees and others to compel the assignees to get in assets due from the other defendants. Davis v. Newton, 6 Metc. (Mass.) 537. But when it comes to special remedies against third persons, such as

the officers and stockholders of a company, the assignees can only pursue those claims which are of a general nature,—that is, which accrue to all the creditors (as, for example, general assessments on the shares, or at least such as accrue to a distinct class of creditors); and therefore if the recovery depends on the equities of particular creditors, or upon the date when their debts were contracted, etc., those creditors must necessarily enforce their own special rights. See Wall v. Balcom, 9 Gray, 92; Ex parte Sheen, 6 Ch. Div. 235; Bristol v. Sanford, 12 Blatchf. 341, Fed. Cas. No. 1,893; Dutcher v. Bank, 12 Blatchf. 435, Fed. Cas. No. 4,203.

In the case of this corporation, the act of 1867, accepting the surrender of the charter, was not as broad as many bankrupt laws are, and it expressly reserved and excepted special remedies against officers and stockholders; and the supreme judicial court dismissed a bill brought by the trustees against this defendant to recover some of the quasi assets for which this suit is instituted, on the very ground that the rights of creditors against stockholders and officers were untouched by the surrender, and must be prosecuted by the creditors themselves. Insurance Co. v. Hill, 60 Me. 178. Enough in value of special assets of this character are shown by the bill to save it from being demurrable on this ground. That the defendant's remedies at law are inadequate is shown by the allegations of bill, and by Bowker v. Hill, Id. 172.

I have no doubt that this court has jurisdiction of a bill under Rev. St. Me. 1857, c. 46, § 34, when the allegation of the citizenship of the parties is sufficient. That statute gives a remedy by bill, and very properly fixes the tribunal; but it does not intend to say that the United States, or a citizen of another state, may not sue in the circuit court.

The question whether the bill was filed too late depends upon whether the cause of action accrued before the return of nulla bona. This is the question, because the suggestion of laches, which might, in equity, shorten the time of limitation, is met by the proof which is contained in the reports of the state court, that the plaintiff and the trustees for him and others tried to attain the result by a different mode of proceeding. Bowker v. Hill, 60 Me. 172; Insurance Co. v. Hill, Id. 178. The statute of limitations of the state, though not binding proprio vigore upon this court sitting in equity (that is, though not positively adopted by any statute of the United States, as it has been adopted in respect to actions at law), is yet equally binding upon the conscience of the court in ordinary suits between party and party. Bank v. Daniel, 12 Pet. 32, 9 L. Ed. 989; Knox v. Gye, L. R. 5 H. L. 656.

I find that the plaintiff had the right to issue execution and try to levy it before bringing this suit, and therefore his bill is seasonable. The distinctions between those cases in which an execution must be sued out, simply, and those in which it must be both sued out and returned unsatisfied, before bill is filed, may be somewhat nice, in some jurisdictions. I understand the general rule in Maine to be that the execution must be returned unsatisfied before a bill will lie. Webster v. Clark, 25 Me. 313; Webster v. Withey, Id.

326; Griffin v. Nitcher, 57 Me. 270; Howe v. Whitney, 66 Me. 17. And more especially I find that this statute is to be so construed. The original act (St. 1848, c. 64, § 2) expressly required the bill to contain an allegation that the judgment remained unsatisfied by reason of the plaintiff's inability to find corporate property wherewith to satisfy the same. The Revised Statutes are much more condensed in phraseology, but there is no reason to suppose that the law was intended to be changed; and, as the remedy is given only to judgment creditors, I apprehend the section to mean that the judgments must remain unsatisfied, notwithstanding an attempt to reach corporate property. It is true that the corporate property was in the possession and charge of the trustees, and that the form of trying to levy an execution became a mere form; but, considering the strictness with which statutory forms are often required to be followed, I am by no means sure that if this form had been neglected the defendant might not have objected, with effect, that the plaintiff had not brought himself within the category of the statute. In the case of McKay v. Hill (decided in this court by Shepley and Fox, JJ., in Sept. term, 1870) Fed. Cas. No. 8,845, I find, by a copy of the able and careful opinion of Judge Fox, that the court passed upon some of the principal points of this case, and held this defendant liable to the then plaintiff under another section of the same statute, giving an action at law to judgment creditors in certain cases. There all the forms of the statute appear to have been followed, and the court sustained the action; deciding, among other things, that this chapter of the Revised Statutes was a re-enactment, and not intended as an alteration, of the act of 1848.

It does not appear by the bill that there are any other judgment creditors of the corporation, and on demurrer the court is not bound to take that fact for granted, and therefore it is not necessary now to decide whether the decree must be for the benefit of all. See Ogilvie v. Insurance Co., 22 How. 380, 16 L. Ed. 349; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Hendricks v. Robinson, 2 Johns. Ch. 283; and other cases cited by the plaintiff.

My order, therefore, must be: Demurrer overruled.

WALSH v. ERWIN.

(Circuit Court, N. D. California. April 1, 1902.)

No. 12,206.

1. EXECUTION—SALE—REDEMPTION.

Code Civ. Proc. Cal. § 703, requires the sheriff, after having made an execution sale, to receive the amount due on the judgment, with the statutory interest, and execute and deliver to the debtor an acknowledged certificate of redemption, which, when filed of record, is declared to effect a termination of the sale, and restores the debtor to his estate in the property sold. *Held*, that where a judgment debtor, within the time for redemption, tendered to the sheriff the amount demanded by him for redemption, and received and filed the certificate of redemption, the redemption was effectual, notwithstanding an error of the sheriff in

computing the amount, the debtor having acted in good faith and paid the additional sum due on demand to the sheriff.[1]

2. MINES AND MINING—LOCATION OF CLAIMS—DESCRIPTION.

Rev. St. § 2324, provides that the location of a mining claim must be distinctly marked on the ground, so that its boundaries can be readily traced, and that all records of such claim shall contain such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. *Held*, that a claim, marked by a blazed tree at the point where the notice of location was posted, and on one of the boundary lines, and three corner stakes placed at stated distances from the notice and from each other, and the distance of the lines leading to and from a corner, at which no stake was placed, was accurately stated, was sufficiently designated to enable a surveyor to ascertain the exact limits of the location, and was therefore sufficient.

In Equity.

A. H. Ricketts (S. C. Denson, of counsel), for complainant.
Goodwin & Webb and L. N. Peter, for respondent.

MORROW, Circuit Judge. This is a suit to determine the right of possession to certain placer mining ground in Plumas county, Cal., claimed by the complainant as the Cascade placer claim, and included in the respondent's application for United States patent upon the Castle Hill placer claim. The respective counsel have entered into a stipulation of facts herein, substantially as follows: The suit was instituted by James T. Walsh, a citizen of Minnesota, against James P. Welch, a citizen of California. Upon the death of the respondent, R. L. Erwin, as administrator of the estate of said Welch, and also a citizen of California, was, by proper proceedings, substituted as respondent herein. On or about May 14, 1877, one Frank Terry and seven associates, all citizens of the United States, entered upon unoccupied public land, they having previously discovered mineral thereon, and posted upon said premises the following notice:

"Notice of Location.

"Notice is hereby given that we, the undersigned, having fulfilled the condition required by the mining laws of the United States and those of this district, and having complied with the usual customs in such matters, do each claim twenty acres of this ground for placer or gravel mining, being a total of one hundred and sixty acres. These claims shall be known as the Cascade Gravel Mining Company, and are situated on the northern side of Grizzly Mountain, in Plumas county, ——— township, about three miles north of the Alturas mine, and are bounded and described as follows: Beginning at this notice, which is posted on a blazed tree, and running south three hundred feet to a stake; thence running west thirteen hundred and twenty feet to a stake; thence running north five thousand two hundred and eighty feet; thence running east thirteen hundred and twenty feet to a stake; thence running south four thousand nine hundred and eighty feet to this notice.

"Located this 14th day of May, 1877.

"Frank Terry.	S. R. Dawson.
"S. Galbreath.	M. J. Walsh.
"J. J. Swiggart.	E. A. Heath.
"T. J. Johnson.	G. W. Moreton."

On the same day said Frank Terry and his associates blazed a pine tree, which stands 300 feet north of the southeast corner of the premises described in said notice, planted a stake at the southeast

[1] See Execution, vol. 21, Cent. Dig. § 858.

corner of said premises, planted another stake at the southwest corner of said premises, and still another stake at the northeast corner thereof, for the purpose of locating said premises as a placer claim. The above notice was duly recorded in the office of the county recorder on the 18th day of May, 1877, and on the 8th day of June, 1877, the said Terry and his associates made, executed, and delivered to the Cascade Water & Mining Company a deed of the following premises: "The mining property known as the 'Cascade Gravel Mine' on the east side of Grizzly Mountain, and being 160 acres of ground," situated in Plumas county, Cal. On the 20th day of March, 1896, the Cascade Water & Mining Company conveyed to the complainant herein "all that real property situated in the county of Plumas, state of California, known as and commonly called the 'Cascade Mining Claim,' and all appurtenances, including water claim, water rights, ditches, and flumes"; being the same claims above referred to. This deed was ratified by the holders of more than two-thirds of the capital stock of said corporation, and was recorded on the 30th day of March, 1896. More than $100 worth of work, labor, and improvements have been done and performed by the successors in interest of the said Terry and his associates upon the premises here in dispute during each and every year since May 14, 1877, except for and during the year 1894, when a notice of intention to hold and work said claim was filed in the recorder's office, agreeably to the act of July 18, 1894, amending section 2324 of the Revised Statutes. The aggregate value of the work, labor, and improvements done and performed upon the said premises during the said time by said parties is of the value of more than $6,000. On April 12, 1894, one David R. Brown commenced an action in the superior court of said county against said Cascade Water & Mining Company, to foreclose a miner's lien for work done by him as a miner upon said premises, and on April 9, 1895, a judgment was rendered in his favor for the sum of $279.90. Thereafter, on May 4, 1895, the said mining ground was sold by the sheriff, in pursuance of an order of sale upon said judgment, to one A. E. Whitney, for the sum of $318.90, and the sheriff's certificate of sale delivered to said Whitney therefor, describing the premises sold as "that certain lot of placer mining claims situated on or near Little Grizzly creek in section 1, township 24 north, range 11 east, Mt. Diablo meridian, county of Plumas, state of California, generally known as and called 'Cascade Placer Mining Claims,' and all appurtenances." Within six months from the date of said sale, on the 4th day of November, 1895, P. R. Walsh, as president of said Cascade Water & Mining Company, applied to the sheriff of said county to redeem said mining ground so sold as aforesaid. Thereupon the said sheriff, with the assistance of one U. S. Webb, an attorney at law, estimated the amount necessary to redeem said mining ground from said sale, by computing the interest on the sum of $279.80 recited in said judgment, at the rate of 2 per cent. per month from May 4, 1895, and then and there stated to said Walsh that the sum of $313.37 was the amount necessary to be paid for the purpose of redeeming said mining ground from said Whitney. Said Walsh, as president, and

for and on behalf of said corporation, then and there paid to said sheriff the said sum of $313.37, and received from said sheriff the following certificate:

"State of California, County of Plumas—ss.: I, J. S. Bransford, sheriff of the county of Plumas, state of California, do hereby certify that on the 4th day of November, A. D. 1895, the Cascade Water and Mining Company, a corporation, judgment debtor under the judgment in the action hereinafter mentioned, in due form of law tendered and paid to me the sum of $313.37, being in full payment of the purchase price paid by the purchaser at the sale of the real property hereinafter described, made by me on the 4th day of May, A. D. 1895, under the decree and foreclosure and sale issued to me out of the superior court of the county of Plumas, state of California, in the action of D. R. Brown vs. the Cascade Water and Mining Company, a corporation, et al., including two per cent. per month interest thereon, up to the time of redemption; that thereupon I received said sum of money so tendered and paid as aforesaid, and have granted and executed to said Cascade Water and Mining Company, a corporation, this my certificate of redemption of said property, in conformity with the statute in such case made and provided. The premises so redeemed or intended to be redeemed are described as follows, to wit: That certain lot of placer mineral claims situated on and near Little Grizzly creek, in section 11, in township No. 24 north, of range No. 11 east, Mount Diablo base and meridian; all in the county of Plumas, state of California, generally known as and called the 'Cascade Placer Mining Claims,' and all appurtenances.

"In witness whereof, I have hereunto set my hand this 4th day of November, A. D. 1895. J. S. Bransford, Sheriff."

This certificate was duly recorded on November 4, 1895. The amount actually necessary to be paid for the purpose of redeeming said property was in fact $357.16, and on or about November 17, 1895, the said sheriff demanded from said Walsh the further sum of $43.79, and on December 7, 1895, said Walsh paid said further sum to said sheriff. On that day the said sheriff tendered the balance so paid him to the said U. S. Webb, as attorney for the said Whitney, and said Webb then and there refused to accept or receive the same, and demanded that said sheriff execute his deed to said Whitney, as purchaser of said premises. The said sheriff refused to execute said deed. On December 10, 1895, said Whitney commenced mandamus proceedings in the superior court to compel the execution of said deed, the only parties to said suit being the said Whitney, as plaintiff, and the said sheriff, as defendant. Said Walsh filed a petition with said court for leave to intervene in said mandamus proceeding, which was by the court denied. This order denying intervention has not been appealed from or modified. After due proceedings had, a judgment was rendered directing said sheriff to execute and deliver to said Whitney a deed to said property, and such a deed was accordingly executed on January 2, 1896. No appeal has been taken from said judgment, nor has it been modified or set aside. Thereafter, and before February 1, 1896, the said Whitney conveyed to said J. P. Welch, original respondent herein, all the right, title, and interest acquired by him in and to said mining premises. It is stipulated that the said Webb had merely the general authority of an attorney at law under a general retainer for said Whitney, and was never authorized by said Whitney to estimate the amount of money required to redeem the said property from said sheriff's sale, but assisted in

such estimation merely at the request of the said sheriff. It is further stipulated and agreed that the following facts appear: On October 31, 1893, J. P. Welch, original respondent herein, with several associates, posted notices of location upon ground overlapping the premises claimed by complainant, and marked the exterior boundaries of three claims, called, respectively, the "Alex," "Alberta," and "Whitney" placer mining claims. Copies of these notices of location were duly recorded. Prior to February 1, 1896, the said locators, other than J. P. Welch, conveyed to J. P. Welch the premises covered by these locations. On or about February 6, 1895, said J. P. Welch applied to the government of the United States for a patent upon said three claims, under the name and style of "Castle Hill Mining Claim," and notice of such application was published by the register of the United States land office for the district in question. It is admitted that $500 had been expended on these premises by Welch and his grantors. Within the time allowed by law the complainant filed his protest and adverse claim in said land office, and within 30 days after the filing of said adverse claim brought suit in this court for the determination of his right to the mining ground claimed to have been located and worked by him as the Cascade placer mining claim. It will thus be seen that the respondent claims the premises in dispute through two sources of title, namely, the sheriff's deed of the Cascade placer claim, and the possessory title acquired from the mining locations made by Welch and his associates.

With respect to the sheriff's deed of January 2, 1896, under which the respondent claims title to the Cascade placer mining claim, it is sufficient to say that prior to the execution of that deed by the sheriff the Cascade Water & Mining Company, complainant's predecessor in interest, had redeemed the property from the sale made by the sheriff on May 4, 1895. The objection that the amount paid in the first instance was not sufficient to effect a redemption of the property under the statute cannot be sustained in an equity proceeding of this nature. The sheriff was the agent created by the statute to receive the amount due upon the judgment with the statutory interest thereon, and execute and deliver to the debtor a duly acknowledged certificate of redemption, which, when filed of record, effects a termination of the sale and restores to the debtor his estate. Section 703, Code Civ. Proc. Cal. The complainant herein paid the amount named by the sheriff within the time allowed for redemption of the property, and received from him the statutory certificate of redemption. The amount was later found to be insufficient, owing to an error in computing the interest upon the principal sum. The error was entirely innocent in its nature, and was corrected as soon as discovered; and the mere circumstance that by reason of this error in computation the full amount was not paid within the statutory period should not devest the debtor of his estate, when it is so clearly shown that he acted in good faith, and without delay, in his efforts to effect a redemption. It is well settled in this state that, "when a qualified redemptioner makes an attempt in good faith to redeem within the proper time, and is only prevented from perfecting a valid redemption by an innocent mistake, equity will relieve him from the consequences

of such mistake, and allow him to perfect the redemption." Pownall v. Hall, 45 Cal. 193; Kofoed v. Gordon, 122 Cal. 314, 324, 54 Pac. 1115.

The respondent contends that complainant had no right to the possession of the mining ground claimed to have been located as the Cascade placer mining claim; that the location was faulty, and therefore void; and that in consequence thereof the land was open to location at the date of location of the said Alex, Alberta, and Whitney claims by the respondent's grantors. Section 2324 of the Revised Statutes provides that:

"The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * *"

In the stipulated facts it appears that complainant's grantors, for the purpose of locating the premises in dispute as a placer claim, blazed a pine tree standing 300 feet north of the southeast corner of said premises, planted a stake at said southeast corner, another stake at the southwest corner, and still another stake at the northeast corner. It also appears that, in the notice of location posted on said premises and recorded in the office of the county recorder, the ground claimed to be located was described as "situated on the northern side of Grizzly Mountain in Plumas county, about three miles north of the Alturas mine, and bounded and described as follows: Beginning at this notice, which is posted on a blazed tree, and running south 300 feet to a stake; thence running west 1,320 feet to a stake; thence running north 5,280 feet; thence running east 1,320 feet to a stake; thence running south 4,980 feet to this notice." The requirements of the statute as to date of location and names of locators were fully complied with in said notice. From the description of the premises on record, and the marks on the ground, could the boundaries of the location attempted be readily traced? In Book v. Mining Co. (C. C.) 58 Fed. 106, 114, a similar state of facts was presented, and the question of the sufficiency of marking a mining location was very thoroughly considered. The court there said:

"The law is certainly complied with whenever stakes and monuments are so placed upon the ground that the boundaries of the location can be traced with reasonable certainty, and without any practical difficulty. 'The object of the law in requiring the location to be marked on the ground is to fix the claim,—to prevent floating or swinging,—so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not, in express terms, require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced;' but they are sufficient for that purpose."

And in Mining Co. v. Willis, 127 U. S. 471, 480, 8 Sup. Ct. 1214, 32 L. Ed. 172, the supreme court of the United States, in passing upon the sufficiency of a description contained in a location certificate, stated the requirements as "sufficiently plain and distinct to enable the

sheriff, in case of a recovery, to execute a writ of possession, or to enable a surveyor to ascertain the exact limits of the location."

Applying these requirements to the case at bar, we find a blazed tree at the point where the notice is posted and on one of the boundary lines, and three corner stakes at stated distances from the notice and from each other. One corner stake appears to have been omitted,—whether from the nature of the surface of the ground or not is not shown,—but the distance of the lines leading to and from that corner are accurately stated. A surveyor would certainly be enabled without difficulty "to ascertain the exact limits of the location," and a prospector could easily ascertain the lines of the ground staked off. The act of location, then, appears to have been fully within the requirements, and the right of possession was accordingly vested in the locators, not to be devested by the removal or obliteration of the stakes, monuments, marks, or notices, without the act or fault of the locators, during the time they continued to perform the necessary work upon the claim and to comply with the law in all other essential respects. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 667; McEvoy v. Hyman (C. C.) 25 Fed. 598. It is not disputed that the complainant has performed the necessary work under the statute upon the premises in question for a period of about 16 years prior to the overlapping locations of the respondent, and paid the taxes thereon. This, under the laws of California, would give the complainant a prescriptive right to the premises that would avail against anyone seeking to initiate a new claim to the same property,—in fact, against all but the government.

Let a decree be entered for the complainant.

DAVIS & FARNUM MFG. CO. v. CITY OF LOS ANGELES.

(Circuit Court, S. D. California, S. D. April 3, 1902.)

No. 1,015.

EQUITY—JURISDICTION—ENJOINING CRIMINAL PROSECUTIONS.

A court of equity is without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional and void, even though it is also alleged that it is the purpose of such prosecutions to injure complainant in his property rights, and that such will be their effect.[1]

In Equity. On motion for preliminary injunction.

Lynn Helm and Lee, Scott, Bailey & Chase, for complainant.

W. B. Mathews, Le Comte Davis, and W. R. Bacon, for defendant.

WELLBORN, District Judge. Complainant at the commencement of this suit was erecting within the city of Los Angeles, for and under contract with another party, a water holder and gas tank, and filed its bill solely to enjoin threatened criminal prosecutions, under an

[1] See Injunction, vol. 27, Cent. Dig. §§ 178, 179.

Restraining criminal prosecution, see note to Arbuckle v. Blackburn, 51 C. C. A. —.

ordinance of said city alleged to be invalid, against its employés for working on said structures, the purpose and effect of which prosecutions, the bill alleges, are to compel complainant to abandon said work, and thereby destroy or impair its vested property rights. The questions now presented for consideration relate to the equitable jurisdiction of this court, and the validity of said ordinance. These questions will be taken up in the order of their statement, because, if the jurisdiction does not exist, further inquiry concerning the ordinance is unnecessary.

The supreme court of the United States has said:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes and misdemeanors, or over the appointment or removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. * * * The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Attorney General v. Cleaver, 18 Ves. 211, 220; Turner v. Turner, 15 Jur. 218; Saull v. Browne, L. R. 10 Ch. 64; Kerr v. Preston Corp., 6 Ch. Div. 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story, Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances. West v. Mayor, etc., 10 Paige, 539; Davis v. Society, 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422, 26 Am. Rep. 471; Stuart v. Board, 83 Ill. 341, 25 Am. Rep. 397; Devron v. First Municipality, 4 La. Ann. 11; Levy v. City of Shreveport, 27 La. Ann. 620; Moses v. Mayor, etc., 52 Ala. 198; Gault v. Wallis, 53 Ga. 675; Phillips v. City of Stone Mountain, 61 Ga. 386; Cohen v. Goldsboro Com'rs, 77 N. C. 2; Waters-Pierce Oil Co. v. City of Little Rock, 39 Ark. 412; Spink v. Francis (C. C.) 19 Fed. 670; Id. (C. C.) 20 Fed. 567; Suess v. Noble (C. C.) 31 Fed. 855." Ex parte Sawyer, 8 Sup. Ct. 482, 124 U. S. 200, 31 L. Ed. 402.

To the same effect are the following cases: Suess v. Noble (C. C.) 31 Fed. 855; Hemsley v. Myers, and nine other cases, including M. Schandler Bottling Co. v. Welch (C. C.) 45 Fed. 283; Brewing Co. v. McGillivray (C. C.) 104 Fed. 272; Crighto v. Dahmer (Miss.) 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666; City of Denver v. Beede (Colo. Sup.) 54 Pac. 624; Wardens of St. Peters Episcopal Church v. Town of Washington (N. C.) 13 S. E. 700; and City of Moultrie v. Patterson (Ga.) 34 S. E. 600.

The clear and positive declaration of law by the highest judicial tribunal of the land in Ex parte Sawyer, supra, is, without the other citations, determinative of the case at bar, since the prosecutions here sought to be enjoined are outside the exception to, and fully within the general rule enunciated in, the Sawyer Case.

Complainant, however, contends that said rule is further restricted to the extent indicated by the following excerpts:

"Writers on equity jurisdiction properly say that the court of chancery does not deal with matters of crime, misdemeanors, offenses against prohibitory laws, nor questions of mere morality. But there is this reservation:

that it is only when those matters are not connected with rights of property with respect to which the court has jurisdiction. Circumstances may confer a jurisdiction. Attorney General v. Cleaver, 18 Ves. 211; Macaulay v. Shackell, 1 Bligh (N. R.) 96. In Spinning Co. v. Riley, L. R. 6 Eq. 558, the vice chancellor says: 'The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation.'" Lottery Co. v. Fitzpatrick, 15 Fed. Cas. 984 (No. 8,541).

"Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the district attorney, since its purpose is to restrain him from instituting prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that when such prosecutions are threatened, under color of an invalid statute, for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available." Central Trust Co. v. Citizens' St. R. Co. (C. C.) 80 Fed. 225.

"'If the charge be of a criminal nature, or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced. * * *" City of Atlanta v. Gate City Gaslight Co., 71 Ga. 126.

Besides the three cases last named, complainant also cites in support of its contention the following: Reagan v. Trust Co., 154 U. S. 388, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Los Angeles City Water Co. v. City of Los Angeles (C. C.) 103 Fed. 711; M. Schandler Bottling Co. v. Welch (C. C.) 42 Fed. 561; City of Rushville v. Rushville Natural Gas Co. (Ind. Sup.) 28 N. E. 853, 15 L. R. A. 321; Spinning Co. v. Riley, L. R. 6 Eq. 558; City of Austin v. Austin City Cemetery Ass'n (Tex. Sup.) 28 S. W. 528; Mayor, etc., v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Port of Mobile v. Louisville & N. R. Co. (Ala.) 4 South. 106, 15 Am. St. Rep. 342; Wood v. City of Brooklyn, 14 Barb. 425; and Iron Works v. French, 12 Abb. N. C. 466.

While it is not my purpose to examine in detail all of complainant's citations, brief references will be made to a few of them.

The opinion in the Lottery Case, supra, as shown by the above quotation therefrom, rests largely upon a principle of equity, well recognized, but which, it seems to me, was inapplicable. The same is true of City of Atlanta v. Gate City Gaslight Co., supra, where the opinion quotes from Kerr on Injunctions the principle to which I refer, as follows:

"'A court of equity,' says Kerr (Injunctions, 2), 'has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. If a charge be of a criminal nature, or of an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. * * * But if an act which is also criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property.'" 71 Ga. 126.

In City of Austin v. Austin City Cemetery Ass'n (Tex. Sup.) 28 S. W. 529, the court discerns and states the inapplicability of the principle as follows:

"Yet it has been held that 'the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or

deterioration of the value of property.' Spinning Co. v. Riley, L. R. 6 Eq. 551. This, however, does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act, not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case."

The principle of equity above stated, whose misapplication has led to erroneous conclusions, as I conceive, in some of the cases cited by complainant, means simply that the fact that a threatened act, if done, would be a crime, will not prevent a court of equity from enjoining the commission of the act, where it would also be an invasion of complainant's property rights, and the other requisites to equitable relief concur.

The case most frequently cited for this principle is Spinning Co. v. Riley, L. R. 6 Eq. 551, where, at page 558, the court, without reference to its facts, says:

"The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable for use or occupation."

This quotation, although so often otherwise assumed, has no reference whatever to criminal prosecutions, or even to civil suits; but the word "proceedings," therein employed, has an entirely different application, as clearly appears from the facts stated in the syllabus of the case, which is as follows:

"The defendants, who were officers of a trades union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the defendants had in fact intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished. Held, upon demurrer, that the acts of the defendants, as alleged by the bill, amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property." L. R. 6 Eq. 551.

As a further abstract statement of the law concretely enunciated in said syllabus, substantially, however, to the same effect as the one above quoted, the court, at page 560, says:

"The truth, I apprehend, is that the court will interfere to prevent acts amounting to a crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property."

This rule has no connection with, or relation whatever to, the question of the power of a court of equity to enjoin criminal prosecutions, and I am unable to accept as well reasoned any conclusion which results from confounding the two matters.

In Reagan v. Trust Co. neither the opinion of the court nor briefs of counsel discuss or in any way refer to the question last mentioned, and this, doubtless, for the reason that the proceedings there enjoined

were not criminal prosecutions, but civil actions to recover statutory forfeitures and penalties; and moreover in that case there were other grounds for equitable relief.

In Los Angeles City Water Co. v. City of Los Angeles, of the numerous authorities which the opinion cites concerning the remedy by injunction, not one touches the question of equitable cognizance over criminal prosecutions; and the inference is a fair one that it was not presented in argument, or specially considered by the court. Furthermore, there was jurisdiction in the case to enjoin civil suits for the forfeiture of complainant's property; and it was, no doubt, assumed by all the parties (whether correctly or otherwise need not now be considered) that the court having acquired jurisdiction for one would exercise it for all purposes.

In M. Schandler Bottling Co. v. Welch (C. C.) 42 Fed. 561, on which complainant seems to place much reliance, the opinion by Philips, district judge, was filed July 18, 1890, on the granting of a temporary injunction. Afterwards, to wit, February 18, 1891, the same case was heard on demurrer before Caldwell, circuit judge, when the demurrer was sustained, the temporary injunction was dissolved, and the bill dismissed for want of equity. 45 Fed. 283. On the first hearing the court said:

"The remaining question not disposed of in that discussion is whether or not this suit is obnoxious to the objection that a court of equity never extends its jurisdiction to the enjoining of criminal proceedings. This is unquestionably a well-settled rule of equity jurisprudence. Kansas City Cable Co. v. City of Kansas City, 29 Mo. App. 89, and loc. cit. This question underwent extended discussion in Ex parte Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. Mr. Justice Gray, who delivered the majority opinion, said, inter alia: 'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. * * * To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, * * * is to invade the domain of the courts of common law.' Without stopping to consider whether this general rule is limited to criminal proceedings already begun in the court of criminal jurisdiction, it is sufficient to the matter in hand to say, as indicated in the quotation above made, that the rule has its exceptions. One of these is where a threatened criminal proceeding is hostile, vexatious, and unwarranted, and involves the wanton destruction of, or injury to, property interests of the accused, and especially so under circumstances where, if permitted to proceed, the party injured would have no adequate remedy at law for restitution. Mr. Justice Gray recognizes this. He quotes from Sheridan v. Colvin, 78 Ill. 237: 'It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters purely criminal or merely immoral, which do not affect any right to property.' Again he says: 'No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.'" 42 Fed. 563.

On the latter hearing the court said:

"The bill seeks to enjoin criminal proceedings. A court of equity possesses no such power. This principle is settled by the uniform current of authorities in England for two centuries, and in this country from the

foundation of its jurisprudence. The recent emphatic reaffirmance of the doctrine by the supreme court of the United States renders it unnecessary to do more than repeat the rule in the language of the court."

Then follows the quotation which I have already given from Ex parte Sawyer, supra.

Thus it will be seen that the latter decision, although not so in terms, is substantially a reversal of the former one. It will also be noted that the opinion on the first hearing, when the temporary injunction was granted, seeks to draw support from Ex parte Sawyer, by quoting certain expressions of Mr. Justice Gray with reference to property rights and civil rights. Obviously, however, these expressions were used by Mr. Justice Gray not to suggest a further exception, but merely to show that the facts of the case did not bring it within the exception embodied in his previous statement of the general doctrine, which I have already quoted, namely (the italics being mine):

"The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*"

This unambiguous and definite statement of the rule does not admit of any exception other than the one which it expressly allows. Besides, a careful examination of at least one of the authorities cited (Suess v. Noble [C. C.] 31 Fed. 855) shows that no other exception could have been in the mind of the court. The following is the statement of the last case:

"The original cause of State v. Suess was removed from the district court of Jefferson county, Iowa, to this court upon the petition of said Suess, and the same is now pending here. The transfer was made in pursuance of the decision of the circuit judge (Brewer) in the case of State v. Walruff (C. C.) 26 Fed. 178. The purpose of that proceeding was to have the brewery owned and maintained by said Suess declared a nuisance, and, as such, perpetually enjoined and abated. A temporary restraining order, which is still in full force, was issued from this court, the purpose of which was to restrain certain persons, who were carrying on the civil proceedings in the state court, from prosecuting the same to the injury and virtual destruction of the property pending the determination of the question of the jurisdiction of this court over the subject-matter of the said original suit. Lewis Suess now presents his petition to this court against the above-named defendants and others, alleging that they are engaged in commencing and carrying on many criminal prosecutions against him before certain justices of the peace 'for each separate sale of beer at his brewery,' and that they propose 'to place him on trial and find him guilty of selling intoxicating liquors, and to impose upon him heavy fines for said alleged offenses,' etc. He also states, in a supplemental petition, that he was indicted at the January term of the district court of said county for the alleged crime of causing a nuisance by the sale of beer at his brewery, that he was convicted of said alleged offense, and that he has taken an appeal to the supreme court of Iowa upon the federal question as to the constitutionality of the prohibitory law, etc. The prayer of his petition is that this court issue an injunction restraining said defendants from the prosecution of said criminal suits in violation of his rights respecting the subject-matter of the action now pending in this court until the final determination of the same."

Thus it will be seen that the criminal prosecutions sought to be enjoined were one of the means employed to close up the complainant's business, and yet the court held (quoting the syllabus):

"No power exists in any court of equity to interfere by injunction with the prosecution and punishment of crimes and offenses in the courts of common law."

In the quotation which Mr. Justice Gray makes from the Illinois case of Sheridan v. Colvin, the phrase, "The court has no jurisdiction in matters purely criminal or merely immoral which do not affect any right to property," has no reference to criminal prosecutions, but was simply intended to declare that a court of equity would not interfere with acts merely on the ground of their immorality, or because they would, if committed, be crimes. So that the decision in Ex parte Sawyer, supra, whether we look solely to its text or the supporting authorities, is, as I have before stated, conclusive against complainant's contention.

In addition to what has already been said, it may be appropriately observed that municipal and state regulations of saloons, beer halls, theaters, and places of amusement generally, market places, slaughter houses, gas works, powder magazines, laundries, cemeteries, fire limits, streets (particularly obstructions, railway tracks, telegraph poles, pipe lines, etc., therein),—indeed, of all establishments, trades, and occupations subject to the police power of the state,—unavoidably affect property rights, and are usually rendered effective by making their violations punishable offenses. Now, if there were such jurisdiction as that for which complainant contends, every controversy over the validity of an ordinance or statute relating to any of the matters enumerated would furnish an occasion for interference by injunction; and thus would be presented the remarkable situation of courts of equity, state and federal, exercising supervisory power over the administration of a part, not inconsiderable, of the criminal laws of the country.

The jurisdiction asserted by complainant does not, in my opinion, exist, and for that reason the temporary injunction applied for will be refused.

RINCON WATER & POWER CO. v. ANAHEIM UNION WATER CO. et al.

(Circuit Court, S. D. California, S. D. April 3, 1902.)

No. 981.

1. WATERS—SUIT TO ENJOIN EXCLUSIVE APPROPRIATION—SUFFICIENCY OF BILL.
   A bill by a riparian owner on a stream, against persons who, by virtue of alleged prior appropriation, claim the right to use all the waters of the stream, to enjoin such use, need not make all other riparian owners parties, nor show the quantity of water to which complainant is entitled, but is sufficient if it alleges that he owns lands irrigable from the stream.
2. SAME—REQUISITES TO EXCLUSIVE APPROPRIATION—TITLE TO SUSTAIN SUIT FOR DIVERSION.
   The posting of a notice by a person desiring to appropriate water from a stream, as required by Civ. Code Cal. § 1415, does not in itself constitute an appropriation, which becomes perfect only when the necessary works have been completed in accordance with the requirements of the succeeding sections, and the water thereby diverted from the stream and conducted to the place of intended use, when the claimant's right relates back to the time of the posting of the notice. Until the appropriation has been so perfected, the claimant acquires no exclusive

right to the use of the water, and cannot maintain any suit, either at law or in equity, for its diversion by others, or to determine adverse claims.

3. RES JUDICATA—CONCLUSIVENESS OF JUDGMENT—DISMISSAL BY CONSENT.
Under Code Civ. Proc. Cal. § 581, which provides that "an action may be dismissed or a judgment of nonsuit entered * * * by either party upon the written consent of the other," and section 582, providing that "in every case, other than those mentioned in the last section, judgment must be rendered on the merits," a judgment of dismissal which recites that it was entered on motion of defendant's attorneys, pursuant to a written stipulation between the parties, is not a judgment on the merits, which concludes the rights of the parties.[1]

4. SAME—EFFECT OF STIPULATION FOR PAYMENT OF COSTS.
The fact that a stipulation for the dismissal of a cause provided that each party should pay his own costs does not make the judgment entered thereon one upon the merits, which will conclude the parties.

5. WATERS—SUIT TO DETERMINE RIGHTS—MULTIFARIOUSNESS OF BILL.
A bill to enjoin defendants from diverting all of the waters of a stream under a claim of prior appropriation is not multifarious because complainant claims portions of the water in different rights, where it is alleged that all of such claims and rights are alike affected by the rights and claims of right of defendants, and the question in controversy is the extent of such rights.

In Equity. On exceptions and demurrer to bill.

Charles Silent and Works & Lee, for complainant.

Keech & Parker, A. W. Hutton, Richard Melrose, and John D. Pope, for defendants.

WELBORN, District Judge. The bill alleges, in effect, among other things, that complainant is the owner of certain lands therein described, through which flows the Santa Ana river; that of said lands about 135 acres are irrigable from said river; that in and through said lands are percolating waters, to the amount of 2,500 miners' inches, measured under a 4-inch pressure; that complainant, prior to the filing of said bill, and on the dates therein mentioned, posted on said lands notices and claims of intended diversions of the waters of said stream, aggregating 30,000 inches, measured under a 4-inch pressure, and caused said notices to be recorded as provided by law, and immediately thereafter entered upon the said stream and took possession thereof, and commenced, and has ever since continuously and uninterruptedly prosecuted, and is now prosecuting, the work of developing, appropriating, and diverting the waters of said stream in pursuance of said claims and notices, and in accordance therewith, and with the laws of said state relating to the appropriation of water; that complainant has a right to the use of 750 inches of water, measured under a 4-inch pressure, diverted from said river by means of a certain ditch, known as the "Yorba Ditch," and that defendants are claiming an exclusive right, as prior appropriators, to the use of all of the waters of said river; and that said adverse claim is unfounded and unlawful. There are also allegations of notices and claims of diversion by complainant's grantor, but it is unnecessary to particularize them, since they involve the same question as the notices and

[1] See Judgment, vol. 30, Cent. Dig. § 1033.

claims which complainant itself posted. The bill further alleges, as a former adjudication, the dismissal of an action in the superior court of Orange county, state of California, wherein the defendants in the case at bar were plaintiffs, and divers other persons, including the grantor of complainant herein, were defendants, pursuant to the following stipulation:

(Title of court and cause.)

"It is hereby stipulated and agreed between the above-named plaintiffs and the defendants A. H. Naftzger, Rincon Town & Land Company, J. R. Newberry, Rincon Water Company, R. Willey, Albert Kleinschmidt, and Ellen Kleinschmidt that the above-entitled action be dismissed, and each of the parties hereby agrees to pay their own costs of the action, and such dismissal may be had and motion of dismissal made by any of the said parties without notice to the other parties to this stipulation, and that the party or parties so appearing and applying to the court for such dismissal may have the order of dismissal made and entered for all the parties.

"Dated this September 22, 1900.

"Chapman & Hendrick,
"A. W. Hutton,
"Richard Melrose & E. E. Keech,
"Collier & Evans and Chas. S. McKelvey,
"Attorneys for the Defendant A. H. Naftzger, Rincon Town & Land Company, R. Willey, Albert Kleinschmidt, and Ellen Kleinschmidt.

"[Indorsed] Filed Sept. 22, 1900."

The judgment of dismissal was as follows:

(Title of court and cause.)

"It appearing to the satisfaction of this court that the plaintiffs and the defendants A. H. Naftzger, Rincon Town & Land Company, J. R. Newberry, Rincon Water Company, R. Willey, Albert Kleinschmidt, and Ellen Kleinschmidt have entered into, made, and filed a stipulation by which said action may be dismissed as to all of said above-named parties, upon the motion of any of them, without notice to the other, and that each party pay his own costs of the action, and Charles Silent, Esq., now appearing on behalf of said defendants and on behalf of Messrs. Collier & Evans and Charles S. McKelvey, Esq., the attorneys of record who signed said stipulation on their behalf, and moved the court that said action, as now pending between said plaintiffs and said above-named defendants, be now dismissed, each party to pay his own costs, which motion was granted, and said action, as between said plaintiffs and said defendants, was accordingly dismissed by the court, and it was ordered that judgment of dismissal be entered in accordance with the order of said court: Wherefore, by reason of the law and the premises aforesaid, it is now ordered and adjudged that said action, as between said plaintiffs and defendants A. H. Naftzger, Rincon Town & Land Company, J. R. Newberry, Rincon Water Company, R. Willey, Albert Kleinschmidt, and Ellen Kleinschmidt, be, and the same is hereby, dismissed, each party to pay its own costs of suit, and that neither party recover any costs from the other.

Waldo M. York,
"Judge Superior Court.

"Dated this September 22, 1900."

The bill prays:

"That it may be determined and decreed by the court: (1) That the complainant is entitled to divert and appropriate the waters of the said Santa Ana river to the extent of thirty thousand miners' inches, measured under a four-inch pressure. (2) That the defendants have no right or title to said waters, or to divert or appropriate the same. (3) That the defendants be enjoined, pending this suit, from diverting or taking from said stream any water in excess of the actual amount heretofore and now diverted by them by and through the ditches and canals now in use by them, and not exceeding

two thousand inches of water, measured under a four-inch pressure, and that upon a final hearing they be perpetually enjoined from diverting or appropriating any of the waters of said stream in excess of that amount. (4) That the defendants be enjoined, pending this suit, from in any way interfering with or preventing the complainant from constructing its works for the purpose of diverting the waters of said stream, and said percolating waters, as belonging to it, or from diverting, appropriating, and using said waters, and that upon a final hearing they be perpetually enjoined from the doing of any of said acts. (5) That the rights of the complainant and defendants in and to the waters of the said Santa Ana river, and the quantity of water they, and each of them, are entitled to divert and appropriate from said stream, be ascertained and adjudged by the court. (6) That the complainant be decreed to be the owner of, and entitled to take out and use, the percolating waters in said land; that its title thereto be quieted; and that the defendants be decreed to have no right, title, or interest in or to the same. (7) That the complainant have judgment against the defendants for its costs in this behalf laid out and expended. (8) And for all other relief to which the complainant may in equity be entitled."

The defendants have filed exceptions to those parts of the bill concerning notices of appropriation and former adjudication, and have also demurred to the bill, as below set forth.

Upon the issues thus raised, my conclusions are as follows:

1. Counsel for defendants concede in their brief that, as against the general demurrer, that part of the bill relating to percolating waters sets forth good ground for relief, but claim that it is bad, as against the special demurrer for uncertainty, in that it fails to allege the sources of said waters. This objection, I think, is untenable.

2. Defendants' contention as to the alleged insufficiency of that part of the bill relating to complainant's riparian rights, because it fails to show the amount of water complainant is entitled to use, and does not make all riparian owners parties, is not well taken, but based upon an erroneous conception of complainant's case. The bill is not brought to determine, between riparian owners, the amounts of water they are severally entitled to use, but it is brought by one riparian owner against persons who, by virtue of alleged appropriation, claim the right to use all the waters of the stream. The bill affirmatively shows that the complainant is the riparian owner of about 135 acres of lands irrigable from said stream, and this is such an interest as will enable the complainant to contest the claims of the defendants, which embrace all the waters of the stream. The objection to this part of the complaint on the ground that it is uncertain, in failing to show the place of the proposed use of such waters, is not well taken.

3. The defendants' objection to that part of the complaint which relates to the Yorba ditch, on the ground that there is no sufficient averment of complainant's ownership, I think, is not well taken. While it is true that the context sometimes shows an averment of ownership to be a mere conclusion of law, as in Turner v. White, 73 Cal. 299, 14 Pac. 794, and Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938, cited by defendants, such is not the case here. Complainant's ownership is pleaded as an ultimate fact, and not as a deduction from the alleged 20 years' user. The objection urged by way of special demurrer, that the allegation as to the title to the waters diverted from said ditch is uncertain, because it fails to show whether it results from appropriation or prescription, is not well taken.

4. The allegations of the bill as to notices of appropriation do not show any right or interest in the complainant entitling it to equitable relief.

Section 1415, Civ. Code Cal., provides, "A person desiring to appropriate water must post a notice, in writing," etc. The three sections immediately following prescribe the subsequent steps necessary to an appropriation, as follows:

"Sec. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

"Sec. 1417. By 'completion' is meant conducting the waters to the place of intended use.

"Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted."

It is obvious that a person who intends to become an appropriator under these sections cannot acquire the exclusive right to the use of the water he intends appropriating, nor maintain any suit, either at law or in equity, for its diversion, until all the steps requisite to an appropriation have been taken.

A well-known text writer has said:

"The appropriation becomes perfect only when the ditches or canals are completed, the water diverted from its natural stream or channel, and actually used for beneficial purposes. * * * While the appropriator's dam and canal are in the process of construction, but he is not yet ready to actually use the water for the purpose intended, its use by other persons causes no injury to the first appropriator, and gives him no cause of action for relief, either equitable or legal, from the fact that his works are not in a condition to divert the water. But the prior appropriator has the right to use so much of the water as is necessary to preserve his flume or works from injury while in the process of construction." Kin. Irr. § 167.

Another text writer speaks to the same effect, as follows:

"The appropriation does not become perfect and final until the works are completed, so that the actual use of the water has begun, or at least so that its actual use can be commenced. Although, as will be shown hereafter, if the works are constructed with due diligence, the appropriation relates back to the date of the initial step, during the process of their construction, in the interval between their commencement and their completion, the appropriator acquires no vested, exclusive right to the water of the stream, and can maintain no action against other persons for their use or diversion of the water. Such right of action only arises when the works and the appropriation are completed, although, on the question of priority between the appropriator and other claimants, his appropriation then relates back to the time of his giving notice." Black, Pom. Water Rights, § 54.

From the statutory enactments and general principles above quoted and stated, the conclusion is not only fair, but unavoidable, that the only right which a person acquires by posting notice is the right to prosecute without interference the works necessary to consummate his intended appropriation. This doctrine is elsewhere stated as follows:

"The notice itself cannot constitute an appropriation of water, nor confer any right on the persons filing it, other than that of proceeding with reasonable diligence to complete the proposed appropriation. If they do not thus proceed, they have no rights whatsoever in the waters of the stream, con-

cerning the appropriation of which they have given their notice." Ditch Co. v. Bennett (Or.) 60 Am. St. Rep. 800, note (s. c. 45 Pac. 472).

The proposition that a person who has no title, legal or equitable, to the use of water, but has merely posted notice of an intended appropriation, and, within the time prescribed by law, commenced suitable works for diversion, can thereupon maintain a suit to determine an adverse claim to such use, is, in my opinion, wholly untenable.

The only case in point which has been called to my attention is Umatilla Irr. Co. v. Umatilla Imp. Co., 30 Pac. 30, decided by the supreme court of Oregon; and that case fully supports the views which I have above expressed.

The supreme court of California, construing section 738, Code Civ. Proc., has held, in Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398, that an administrator can bring an action to quiet title to real estate which belonged to his decedent; in Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806, that the holder of an equitable title may "come before the court and have his equities declared superior to any and all opposing equities"; and in Pierce v. Felter, 53 Cal. 18, that the owner of a leasehold estate can maintain an action to determine an adverse claim made by another person; but it has never been held, in California or elsewhere, so far as I am advised, that a notice of appropriation confers any right to water or its use which can be quieted by judicial decree. In federal courts, where the remedies provided by state laws for quieting title, subject to certain qualifications, are followed (see Davidson v. Calkins [C. C.] 92 Fed. 230; Morrison v. Marker [C. C.] 93 Fed. 695; Adoue v. Strahan [C. C.] 97 Fed. 591; and cases below cited), ownership in the complainant, either by legal title or a perfect equity, has always been deemed essential to the maintenance of his suit.

In Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201, it was held (quoting the fifth paragraph of the syllabus):

"One having no title cannot successfully invoke the aid of a court of equity to remove a cloud from such nonexisting title."

In Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, it was said:

"Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises."

And in Frost v. Spitley, 121 U. S. 557, 7 Sup. Ct. 1129, 30 L. Ed. 1010, that:

"The necessary conclusion is that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title."

And in Guarantee Trust & Safe Deposit Co. v. Delta & Pine Land Co., 43 C. C. A. 396, 104 Fed. 8, Judge Maxey says:

"It is obvious, therefore, that, if that deed did not pass the legal title, the appellant is without standing in court; for although, under the laws of Mississippi (Code 1892, § 500), a bill may be maintained in the circuit court of the United States by a person not in possession against another who is also out of possession, as is the case here, 'still this does not make the

complainant's rights any the less dependent upon title in him, nor does it put him in a position to have a cloud removed from a title which has no existence."

In Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733, the suit was maintained on an equitable title, but the equity was perfect.

5. The former judgment set forth in the bill is not an estoppel. Haldeman v. U. S., 91 U. S. 584, 23 L. Ed. 433; U. S. v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601. If the question, however, is to be determined by the statutes of California, and the decisions of the supreme court of that state, the conclusion reached will be the same. The pertinent provisions of the Code of Civil Procedure of California are as follows:

"Sec. 581. An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * (2) By either party upon the written consent of the other.

"Sec. 582. In every case, other than those mentioned in the last section, judgment must be rendered on the merits."

The dismissal in the present case recites that it was entered on motion of defendants' attorneys, pursuant to a written stipulation between the parties, and therefore was a dismissal under subdivision 2 of section 581, above quoted, and not a judgment on the merits, under section 582. It is true that the stipulation provides that:

"Such dismissal may be had and motion of dismissal made by any of the said parties, without notice to the other parties to this stipulation, and that the party or parties so appearing and applying to the court for such dismissal may have the order of dismissal made and entered for all the parties."

But the attorney securing the dismissal failed to exercise the privilege last mentioned, and had the order entered solely on motion and behalf of defendants, for whom he appeared.

Merritt v. Campbell, 47 Cal. 542, rightfully understood, is not an authority against the conclusion which I have announced. The case is involved, and it is true that some of the utterances of Wallace, C. J., who wrote the first opinion, are favorable to the contention of the complainant herein, but those utterances were beyond the facts of the case. The circumstances of that dismissal are recited in the judgment itself, as follows:

"This cause came on regularly for trial; David Belden and Bodley & Rankin, Esqs., appearing as counsel for the plaintiffs, and Francis E. Spencer and Moore & Laine, Esqs., for the defendant. Whereupon, by agreement of the counsel for the respective parties, it was ordered by the court that this cause be dismissed; each party paying his own costs."

Thus it will be seen that both of the parties, through their respective counsel, were present in court, and openly participated in the dismissal. Such a dismissal might well be held equivalent to a retraxit at common law, which Blackstone defines thus:

"A retraxit differs from a nonsuit in this: One is negative, and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a retraxit is an open, voluntary renunciation of his claim, in court, and by this he forever loses his action." 3 Bl. Comm. 296.

The form of the plea is as follows:

"That afterwards, to wit, in the said last-mentioned term, the said plaintiff came into the said court, in his own proper person, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdraw himself." 3 Chit. Pl. p. 930.

The main characteristics of a retraxit at common law were: First, it was made by the plaintiff in person; second, it was made in open court. 18 Enc. Pl. & Prac. 899. The circumstance that it was or was not made pursuant to an agreement between the parties had nothing whatever to do with the character of the proceeding. In Merritt v. Campbell the dismissal had all the elements of a retraxit, except that the renunciation was made not by the plaintiff in person, but through his attorneys. And it was with reference to that distinction that Justice Wallace said:

"A retraxit at common law, it is true, must have been the act of the plaintiff appearing in his proper person in court, and not for that purpose by his attorney. But under our statute concerning attorneys and counselors at law (St. 1851, p. 49, § 9), this authority must be considered to be conferred upon the attorney of record in a cause (Board v. Younger, 29 Cal. 147), and his power extends to a proceeding of that character."

Again, Merritt v. Campbell was not dismissed by one of the parties upon the written consent of the other. Indeed, there was no written consent whatever for the dismissal, but it was made by the oral agreement of both parties in open court, or, as said by Justice Crockett in his opinion:

"The action was not dismissed by the plaintiff at his own cost, as provided in the first subdivision, nor by either party upon the written consent of the other, as provided in the second subdivision, but by the oral agreement of both parties in open court," etc.

The following paragraph, therefore, from the opinion of Justice Wallace, and partly quoted in complainant's brief:

"The statute (Practice Act, § 148) provides for both a judgment of nonsuit and a judgment of dismissal, and by subdivision 2 it is provided that a judgment of dismissal may be rendered at the application of either party upon the written consent of the other. We are of opinion that such a dismissal, when had by such consent, amounts to the open and voluntary renunciation of a suit pending, which must be held to operate a retraxit. We have the less hesitation in giving this construction to the statute because, in practice in this state, it has generally, perhaps universally, been considered to be the intention of the parties, in agreeing to dismiss an action, to thereby put an end to the controversy,"

—Was entirely outside the facts of the case, and therefore unauthoritative. The opinion of Crockett, J., on rehearing, states the facts correctly, and must be accepted as the true exposition of the doctrine the case enunciates, and implies that, when a dismissal is had by either party upon the written consent of the other, the judgment is not an estoppel. After quoting section 148 of the practice act then in force, which is embodied in the Code of Civil Procedure as section 581, he proceeds (section 149 is section 582, Code Civ. Proc.):

"These are the only conditions recognized by the statute on which a judgment of dismissal or nonsuit may be entered, and the plaintiff's case does not come within either of them. But section 149 of the practice act provides that 'in every case, other than those mentioned in the last section, the

judgment shall be rendered on the merits.' This judgment, therefore, not rendered in accordance with any of the provisions of section 148, but upon oral agreement of the parties in open court, and with a stipulation that the defendant would pay certain costs, which had not been adjudged against him, must be deemed to be a judgment against the plaintiff on the merits, rendered by consent of the parties."

On this subject, and with reference to Merritt v. Campbell, the supreme court of California, in a comparatively recent case, has said:

"(1) Defendant pleaded a judgment in bar, based upon the following facts: Plaintiff filed her complaint, and defendant answered. The time arrived for trial, and the plaintiff's attorney failed to appear. Thereupon defendant answered 'Ready,' and made a motion that the action be dismissed by reason of nonappearance of plaintiff. At this stage of the proceeding, plaintiff's attorney appeared and declined to further prosecute the action. The court thereupon ordered the action dismissed for want of prosecution, and gave judgment in favor of defendant for his costs. Thereafter a new complaint was filed upon the same cause of action, and defendant, by his answer, pleaded this aforesaid judgment in bar to the prosecution of the present action. Section 581 of the Code of Civil Procedure declares that an action may be dismissed or a judgment of nonsuit entered in the following cases: '(3) By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.' The succeeding section declares: 'In every case other than those mentioned in the last section judgment must be rendered on the merits.' In this case it may be fairly said that the plaintiff failed to appear at the time the case was called for trial, and under the authority of this section the court was justified in dismissing the action. We are not inclined to extend the doctrine of retraxit as recognized in the case of Merritt v. Campbell, 47 Cal. 543, and that case is essentially different in its facts from the case at bar. When there has been no adjudication of the cause upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of a judgment of res adjudicata upon the facts. Upon reason, there is nothing to justify such a rule. Nothing has been litigated, and no principles of estoppel can be involved. If plaintiff had proceeded with the trial until nonsuited upon the weakness of her evidence, such judgment of nonsuit would not have been a bar to the commencement of the present action. How much less reason to declare a bar under existing circumstances! We find no direct authorities in this state upon the question, but in the case of Laird v. Morris, 23 Nev. 34, 42 Pac. 11, the matter is directly presented under a similar statute, and after careful consideration it was held that such a judgment was not a bar." Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

These latest views of the supreme court of California are in substantial accord with those expressed by the supreme court of the United States in Haldeman v. U. S., supra, where it is said:

"There must have been a right adjudicated or released in the first suit in order to constitute it a bar, and this must appear affirmatively. The plea does not aver this, nor does it state any fact from which it can be inferred that the parties had any contest at all about their interests. There was neither trial nor decision, nor averment, even, that the parties had by their agreement adjusted the matter in controversy. Whatever may be the legal effect given in the courts of Kentucky to a judgment entry, 'Dismissed agreed,' it is manifest that the words do not of themselves import any agreement to terminate the controversy, nor do they imply an intention to merge the cause of action in the judgment. Suits are often dismissed according to the agreement of the parties, and a general entry made to that effect, without incorporating the agreement in the record, or even placing it on file. This agreement may settle nothing, or it may settle the entire dispute. If the latter, in order to avail as a bar, there must be a proper statement to that effect. But the general entry of the dismissal of a suit by agreement is no evidence of an intention to abandon the claim on which it is founded, but,

rather, of a purpose to preserve the right to institute a new suit if it becomes necessary. It is a withdrawal of a suit on terms. These terms may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points."

As to the effect of a stipulation for payment of costs, the supreme court of the United States, in the same case (Haldeman v. U. S., supra), said:

"But the counsel for the plaintiffs in error deny that this is the effect of the order, and insist that the pleas present a case of retraxit, by which the plaintiff forever loses his action, because the United States voluntarily announced to the court that, if the defendants would do what they were not bound to do,—pay the costs,—it would dismiss the suit. This announcement does not imply that the United States had no cause of action, or, if they had, they intended to renounce it. It implied nothing more than a willingness to receive the costs, and permit the dismissal of that particular action. There is no implication that the cause of action was adjusted. Nonsuits are frequently taken, on payment of costs by the adverse party, in order to arrange the controversy out of court, but it has never been supposed that the effect of such a proceeding was to prevent the institution and maintenance of a subsequent suit in case of failure to settle the matter in dispute. The defendants, in consenting to pay the costs on the withdrawal of the suit, gained delay, if nothing more, and this doubtless served their purpose; but the idea of turning this withdrawal into an intentional abandonment of the cause of action is an afterthought."

6. The objection of multifariousness is not well taken, because the bill alleges that the defendants claim, as prior appropriators, all the waters of the Santa Ana river, and that all of the rights and claims of right to the waters of said river pertain to and affect complainant's lands described in the bill, and that the controversy with respect thereto between complainant and defendants relates to and affects the rights and claims of right of the defendants in and to the waters of said river, and the extent of said rights, as against the complainant. 14 Enc. Pl. & Prac. p. 198 et seq.; Bates, Fed. Eq. Proc. § 134 et seq.; U. S. v. Guglard (C. C.) 79 Fed. 21; Kelley v. Boettcher, 29 C. C. A. 14, 85 Fed. 55.

The demurrer sets up various other objections to the bill for uncertainty, none of which, however, in my opinion, are well taken.

The allegations of the bill relating to notices of appropriation and a former judgment do not, as I have already held, show any independent rights to equitable relief, nor do they strengthen the right to relief under the other averments of the bill; and therefore the defendants' exceptions, all of which go to said allegations, will be allowed. Stirrat v. Manufacturing Co. (C. C.) 44 Fed. 142; Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co. (C. C.) 46 Fed. 72. Some of the matter covered by the tenth exception is pertinent, but so intermingled with the impertinent matter that one cannot be separated from the other, and under such circumstances the exception must be allowed. 19 Enc. Pl. & Prac. 210, note 1.

The demurrer will be overruled. While its third paragraph and the twelfth exception to the bill cover largely the same matters, yet said paragraph goes to several material averments not included in the exception.

Defendants are assigned to answer the bill at the next rule day.

GREACEN v. BELL.

(Circuit Court, D. New Jersey. April 5, 1902.)

TRADE-MARKS—TRANSFER OF RIGHT TO USE—FORMATION OF PARTNERSHIP.

When a trade-mark or trade-name is owned by one who enters into a partnership with another for the manufacture of the article designated, the title to the trade-mark does not pass to the partnership except by express agreement; nor does an agreement made on retirement of the owner from the firm, that the other partner may continue the manufacture of the article with the trade-mark thereon, conditioned that he will furnish the same to the retiring partner at a fixed price, which is about the cost of manufacture, and will not sell to others at less than a stated advance over such price, give the remaining partner the right to use the trade-mark after he has ceased to comply with the agreement on his part.

In Equity. Suit to enjoin infringement of a trade-mark.

Joseph D. Gallagher, for complainant.
Edwin B. Williamson, for defendant.

KIRKPATRICK, District Judge. It appears from the record in this case that in 1885 the Waddell Manufacturing Company was engaged in the manufacture of certain washers made from a combination of rubber, to which it applied the distinguishing name of "The Boss," and that afterwards the said company adopted the name of the "Boss Washer Company." Neither of said companies was incorporated. In 1886 William M. Clarke succeeded to the business of the Boss Washer Company, became the owner of the assets, and continued to manufacture the said washers, and their sale, under the name of the "Boss Washer." It also appears that early in 1887 a controversy arose between the said Clarke and one Rosegarten in respect to the right to use this trade-mark or name, and that a decree was entered in the circuit court of the United States for this district affirming Clarke's right thereto and his ownership in said trade-mark name. It also appears that said Clarke entered into a partnership with Andrew Bell, the defendant, for the purpose of manufacturing and selling "Boss" washers, and after the arrangement had continued for some time he made a memorandum of the agreement in these words:

"Newark, N. J., May 20, 1889. This certifies that Andrew Bell is interested in the manufacture and sale of 'Boss' washers, and other goods made of rubber as equal partners with me, we sharing equally the profits and losses made in said rubber goods. This partnership began November 5, 1886, and is to continue as long as may be mutually agreeable. The mill press and molds used in said business are to be paid for out of the joint funds, and belong equally to Andrew Bell and William M. Clarke. [Signed] William M. Clarke."

The partnership was formed and continued to manufacture and put on the market "Boss" washers until March, 1891, when Clarke, retiring, sold Bell his interest in the personal property of the firm, as per schedule attached to the bill of sale. At the time of the sale it was agreed between the parties that Bell should continue to manufacture

the "Boss" washers, and sell the same to a firm in which Clarke was interested, at $3.50 per thousand, which was about the cost price, and that said Bell should not sell washers so made to any other persons at a less price than $4.50. Thereafter Bell continued the business, and for a time sold the washers as per agreement. Upon his failure so to do he received notice from Clarke that he was no longer to continue their manufacture and sale. Bell continued the business, and one Edward J. Greacen, who holds the assignment of Clarke's rights to the trade-mark "Boss Washer," filed this bill to restrain Bell from using the trade-mark name "The Boss," and using the name of the "Boss Washer Company." It is conceded that prior to the partnership agreement between Clarke and Bell the title of the trade-mark and name "Boss Washer" was in Clarke, as determined by the Rosegarten suit. Bell admits that he did not own it, and it will be observed that neither in the memorandum agreement of May 20, 1889, nor in the bill of sale of the assets of the firm of March 1, 1891, was any mention made of this trade-mark. That its transfer was not in the contemplation of the parties appears from the testimony of Bell, wherein he says: "At the time of the transfer of the business nothing was said about the trade-mark;" and from the agreement of May, 1889, which speaks only of the profits of the business. So that if the title to the trade-mark passed to the partnership it must have been solely by the operation of the law. When a trade-mark or trade-name is owned by one who enters ino a partnership with another for the manufacture of the article designated, the title of the trade-mark does not pass to the partnership except by express agreement. This is the doctrine laid down in Browne, Trade-Marks, § 364, wherein he says:

"Where one allows the use of his trade-mark on goods manufactured by the firm, that fact alone does not prevent the use of it, and it may remain the sole property of the individual owner, and the fact that the property was used by the partnership for the partnership's profits does not, of itself, make it the partnership's property. What the partnership takes over as its own depends entirely on the terms of the partnership agreement."

In the case of Kidd v. Johnson, 100 U. S. 617, 25 L. Ed. 769, one Pike was the owner of a trade-mark, and went into partnership with two of his employés. He allowed the use of his trade-mark upon packages made by the firm, but, inasmuch as he did not in terms make any assignment to the firm of his trade-mark, Justice Field, speaking for the court, said:

"The trade-mark no more became the partnership property from that fact [the user] than did the realty itself, which he also owned, upon which the business was conducted. Taking his clerks into partnership with him changed in no respect, by its terms, their relation to his individual property."

Applying this principle to the case at bar, I am of opinion that, in the absence of express agreement, no title to the trade-mark passed from Clarke to the partnership by the agreement of May 20, 1889, nor by the bill of sale of his interest in its assets. It is urged that, by the purchase of the molds with the trade-mark name "Boss Washer" stamped therein, Bell acquired a title thereto; but the object of the purchase of said molds, adaptable only to the manufacture of wash-

ers, with the trade-mark imprinted thereon, is apparent when we consider that, by the agreement between Clarke and Bell, Bell was to manufacture "Boss" washers for the Newark Brass Works, in which Clarke was interested, and for the general trade, to which he was to sell them at specific prices. The price to the brass works for said washers was to be cost or nearly so, and from $1 to $1.50 per thousand less than they should be sold to others, and the concession and benefit appears from the evidence to have been made as a consideration for the right to use the trade-mark. If Bell considered himself the owner of the trade-mark, I cannot conceive why he should have tied himself up by such a disadvantageous contract in regard to the disposition of the product of the business.

It is admitted by defendant that he has sold "Boss" washers contrary to the terms of the agreement, and that he was told by Clarke's counsel to stop using the trade-mark, and that he promised, but has failed, so to do. I conclude from what has been said that the defendant, Bell, acquired no title to the trade-mark name "Boss Washer," either by the formation or the dissolution of the partnership with Clarke; that his right to the use of the said trade-mark ceased when he neglected to comply with the terms of his agreement with Clarke in respect to price; and that thereafter he was an infringer.

The right of the complainant to bring this suit as an assignee of Clarke has not been raised, and he is entitled to a decree as prayed for.

THE STARTLE.

(Circuit Court, D. Delaware. April 21, 1902.)

1. TOWAGE—OBLIGATION OF TUG—LIABILITY FOR LOSS OR INJURY OF TOW.
   A tug which undertakes a towing service is not an insurer of the safe delivery of the tow, but the obligation imposed on it by the law is that it shall be reasonably adequate to the service undertaken, and that those in charge shall possess and exercise the skill and care ordinarily exercised by those having experience in the same service. Where the master is shown to have been an experienced and competent man, much must be left, as occasion arises, to his judgment and discretion in the management of the tow, and the burden rests upon the owner of the tow to prove that its loss or injury was due to negligence on the part of the tug to render the latter liable therefor.

2. SAME.
   The fact that a tug did not report for service in taking out a tow at the time agreed upon, and did not start until several hours after the appointed time, when the tide was not so favorable, will not support an action for an injury to the tow on the voyage where the owner accepted the service of the tug after her arrival, and the tow was then taken out with his consent.

3. SAME—INCIDENT CAUSES OF INJURY.
   Delay by a tug in proceeding with its tow, or other errors in navigation, although negligence, will not render it liable for an injury to the tow caused by the breaking away and loss of some of the boats while anchored, where there was no direct causal connection between such acts and the loss, which resulted directly from intervening causes.

4. SAME—GROUNDING—INCOMPETENCE OF PILOT.
   Where at the time of making a contract for towing a fishing fleet in Delaware Bay the master of the tug stated that he was wholly un-

acquainted with the waters at a certain part of the route, and the owner of the fleet agreed to put one of his men on board as a pilot when such place was reached, which he did, such pilot was not the agent of the tug, but of the owner of the tow, and the tug cannot be held in fault for grounding through his ignorance or incompetence, after the master had placed him in charge of the navigation at the place designated.

5. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to establish a charge of negligence on the part of a tug which rendered it liable for the loss of a part of a fishing fleet in tow, which broke away from others of the boats while anchored at night, when the weather was not stormy, and from a cause not appearing.

In Admiralty. Suit against tug to recover for loss of tow. On certificate from the district court for the district of Delaware.

George A. Elliott and Benj. Nields, for libelant.
Flanders & Pugh, for respondent.

GRAY, Circuit Judge. The facts in this case appear to be as follows: Some time in March, 1896, the libelant had a conversation with Capt. Byrne, of the tug Startle, at Delaware City, in which he asked him whether he would tow the libelant's fleet, consisting of two scows and twelve or fourteen sturgeon boats, from Delaware City to the mouth of Mispillion creek, when he, the libelant, was ready to go. Capt. Byrne said he would be willing to do so, and asked the price that libelant usually paid for such service. Upon being told, Capt. Byrne said he would be willing to take the tow down for the sum named. Libelant then asked him if he were acquainted with the water on the western side of the bay, below Mahon's ditch. He said he was not familiar with the water below that point. Sadler, the libelant, testifies that he then told him "that we usually had in our crew some fishermen who were acquainted with the water below there, and that we would render—that is, I would render—him what assistance I could in that way." Capt. Byrne, in his testimony, says that when he told him he was not acquainted below Mahon's ditch, libelant said, "So far as that is concerned, I will put a man aboard that knows every inch of the way;" that he gave the man's name as Collins.

On the 31st day of March, libelant telephoned to one Hughes, the agent of the tug in Philadelphia, that he would be ready to leave Delaware City early next morning, April 1st. As the tug did not arrive in Philadelphia until late that night, she did not start for Delaware City until about 4 o'clock in the morning of April 1st. She arrived there between 7 and 8 o'clock of that morning, and, while the tow was making ready for her, took on a small supply of coal, the libelant cautioning the captain that he must not take on more than was absolutely necessary, on account of the shallowness of the water into which they were going. The captain asked the libelant for the pilot he had promised, and the man named Collins, who was working on some of the boats composing the tow, was pointed out by libelant and told to go on board the tug, which he did. The libelant says that the tug was much later in arriving at Delaware City than he expected, and that he spoke to the captain about the lateness of the hour and the

resulting disadvantage in the stage of the tide. No objection, however, was made to proceeding at once on the voyage down the bay. After geting below Reedy Island, the captain determined, on account of a freshening easterly wind and thickening weather, to make for the eastern side of the channel, and after he had reached Cohansey creek, determined that it was best to put into the creek until the weather should moderate, and start out, if possible, at 3 o'clock the next morning on the high tide. The captain testifies that he consulted with Collins, and that Collins agreed with him that it was the right course to pursue. During the evening, a large fleet of oyster boats came into the mouth of the creek, for harbor, anchoring at various places, and remained there until 6 or 7 o'clock the next morning. On this account, the tug waited until about 8 o'clock before starting out, the captain and those on board the tug agreeing in the opinion that it would have been almost impossible to have taken such a tow through the fleet of oyster boats with safety. Capt. Pierce, who testified as an expert, was also of this opinion. On going out to the mouth of the creek, owing to the lowness of the tide, the tug stuck on the bar, and had to wait until the tide had raised sufficiently to go over it, which it did about 11 o'clock.

The tow arrived on the westerly side of the bay, opposite Mahon's ditch, betweer 12 and 1 o'clock on Thursday afternoon, April 2d. The captain of the tug then called Collins to the wheel, telling him that he "did not know any more,"—that is, he was unacquainted with the waters from Mahon's ditch down to Mispillion creek. Collins took the wheel, and proceeded down the bay until the tug was about opposite the Mispillion light, when it ran aground. The tide was running down, and the wind blowing in the same direction, the tow swung around the stern of the tug, one of the houseboats going to starboard and the other on the port side. Young Sadler, the son of libelant, jumped off the houseboat onto the tug, and helped clear up the lines, so as to allow the boats to float past the tug, which they did, drifting with the tide, until they were held up by the lines which were then fastened to the bow of the tug. These lines were soon afterwards cast off, with directions to the tow to drop an anchor on the leading houseboat, which was done, the tow bringing up to the anchor a short distance from the tug. The statements of the witnesses, as to the distance between the tow and the tug, vary, in estimating it, from 300 feet to half a mile. As the tide was ebb, the tow straightened out down the bay, in the reverse position to that which it had had before the tug grounded.

There is some dispute as to why the lines were cast off the bow of the tug, after she struck and the tow had passed her. It seems, however, immaterial whether the captain ordered them off, or whether they were cast off by order of the libelant's son, who was on board the tug, as, manifestly, to have kept the tow fastened to the bow of the tug would have tended to make it more difficult to back off as the tide arose, as the strain of the lines from the tow to the bow of the tug, would have been in the direction of hauling her further on to the place where she had grounded. The tug grounded about 4 o'clock in the afternoon, and was able to back off about 9 in the evening.

There is much discrepancy in the testimony as to the weather conditions from the time the tug again floated until the next morning, those on the tow saying that the night was fair, and the breeze light, while the captain and crew of the tug speak of a fresh breeze from the northwest, and considerable sea all night. All unite, however, in saying that the breeze increased towards morning, and that by daylight the weather was bad. During the night, but at what hour no one is able to testify, for no one on the tow seems to have been watching at the time, several of the fishing boats broke loose and were carried away with their nets and fishing apparel, and the smaller of the two houseboats was injured.

This constitutes the loss, to recover which this libel against the tug has been filed. The captain, the mate and the deck hand on the tug agree in testifying that, after the tug had backed off of the shoal, about 9 o'clock in the evening, she attempted to approach the tow and to communicate with those on board. They say that they could not go much nearer than they were when they were aground, as the tug again touched the bottom in going towards the tow. They all testify that they stayed as near as they could, blowing the whistle constantly in order to obtain a signal from those on board, but obtained none and saw no one. The tug then went off in a northerly direction, a short distance, about 300 yards according to the captain, or half a mile or three-quarters, according to the mate and deck hand, and anchored for the night. These same witnesses all agree in their testimony, that the next morning, which was Friday, on the high tide, the tug again approached the tow as near as they could, going until they touched the bottom, and were again unable to communicate with those on board, receiving no signal from any one. This, they say, they repeated each high tide until Sunday morning, when a small boat from the tow carried a line to the tug, and the houseboats and what remained of the fishing boats were towed to their destination at the mouth of Mispillion creek. The tow had a small boat afloat, available for communication with the tug, and it seems as if there was a tacit understanding that it was relied on for that purpose. The tug had a lifeboat on top of its house, which could not be conveniently launched.

The libel alleges a specific contract between Capt. Byrne, master of the tug Startle, and Albert N. Hughes, agent for the tug, whereby and in consideration of the sum of $40, to be paid by the libelant, the said Byrne undertook to tow safely and with reasonable diligence, the houseboats and fishing boats from Delaware City to and into the mouth of Mispillion creek, in the Delaware Bay, the said steam tug to start with her tow at 2 o'clock in the morning of the 1st day of April, in order to take advantage of the tides and to tow said scows and fishing boats safely to the point of destination.

The libel alleges, secondly, that in violation of said towage contract, the said tug did not start from Delaware City at 2 o'clock in the morning of the 1st day of April, but, through the negligence and carelessness of the said master or agent, did not reach Delaware City and take said scows and fishing boats in tow until after 8 o'clock in the morning, whereby the advantage of the tides was disregarded and lost.

Third. That after said tug had started with her said tow, her master

did not use reasonable diligence in proceeding to said point of destination, but, on the contrary, carelessly and negligently, and without necessity, deviated from the proper course and took said tow to a point on the eastern side of Delaware Bay, to wit, into Cohansey creek, where the tow arrived about 5 o'clock in the afternoon of the 1st day of April, and that the said tug carelessly and negligently remained until about half past 8 o'clock in the morning of the following day, and on leaving said creek ran aground and remained fast until about half past 11 of the same morning, and that the master's attention had been called to the necessity of the tow's leaving that point at high water, to wit, about 2 or 3 o'clock the next morning, and that it was through the negligence and carelessness of the said master, that the said tug failed to take advantage of the tides.

Fourth. Negligence is charged in the tug's not stopping with the tow at Mahon's ditch, after it had crossed the bay to its westerly side.

Fifth. Negligence is averred in the casting off of the tow, or allowing it to be cast off, after the tug ran aground.

Sixth. Negligence is charged in the running aground of the tug; and,

Seventh. It is charged in the tug's not coming to the rescue of the tow during the night.

It nowhere appears in the testimony, that the master of the tug was otherwise than experienced and of good reputation as a navigator; and it affirmatively appears that he had been for more than 40 years in the tug service of the Delaware bay and river, and the positive testimony of the expert witnesses produced by the libelant, was to the effect that he was in all respects a competent navigator. Where this is the case, there is much to be left, as occasion arises, to the judgment and discretion of the master of the steamer having charge of the tow.

The contention so strongly urged by libelant, that there was a special contract between the captain and agent of the tug and libelant, for a towage service that was to commence at 4 o'clock on the morning of the 1st of April, seems unimportant, for undoubtedly, whatever the desire of the libelant was, he accepted the service of the tug at the hour in the morning after its arrival when it was available, and whatever the original intention may have been on either side, the service undertaken by the tug began, with the consent of the libelant, at the hour when it actually proceeded down the river with the tow. No claim, therefore, can be supported on the fact, that the tug did not report at Delaware City at an earlier hour than she did.

The determination to put into Cohansey, whatever may have been the ulterior consequences, was the exercise of a discretion on the part of the master of the tug, which there is no testimony in the record to successfully impugn. With the wind from the east, undoubtedly the westerly side of the bay would have been rough, and the opinion of the captain of the tug, that it would have been unwise to have risked the tow under such conditions on that side of the bay, seems to have been supported by the man, Collins, who was placed on board of the tug, by libelant, as a pilot from Mahon's ditch down to Mispillion. At least the captain of the tug testifies that Collins

agreed that it was the right thing to go to the eastward, and put into Cohansey creek. The mate of the tug agrees in this judgment, as does also Capt. Pierce, an experienced tug captain, who testified as an expert. It is true, that the testimony of some of those on the tow, and of so-called experts summoned by the libelant, is to the contrary, but a mere difference of opinion as to the wisdom of the course taken under the conditions obtaining, is not sufficient to support the charge of negligence or unskillfulness on the part of those navigating the tug. But apart from this consideration, it is true that, even if it were clearly a negligent or unnecessary delay that occurred, in the taking of the tow to its destination, such delay was not the proximate cause of the loss complained of. The boats were lost by reason of intervening causes. It is impossible to predicate the loss of the boats as a necessary and immediate consequence of the delay occasioned by the stop in Cohansey creek on the night of the 1st of April. The same may be said of the contention, that the tow should have stopped at Mahon's ditch and waited for the next morning's tide. Even if it could be said that it was gross carelessness not to have so stopped, it does not appear that this fact had any direct causal relation to the breaking away of the boats, and their loss, after the anchoring of the tow the same night. In this case, as in that of the stoppage at Cohansey, an intervening cause or causes render this negligence too remote for judicial consideration. There are always many antecedents to a given catastrophe, but for the existence of which, the result inquired about would not have occurred; it is, however, only the direct and immediate cause, under the control of human agency, which can be judicially considered. Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Roach v. Kelly, 194 Pa. 31, 44 Atl. 1090, 75 Am. St. Rep. 685; Denny v. Railroad Co., 13 Gray, 481, 74 Am. Dec. 645; Hoadley v. Transportation Co., 115 Mass. 304, 15 Am. Rep. 106; The R. D. Bibber, 2 C. C. A. 50, 50 Fed. 841; The King Kalakau (D. C.) 43 Fed. 172.

This brings us to what seems to be the gravamen of the case, namely, the negligence charged in the running aground of the tug, and that averred in the casting off of the tow, or allowing it to be cast off, after the tug ran aground, and finally, the charge of negligence, in that the tug did not come to the rescue of the tow during the first night after the tug ran aground.

The running aground of the tug, under the circumstances, was not necessarily negligence, and to find it so, it must be clearly proved by the libelant. It is to be observed at the outset, that the service undertaken by the tug was not that of a common carrier, and there is no question of insurance or quasi insurance of the tow while under its charge. This action is not for the nonperformance of a contract to do a particular thing; that is, deliver these scows and sturgeon boats at the mouth of Mispillion creek. It is for a tort,—that is, for the alleged negligence of those in control of the tug, in so managing and navigating her as to have occasioned the loss in question. After this service was undertaken, the law imposed the obligation upon those in control of the tug, that she should be reasonably ade-

quate for the service, that those in charge of her should possess and exercise the skill and care ordinarily exercised by those having experience in the same service, when engaged therein. The want of any of these qualifications, or the absence of the due care required under the circumstances, would be culpable negligence, if, as a direct consequence thereof, loss came to the libelant. The thing, however, does not speak for itself, and the burden of proving such culpable negligence rests upon the libelant.

Recalling the fact, which is nowhere disputed, that the captain of the tug, when first spoken to by the libelant, in regard to taking the tow to Mispillion creek, disclaimed any knowledge of the waters on that side of the bay below Mahon's ditch, and that a man connected with the fishing enterprise of the libelant was proffered by the libelant as a competent pilot, it is hard to conceive how negligence can be imputed to the captain, who relinquished the wheel to such pilot upon leaving Mahon's ditch. The undisputed testimony is, that at that point, the captain of the tug called Collins, who was on board for that purpose, and said: "Here, take the wheel. I don't know any more now." The contention of libelant, that this man was in some way the agent and employé of the tug, is not borne out by the testimony. He was designated by the libelant for this particular service, and went on board at the suggestion of the libelant. The captain did not accept him as his agent or employé, did not pay him, or contract to pay him, but simply put the navigation or steering of the tug from that point down to its destination at the risk of the libelant. Libelant certainly had no right to look to the captain for the possession of a knowledge of those waters which he expressly disclaimed having. The testimony of Collins, that the captain, of his own motion, told him to haul up to the westward just before the tug struck, is denied by the captain, and it is nowhere corroborated by other testimony. The captain, however, does say that, just before the tug went aground, he signaled from its stern to the libelant, who was on the tow, to know whether the tug was on its right course, and that the libelant indicated by a signal that the tug should haul a little more to the westward, which fact he communicated to Collins at the wheel. There is nothing, however, in this testimony, sufficient to reimpose upon the captain of the tug the responsibility of its navigation. The charge of negligence in the libel, based on the running aground of the tug, must, therefore, be dismissed.

There is no evidence in the record sufficient to support the charge of negligence resting on the casting off of the tow, or allowing it to be cast off, after the tug ran aground. Whether the captain peremptorily ordered the lines to be cast off of the bitts in the forward part of the tug, which he denies, or whether they were cast off by the orders of young Sadler, it seems quite obvious that under the circumstances it was not an improper thing to do, for they were cast off with the intention of anchoring the tow, which was done as soon as the anchor could be dropped overboard. The manifest tendency of the hanging on of the tow to the bow of the tug against the ebb tide, would tend to pull the tug farther on to the shoal, or at

least make it very difficult for it to back off. No negligence, therefore, is found as to this matter.

Nothing more could be done after the grounding of the tug until she floated again. The grounding occurred about 4 o'clock in the afternoon. Some time after this happened, and after the tow had been anchored, and it was apparently swinging safely to its anchor with the tide, a bateau came from the tow to the tug and took off young Sadler and another man belonging to the tow. Before they left, it appears that the captain promised to come to the tow after the tug was afloat, or at least to stand by them. Undoubtedly it was the duty of the tug to stand by them, and to take the tow into Mispillion creek as soon as it was safe and prudent to do so. The tug was gotten off the shoal at about 9 o'clock in the evening. Let us see what were the conditions with which the captain had to deal at that time, and with reference to which his judgment was to be exercised. The night was reasonably fair. The wind was blowing from the northwest, moderately. The tow was riding securely to its anchor. Collins, the pilot, who was supposed to know the waters in which they were, and the only one who knew them, had left the tug and jumped aboard the scow as it drifted by, when the tug grounded. It is in evidence that he had betrayed such ignorance, while handling the tug from Mahon's ditch to the place in which they then were, as to justify the captain of the tug in refusing to place further confidence in his capacity as a pilot. The captain then, ignorant himself of how to get into Mispillion creek, had no one upon whom he could rely. He, however, testifies, and there is no one to really contradict that testimony, that after getting off the ground, between 9 o'clock and midnight, he tried to approach the tow, and did, although he almost immediately struck the bottom; that he blew his whistle for a long while to attract the attention of those on the tow, from whom he might have a signal; that though he saw the lights on the tow distinctly, he saw no one and received no signal therefrom. The tow being in apparent safety, he backed off a distance, variously estimated at from a quarter to one and three-quarters of a mile, and anchored. According to those on the tow, the wind did not increase very much until daylight, and the conditions all through the night, from the time the tug went to her anchorage until daylight, must have remained pretty much the same. Yet, during the night, four of the sturgeon boats got adrift and were lost, with their paraphernalia, and the smaller of the houseboats leaked and was in a sinking condition. On the next morning, which was Friday, at high tide, the captain testifies, and the mate and deck hand corroborate him, that he again approached the tow as near as he could without grounding, having struck the bottom once or twice, and endeavored to attract attention, and signaled them to send off a bateau, by which a line could be run from the tow to the tug; that he was again unsuccessful in obtaining any signal, and that as he had no small boat afloat and only a lifeboat on top of his house, he again retired. This was repeated, according to his testimony and that of those on the tug, each high tide until Sunday morning, when those on the tow put

off in a bateau and carried a line to the tug, by which they were towed to the place of destination, the captain having received directions how to steer from a passing fisherman familiar with those waters. The increase in the wind and sea, which came on Friday morning, seems to have occurred after the loss of the boats.

It is true, that witnesses for libelant, including the libelant himself, testified that the tug did not, during the night, after it floated, attempt to approach the tow or to communicate with it, by signal or otherwise. This negative testimony, however, is not sufficient to overcome the force of the positive testimony of those who were on the tug, as to the attempts to approach and the blowing of the whistle, and as the burden is upon the libelant to show negligence by preponderance of testimony, it is insufficient in this case for that purpose. It is to be remembered, too, in this connection, that, according to libelant's testimony, a bateau came over to the tug, after the tow was anchored, for the purpose of taking off persons on the tug who belonged to the tow, and communicating with the captain. As the weather conditions do not seem to have changed during the night, it is hard to understand why communication could not have been again had in this way with the tug, after it floated, if it were desired by those on the tow that an effort should be made to tow them into Mispillion creek that night. The failure to do so, or to make signals from the tow to the tug, would seem to indicate that those on the tow acquiesced in judgment, as to the propriety of remaining as they were during the night.

Under these circumstances, we must inquire of what negligence the captain was guilty, of which the direct and immediate consequences can be said to have been the loss here in question. As the boats got adrift on the first night after the grounding of the tug, and no damage came to the tow after that night, it is needless to inquire as to how far the captain was negligent in not getting the tow away from its anchorage before Sunday. If there was any culpable negligence with which we are concerned in this case, it must have been in the fact that he did not attach himself to the tow and carry it into Mispillion creek on the first night. As we have seen, however, there was nothing in the condition of the weather or of the sea on that night, to indicate special danger to the tow in the place where it was anchored. No particular stress of wind or waves has been shown on that night, to account for the breaking away of the boats,—none certainly, which would reasonably raise an apprehension of that, or any other danger to the tow, in the mind of those on the tug, and make it the duty of the captain to attempt, further than he did, to attach himself to the tow, and take it in the nighttime across the waters which separated him from Mispillion creek, as to the navigation of which he was entirely ignorant. We see nothing in the facts disclosed in the record in this connection, which would justly impugn the fairness of the judgment exercised by him under the circumstances detailed, nothing to show that he acted outside the limits of a fair discretion, in regard to what should be done under the circumstances that surrounded him. Even if, in the light of subsequent

events, the course pursued by the captain of the tug should appear to have been a mistaken one, a mere mistake is not enough to charge the tug with the loss which followed. To make the tug liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made. See opinion of Waite, C. J., in The W. E. Gladwish, 17 Blatchf. 82, Fed. Cas. No. 17,355; The Czarina (D. C.) 112 Fed. 541.

What was the precise cause of the four boats breaking away is not disclosed by any testimony in the record. No one appears to have been on the watch, or at least no one appears to have seen the boats at the time of their breaking away. As the night was not stormy, and as the other boats held on, we are at liberty to infer that those lost may have been insecurely fastened; that is, some other cause than the alleged negligence of the tug, in leaving them in that position, even if it were negligence, must have intervened. At all events, it is not found that the libelant has supported his allegation of negligence on the part of the tug, as the proximate cause of his loss, by clear and indubitable proof.

The libel must therefore be dismissed.

In re BROOKLYN FERRY CO. OF NEW YORK.

THE RICHARD CROKER (two cases).

(District Court, E. D. New York. February 5, 1902.)

COLLISION—STEAM VESSELS CROSSING—CONFUSION OF SIGNALS.

A ferryboat and tug each *held* in fault for a collision in East river for improper maneuvers and for changing signals for crossing, causing confusion in the management of both.

In Admiralty. Proceedings for limitation of liability by the owner of the ferryboat Alaska. On libels against the Alaska and the tug Richard Croker to recover damages for personal injuries resulting from collision.

Wilcox & Green, for petitioners.
James C. Cropsey, for libelants O'Donnell.
John Whalen, for city of New York.

THOMAS, District Judge. The ferryboat Alaska, bound from the foot of Greenpoint avenue, Brooklyn, for Twenty-Third street, New York, passed under the stern of a tow, and thereafter collided with the tug Croker, that, facing north, had left the Twenty-Second street pier, and swung around to starboard, thereby gaining a heading down stream.

The captain of the Alaska testified that the Alaska gave one whistle when 500 or 600 yards from the Croker, who was slightly on the Alaska's starboard bow, and swinging to starboard. The Croker not answering, the Alaska gave another single whistle, the vessels being then about 600 or 700 feet apart. The Alaska sheered a little to starboard, the Croker then coming almost head-on to the Alaska. Then

the Alaska rang a bell to stop and go back, the Croker being then about 300 or 350 feet away. Then the Croker gave one whistle, the Croker being 300 or 350 feet away. Then the Croker blew two whistles, and the Alaska answered with two immediately. The Croker sheered slightly to port, being then about 600 feet from the Alaska. At this time the Alaska was backing. Question having arisen as to how, with the Alaska backing and the Croker sheering to port, the vessels could come together, the answer was, "I don't know what happened aboard the Croker, but she jumped right around to her starboard."

The captain of the Croker says that when he had swung the Croker around into the river and straightened he stopped his engine to let the Alaska come in. The Croker was running with the ebb tide for a few seconds, and the ferryboat kept coming across. When the Alaska came across under the tow's stern, she sheered up. "It looked as if she wanted to come between us and the tow. When I see he was going that way, I blowed him one whistle. He sheered his boat the other way, and blowed me two. The Croker did not answer the two whistles, but blew alarm whistles and started backing, hooked up." This witness says that after stopping his engines he did not move them until he moved to go back, which he did when the vessels were 200 feet apart.

The position of the captain of the Croker seems to be this: That he stopped 600 or 700 feet away from the Alaska, to allow the latter to cross his bow, although the Croker had the right of way, but the Croker did not blow two whistles for that purpose. When the Alaska came from up under the tow she changed her course to starboard, and thereupon the Croker blew her one whistle, but the Alaska answered with two; whereupon the Croker, who had been stopped in the water, blew alarm whistles and reversed. It is not understood how such navigation on the part of either vessel is defensible. When the Alaska agreed to the two signals, she should have tried to carry them out, and not leave the burden upon the Croker alone. What she did do was to go astern, as if she had given an alarm whistle, which she did not, but should have given when the first signal was crossed. The Alaska's story is that she gave two single whistles, received one from the Croker, then two from the Croker, and answered the two, although she was already going astern, as if in expectation of collision, but gave no alarm signal. The Croker had been swinging to starboard, and answered and obeyed the single whistle, but for some reason, probably on account of some change of direction of the ferryboat, changed her own signal, inducing the Alaska to do the same, and in the confusion that followed the collision resulted.

The libelants should have decrees against both vessels, James O'Donnell for $150, amount of the physician's bill for services to his wife, which is the only item of expense proven by him, and Susan O'Donnell for the sum of $1,500. As between the two vessels, the damages and costs will be divided.

THE THOMAS L. JAMES.

(District Court, E. D. North Carolina. April 5, 1902.)

1. SALVAGE—RESCUE OF STRANDED SCHOONER—COMPENSATION.
The schooner Thomas L. James, loaded with lumber, was run ashore by the master "to save life" on the coast of North Carolina, during a storm, and stranded between two bars in a position of extreme peril. She was regarded by her master and mate as being in an almost hopeless condition. Her rudder and some sails were gone. She had 3 feet of water in her hold, and while she drew 13 feet as loaded there was but 10½ feet at the place of stranding at ordinary high water. Libelants, 10 in number, went on board, and there remained for 3 days, in a position of great peril, most of the crew being sick, and the master and mate having been taken off the first day. Libelants pumped out the vessel, and threw overboard the deck load, 122,000 feet, and with the assistance of others floated the schooner, and brought her into port with her remaining cargo. They also afterwards rafted and saved 40,000 feet of the lumber jettisoned, about 60,000 more being saved by others. The schooner and remaining cargo saved were of the value of $14,000. *Held*, that libelants' services were of a high order of merit, and the others assisting in the salvage not being before the court, and the amounts paid them not being shown, that libelants would be allowed for their services in salving the vessel and cargo on board $1,000; that they would further be allowed one-third the reasonable value of the lumber rafted and salved by them subsequently.[1]

2. SAME—VALUE OF SALVED CARGO—PRIVATE SALE BY OWNER OF VESSEL.
A sale of lumber jettisoned from a ship, and subsequently rafted and salved by others, by an agent of the ship, at private sale and without advertisement, does not fix its value for the purpose of determining the compensation to which the salvors are entitled.

In Admiralty. Suit to recover for salvage services.

W. D. McIver, for libelants.
A. D. Ward, for respondent and claimants.

PURNELL, District Judge. On December 25, 1899, D. H. Ward, J. M. Howland, Herman Kirkman, C. Kirkman, Lawrence Kirkman, A. W. Pittman, Ab. Bell, E. H. Heady, L. A. Seawell, R. L. Smith, Geo. W. Smith, and W. A. Prince filed a libel for salvage services against the schooner Thomas L. James, of Key Port, N. J., her tackle, apparel, furniture, and cargo, on board and ashore. On January 15, 1900, an answer was filed. By consent, on the 26th day of April, 1900, the case was referred to a commissioner to take the depositions of such witnesses as the parties might produce, and their examination in writing and on oath return to the court on or before the 15th day of July, 1900. By consent the cause was continued from time to time. The report of the commissioner was filed April 23, 1901, and the cause set down for hearing, and continued from time to time, until the final hearing was had, on the 21st day of March, 1902, both libelants and

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

respondent being represented by proctors. Upon such hearing and upon careful examination of the proofs filed the following appear and are held by the court to be the facts:

The schooner Thomas L. James, loaded with lumber, bound from Savannah, Ga., to Roundant, N. Y., was driven ashore and stranded on the new shoal near Bogue Inlet, N. C., on October 31, 1899. In the wreck report of the master, dated November 15, 1899, to the collector of customs, in stating the cause of the casualty he says: "Vessel filling. Run ashore to save life. Force of wind eighty miles an hour." The cargo consisted of 372,000 feet of lumber,—122,000 on deck and 250,000 in the hold. The deck load was mostly of heavy timbers, and the libelants threw off said deck load of lumber. It required seven, eight, and sometimes ten men to get one piece overboard. The ten libelants first named began work on Saturday, and remained aboard and by the vessel until and during Monday following, working the pumps, throwing overboard timbers upon each succeeding flood tide, and rafting the same between tides. Most of the crew were sick. Those who could assisted. The inflowing tide carried the lumber thrown overboard inside the banks, and down the adjacent sound waters, where, with boats, it was gathered together and floated to safe places on the mainland. Said first-named ten libelants rafted two rafts, containing about 40,000 feet of lumber, which they guided to safe harbor, and continued for 30 days thereafter to care for and watch. Libelants R. L. and Jas. Smith gathered together of the said cargo thrown overboard and floating as aforesaid another raft of about 12,000 feet, and guarded the same until about the 30th day. A. W. Moore, W. W. Davis, and Elijah Kennedy were engaged two days in getting up the drifting lumber and cargo, and saved about 1,200 feet. The scow schooner Little Jim, Capt. Saloame and two men, also Oliver Willis, with a mate and sharpie, saved and salved of said lumber about 3,700 feet. One hundred thousand feet of the deck load was saved. When libelants, the ten first named, spoken of herein as the "ten," went aboard the vessel, the water was beating upon her decks. She was lying on the starboard side of the channel. There was from 2 to 6 feet of water on the starboard, and 7 to 11 on her port side, according to the tide. High seas striking her on the port side washed up on the deck load. There was about 3 feet of water in the hold when she struck on the bar. The rudder was gone, also one of her sails. There was one bar on the outside, and one bar on the inside, and the vessel was between them. There were breakers on the shoal. The tide at this point runs about 4 marine miles an hour. The vessel was drawing about 13 feet of water, and there was about 10½ feet of water in the channel at ordinary high tide. With strong breezes from the seaward, the vessel would have gone to pieces. She came in on an extraordinarily high tide, called a "storm tide." When libelants went to her the opinion was expressed by the captain and the mate that she had "broken her back on the reef, had knocked her bottom out," and when the pumps were tried by McGinn he was laughed at. No bargain was made with libelants. The captain directed them to throw the deck load overboard, saying they should be well paid,

and to look to the ship and cargo for compensation. The vessel was almost in a hopeless condition. She was on the reef just inside the point of the reef. She was drawing 13 or 13½ feet of water when the average tide was not over 10 or 10½ feet. She was down by the head, and listed aport on the sand, without protection by reason of being near the shore, and without sufficient water on ordinary high tide to have floated. Her condition seems to have been considered by both the captain and mate as desperate. She was in extreme peril, and there was great personal risk in saving the cargo and vessel. By the efforts of the first named ten libelants and others the vessel was lightened, floated, and towed within the harbor of Swansboro, where she was when libeled. The value of the property, ship, and cargo actually saved and located in Swansboro Harbor was $14,000,—ship, $10,000; cargo, $4,000. There is no evidence as to the amount of insurance on the ship or cargo. Evidence on this question is studiously avoided and guarded. Libelants are men of small means, and obtained advancements on their claims in this behalf from Geo. W. Smith and A. M. Prince, who say they bought the claims. There is no evidence of an assignment. There are allegations in the pleadings of an agreement to arbitrate the matters set forth in the libel, but it appears from the testimony that said agreement and alleged arbitration are for many reasons void, and of no effect, and this was conceded in the argument. There is also much testimony offered touching an alleged receipt executed by libelants, in possession of respondents but not produced, which simply serves to encumber the record, as it must have been known to proctors and is held by the court to be incompetent, and exceptions to all such testimony sustained. It cannot be considered. The receipt was not produced or proven to be lost. No proof is offered on this subject, but testimony tending to show its contents and purport was objected to on the hearing. Libelants have not been paid for services rendered in this behalf. Settlements have been made with other parties, which it is not necessary to consider in this connection, since the claim of the libelants is separate and distinct and unaffected by any contract others may have made by way of settlement. Such contract or settlement is good inter partes, but does not affect the claims of libelants. The only effect of such testimony and transactions would be as a guide to aid the court in arriving at a fair adjustment of the claims under consideration. Claimants ask to be allowed to pay libelants the amount heretofore tendered, being 25 per cent. of what they say is a reasonable valuation of the deck load salved, about $200. It is conceded in the pleadings and in the argument that the services rendered entitled the libelants to salvage; the gist of the contention being that it was not salvage services of a high order, and that 25 per cent. of the deck load saved and sold by claimants is reasonable compensation. McGinn filed a libel against the vessel and cargo in behalf of himself, his steamer (the Nannie B.), and crew, to which libelants were not parties. This libel was settled and withdrawn on the payment of $1,000. This proceeding is in no way binding on the libelants herein, and can in no way affect their claims. It is aliunde their rights. Some of the lumber saved was sold by T. M.

Thomas, but this sale was irregular, and cannot be considered as a test of the value of such lumber. He was the agent of the claimants.

The first argument pressed by proctor for respondents is that salvors cannot assign their claims for salvage, and if they do so the assignment does not carry with it the lien therefor. The authorities cited in the argument and brief all refer to seamen's wages, and in considering this question the supreme court in The Resolute, 168 U. S. 441, 18 Sup. Ct. 113, 42 L. Ed. 533, says: "A portion of the libelant's claim arises by assignment, and the authorities are almost equally divided upon the question whether such assignment carries the lien of the assignor to the assignee; obviously these are not jurisdictional questions." The district court, which allowed both the assignment and lien, was affirmed. The salvor ranks even seamen's wages incurred prior to the salvage services upon the general principle that it tends to the preservation of the res, without which the seamen themselves might lose their security. For the same reason it is superior in dignity to claims for materials and supplies or the cargo's claim for general average arising out of jettison on the voyage, when the vessel was subsequently wrecked. The admiralty guards with care all assignments or trades made with those of whose interests it has jurisdiction, for reasons which have been too often enumerated to require repetition, and will not permit hard bargains to be enforced against those who under stress or ignorance of the ways of those who may be found most ready to take advantage of their circumstances. Salvors are not always of the seaman class. Generally they are better versed in the ways of the landsman, and more crafty in business transactions. Their claims are highly favored. They are property possessing many of the incidents of choses in action, and there is no good reason why, by a properly drawn instrument in writing, a salvor should not be able to assign his claim and the lien which the law gives him therefor. Were this a question in the cause, the court would follow the decisions to this effect. But there was no assignment. Libelants obtained advancements, and even these will be protected when made in good faith. Courts of admiralty administer natural justice and equity.

It may be here remarked that the course of respondents, as shown in the depositions and in the pleadings, do not commend themselves to a court of admiralty, which does not countenance such hardships and tricks as seem to have been attempted on the libelants in this cause. The transactions as disclosed in the record seem to be a succession of attempts to impose hardships on the libelants which a court of admiralty will prevent when its jurisdiction is invoked.

Libelants are lumbermen, boatmen, fishermen, and sailors familiar with the coast, its tides, winds, and dangers, and the labor in which they were engaged. In that locality, "as uncertain as the wind" is full of meaning, and not a sentimental simile. That the wind did not veer to the east or southeast was fortunate for them, the ship, and the cargo. Had it done so all, at least much, would have been lost. It was a danger well understood, and, being so recognized, hard work was necessary. There was no complaint they did not do their full

duty, and no attempt to minimize the services rendered, until after the ship was safely moored in a snug harbor, and all danger had passed. Then there was much talk about what men could have been hired for by the day or hour and attempts to fix the compensation. But there were no other men at the wreck. The need of them was pressing, and the change of tone towards the ten men was an apt illustration of the familiar couplet of the sickness of his Satanic Majesty, when he would feign have assumed saintly ways, but upon restoration "devil of a saint was he." Salvage does not depend on contract,—springs from no duty. In the case at bar there was no contract. Under such circumstances it is based upon public policy. The salvor who rescues a ship or cargo from the grasp of the sea, wind, and wave need prove no bargain with the owner or master. He is paid by the court, not merely for the value of his time and labor in the special case, but a bounty in addition, that he may be encouraged to do the like again. "If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever, if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service as great as if rendered at sea, and yet the claim of salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice." Marshall, C. J., in The Blaireau, 2 Cranch, 240, 2 L. Ed. 266.

Being founded on sound public policy, the admiralty ignores and disregards any unfair settlement, whether it be by contract or pretended arbitration. Dealings with salvors, as with seamen, to be upheld, must appear to be just, open, and equitable, and the burden of showing that they are so is on the representatives of the vessel or property saved, whether owners, insurers, or in any other capacity. The award is controlled by no general rule, but is governed by the circumstances of each particular case.

The services rendered by the first-named ten libelants, in operating the pumps to free the vessel in her precarious condition of the water in the hold, and throwing the deck load of lumber overboard, were services essentially to the ship, and for these services they are entitled primarily to a lien on the vessel and cargo aboard, and, secondarily, to a lien on the cargo thrown overboard. The pumping done after she was towed into port, and for which they were paid small amounts, was not, strictly speaking, a salvage service, but it was a service to the ship. Rafting the lumber flotsam and mooring in safety on the stage of the tide when work aboard ship could not be done, while it kept them constantly engaged, was strictly a salvage service rendered to the cargo, for which they have a lien on the lumber salved primarily. As to the first claim, the salvage services to the ship, it is difficult to make a per cent. or even an average allowance; for others were engaged who are not parties to this proceeding, and who have been paid and satisfied under another proceeding, of which the court knows nothing except incidentally. Were all such parties represented, the

court would be inclined to allow all at least 25, and possibly 33, per cent. of the property salved, the vessel and cargo on board. But this it will readily be seen would be impracticable, since master, owners, and other salvors have made settlements, and the latter are not before the court. The award must therefore, of necessity, be in a lump sum. Considering the condition of the vessel, stranded, and in the opinion of those most interested and best informed, the master and mate, a hopeless wreck, on the beach, without sufficient water to float her, rudder gone, some of the sails gone, her bottom knocked out, "back broken," the crew sick and worn out from labors in a gale through which they had passed, and by which they had been forced to make land "to save life," on a sparsely settled coast, with shifting sandbars, there to-day and gone to-morrow, in a position where an easterly or southeasterly wind would cause her destruction; considering the property saved by the efforts of the salvors,—all of them,—a third of the value of the property saved would not be excessive as a reward for salvage services rendered under such circumstances. Was there no danger to the ten who remained aboard, working day and night, as the waves and wind permitted? It is in evidence that to fall overboard was to be drowned. In the event of an adverse wind, there was no way for the salvors to get ashore. The master and mate were taken off by the steamer Nannie B. the first day, and the evidence does not show when either returned, or, if they returned, how long they remained. It is not creditable to parties whose property has been saved from such dangers to belittle the services of those who would "lend a hand,"—risk the dangers,—when the master and his mate seemed to be without hope. If nothing was saved, the salvors got nothing. They assumed the risk, faced the dangers, and should be rewarded accordingly. Their services were as valuable and effective and attended with more danger to themselves than those rendered by Capt. McGinn and his crew of the steamer Nannie B., who could go into port at night or in case of storm or as occasion required. True, had this claim been involved, the value of the steamer and other facts would have been considered, as in The Penobscot (D. C.) 103 Fed. 205; Id., 45 C. C. A. 372, 106 Fed. 419; but it is not involved in this proceeding. By settlement, this steamer and crew were paid $1,000. Why not at least this amount to the salvors?

Considering all the circumstances above recited, the value of the property salved, the dangers attendant thereon, and the meritorious services rendered by the ten salvors first named in the libel, D. H. Ward, J. M. Howland, Herman Kirkman, C. Kirkman, Lawrence Kirkman, A. W. Pittman, Ab. Bell, E. H. Heady, L. A. Seawell, and R. L. Smith, it is considered, ordered, and adjudged that they be and are hereby allowed $1,000, or $100 each, for salvage services rendered the schooner Thomas L. James, and the cargo aboard, in the hold, and saved. The service in rafting and watching the lumber, as has been said, is not salvage of as high order as that rendered the ship. A part of this service was rendered during the time, and enters into the award hereinafter made; but after the said salvage services were rendered the ten salvors were engaged for 30 days in rafting, mooring, and

watching the lumber. In this way they saved 40,000 feet. This lumber was sold by an employé of the vessel or the owners thereof,—a man whose name appears on respondents' stipulation. As said by proctor for libelants referring to the pretended arbitration, it was a sale "by the boat and for the boat." It can therefore furnish no test as to the value of the said lumber. It is in evidence that the lumber salved was or would have been worth $25 in New York, and the freight is $6 per 1,000, and there are always sailing vessels ready to take a cargo to New York. The freight would have been less, possibly the market not so good, at Norfolk, Va., or Baltimore, Md. And there is a market at New Bern or Elizabeth City, in this district, for lumber, the voyage to either of which ports is safe, being by inland waterways, as it is to Norfolk. Large quantities of lumber are shipped from both ports. There is no evidence of the price of this grade of lumber at either port, except New York; but taking this as a basis, and allowing a liberal discount for handling and freight, $12 per 1,000 should be about the price of such lumber at Swansboro. One hundred thousand feet of the deck load is admitted to have been sold for $938. This sale, as has been seen, was no test. It was without advertisement or other incidents of a fair sale. A fair compensation should be allowed for this service on 100,000 feet saved, at $12 per 1,000 feet, $1,200. One third of this sum, $400, libelants should be allowed, and is hereby fixed as the compensation of all those engaged in the service of saving the lumber adrift. Many so engaged are not parties to the libel, some have been paid, and of others the court has no information, and can deal only with claimants who are parties. The ten saved and salved 40,000 feet of lumber, and are hereby adjudged to be entitled to $160 for such services, or $4 per 1,000.

It is agreed R. L. Smith and Jas. Smith, mentioned in the depositions, mean the same person, R. L. Smith, libelant. It appears, not clearly, but sufficiently so, that this libelant saved and salved 12,000 feet of lumber, and upon the basis established would be entitled to $48 salvage. Moore and Davis saved and salved 1,200 feet, and the crews of the Little Jim and the sharpie Nellie Bly saved and salved 3,700 feet, of said lumber, and are entitled to $14.80 salvage. The last named, Moore and Davis, and the crews of the two boats, are not parties to the libel, but it appears libelants G. W. Smith and A. M. Prince "bought out" the interest of these parties in the salved lumber after 30 days, and continued for some time to watch and care for it. This would give them a joint interest in the lumber; but, as before said, there was no legal assignment of the interests. To collect the amounts herein adjudged to be due these parties, it would be necessary to make them parties to the proceeding pro forma, and then for them to receipt for the same, or other parties do so under a formal power of attorney authorizing the collection and receipt. The same claim is made by G. W. Smith and A. M. Prince as to the interest of the ten libelants in the lumber, and the same course must be pursued in regard thereto; but the ten are parties. Smith and Prince will be reimbursed out of the allowance for salvage with a liberal bonus for the advancement, but cannot collect said amount, except jointly

with the ten libelants. The fractional division, which would, for a proper solution, require the abstract rules of algebra and differential calculus, and be as unintelligible to any of the parties concerned as calculations for tides and eclipses of the planets, the court does not propose to attempt. It has no place in the admiralty, as it would only serve, which has already been sufficiently done, to further "muddy the waters." To find one unknown quantity frequently puzzles the brain, but in this cause there are several unknown quantities.

It is therefore now ordered, adjudged, and decreed that the sum of $1,000, $100 each, be, and the same is hereby, awarded the ten first-named libelants, D. H. Ward, J. M. Howland, Herman Kirkman, C. Kirkman, Lawrence Kirkman, A. W. Pittman, Ab. Bell, E. H. Heady, L. A. Seawell, and R. L. Smith, for services rendered the schooner Thomas L. James, and the cargo on board between-decks. It is further ordered, adjudged, and decreed that the sum of $160 be, and the same is hereby, awarded the said ten libelants for salvage services rendered in saving the lumber thrown overboard. It is further ordered, adjudged, and decreed that the sum of $48 be, and the same is hereby, awarded the said R. L. Smith for salvage services rendered in saving the lumber thrown overboard. It is further ordered, adjudged, and decreed that the sum of $19.60 be, and the same is hereby, allowed to Moore and Davis and the crew of the Little Jim and Nellie Bly, as set forth in the opinion, said amounts to be paid, as set forth, to G. W. Smith and A. M. Prince, upon their filing a power of attorney, as set out. It is further ordered, adjudged, and decreed that claimants (respondents) pay the cost of this proceeding, including the commissioner's bill of $171.15, for taking and reporting the depositions herein. It is further ordered that judgment be entered against the respondents (claimants) and the sureties on the stipulation, in accordance with this decree, for the sums hereinbefore mentioned, and in favor of the several parties named.

BOARD OF TRADE OF CITY OF CHICAGO v. O'DELL COMMISSION CO. et al.

(Circuit Court, S. D. Ohio, W. D. March 1, 1902.)

No. 5,555.

EXCHANGES—RIGHT TO ENJOIN USE OF QUOTATIONS—PERMITTING ILLEGAL TRANSACTIONS.

The evidence on a motion for a preliminary injunction showed that the greater part of the transactions on the exchange of the Chicago Board of Trade, complainant, were in futures, in which, while in form contracts for the sale and delivery of commodities in the future, it was not contemplated by either party that such commodities would be actually delivered or paid for, but that the deal would be closed by the payment of differences in some form of settlement. It was further shown that such facts were fully known to complainant's officers. *Held*, that such transactions were bucket-shop deals, in violation of the laws of Illinois, and illegal under the statute of Ohio, and that complainant, knowingly permitting the use of its exchange by its members for such purpose, had no standing in a court of equity which entitled it to an injunction against the use of the quotations made on its exchange by a concern conducting a bucket-shop business in Ohio.

In Equity. On motion for preliminary injunction.

Henry S. Robbins and Thornton M. Hinkle, for complainant.

Foraker, Outcalt, Granger & Prior and Shay & Cogan, for respondents.

THOMPSON, District Judge. The bill states, in substance, that the complainant is a corporation organized to maintain a commercial exchange; that it is maintaining such an exchange; that the volume of its transactions is so large that it has become one of the great grain and provision markets of the United States; that the quotations of the prices made in these transactions have become a species of property of great value to the complainant; that complainant furnishes these quotations to the telegraph companies, who pay complainant large sums of money for the privilege of selling them to their customers; that they are so furnished to the telegraph companies under contracts by the terms of which the telegraph companies agree that they will not knowingly sell or transmit the same, directly or indirectly, to any person, firm, or corporation conducting a bucket shop or other similar place where such quotations are used as a basis for bets or other illegal contracts based upon the fluctuations of the prices of commodities dealt in on said exchange; that the defendant the O'Dell Commission Company conducts a bucket shop where complainant's quotations are used as the basis for bets on the fluctuations of the prices of commodities dealt in on complainant's exchange; that these quotations are obtained by the O'Dell Commission Company from the telegraph companies surreptitiously and by theft, or from persons who so obtain them; that the unauthorized use of these quotations by the O'Dell Commission Company, without their being obliged to pay complainant or the telegraph companies anything therefor, is

calculated to, and in time will, if not entirely stopped or prevented, destroy the value thereof to complainant; and the prayer of the bill, among other things, is that the O'Dell Commission Company be enjoined from receiving or using these quotations. The O'Dell Commission Company and its officers deny that they conduct a bucket shop, or that they obtain complainant's quotations surreptitiously or by theft, but do not deny that they are receiving and using the same, and admit "that neither of them is paying either of said telegraph companies therefor," and admit "that if one person * * * be allowed to secure such quotations without the restrictions as to the use thereof which complainant imposes * * * such person can, if he will and so desires, furnish them to all the bucket shops * * * desiring them, and thus entirely defeat the efforts of complainant to prevent their use in bucket shops as the basis of their illegal transactions"; and they allege that these quotations have become public property, and that they are entitled to receive and use them, and that any refusal of the telegraph companies to transmit them would be a violation of the interstate commerce laws of the United States; and they further allege that complainant conducts a bucket shop or keeps a place in its exchange hall wherein is conducted and permitted the pretended buying and selling of grain, provisions, and other produce, either on margins or otherwise, without any intention of receiving or paying for the property so bought, or of delivering the property so sold, and that much the larger part of its transactions are of this character; and that complainant cannot have a property right in quotations founded in greater part on gambling transactions, nor any equitable right to enjoin the use of such quotations by a rival in the bucket-shop business. The admissions of the pleadings and the evidence show conclusively that the O'Dell Commission Company is carrying on a bucket-shop business, and that in furtherance thereof it receives and uses complainant's quotations, without any authority therefor from the complainant or the telegraph companies, or from any one representing them or either of them, and without paying anything for the same to the complainant or the telegraph companies, and that such an unauthorized use of said quotations is destructive of the value thereof to complainants.

Now, passing other questions, does the evidence show that the complainant keeps a bucket shop or place wherein is conducted or permitted the pretended buying and selling of grain, provisions, or other produce, either on margins or otherwise, without any intention of receiving or paying for the property so bought, or of delivering the property so sold?

Its members, if acting in good faith, may buy and sell grain and other produce on its exchange for future delivery, and afterwards, before the maturity of the contracts, may cancel the contracts and settle the transactions covered by them by paying and receiving the differences between the contract prices and the market prices of the commodities, as shown by complainant's quotations, on the day of settlement, without violating the laws of Illinois against bucket shopping, and the test of good faith is whether, when they buy and sell, they

intend to receive and pay for the property so bought or to deliver the property so sold. If the apparent buying and selling is a mere cover for speculating on the fluctuations of the market, it is bucket shopping. The evidence convincingly shows that the larger part of the transactions, in grain and other produce, on complainant's exchange, are mere gambling transactions, conducted by some of its members in violation of the laws of the state of Illinois against bucket shops, and it remains to be considered whether the complainant, the corporation itself, conducts or permits these illegal transactions upon the floor of its exchange. Complainant may not conduct these transactions, but if, through its officers and agents, it knows that they are conducted by some of its members, and does not prevent such transactions, it must be deemed to permit them. It permits unless it prevents, and if it permits then it keeps a bucket shop, in violation of the laws of Illinois, and it will not discharge its duty to the public or escape criminal liability by merely enacting rules prohibiting such transactions. It must go a step further, and enforce its rules, and prevent all such transactions within its knowledge.

The president and a number of members and ex-members of the board of trade have testified as to the manner of conducting the business of the exchange.

William S. Warren, president of the complainant, and who is also the president and manager of Hulbert, Warren & Co., a corporation doing a commission business on complainant's exchange, was called as a witness by the defendants, and testified that his company bought and sold on the exchange about 200,000 bushels of grain per day, or from 50,000,000 to 65,000,000 bushels per year, for future delivery, of which not less than 10 per cent. was delivered; but afterwards, being called upon to show from his books the amounts of his sales and purchases and the deliveries thereunder for the year 1901, testified that his purchases alone for that year amounted to 75,440,000 bushels, of which there was delivered to him 3,145,000 bushels, leaving undelivered 72,295,000 bushels; that the contracts covering the undelivered grain were canceled, and the transactions represented by them were settled, before the day of delivery, by the parties paying and receiving the difference between the contract prices and the market prices, as shown by complainant's quotations, on the day of settlement. Now, it is fair to assume that his sales would equal his purchases, but, if they amounted to even 50,000,000 bushels, it would make his total dealings in grain, for 1901, 124,440,000 bushels, and if 200 members of the 1,803 members doing business on complainant's exchange also dealt in grain to the amount of only 35,000,000 bushels each per year it would make their total dealings 7,124,440,000 bushels, or more than twice the number of bushels produced in the United States in that year.

The contracts for undelivered grain were canceled through a process of offsetting or "ringing up," facilitated by the conveniences afforded by the exchange clearing house. Section 6 of rule 22 of the rules and regulations of complainant provides:

"Sec. 6. In case it shall appear that the delivery of any outstanding trade or contract between members of the association may be offset by some other

corresponding trade or contract made by the parties with other members of the association, and the parties to such trade or contract, or their authorized agents, consent to such offset, such trade or contract shall be deemed to have been settled, and any balance between the current market value of the property covered by such trade or contract and the several contract prices shall be due and payable immediately by the party from whom such balance may be due to the party entitled to receive the same under his contract. The current market value of the property contracted for shall be conspicuously posted, at a stated hour each day, under the direction of the board of directors, in the exchange hall, and in the settlement room of the board, which posting shall serve as a basis for the adjustment of all contracts settled, as herein provided, on that day. In order to facilitate the operation of this section, each member is required to keep a settlement book in which shall be entered the names of parties with whom settlements have been made, and the dates and terms of the trades included in such settlements, and the terms of such settlements, and the prices at which the commodities were originally sold or purchased, and the amounts due to or from him or them on each separate settlement, also the net amount due to or from him or them on all settlements; and the board of directors is hereby authorized to provide a suitable office, with the necessary employés, to which members shall be required, at stated hours each day, to make reports, showing the net balance due to or from each member, as shown by such settlement book, and also the general balance due to or from him or them upon all such settlements, each report to be accompanied with an acceptable check for the aggregate of balances, if any, due from him or them on the contracts so settled; whereupon, if said report is found to be correct as compared with other reports rendered him, the person in charge of said office shall, at a stated hour each day, pay to each of the parties making such reports any balances which he may have collected, and which shall appear to be due to them by said reports, less such charges as shall be prescribed by the board of directors as compensation for the service of said office."

For the year 1900 the clearings amounted to $62,229,165.25, and the balances paid over by the clearing house were $23,821,284.05, as shown by the anual report of the board for that year. The report furnishes no statement of the cash transactions made on the exchange. The making, operation, and enforcement of these clearing house rules and regulations require a knowledge of the transactions which ought to disclose their true character.

The process of "ringing up," as it is called, is described by Warren as follows:

"Q. Is the manner of 'ringing up' deals there a regular course of business? A. Yes, sir. Q. Are those deals that are 'rung up' in the regular course of business settled by a mere payment of differences between the two prices of purchase and sale? A. They are settled by the payment of a difference based on the settling price of the day. * * * [Where the '*' is used, it is to indicate omissions.] Q. What does he fix the settling price from? A. The average market price of the day. * * * Q. How is it based upon the settling price? A. Through the clearing house. * * * Q. That is right. Now, how is it done? A. It is done by the payment of a check for the balance or the receiving of a check. Q. The balance of what? A. The balance that is due or payable on the settlements of the day. * * * Q. Now, how are they— Just tell us how they are settled. A. Well, if I have bought of you 5,000 bushels of wheat for May delivery, and sold it to Mr. Robbins, and Mr. Robbins has, in turn, sold it to you, we make an offset of those trades, and each one pays or receives, as the case may be, the difference, based on the settling price of the day. Q. How do you arrive at the difference based on the settling price? A. I don't understand your question, Mr. Jenks. (Question read.) A. I will have to get a pencil and paper and

figure it out. * * * Mr. Jenks: Q. No; describe it so that these reporters can write it down. A. Warren has sold to Jenks 5,000 bushels of wheat at 79 cents. Jenks has sold it to Robbins at 79½. Robbins has sold it to Warren at 80. An offset is made of those trades, and the differences are settled through the clearing house on the basis of a settling price of, say, 79½. Q. Who says 79½? A. The board of trade. Q. Well, all right. Now, you send the clearing house sheet to the clearing house the next morning, don't you? A. Yes, sir. * * * Q. Well, then, I put in a clearing house sheet, and I state there is owing to me how much? A. $25.00. Q. Robbins puts in one, and he says there is owing to him how much? A. $25.00. Q. You put in one that you owe how much? A. $50.00. Q. Whom to? A. The clearing house. Q. Then all three of us would send in a clearing house sheet? A. Yes, sir. Q. Two of us would say that we claimed from the clearing house so much? A. Yes, sir. Q. What would those amounts of claim and debit arise from? A. From the difference in price in the purchases and sales. Q. Now, I will suppose that you sold to me to-day 5,000 bushels of wheat for May delivery; I to-day sold to Mr. Robbins 5,000 bushels of wheat for May delivery; he to-day sells to you 5,000 bushels of wheat for May delivery. When is that 'rung up' between us three? A. At any time between now and the 30th of May,—31st of May. Q. You can 'ring it up' to-morrow morning? A. Yes, sir. Q. And pay those differences, and receive them through the clearing house? A. Yes, sir. Q. Now, we three are members of the board? A. Yes, sir. Q. Supposing that in that same transaction you had a customer, and say that customer is Mr. Whitney, who ordered you to sell 5,000 bushels of May wheat, which you sold to me. You have another customer, and we will say that that customer is Mr. Shea, who orders you to buy 5,000 bushels of wheat. Now, we will say that that transaction between you, me, and Mr. Robbins and yourself grew out of those two orders, and Mr. Whitney and Mr. Shea were not members of the board. We will say that is to-day. To-morrow Mr. Whitney orders you to buy that wheat which you have sold for him. What will you do? A. I would go on the market and buy it. Q. Then suppose that was the only transaction Mr. Whitney had with you, and he wanted to get out and stay out; how would you close that up with him? A. I would render him an account of purchase and sale, and assume the contracts myself. Q. What contracts? A. The contracts for the purchase and sale that I had made on his order. Q. Where have you got any, in the case I cited? A. If I haven't these, I have others. Q. Have you? Now, we will suppose that Mr. Shea wants to close out his, and he orders you to buy in his wheat; what do you do? A. I go into the market and buy it. Q. And how do you close it out with him? A. In the same manner. Q. The same manner as what? A. As I did with Mr. Whitney. Q. That is, if each one of them make money, as a profit on the difference between the purchase and sale price, you would give each one of them your check? A. For the net profit; yes, sir. Q. After taking out the commission and everything else? A. The war tax. Q. Now, suppose each of them lost money; what would you do? A. I would collect it of them, if I could. Q. Yes; and that that you collected would be the difference between the purchase and sale price, deducting the commission and the war tax? A. Adding the commission, in this case. Q. Well, adding the commission and war tax? A. Yes, sir. Q. Then, if they had put up any margins to begin with, you would give them what was left of that, wouldn't you? A. Yes, sir. Q. Now, you say that in both of these cases you have 'rung up' your deal on the board, mind you, by this set-off in the trade that you had with me, and I had with Robbins, and Robbins had with you; you have 'rung them up.' Now, you have had only these two orders here. You say that you still have got the contracts open,—one of purchase and one of sale? A. I did not say so. If I did, I didn't understand the question. In the suppositious case which you have given, the whole thing— Q. The whole thing is ended? A. Yes, sir. Q. And we will say the initial transaction was to-day, and the closing out of the whole business was to-morrow, and this deal was a purchase for May delivery; then that whole business will have been conducted from beginning to end and settled on the mere difference in the market price,

wouldn't it? A. Yes, sir. Q. And all the members of the board conduct their business in the same way, where the trades are the same as you have described; I mean where the customers give the same sort of orders, and you are able to make the 'ring' in the same way? A. Every member of the board, Mr. Jenks? Q. Yes; all of them who do that kind of business, do they do it in the same way? A. That is the general course of business; yes, sir. * * * Q. Now, that trade between you and me, I have sold to you and have bought from you the same commodity, for the same delivery, but at a different price,—one side of it is 75 cents, and the other side is 74 cents; according to the practice over on the board, you and I may balance those two contracts, may we not? A. Yes, sir. Q. Without delivery cancel the contracts by going through the clearing house with our respective clearing house sheets, and one of us claiming from the other that one cent a bushel, and the other paying the one cent a bushel through the clearing house. That would end the transaction between us, would it? A. Yes, sir. Q. And we settle those contracts upon the difference in the two prices,—one 75 cents and the other 74. That is right, isn't it? A. You settle it on the difference in value of the two parcels of wheat. Q. And the value is fixed by the two prices? A. Yes, sir."

Deliveries by notice are described by Warren as follows:

"Q. Then this 7,000,000 and odd that you delivered by notice. Did those delivery notices start from your office? A. No, sir. Q. Did any of them stop with your office? A. Of the 7,000,000; no. Q. Do you know through how many different hands those notices passed before they came to you, and before they stopped, after they were in your hands? A. I do not. Q. The 7,000,000 that you say were delivered by notices, those transactions were settled up by you by merely paying or receiving the difference in the purchase and sale price of the commodities, weren't they? A. Differences are adjusted between the values of the property at the purchase and sale prices. Q. Well, I don't see any difference; maybe you do. The difference in the two prices—the contract prices, the purchase and the contract price of sale—was all that was paid or received by you in winding up those transactions, where the notices of delivery were given, weren't they? A. Yes, sir. Q. And those matters were put on the clearing house sheet, and passed through the clearing house, just the same as though the deals had been 'rung up,' were they not? A. Yes, sir."

As to whether all members do business in this way, Mr. Warren says:

"Q. Mr. Warren, do you know how other members of the board of trade conduct their business at the pits and on the floor of the exchange? * * * A. I have no personal knowledge of the manner of any person's business except my own. Q. As president of the board of trade, you don't know how any other member of the board transacts or conducts his business which is transacted or conducted on the floor of the exchange room of the board of trade,—is that correct? A. I know he has to do it according to the rules of the board of trade. * * * Mr. Jenks: Answer. A. I cannot answer that question in all its detail. I may know in a general way. No two firms, perhaps, conduct their business exactly, in all its minutiæ and minute details, in the matter of their accounts and everything of that sort, alike. Q. You haven't been asked that, have you? Mr. Warren, you are a man of a little extra intelligence. Now, if you do not understand the question that I put to you, just say so. Do you know how other members of the board of trade transact their business on the floor of the exchange room, and at the pits, in the business that they do transact there, and will you answer the question yes or no? A. Will you make it a little clearer what class of business you refer to? Q. That which they do at the pits, or on the floor of the exchange room, and at the same place where you transact your business? A. Well, I know, in general terms, how they do it; yes. Q. How? A. I know, in a general way, how they do it; yes. Q. Do they

do it in the same way you have described as the manner in which you do your own business? * * * A. The only description I remember of having testified to were those hypothetical trades between you and myself. Is that what you have reference to, Mr. Jenks? Mr. Jenks: Q. I want to know whether the other members of the board do their business in the same way that you do your business at the pits? A. In a similar manner; yes. * * *"

As to bucket shopping, Mr. Warren says:

"Q. Then you don't know what a 'bucket shop' is, as that term is used by the board of trade of the city of Chicago in its rules? * * * A. Yes; I know. Mr. Jenks: Q. What is it? A. It is a place where dealings are had upon the fluctuations in the market price without any bona fide transaction. * * * Mr. Jenks: Q. In your meaning, would it be a bona fide transaction if the parties did not intend to receive or deliver, but did, as a matter of fact, settle on differences in the market price? * * * A. If the parties did not intend to receive or deliver, that says, does it? Mr. Jenks: Q. Yes. A. No; it would not. Q. But if they did intend to receive or deliver, and did then settle on the difference in the market price, that would be a bona fide transaction? A. Not in a bucket shop. Q. Not in a bucket shop? A. No, sir. Q. If parties dealt together, one contracted with the other to buy 10,000 bushels of May wheat, and afterwards sold out that 10,000 bushels of May wheat to the same person, and they settled both contracts by payment of the difference in the market price, would that be a bona fide transaction, according to the rules of the board of trade? * * * A. Yes. * * * Q. But if the same kind of contract is made anywhere else in the purchase and sale of commodities, and they 'ring up' the deals, and settle them by merely paying the differences, is that a bucket-shop transaction, according to your notion? * * * A. The same kind of transaction as what, for instance? * * * Q. I mean, made anywhere away from the board of trade? A. You could not make the same kind of contract away from the board of trade, because it would not be subject to the rules of the board of trade. Q. Do you define as bucket-shop deals such as are not made under the rules of the board of trade? * * * A. Not necessarily. Mr. Jenks: Q. Well, if, as a matter of fact, a man kept a place, and he bought and sold for future delivery, and 'rung up' those trades by merely settling the difference between the purchase and the sale price, according to your notion would that be a bucket-shop deal? * * * A. Yes, sir. * * * Mr. Jenks: Q. As a matter of fact, do you contend that the business of the members of the board and the board is increased when bucket shops are closed? * * * A. Yes, sir. Mr. Jenks: Q. If the bucket shops are closed, is the business of the board of trade increased, because the persons who deal at the bucket shops would deal on the board of trade, through its members? A. Yes, sir. * * *"

As to the visible supply of grain in Chicago on December 2, 1901, Mr. Warren testified:

"Q. Do you know what the visible supply of wheat in the city of Chicago was on the 2d day of this month (December, 1901)? A. Approximately. Q. How much? A. About 10,000,000 bushels. Q. Do you know the supply of corn in elevators in the city of Chicago on the 2d day of this month? A. Approximately. Q. How much? A. About 9,000,000 bushels. Q. Do you know the supply of oats in Chicago on the same day? A. Approximately. Q. How much? A. About 2,000,000 bushels. * * * Q. You don't know how many bushels of No. 2 and No. 1 wheat there were in store? A. I know approximately how much No. 2 there was. Q. How much No. 2? A. About 4,500,000. Q. No. 2 wheat in the— A. I beg your pardon. Contract wheat is what I meant to testify to. That includes No. 2 red winter and No. 1 northern spring. Q. There was about 4,000,000 bushels of that? A. I think 4,500,000 bushels,—4,500,000 to 5,000,000. Q. 4,500,000 to 5,000,000 bushels of wheat that would be deliverable under contracts made on the board of trade here? A. Yes, sir. * * * Q. But can you give us an estimate of the quantity

(wheat) that you dealt in for the December option? A. Yes; I will give you an estimate. Q. How much? A. Probably 5,000,000 bushels. Q. Can you give us an estimate of the amount of corn that you dealt in for the December option; I mean your firm or corporation? A. Probably 2,000,000 or 3,000,000 bushels. Q. Did you deal in oats? A. Yes, sir. Q. About what quantity for the December option? A. Well, probably 1,000,000 or 1,500,000 bushels. Q. For the December option how much wheat have you delivered up,—actually delivered and received pay for? A. I don't know. Q. Can you make an estimate of it? A. No, sir; I wouldn't make an estimate of it. Q. Or the corn? A. No, sir. Q. Or the oats? A. No. Q. Or that you have delivered? A. It is all included in the estimate for the entire year which I gave you. Q. Yes; all that you have delivered has been done within a week, hasn't it,—this week? A. Yes, sir. Q. And you don't know how much it is? A. No, sir. Q. Have you delivered any? A. I think we have. Q. But you are not sure of that? A. I know we have received. I wouldn't testify that we have delivered. Q. What is your best recollection as to whether you have delivered out anything? A. I think we have delivered out some wheat. Q. Do you know how much? A. No; I do not. Q. But you are not sure that you have delivered out wheat? A. No; I wouldn't swear to it."

In relation to "hedging," Mr. Warren testified as follows:

"Q. Do you ever make contracts for future delivery against that grain in the Chicago market? A. Yes, sir. Q. That is what is called 'hedging,' is it? A. Yes, sir. * * * Mr. Robbins: Q. I wish you would describe this question of 'hedging.' What class of 'hedging' you do, first? A. Well, I buy grain in the country and put it in store, and sell against it for future delivery. Q. Where? A. On the board of trade. Q. Now, what happens when you get ready to move,—to sell that grain, part with it? A. Well, I move the grain in here, and deliver it on the contracts. I may sell it to some one else here, I may sell it to go in other directions, and when it is so delivered the contract is filled, or when so sold the contract covered by a purchase in the market. Q. What quantities in your business do you deliver on those 'hedging' contracts on the Chicago Board of Trade? A. Well, that is a very general question. At times, we deliver considerable; other times, we deliver very little. Q. You sell where it is to the best advantage to sell at the time you determine to part with the grain? A. When May corn was at a great premium last spring, we delivered quite a large quantity of corn on contracts in the country. * * * Q. An exporter of the commodity, who intends to export it, and who makes a 'hedge' sale of it on the board of trade, does that 'hedge' sale stop him from exporting? A. No. * * * Q. How does he get out of that 'hedging' contract of sale? A. He buys it in. Q. Then how does he settle the two contracts,—the one of sale and the other of purchase? A. He may settle them by delivery; he may settle them by offset. Q. He has shipped off the stuff that he contracted to sell? A. The man he buys of may deliver to him, and he will deliver it to the man he sold it to. Q. That is it? A. Yes, sir. Q. Is that the usual way that they close their 'hedging' contracts? A. It frequently happens that way. Q. Is that the usual way? A. It is not the usual way. Q. What per cent. of them are closed up in some other way? A. I wouldn't be able to testify on that. Q. What is the other way that you close them up in? A. Settling. Q. 'Ringing' them up and paying the difference? A. Yes, sir. Q. Isn't that what the exporter calculates to do, if he makes a 'hedging' trade? A. I don't think he always knows what he will do when he makes the trade. Q. Are you an exporter? A. To a small extent. Q. When you export the stuff after you have made a sale of it on the board,—a 'hedging' sale,—you calculate to deliver the stuff that you export on that sale, do you? A. You mean the identical stuff? Q. Yes, sir. A. Certainly not. Q. Do you expect to buy that stuff in and 'ring it up'? A. I expect to buy it in; I don't expect to 'ring it up.' Q. You don't expect to? A. No, sir. Q. But you know, as a matter of fact, that in ninety-nine cases out of one hundred you do 'ring it

up,' don't you? A. I don't know that. Q. You don't know that? A. No, sir. Q. You do know that in ninety-five cases out of a hundred you do 'ring it up'? A. I would say in the majority of cases we do. Q. Can you answer the question just as well? A. I wouldn't swear to any specific per cent. Q. Would you swear that in ninety per cent. of the cases you 'ring it up'? A. No; I would not. Q. Would you swear in eighty-five per cent. you 'ring it up'? A. Well, I should think that would be a pretty fair average; I will take the chances on swearing to that. * * * Q. Now, just confine yourself to wheat. The miller has got wheat which he intends to manufacture into flour, and he 'hedges' on the board of trade by selling a like quantity of wheat. He manufactures the wheat that he has into flour, ships the flour away, and sells it. Can he deliver that wheat on his 'hedging' sale made on the board of trade? A. No. Q. How can he get out of that, then? A. Buy it in. Q. Then if he does buy it in, and he don't want the wheat, how does he 'ring up' the deal? A. He may settle the deal by delivery; he may settle it by offset. Q. And 'ring,' and closing through the clearing house? A. Yes, sir."

As to cash sales, Mr. Warren testified as follows:

"Q. Are your deals in cash transactions usually made on the board of trade? A. Some of them. Q. Well, it is a small proportion of them, isn't it; the cash transactions? A. Yes, sir; it is less than our future dealings. Q. No; a small proportion of the cash transactions that are made? A. Oh, we buy more cash grain in the country than we do in Chicago; yes, sir. Q. That is what I am after. You don't buy very much cash grain on the floor, do you? A. Oh, we buy considerable at times. * * * Q. Where is it done? A. It is done sometimes in the same place that the future dealing is done; at other times, it is done down among the tables, in what we call the 'cash crowd.' Q. Well, you have a place for the 'cash crowd.' It is very seldom done at the pits, isn't it? A. Rather seldom; yes. Q. Now, the market for dealing in futures on the floor of the exchange room opens at what hour? A. 9:30. Q. And the place for that is at the pit? A. Yes, sir. Q. The market for dealing in cash stuffs opens at what hour? A. The carlot market opens at about 11 o'clock,—half past eleven. Q. That is over by the tables? A. Yes, sir. Round lots of cash grain are dealt in at any time of the day or evening, however. * * * Q. What I mean is this, Mr. Warren: that you are not at all confined to the floor of the exchange room in buying cash orders? A. No, sir. Q. You buy those wherever you find them,—wherever you meet the man? A. Yes, sir. * * * Q. Is cash stuff —exclusively cash stuff—sought for in the pits, and trades made in it at the pits? A. Sometimes. Q. Very seldom? A. Rather seldom. Q. The pits are not for that purpose, are they? A. They are. Q. They are used generally for the transactions in futures? A. The greater part."

W. E. McHenry, a member of the board of trade, and a broker and commission merchant, who has been doing business on its exchange since 1867, testified that on one call he bought 5,300,000 bushels of wheat for future delivery; and he also testified, to repeat his language:

"Q. Yes; for future delivery? A. I should say that, take my own business as a sample,—of course, varying a great deal under different circumstances,—that about five per cent. of the amount of property that I have dealt in upon the board of trade has been settled by the actual receipt and delivery of property. That would be about a fair estimate."

And of the 5 per cent. only part was actually delivered and paid for, the remainder being delivered by notice, and that 95 per cent. of his transactions were closed by settlements on "rings," through the clearing house; and he also testified as follows:

"Q. Have you any deals open for December wheat on the 1st day of December [1901]? A. Well, the 1st day was Sunday; better make it the

2d. Q. On the 2d day of December? A. Yes; I had 10,000 bushels coming and 10,000 bushels going. Q. Out of the 500,000? A. Yes, sir. Q. What was done with that 10,000? A. That was delivered to me, and I delivered it out. Q. But you did not pay for it? A. No, sir. Q. It was delivered to you by a notice, in the way you have described, and the notice was passed right over by you to somebody else? A. Yes, sir."

In relation to the duty of the settlement clerks, Mr. McHenry testified:

"The Master: Q. Divide that into two parts: First, what are their duties? Answer that first. A. Well, I will take my own settlement clerk as a sample. Mr. Jenks: Yes. A. Every day, at the close of the session, I give him my card for the transactions I have made during the day on the bought or sold side of that card. He takes that, and goes around among the other settling clerks employed by other members of the board, and endeavors to settle my contracts,—get them off my book. Q. How can he do that? A. There is a collection of these people that are employed by the members of the board, and they get together, and find out where people have property bought for a delivery or property sold for a delivery, and endeavor to make these settlements between each other. Q. And all of those settling clerks that meet there are employed by their employers for the same purpose, are they not? A. Yes, sir. Q. Now, they go over and ascertain who has got this commodity bought and sold. What is the object of your clerk in being there? Suppose you have made a sale on your card of a commodity; what do you want that clerk to find out? And what does he go there to find out? A. He goes there to find out to whom the party— Wait a moment; just a second. I will get this straight in my head in just a moment. He goes through to find out to whom people have property sold, and I have it sold to; to see—to ascertain—if I have it bought of somebody else that those people have it sold to, and thus make a 'ring,' if he possibly can, or a settlement. * * *"

As to where it leaves the customer of the commission man, Mr. McHenry says:

"Q. Now, we will suppose that all those members of the board are commission men, and they are all dealing for outside customers which they have; do they pay any attention to those outside customers, or their contracts, in 'ringing up' those deals on the board, as between themselves? A. Not unless they have special directions from the customers not to 'ring up' or settle their contracts: otherwise than that, the customer is not paid any attention to whatever in the settlement of these trades. Q. Is it the rule and general custom to 'ring up' these deals wherever they can, and cancel the contracts without reference to their customers at all? A. Yes, sir. * * * Mr. Jenks: Q. Suppose a commission man has a customer who orders a purchase of 10,000 bushels of wheat to-day for May delivery, and he to-morrow orders that purchase closed out; what does the commission man do? A. He goes upon the board of trade and buys it first. Then he sells it, reporting the sale to the customer, making him out an account of purchase and sale, charging him the commission, government tax, and charging him up or crediting him with profit or loss, as the case may be, in the transaction. Q. Then, if a customer to-day buys 10,000 bushels of May wheat at a price, how can he get out of that transaction, if he wants to, to-morrow? A. By simply ordering his commission merchant to sell it. Q. And the commission merchant always does sell it under such circumstances? A. Under such circumstances; yes, sir."

As to stop orders, he says:

"Q. Mr. McHenry, I don't know whether I asked you this yesterday. If I did, you will remember better than I. In receiving orders from your customers to buy or sell commodities on the board of trade, are there sometimes, accompanying those orders, a stop order to limit the loss? Did I ask you

that yesterday? * * * A. It occasionally happens, but very rarely. Q. When it does happen that a stop order accompanies the order of purchase or sale, is that order executed just the same on the board of trade as it would be if the stop order was not there? A. Yes, sir. Q. Then, when the price fluctuates so as to come to the stop order price, does it require any further directions from the customer before the board of trade man will close that transaction out on the floor? A. An order filled under instructions of that kind is, and should be, closed as near the stop order price as possible. Q. And without any further directions from the customer? A. Yes, sir. * * * Q. Now, between you and the customer, what is done to end the whole business? A. Well, to answer that question, I shall have to say something else. The Master: Proceed. A. For the simple reason that I might buy 5,000 bushels of wheat for John Brown to-day at 79 cents, for May delivery. He would tell me to stop that at 76 cents. Wheat did not reach 76 cents to-day, but to-morrow morning it opens at 75½ cents. It would then be my duty to close that contract of his at the nearest to 76 cents that I could. He would then owe me a half cent a bushel more than his stop or order price. * * * Mr. Jenks: Q. Now, suppose you did close it out as near the stop-order price as you could; what else would be done in order to terminate the whole transaction between you and your customer? A. I would make up an account, purchase and sale, for 5,000 bushels of wheat bought for May delivery, at 79 cents, sold at 75½; that is, assuming, of course, that I could not stop it at 76. I would charge him with the loss, including the commission and government tax. Q. And the loss would be the difference in the two prices bought and sold? A. Yes, sir."

As to bucket shops, he says:

"Q. Isn't it a fact that if on the board of trade they had not an opportunity of 'ringing up' their deals, without the receipt and delivery of the property and paying for it, that it would curtail the business of dealings there in futures or options? * * * A. I think I have already answered just now that it possibly might curtail the volume of business. * * * Mr. Jenks: Q. Is there money enough in the country to carry on the volume of business that is conducted on the board of trade in Chicago, if all those dealings in futures should result in a delivery and payment for the commodity? * * * A. Well, sir; I can't answer that question intelligently. I have seen so much business done in this country, and in so many ways— Mr. Jenks: Q. Without any money at all? A. Well, I don't know as to that; but I am not prepared to say absolutely that the business could not be done, and still I am very frank to say, as I have stated before in my answers, that I have no doubt that if the business were conducted without these settlements, and without the commodities, and under the present rules, that it would be curtailed. Q. What would curtail it? A. First, a lack of absolute stocks on the board in Chicago, the actual property being here. Q. The actual grain, you mean? A. The actual grain being here. * * * Mr. Jenks: Go on. A. Because, under the present system, there is a large amount of property sold in Chicago that is in store all through the country."

As to "ring" settlements he says:

"Q. Is there an object, in your business, to get those settlements made as soon as possible, that the deals may be 'rung up'? A. Yes, sir. Q. You have settlement clerks, whose business it is to see that all deals on the board are closed by 'ringing up,' as soon as a 'ring' can be made, haven't you? A. Yes, sir. * * *"

As to "scalping" he says:

"Q. What is 'scalping' business, Mr. McHenry? A. That is where a man, we will say, buys or sells 5,000 bushels of wheat, and tries to get a quick profit out of it, either one side or the other. Q. How does he try to get a profit out of it? A. He sells 5,000 bushels of wheat at 77, and he can buy it back

at 76⅞, he has made $6.25. * * * Q. Is that kind of business done on the floor of the exchange room of the board of trade? A. Oh, there are what are known as 'scalpers' there. Q. Do they— A. I use that term in contradistinction of a broker or commission merchant."

He also states that after filling a government position he resumed business on June 1, 1901, on the exchange, and bought for December delivery 500,000 bushels of wheat, and sold 500,000 bushels of wheat for that delivery, showing his dealings in wheat for that delivery to be 1,000,000 bushels, or about one-fifth of the visible supply of wheat in Chicago on the 2d day of that month deliverable on contracts under the rules of the board of trade.

James E. Boyd, who, in 1891 and 1892 was the governor of Nebraska, and who was formerly a member of the board of trade, testified that he did a large business in grain on the exchange; that a small day's business would be half a million bushels, and that he had dealt in as high as four or five millions of bushels a day, and he did not believe that in his business the actual deliveries reached half of 1 per cent.; that 99 and over of his customers wanted to speculate in market prices; and in relation to "hedging" he says:

"Q. Will you state what was the course of making 'hedging' deals by other people, so far as you know? A. Well, in the corn states—I will speak of corn particularly—there is a great deal of corn cribbed, and the parties who crib the corn usually sell it for May delivery, and thereby gain the benefit of the carrying charges and such things, between the cash price—the difference in the cash price—and the difference on the May option. I have known men to 'hedge' hundreds of thousands of bushels of corn in that way on the Chicago Board of Trade; but the demand for corn might be more urgent in the South, in Baltimore and St. Louis, and they would ship that corn to St. Louis or Baltimore or Galveston, from our part of the country, and when they were ready to do that then they would close their 'hedging' deal on the Chicago Board of Trade."

As to "scalping" he says:

"Q. What is meant by the word 'scalp' on the Board of Trade of Chicago? A. Well, sir; I take it that a man wants to make a little money, and close his trade out after he makes a little money, and not to receive or deliver the stuff at all,—no idea of that. * * * Q. In these 'scalping' deals, governor,—did you observe when those deals would be closed out, with reference to the time of the original transactions? A. Some might be closed out in ten minutes, some in an hour, and some not for quite awhile,—for many days. Q. As a rule, were they generally closed out by 'scalpers' on the same day that the initial transaction was made? A. Yes, sir; I think so."

William A. Crosby, a member of the board for 30 years, and who did a commission business on its exchange from 1877 to 1887, says there were about 250 members doing a commission business on the exchange. He is now employed by F. G. Logan & Co., and for three years had charge of their business on the floor of the exchange, but now manages their office. He says 99 per cent. of the deals of commission men are for future delivery, and that more than 95 per cent. are closed by "rings" through the clearing house; and as to "scalping" he says:

"Q. Are the 'scalpers' members of the board of trade? A. Well, it is a term that is likely applied— 'Scalping' is applied primarily to members of the board who stand in the wheat pits, for instance, and trade for their own ac-

counts on small profits and small losses, on the fluctuations of the market. Q. That is to say, let's take the case of 'scalping,' and the 'scalper' is operating in May wheat; how does he conduct his 'scalping' operations? A. Well, the term 'scalping' is applied primarily to those traders who stand in the pit and trade for an eighth or a sixteenth profit, or less, making a rapid turn in the market. Q. Close out a trade as soon as they can get a small profit? A. Yes; or a small loss,—as quick in one way as the other."

And he further says that F. G. Logan & Co. have a blackboard in their office to display quotations for the convenience of customers,—to tell them what the market is. About 25 members of the board have blackboards and tickers. F. G. Logan & Co.'s office is in the board of trade building.

As to "hedging" he says:

"Q. You speak of 'hedging.' Do you refer to the 'hedging' that comprises the class of transactions where persons who hold cash property—hold and are carrying cash property—execute contracts upon the board of trade for future delivery of the same quality of the property they have for a future month? A. Well, in a general way, yes. My idea of the correct condition of which the term—to which the term—'hedging' applies would be to people in other markets and in the country who have elevators in the country, and they have cash grain in their elevators, and they want to minimize their risk in holding that grain, and they sell in some other market for future delivery, against the property that they are carrying in their warehouse. I would not consider the term 'hedging' to apply to warehousemen here in Chicago so much. Q. Do warehousemen in Chicago resort to a similar practice, when having property or grain on hand to sell for a future month? A. Yes, sir. * * * Q. How much wheat have you ever delivered on those 'hedging' deals compared with the whole amount of deals that you have managed? A. Very little. * * * Q. Well, do you think it would amount to three per cent.? A. No; I don't believe it would. * * * Q. Well, what I mean is, does the fact that he has a 'hedging' contract on the board of trade here prevent his shipping his property to some other market, or selling it to be shipped somewhere else? A. Why, it does not."

Austin W. Wright, a member of the board of trade and a speculator on its exchange, says:

"Q. What is a speculator on the board of trade? A. One who buys or sells stuff and waits for developments. * * * Q. Can you give us the per cent. of the transactions that resulted in delivery to you and payment for the commodity? A. No, I cannot; I never paid for any stuff but three times, I think,—three or four times. Q. Three or four times? A. Yes, sir. Q. In thirty years? A. Yes, sir. * * * Q. At the time of transactions in those commodities on the floor of the exchange room of the board of trade, what was your intention as to receiving and paying for that stuff? * * * A. I had no intention of either receiving or paying for it, unless it was to my advantage to do so. * * * Q. As a rule, is the market higher or lower on the board of trade than it is anywhere else? A. The speculative market is usually a little higher than it is at points of consumption."

Walter Comstock, a member of the board of trade and a commission man there, says that only about 2 per cent. of the trades made on the exchange for future delivery result in deliveries.

Lyman L. Kellogg is on the board, and states:

"Q. What do you do now, and how long since you were in the receiving business and shipping business? A. Since I dropped that, I am 'scalping.' Q. How long since you have dropped that? A. About ten years ago. Q. How long have you been a 'scalper'? A. About ten years. Q. What is a

'scalper,' as known on the Chicago Board of Trade? A. Well, he buys and sells grain for a small profit. Q. For future delivery? A. Yes, sir."

The president of the board has told how he conducts his business on the exchange, as a commission man, and that the other members who are brokers and commission men there conduct their business "in a similar manner," "in the same way," and that it is "the general course of business," and he necessarily knows, therefore, that transactions in futures are the principal business of the exchange, and that cash transactions are comparatively small, and that of the transactions in futures 85 per cent., according to his statement, or 98 per cent., according to the weight of the testimony, are settled before the day of delivery by the parties paying and receiving the difference between the contract prices and the market prices, as shown by the board quotations, on the day of settlement; and, further, that the assumed quantities of the commodities which are represented to be the subjects of these transactions exceed the entire production of such commodities in the United States; and he knows that it is contrary to human experience that all or more than a small per cent. of such dealings could have been entered into with a bona fide intention to receive and pay for the commodities bought or to deliver the commodities sold; and the testimony justifies the belief that a large part of the deliveries actually made were not contemplated by the parties when the deals were made, but grew out of subsequent conditions, which rendered actual deliveries desirable or acceptable to one or all of the parties. The evidence offered in support of the bona fides of these contracts, fairly considered, goes no further than to show that the dealers believe that they may be required to deliver should the other party violate or repudiate the common understanding that the deals may be "rung up" and settled by paying the difference in prices. And he knows that "stop orders" and "scalping" transactions are, in their nature, inconsistent with and exclude the intention of delivery; the one requiring the closing of the deal by the payment of the difference in prices when the market price reaches a given figure, and the other requiring the same thing in a short time, or as soon as the fluctuations of the market show a small gain or loss. And he knows that as a rule the "hedging" deal is made by one who at the time has the commodity on hand, and who makes the deal to cover possible losses, and the expense of carrying and delivering the commodity, when it is actually sold, whether at home or abroad, and who settles the pretended sale or deal on the exchange by a pretended purchase or deal there, and the payment or receipt of the difference between the prices. The "hedging" deal usually is an appeal to chance for indemnity against the expenses and possible losses of an actual transaction. He knows, too, that actual deliveries are made by the transfer of warehouse receipts and the payment of the price of the thing sold, and not by a mere notice of an intention to deliver, which is passed from hand to hand, through a "ring," in which all deals except the last one are settled by the payment of the differences in prices. And his knowledge of these things must be imputed to the complainant, whose chief officer and

agent he is, charged with the duty of enforcing its rules and regulations, and of conducting its business and managing its affairs, in accordance with the law of the land.

The court finds, therefore, upon the evidence submitted, that the greater part of the dealings in futures on complainant's exchange are bucket-shop transactions, and that they are permitted by complainant in violation of the laws of Illinois. It is suggested, however, that the public good will be best served by suppressing the smaller bucket shops, even upon the application of the complainant; and reference is made to 2 Pom. Eq. Jur. § 941, where it is said that, "in compliance with the demand of a high public policy, equity may aid a party equally guilty with his opponent." But the situation here does not call for the application of that doctrine. The bucket shops are the offspring of the Chicago Board of Trade and kindred organizations, to which they still look for sustenance and life, and they can only be effectually suppressed by striking at the root of the evil. When this species of gambling on the commercial and stock exchanges of the country ceases, the bucket shops will disappear, and not before.

Many applications have been made by the bucket shops to enjoin complainant from depriving them of its quotations, and such applications have uniformly been refused, upon the ground that courts of equity will not lend their aid to carry on an illegal business, nor will they lend their aid to the complainant to maintain a place where bucket shopping is permitted in violation of the laws of Illinois and Ohio.

The application, therefore, of the complainant for a preliminary injunction will be denied.

In re POOLING FREIGHTS.

(District Court, W. D. Tennessee, W. D. May 26, 1902.)

1. INTERSTATE COMMERCE—CARRIERS—INDICTMENT.
   Where a carrier is a corporation, not only the carrier itself, but the officers individually, are subject to indictment for violation of the interstate commerce act of February 4, 1887.
2. SAME—POOLING.
   Under Act Cong. Feb. 4, 1887, § 5, forbidding the pooling of freights or the division of earnings by competing railroads, either a distribution of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon, or a money pool, whereby the aggregate or net proceeds of certain different and competing railroads are divided among them, is prohibited.
3. SAME.
   Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, is within the prohibition of the interstate commerce act.
4. SAME—IMMUNITY TO WITNESS.
   Act Cong. Feb. 11, 1893, granting immunity to any witness for any offense concerning which he has given testimony before the interstate commerce commission is confined to the witness personally, and cannot be extended to include a corporation which he represents.

HAMMOND, J. Section 5 of the act to regulate commerce, approved February 4, 1887, forbids the pooling of freights and division of earnings by competing railroads in language as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

The word "pool" is defined in the Century Dictionary as follows:

"Pool (noun): A combination intended by concert of action to make or control changes in market rates. * * * A combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public, and distribute the profits of the business among themselves equally or according to special agreement. In this sense pooling is a system of reconciling conflicting interests and of obviating competition, by which the several competing parties or companies throw their revenue into one common fund, which is then divided or redistributed among the members of the pool on a basis of percentage or proportions previously agreed upon or determined by arbitration.

"Pool (verb): To put into one common fund or stock for the purpose of dividing or redistributing in certain proportions; make into a common fund; as to pool interests.

"(Ex.). The common method of accomplishing this [dividing the tariff between competing lines] is to pool the receipts, and to redistribute them on percentages based upon experience and decided by an arbitrator."

The statute contemplates two methods of pooling, both of which are prohibited: First, a physical pool, which means a distribution by the carriers of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon; and, secondly, a money pool, which is described best in the language of the statute, "to divide between them [different and competing railroads] the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." By the language "any common carrier subject to the provisions of this act," as employed in section 5, supra, is meant any railroad engaged in the transportation of passengers or property from one state or territory of the United States or the District of Columbia to another state or territory of the United States or the District of Columbia. Traffic carried only within the territorial limits of a state is not interstate in character, and the instrumentality of its transportation is not subject to the provisions of the statute with respect to such traffic. If, from the evidence of witnesses the district attorney brings before your body, you find there is probable cause for believing that there exists within the jurisdiction of this court an agreement whereby traffic is or has been within the statutory period of two years divided by and among different and competing lines of railroad, no matter in what proportions, then it will be your duty to return indictments against those who you have reason to believe are probably guilty. The statute provides for the indictment not only of the carrier itself, but also of the officers individually, where the carrier is a corporation, so that in such case both are indict-

able. The agreement for the division of traffic need not necessarily be reduced to writing in order to constitute an offense. Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the act to regulate commerce.

In this connection the court charges you that no witness shall be excused from testifying or producing documentary evidence in obedience to a subpœna duces tecum upon the ground or for the reason that his testimony might tend to incriminate him, but, having so testified, and in order that he might not be deprived of the immunity which the constitution vouchsafes him, the act declares that he shall not be prosecuted for any offense of which he has given evidence. The act relating to testimony of witnesses in cases involving violation of the interstate commerce law provides that:

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the interstate commerce commission, or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission or in obedience to its subpœna or the subpœna of either of them, or in any such case or proceeding: provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

You are also instructed that this act of February 11, 1893, does not grant immunity from indictment and prosecution to a corporation even though its officers or agents have been compelled to appear before the grand jury and testify to facts which would tend to incriminate it, or produce books and papers of the corporation bearing upon the offense of which it is charged. The immunity of the statute is confined to the witness who gives his testimony, belongs only to him personally, and cannot, in the nature of the thing, be extended to include the corporation he represents. There is no vicarious immunity provided for by the statute, and therefore the corporation carrier cannot become immune through the grace of the statutory pardon.

In re MORRIS.

(District Court, E. D. Pennsylvania. April 18, 1902.)

BANKRUPTCY—DISMISSAL OF INVOLUNTARY PETITION — COUNSEL FEES AND DAMAGES.

On dismissal of a petition to have another adjudged an involuntary bankrupt, the respondent is entitled to costs, but there is no provision in Bankr. Act 1898, authorizing the allowance of counsel fees or damages, except section 3e, which applies only when respondent's property has been taken out of his possession.

In Bankruptcy. On motion to dismiss petition and for allowance of counsel fees and damages.

Harry S. Hopper, Esq., for creditor.
Abram S. Ashbridge, Jr., for alleged bankrupt.

J. B. McPHERSON, District Judge. This petition was filed by a single creditor, who averred that the creditors of the bankrupt were less than 12 in number. The bankrupt filed an answer averring the existence of a larger number, and appending the list required by section 59, cl. e. Upon this answer the usual order was made, notifying the creditors that they might join in the petition if they so desired. None having asked to join, it follows that the motion to dismiss must prevail.

I am asked also to make an order awarding costs to the bankrupt, together with counsel fees and damages. Undoubtedly the bankrupt is entitled to costs, but there is no provision in the act for the allowance of counsel fees or damages, except under section 3, cl. e, and this applies only when the bankrupt's property has been taken out of his possession. The subject has been fully considered by Judge Brown in the Southern district of New York in Re Ghiglione, 1 Am. Bankr. R. 580, 93 Fed. 186, and it would be superfluous to go over the ground again. I fully agree with Judge Brown's reasoning and conclusions.

An order may be entered dismissing the petition, at the costs of the petitioning creditor.

WEIL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1902.)

No. 3,072.

CUSTOMS DUTIES—HIDES AND SKINS.

An assessment of merchandise comprising 11 bales of hides and skins mixed together indiscriminately, as "hides of leather, raw," under Act July 24, 1897, par. 437, will be affirmed where, notwithstanding the appraiser's demand that the importers produce two bales besides the sample bale, so as to enable him to satisfy himself as to the relative proportion of hides and skins, they fail to do so, and fail to show that the other bales contain the same proportion of hides and skins as the sample bale.

Appeal by the importers from a decision of the board of general appraisers which affirmed the assessment of duty by the collector of customs upon the merchandise in question.

Walter Bunn, for importers.
Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. The merchandise in question comprised 11 bales of hides and skins mixed together indiscriminately, and which were assessed for duty as "hides of leather, raw," at 15 per cent. ad valorem, under paragraph 437 of the act of July 24, 1897. The importers protested against this assessment, and claimed that the relative weight of skins and hides in the sample bale should be used to determine the relative weight of the skins and hides in all the other bales, and that the same should be classified accordingly. In accordance with the provisions of section 2901 of the Revised Statutes, the appraiser thereupon ordered two more bales to the public stores for examination, in order to satisfy himself as to the proportion of skins and hides. The importer, however, failed to produce the bales, or any further evidence in regard to the same. There is no evidence that the other bales contained the same proportion of hides and skins as the sample bale; and if it was not the duty under the statute, it was at least within the discretion, of the appraiser, to order the production of other bales for examination.

Inasmuch as the importers failed, in the first place, to properly identify the number of skins and hides, and have since failed to produce the required evidence, the decision of the board of appraisers is affirmed.

MEXICAN NAT. R. CO. v. SLATER et al.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,063.

1. WRONGFUL DEATH—RIGHT OF ACTION UNDER MEXICAN LAWS—ENFORCEMENT IN UNITED STATES.

The statutes of Mexico giving a civil right of action to recover damages for wrongful death through negligence, although it bases such right of action on the fact that defendant's negligent acts or omissions constitute crimes, do not for that reason belong to the class of criminal laws which can be enforced only in the courts of the country where the offense was committed.

2. SAME—JURISDICTION.

The laws of Mexico giving a right of action to recover damages for a wrongful death occurring in that country are not contrary to the public policy of Texas, nor to natural justice or good morals, nor is their enforcement in that state calculated to injure the state or its citizens, and an action to enforce the right so given may be maintained therein in a state or federal court having jurisdiction of the parties, in which the established forms of procedure are such that substantial justice can be done between the parties.[1]

3. EVIDENCE—PROOF OF LAW OF FOREIGN COUNTRY—EXPERT TESTIMONY.

In an action based on a statute of a foreign country, which must be proved, while the statute itself must ordinarily be proved by a duly authenticated copy, the introduction of such copy does not render inadmissible parol testimony of persons learned in the law of such country to prove the construction placed on the statute by its courts or the unwritten law of the country affecting the right of recovery, to aid the court in correctly construing and applying the statute; and such testimony is peculiarly appropriate and should be received where the statute is written in a foreign language, and the copy introduced is a translation.

4. WRONGFUL DEATH—RIGHT OF ACTION UNDER MEXICAN LAWS—ENFORCEMENT IN UNITED STATES.

Under Rev. St. Tex. 1895, art. 3027, in an action for wrongful death "the jury may give such damages as they may think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action * * * in such shares as the jury shall find by their verdict." As construed by the courts of the state, while such damages are limited to compensation for pecuniary loss, they are not confined to such sum as can be exactly proved, but may include a further element of damages where the person killed stood in the relation of husband, wife, or parent to the beneficiaries; also to be fixed by the jury in the exercise of "their own knowledge, experience, and sense of justice," and the right to such damages is not affected by the remarriage of the surviving wife or husband. The statute also requires that the rights of all entitled to damages shall be determined and settled in one action. Under the laws of Mexico the liability of the defendant in such case is limited to the furnishing of a continuing support to the legal dependents of the deceased during the periods of time that such support would have been due from him, and in the amounts that it would have been due, proportioned to his ability to give it and the necessities of

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[1] See Death, vol. 15, Cent. Dig. § 50.

What law governs actions for death by wrongful act, see note to Burrell v. Fleming, 47 C. C. A. 606.

those entitled to receive it, which questions are required to be determined by the judge. The recovery in such case is in the nature of alimony or pension awarded by the court to each beneficiary, payable in monthly installments, which cease in the case of a widow or daughters on their marriage, and in the case of sons on their attaining majority. *Held*, that the right of recovery given by such laws, at least in a case where the wife and daughters of the deceased are beneficiaries, is so dissimilar to that given by the laws of Texas, and so incapable of enforcement through any procedure provided for trials at law by the statutes of Texas or by the common law, with due regard to the rights of the defendant, that a circuit court of the United States in that state should decline jurisdiction of an action at law for its enforcement.

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

This was an action by the defendants in error, Lena M. Slater, and William F. Slater, Jesse R. Slater, Annie E. Slater, and Henry G. Slater, minors, surviving wife and children of William H. Slater, deceased, against the Mexican National Railroad Company (the plaintiff in error), to recover damages for the death of the deceased. The petition is in the usual form until it reaches the ninth paragraph, and then it is in the words and figures following:

"(9) Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater through the defendant's negligence as aforesaid, they, the plaintiffs, have had the right of action against the defendant for their damages, and they say that the following were, and are now, the laws of Mexico applicable to this case, out of which the said right of action grew, and by virtue of which the same now exists in the said republic of Mexico, to wit:

"From the Federal Constitution of the Mexican United States:

" 'Art. 72. Congress has power: * * * (22) To enact laws governing the general lines of communication, and governing postoffices and mails.'

" 'Art. 97. The federal court has jurisdiction: (1) Of all questions growing out of the execution and application of the federal laws, except when the application of the law only affects interests of individuals, in which case the local judges and tribunals of the state shall entertain jurisdiction.'

"From the Penal Code of Mexico:

" 'Art. 4. A crime is a voluntary infraction of a penal law, doing that which it prohibits, or neglecting to do that which it commands.

" 'Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

" 'Art. 6. There are intentional crimes, and crimes resulting from neglect.'

" 'Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands.'

"Pen. Code, bk. 2. 'Civil Liability in Criminal Matters':

" '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: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, 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, a proximate and inevitable consequence.

"'Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

"'Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

"'Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

"'Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

"'Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

"'Art. 310. The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"'Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.'

"'Art 318. The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensable expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave.

"'Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: (1) At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. (2) When those beneficiaries get married. (3) When the minor children become of age. (4) In any other case in which, according to law, the deceased, if alive, would not be required to continue the support.

"'Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it.'

" 'Art. 325. * * * Table of mortality and expectancy of life:

A 10	Corresponded		40.80
" 15	"		37.40
" 20	"		34.26
" 25	"		31.34
" 30	"		28.52
" 35	"		25.72
" 40	"		22.89
" 45	"		20.05
" 50	"		17.23
" 55	"		14.51
" 60	"		11.05
" 65	"		09.63
" 70	"		07.58
" 75	"		05.87
" 80	"		04.60
" 85	"		02.00'

"Federal Civil Code, chap. iv:

" 'Art. 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it.

" 'Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law.

" 'Art. 207. Fathers are obliged to support their children. If it should be impossible for parents to do so, or should they be unable to do so, the obligation falls upon other ascendants by both lines of ascendancy who are nearest of kin.

" 'Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to do so, or they are unable to do so, then those descendants next in kin are obliged to do so.'

" 'Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness.

" 'Art. 212. In regard to minor's support it comprehends in addition to the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances.'

" 'Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it.'

" 'Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support.'

" 'Art. 225. The right to receive cannot be renounced nor is it an object of transfer or assignment.'

"Pen. Code, bk. 2:

" 'Art. 313. The judges who take cognizance of suit based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed. * * *'

" 'Art. 321. In cases of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

" 'Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover, and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him

the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

"'Art. 323. If the blows or wounds cause the loss of any member, not indispensable for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and part of the body remaining crippled, lamed or deformed.

"'Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

"'Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under a disability to work.

"'Art. 326. No person shall be charged upon a 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 conditions of the preceding article, those liable are * * * railroad companies.'

"'Art. 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided by the Civil Code of the Commercial Code, according to the nature of the demand and the subject-matter treated of.

"'Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, for indemnity for injuries, or for the payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"'Art. 365. A pardon shall in no case extinguish civil responsibility nor the actions to enforce it, nor the legal rights which third persons may have acquired.

"'Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew.'

"Transitory Law, Pen. 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 the 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.'

"From the Federal Civil Code:

"'Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged.'

" 'Art. 20. When a judicial controversy can be decided neither by the text nor the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

" 'Art. 21. In cases of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same specie, it shall be decided by observing the greatest equality possible between the parties.'

" 'Art. 1095. Limitation bars in three years: * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals.'

"Acts of congress of December 15, 1881:

" 'Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two municipalities, or federal district and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies, through delays or obstructions, carlessness or fault in the service or for accidents or mishaps in the operation.'

"From the regulations for the construction, maintenance, and operation of railroads:

" 'Art. 52. The coaches and cars which enter into the make-up of a train shall have the draw-heads of the same height, so that their centers will be opposite to each other.

" 'Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have been previously inspected very carefully.'

" 'Art. 99. The company shall be responsible for the moving of all trains on its road.'

" 'Art. 184. Companies (railroad) are liable for all faults and accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes.'

" 'Art. 208. All violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts or omissions committed by them.'

"Plaintiffs further allege that by reason of the general statutes of the state of Texas and by virtue of general principles of right and justice and of the laws of Mexico hereinbefore mentioned, they had, and now have, a right of action for their damages against defendant in the republic of Mexico, and the same now exists in said country as well as in the state of Texas and in the United States of America. And they say that the acts of negligence upon the part of the defendant, its agent, servant, and employés, were wrongful and actionable, as has been hereinbefore shown by the plaintiffs, in the republic of Mexico at the time of the killing complained of, and are now so; and they say that the same were then and are now wrongful

and actionable in the United States of America and in the state of Texas. And plaintiffs say that by reason of the negligent killing of the said William H. Slater they have suffered damages in the sum of thirty thousand dollars ($30,000.00). Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition, and that they have judgment for their said damages, and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit, and for general and special relief."

The petition was filed on November 17, 1900. On December 4, 1900, the defendant (the plaintiff in error) answered by demurrer in substance as follows: That the petition shows no cause of action: (1) Because it appears that the wrong which resulted in the death of William H. Slater occurred in the republic of Mexico. (2) The laws of Mexico are not similar or analogous to the laws of Texas (designating the points of dissimilarity). (3) It appears that the plaintiffs' right to recover damages in Mexico, if any, depends wholly upon the infraction of a penal statute of the republic of Mexico, which has no extraterritorial effect, and the court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government. (4) It does not appear that all the parties authorized under the Mexican law to maintain an action for the recovery of damages are parties to this action. The action is therefore not authorized by the Texas statute, and, if entertained, will subject the defendant to a multiplicity of suits, contrary to the well-established policy of Texas. (5) The laws of Mexico as pleaded are so unlike and dissimilar to the laws of Texas that this court should not undertake to administer the same under the doctrine of national or interstate comity. These demurrers were all overruled. On March 18, 1901, the defendant, by leave of the court, amended its answer, by which it excepted further, and submitted that it affirmatively appears from the plaintiffs' petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas and the common law that this court cannot administer or enforce said laws and rights. And not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, the defendant pleaded: (1) A general denial; and (2) that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to wit, of surviving husbands, wives, mothers, fathers, and children, is the right of alimony or pension, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters, and when the boys arrive at the age of 21 years; which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and the courts, neither in law nor in equity, have power or authority to create a remedy for such enforcement; that the laws of Mexico, as pleaded by the plaintiffs, when construed in connection with other provisions of the Mexican laws securing the right of recovery in surviving wives, mothers, fathers, husbands, and children for personal injuries resulting in death, to wit, articles 211, 212, 213, 214, 217, 221, and 224 of the Civil Code of the federal district, and with articles 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secure a right of alimony or in the nature of a pension, and therefore secure a right of recovery unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and the court has no jurisdiction to grant the relief prayed. To this amended answer the plaintiffs filed their first supplemental petition, and demurred to the matters pleaded in the defendant's answer, because the same constitute no defense to the cause of action, and especially because the laws referred to relating to alimony and pension, namely, the articles of the Civil Code mentioned, are provisions of the laws of Mexico regulating matters growing out of the marriage relation, and involving the duties and obligations of parties to the marriage

contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference, between the laws of Texas and of the United States and Mexico as to the nature of the right of action claimed by the plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States. And, further, because the provisions of the laws referred to, namely, articles 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony, and in no sense can they be the foundation for a defense to the action. In aid of which exceptions the plaintiffs filed with their replication as Exhibits A and B, and made a part thereof, the following, namely: A translation of chapter IV of Book 1, title V, of the Civil Code of Mexico, which treats of alimony (de los alimentos), which chapter includes the articles mentioned in the amended answer; also a translation of certain articles of chapter 11 of book 111, tit. 1, of Mexico Code of Procedure, relating to temporary alimony, including the articles mentioned in the amended answer.

"Exhibit A.

"Chapter IV, of Book 1, Title V—Concerning Alimony.

"Art. 205. The obligation to furnish alimony is reciprocal, the one who furnishes alimony has in his turn the right to demand it.

"Art. 206. Parties to the marriage contract, in addition to the general obligation which the marriage imposes, are bound for alimony in cases of divorce and in other cases provided by law.

"Art. 207. Parents are bound to give alimony to their children. If there be no parents, or they be not able to give alimony, the obligation falls on the other relations on both sides in the nearest ascending grade.

"Art. 208. Children are bound to give alimony to their parents. If there be no children, or if they are not able to give alimony, the nearest relations in the descending grade are bound.

"Art. 209. If there be no relations in the ascending or descending grade, or if they are not able to give alimony, the obligation falls on the brothers and sisters of both parents; on those of the mother alone, if there be none of the father, and on those of the father if there be none of the mother.

"Art. 210. Brothers and sisters are bound to give alimony to their younger brothers and sisters only until they are 18 years of age.

"Art. 211. Alimony comprehends food, clothing, dwelling place and attendance in sickness.

"Art. 212. Respecting minors, alimony includes in addition, the expenses necessary for the primary education of the dependent, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances.

"Art. 213. The one bound to supply alimony fulfills his obligation by assigning a pension sufficient to support the dependent, or by taking him into his family.

"Art. 214. Alimony should be in proportion to the estate of the one bound, and to the necessities of the one who receives it.

"Art. 215. If the obligations to receive alimony falls upon several, and all are able to give, the judge shall apportion the amount among them according to their means.

"Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them; and if one only shall have the means he alone shall comply with the obligation.

"Art. 217. The obligation of supplying alimony does not include that of endowing the children, nor that of providing them with capital to prosecute the business, art or profession for which they may have been fitted.

"Art. 218. The right to demand that alimony be made secure exists in favor of: I. The person entitled to alimony. II. The relative in ascending grade who may have him (the person entitled thereto) under his parental control. III. The guardian. IV. The brothers and sisters. V. The public department.

"Art. 219. If the person who demands security of alimony in the name of the minor, cannot and does not wish to represent him in court, the judge shall appoint a temporary guardian.

"Art. 220. The security may consist of a mortgage, bond or deposit of an amount sufficient to cover the alimony.

"Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for that purpose he must give legal security for it.

"Art. 222. Where the father enjoys the use of the property of the child, the value of the alimony shall be deducted from it (the income) if it is sufficient to cover it (the alimony). On the contrary, where the income is not sufficient the difference shall be (a charge) on account of the father.

"Art. 223. If the necessity of the dependent proceeds from bad conduct, the judge, having knowledge of the cause, may diminish the sum fixed as alimony, placing the one at fault, if necessary, under care of competent authority.

"Art. 224. The obligation to supply alimony ceases: I. When the one bound lacks the means of compliance. II. When the dependent is no longer in need of alimony.

"Art. 225. The right to receive alimony cannot be renounced, nor can it be subject to compromise between the parties."

"Exhibit B.

"Chapter 11, of Book 111, Title 1—Civil Procedure—Temporary Alimony.

"Art. 1372. In order to decree temporary alimony to one who has the right to exact it, it is necessary: I. To make complete proof of the right under which it is asked. II. To prove proximately at least, the means of the one who should give alimony. III. To make sufficient proof of the urgent necessity for temporary alimony.

"Art. 1373. The proof required under paragraph 1 of the preceding article shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in form of a public writing.

"Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party to be within the cases provided in articles 207 to 210 and 3324 and articles of the Civil Code relating thereto.

"Art. 1375. When husband or wife asks alimony, the act or certificate of marriage must be presented.

"Art. 1376. After compliance with the provisions of the preceding articles, the judge, if he believes the right has been established, shall designate the amount of alimony and shall adjudge it, directing it to be secured months in advance in all cases.

"Art. 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it." The counsel for the respective parties agreed in open court as follows: "It is agreed by counsel upon both sides that the translation of the laws of Mexico, as set up in plaintiffs' petition, and which translations are herewith filed, and marked Exhibits 'A' and 'B,' for identification with the records in this case, are correct translations of the laws they purport to be translations of, taken from the respective codes in said petition mentioned. And it is further agreed that the laws described in defendant's original answer and plaintiffs' supplemental petition are the laws of Mexico, having application to this case." Thereupon the court overruled the demurrer of the defendant, and sustained the demurrers of the plaintiffs, to which ruling the defendant duly excepted. The trial proceeded, and, after the evidence, including proof of the laws of Mexico had been closed, the judge, on his own motion, charged the jury in part as follows: "The damages, then, must be measured by the pecuniary—money—injury to the respective plaintiffs. * * * In cases of this kind the damages * * * must be measured by the pecuniary standard,—that is, the money value, of the life of the deceased to the surviving wife and children; and the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and

their knowledge, experience, and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of the deceased. See Railway Co. v. Lehmberg, 75 Tex. 67, 69, 12 S. W. 838." The jury returned the following verdict: "We, the jury, find in favor of the plaintiffs, and assess their damages at seven ($7,000) thousand dollars. Of the amount of damages so found we award to the plaintiff Lena M. Slater the sum of $2,691.00, to the plaintiff William F. Slater $453.00, to plaintiff Jesse R. Slater $717.00, to plaintiff Annie E. Slater $1,346.00, to plaintiff Henry G. Slater $1,793.00;" on which it was "ordered, adjudged, and decreed by the court that the plaintiffs do have and recover of and from the defendant, the Mexican National Railroad Company, the full sum of seven thousand dollars, with interest thereon from this date at the rate of six (6) per cent. per annum. It is further ordered, adjudged, and decreed by the court that of the said sum of seven thousand dollars the plaintiff Lena M. Slater do have and recover the sum of two thousand six hundred and ninety-one dollars ($2,691.00), the plaintiff William F. Slater the sum of four hundred and fifty-three dollars ($453.00), the plaintiff Jesse R. Slater the sum of seven hundred and seventeen dollars ($717.00), the plaintiff Annie E. Slater one thousand three hundred and forty-six dollars ($1,346), and the plaintiff Henry G. Slater one thousand seven hundred and ninety-three dollars ($1,793.00), with interest on the said sums, respectively, from this day, at the rate of six (6) per cent. per annum."

Thos. W. Dodd and Leroy G. Denman, for plaintiff in error.

C. A. Keller and E. A. Atlee, for defendants 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 grounds of the defendant's demurrers and of its special plea are these: (1) That the death occurred in the republic of Mexico, and not within the jurisdiction of the circuit court. (2) That under the Mexican laws the parties who may prosecute the suit are different from the parties who may prosecute a like suit in the state of Texas, and that the laws of Mexico pleaded and relied upon by the plaintiffs are so far different in other particulars from the laws of Texas as to put the case outside of the jurisdiction of the circuit court. (3) That the right of the plaintiffs to recover depends solely upon the construction of a penal statute of Mexico, which has no extraterritorial effect. (4) That under the laws of Mexico the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas or the common law that this court cannot administer or enforce those laws and the plaintiffs' rights thereunder. The parties to this suit are citizens of the United States, and all of the plaintiffs are citizens of Texas, and inhabitants of the district in which the suit was brought, while the sole defendant is a corporation organized under the laws of the state of Colorado, and has constructed and operates a line of railroad to the city of Laredo, in the district and at a point where the circuit court is held, and where also the defendant has a duly authorized and recognized agent upon whom process may be served; and the defendant, being thus an inhabitant of the district, has duly appeared.

The statutes of Mexico creating the plaintiffs' right place the acts and omissions charged against the defendant to support their claim of

right in the class of negligent crimes; but it cannot be contended that the act belongs to that class of criminal laws which can only be enforced by the courts of the country where the offense was committed, for it gives a civil action to recover damages for a civil injury. It is such an injury as would not have supported an action at common law, for it was early held, and has become settled law, that at common law the death of a human being could not be complained of as an injury in a civil court. As the right to compensation in such cases is one of recent creation, it is dependent solely upon the statute of the country where the injury is inflicted from which the death results. But when an act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal, and not a real, action, and is of that character which the law recognizes as transitory, and not local, the wrongdoer may be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. Wherever, by either common law or the statute law of the country, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439. We have seen that the foreign law here involved does not belong to the class of criminal laws which can only be enforced by the courts of the foreign country. The right created by those laws is not contrary to the public policy in the state of Texas, in which state the circuit court to which this writ of error issued is held. Rev. St. Tex. 1895, arts. 3017, 3027. It is not contrary to abstract justice, or to pure morals, nor calculated to injure the state of Texas or the United States or their citizens. We have already shown that the circuit court has jurisdiction of all of the parties to this action.

What we have said sufficiently disposes of the first and third of the grounds of error as stated in the opening of this opinion. The first clause of the second ground becomes immaterial in view of our conclusion as to the fourth ground, which substantially includes the last clause of the second, and hence there remains for discussion only the fourth ground of error, assigned as numbered in our opening statement. On the subject of jurisdiction, therefore, it remains to inquire only whether, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. From the nature of our system of national judicature, and from the nature of the case, there is no general law or statute of the United States prescribing the forms of procedure and the law of the trial in such cases in the circuit court other than the statute which requires that the forms and modes of procedure in civil causes in the circuit court shall conform as nearly as may be to the forms and modes of procedure existing at the time in like cases in the courts of record of the state within which the circuit court is held. Rev. St. § 914. As we have seen, "in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice, or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can

see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure the state or its citizens, or if we have not jurisdiction of the parties who must be brought in to enable us to give a statutory remedy, or if, under our forms of procedure, an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." Higgins v. Railroad Co., 155 Mass. 176, 180, 29 N. E. 534, 535, 31 Am. St. Rep. 544, quoted with approval in Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. We must, therefore, look somewhat closely to the Texas law and practice thereunder preparatory to a comparison of that law with the laws of Mexico, to determine whether the circuit court, in an action at law, can give a substantial remedy and do substantial justice between the parties in this cause.

Article 3027 of the Revised Statutes of Texas of 1895 provides:

"The jury may give such damages as they may think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."

The learned judge of the circuit court who presided on the trial of this case sat in the case of Hall v. Railroad Co., 39 Fed. 21, and in his instruction to the jury in that case stated the Texas law thus:

"It is necessary for the plaintiff, in cases of this kind, to show a damage of a pecuniary nature. Yet such damages are not to be given merely in reference to the loss of a legal right, but may be calculated with reference to the reasonble expectation which the plaintiff had, resulting from his condition, and the disposition and ability of his son, during his life, to bestow upon him pecuniary benefit as of right, or in obedience to the dictates of filial duty without legal claim."

In Railway Co. v. Lehmberg, 75 Tex. 67, 68, 12 S. W. 838, 840, which the trial judge cites in his charge in the instant case, we find the Texas law announced thus:

"While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative; and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, it yet must be admitted that the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some, but not to every, extent be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the lawmaker. In some states an attempt has been made to remove them to some extent by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law, and no rule is prescribed for making the calculation upon facts capable of exact ascertainment, it necessarily follows, we think, that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience, and sense of justice should fix and assess the proper sum."

In an earlier case (Railroad Co. v. Kuehn, 70 Tex. 582, 8 S. W. 484), it is said at page 587, 70 Tex., page 485, 8 S. W.: "That pending the suit the widow married again does not preclude her right of action." And in Railway Co. v. Younger, 90 Tex. 387, 38 S. W. 1121, on certified questions duly propounded to the supreme court to obtain its rulings on the points stated, that court answered: "To the first question we answer that evidence of the marriage of plaintiff, Younger, after the death of his wife, on account of which he sought to recover damages, was properly rejected by the court." And in the argument in the opinion it is stated: "If the plaintiff's wife was killed through the negligence of the defendant, he then lost the value of her life as a wife; and the fact that her place has been supplied by a subsequent marriage does not in any manner operate to mitigate the damages for which the wrongdoer was responsible."

Looking only to the sections of the statutes put in evidence, we see that the civil liability imposed by the Mexican law obliges the wrongdoer to indemnify the injured party "for the violation of a right which is 'formal, existing, and not simply possible,' and this imports the payment of damages; that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing, and not merely possible right is attacked." Arts. 301, 304, 305, Pen. Code, bk. 2, "Civil Liability in Criminal Matters." "The civil responsibility that grows out of a homicide done without right (or justification) comprehends * * * the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also the posthumous descendants that he may leave. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule, the obligation shall cease, (1) at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; (2) when those beneficiaries get married; (3) when the minor children become of age; (4) in any other case in which, according to law, the deceased, if alive, would not be required to continue the support." Articles 318, 319, Id. The articles of the statute law of Mexico put in evidence in this case appear to stand together, and, though taken from different books and different chapters of the laws as passed and published, to have a direct relation to the same general subject, and to define and limit the rights which they create. Counsel for the plaintiff in error contend that the general and special demurrers and exceptions to the respective pleadings of the parties necessarily involve and require: (1) The proper construction of the laws of Mexico touching the nature of the right and damages secured to surviving widows and children; (2) the power and authority of the circuit courts of the United States to administer these laws and enforce the right secured by them to the plaintiffs; and (3), as practically preliminary to the other two, the manner of proving and construing the laws of a foreign country. The law of Mexico being that of a for-

eign country, of which our courts do not take judicial notice, could only be proved as a fact, and, if not proved in the trial court, cannot be taken judicial notice of by this court on this writ of error. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The plaintiff in error contends that under the agreement of counsel the translations of the statutes as set out in the plaintiffs' petition and in Exhibits A and B, constituting, as it does, all of the testimony in relation to the laws of Mexico which was admitted by the trial judge, in no manner negatives or tends to negative the existence of other written or unwritten laws of Mexico having application to the issues in this case, and that, in further proof of the laws of Mexico as practically construed and enforced in that republic, it tendered the testimony of Emilio Velasco, a man learned in the laws of Mexico, taken by deposition, duly verified and authenticated and returned into court, which testimony was as follows:

"(1) That the said Emilio Velasco was a native citizen of Mexico. (2) That he was a lawyer in Mexico by profession, and had been since January, 1860. (3) That he was a graduate of the Law School of the City of Mexico, graduating in January, 1860. (4) That he was familiar with the laws of Mexico and the states of Nueva Leon and Tamaulipas in force now and that were in force for two years past, touching the right of the surviving wife and children to recover damages for personal injuries resulting in the death of the husband and father. (6) That the right in a surviving wife and children in a civil suit for damages, where no criminal proceedings had been had, and defendant had been absolved, it was necessary, as a precedent to a recovery, that the court trying the civil cause find that the killing or injury was a crime as defined by the Penal Code. (7) That the right was in the nature of alimony or pension to be paid in installments monthly for periods of time fixed by the court. That obligation to pay alimony to the wife and children does not imply that of giving a sum larger or smaller at once, but of giving a pension. Alimony comprises meals, dress, habitation, and assistance in case of sickness; and, as regards minors, besides the necessary expenses for the education of the party supported, and for furnishing him a trade, art, or profession, honest and suitable to sex and personal circumstances. (8) That the party obliged to give alimony complies with this obligation by assigning a competent pension, or by incorporating him into his family. (9) That the obligation to furnish alimony or support as a consequence of civil responsibility lasts all the time that the deceased ought to have lived, calculating the time according to the table of probabilities, which is a continuance of article 325 of the Penal Code, bearing in mind, however, the condition of the health of the deceased; but that this obligation would cease at any time when it is not absolutely necessary to the subsistence of the parties who receive it. Therefore the obligation ceases from the moment in which the condition of fortune of the parties who receive alimony vary allowing them to subsist without the necessity of the alimony. It ceases with the wife and daughter when they marry, and with sons when they become twenty-one years of age; and it ceases when circumstances are produced that, according to law, the obligation of giving would have ceased on part of deceased if he had lived. (10) That civil responsibility is based upon infraction of the Penal Code. It is the infraction of the Penal Code that gives or engenders civil responsibility. (11) In case the injured party has contributed to the deed, or fault, or negligence, or to the omissions which caused the injury, he is co-author of the offense or fault, and his representatives cannot recover. (12) That the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury,

or if he contributed in any way with his fault, negligence, or omission to the accident."

To the reading of this deposition counsel for the plaintiffs (the defendants in error) objected on the ground that the statutory law of Mexico as pleaded is best proved by the statutes themselves, and that, the statutes having been offered in evidence, the deposition of witnesses as to what is the law is inadmissible, which objection the court sustained, and the defendant duly excepted. Counsel for the plaintiff in error contend that this ruling assumes that the statutory law of Mexico is all of the law in cases of the character of the action at bar affecting the right of recovery, in that it assumes that it is incompetent to offer testimony of one learned in the laws of a foreign country as to what the law is, whether written or unwritten; and that it assumes that it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute of a foreign country and written in a foreign tongue. Undoubtedly, the usual and better mode of authenticating foreign written laws is by a copy proved to be a true copy. But unwritten laws must ordinarily be proved by parol evidence. Greenl. Ev. § 488. Counsel further insist that the trial court, in admitting only the copies of the certain statutes offered, and refusing the aid of parol evidence, fell into a mistake as to the laws of Mexico which determined the rights of the plaintiffs and the defendants in this case. In support of this contention they refer to the instruction of the trial judge to the jury, in which he uses this language:

"In cases of this kind the damages are measured solely by the pecuniary injury to which the respective parties are entitled, including the loss of prospective damages."

And this language he reiterated as follows:

"In cases of this kind the damages, as before stated, must be measured by the pecuniary standard,—that is, the money value of the life of the deceased to the surviving wife and children; and the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence and their knowledge, experience, and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of the deceased."

A most eminent text writer, in a work of standard authority, has said:

"No tribunal on earth, however learned, could hope by any degree of diligence to master the laws and processes and remedies of all other nations, and the qualifications and limitations properly belonging thereto."

The same writer has said:

"In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. But the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." And, again: "There are many questions, however, which may arise as to what are and what are not matters properly belonging to the remedy, and what are and what are not matters properly belonging to the merits. Many cases of this sort may be found collected and discussed by foreign jurists upon the peculiarities of their own jurisprudence. But they could not be made intelligible to a lawyer under the common law without occupying a space in

explanations wholly disproportionate to their importance in a treatise like the present." Story, Confl. Laws, §§ 557, 558, 563.

The statutes of Mexico were conceived and are expressed in the Spanish language, which is the vernacular tongue in Mexico. They are addressed to those having full knowledge of the Spanish idiom. They are addressed also to persons instructed in or charged with a knowledge of the unwritten laws, customs, and usages of that people; and, like the cases referred to by Mr. Story which could not be made intelligible to a lawyer under the common law, without laborious explanations, these statutes, thus conceived and addressed, while they must be construed by whatever court is charged with the duty of executing them, may be more rightly and safely construed with the aid of the testimony of competent witnesses instructed in these laws, customs, and usages, the idiom of the language, and the unreported decisions of their enlightened domestic courts, which, we are informed, do not accompany their decisions by the announcement of judicial opinions, if they are not, as is probably the case, forbidden by law to do so. The deposition of the witness having been offered to prove as a fact the law of the foreign country, was addressed to the judge to aid him in his rulings during the progress of the trial, and in giving his instruction to the jury; and, if he erroneously refused to receive and consider it, it is still such proof of the foreign law offered in the trial court that it can be taken judicial notice of by this court on writ of error. Without the aid of this testimony, we would find it difficult to construe the limitations expressed in the latter part of article 319, above quoted, and especially the second one of those limitations; and while we probably would, from the nature of the case, and from a careful consideration of the statutes pleaded and proved, have reached the conclusion that limitation 2 must relate to female beneficiaries, whether minors or not, and that limitation 3 relates to minor children of the male sex, we should have felt the need of the further proof which is offered to be supplied by the deposition of the learned Mexican lawyer. We conclude that the learned trial judge erred in sustaining the objection to the introduction of this proof, and, for the reason already given, we will take judicial notice of it on this writ of error. Without requoting here or attempting further to analyze the provisions of the statute law of Mexico set out in the statement of the case and to some extent considered in the foregoing part of this opinion, it appears clear to us from a careful comparison of the different sections of the statute and a careful consideration of the deposition of the Mexican lawyer that the right created by the Mexican laws is the right to a continuing support during the periods of time that support would have been due from the deceased, and in the amount that it would have been due, proportioned to his ability to give it and the necessities of those who had the right to receive it. Any judgment that may be rendered against the defendant must as studiously respect and enforce its right as it does the rights of the plaintiffs. Limitations placed on the right of the plaintiff are for the protection and just treatment of the party bound. The provisions of the Mexican law which we are considering seem to regard and relate to

not only the paramount interest of the individual parties to the transactions, liabilities, and reparations, but also to the interest of the public in having the support due to the beneficiaries so extended that it will continue through the period for which it is provided. The provisions of the Mexican statute on this subject have in view the declaring and conserving the interest of Mexican citizens; and where, as in this particular case, the beneficiaries are citizens of the United States, our laws, state and national, as administered in our courts, may be deemed adequate to authorize and secure the preservation of the rights of the beneficiaries and the protection of the interest of the public, and may yet be not adequate to the due enforcement of the limitations put upon the plaintiff's right for the just protection of the party charged. Possibly in the Texas state courts, where the distinction between law and equity does not exist, or at equity in the courts of the United States, a decree might be passed fixing the liability of the defendant, and retaining control of the parties to the suit and of the subject-matter so as to enforce that liability, with the limitations provided in the interest of the defendant. It is difficult to conceive what judgment at law the circuit court could render that would protect that interest of the defendant in the limitations put by the Mexican law on the plaintiff's right. It may be that, under our system of judicature, the jury, taking the place of the judges in the Mexican system, might, under proper instructions, on full proof, and aided, as Mexican trial judges are aided, by their own experience and knowledge of affairs, be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries (the case before us does not require that question to be decided now, and on it we express no opinion); but if in a case where only male beneficiaries are parties there may be no insuperable difficulty in the way of our enforcement of the right secured by the Mexican law, it is difficult to conceive how the most learned trial judge could instruct a jury so as to enable them, on any possible condition of proof, to fix a present sum which would give female beneficiaries their due, and give them only their due. Before the fact of their marriage shall have occurred, on what basis established by law or by human experience can the proximate date when those beneficiaries will get married be fixed by the jury, or by any other human intelligence? The Texas law provides that "an action for actual damages on account of injuries causing the death of any person may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all." Rev. St. 1895, arts. 3017, 3022. It is clear, therefore, that the rights of all entitled to damages on account of injuries causing the death of any person must be considered and settled in one action against the wrongdoer, and that in the case where some of the beneficiaries are males and some of them females the same difficulty is presented as occurs in a case where female beneficiaries alone are interested and are parties plaintiff. The learned and distinguished counsel who appeared in this court for the defendants in error, and who submitted an oral argument and a printed brief, presents in his second proposition in his printed brief "that conditions which may arise,

and under which, according to the law of Mexico, civil liabilities for damages for injuries resulting in death will cease, may constitute defensive matter, the effect of which is to bar the remedy rather than to extinguish the right of action. But no such contingencies have been pleaded. The court is not called upon to construe the law relating thereto." This proposition, in our opinion, is not sound. The limitations we have been considering relating to the female beneficiaries directly affect the plaintiffs' right, and are not merely defensive matter to be availed of by the one bound after the marriage of the female beneficiaries shall have occurred.

We therefore conclude that the right of the survivors (the plaintiffs) to recover damages for personal injuries resulting in the death of William H. Slater is alimony, or pension, payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is therefore so dissimilar from the laws of Texas and the common law that the circuit court in an action at law cannot administer the same and enforce the rights of the plaintiffs so as to do substantial justice between the parties.

It is unnecessary to notice any of the other questions presented by the assignment of errors. The view we have taken of the case requires that the judgment of the circuit court shall be reversed, and the cause remanded, with direction to that court to sustain special exception No. 2, filed by the defendant on March 18, 1901, and to dismiss the plaintiffs' action.

CHESAPEAKE & O. FUEL CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 986.

1. MONOPOLIES—ANTI-TRUST ACT—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.

   By the anti-trust act of July 2, 1890 (26 Stat. 209), congress has, in the exercise of the power delegated to it by the constitution, declared all contracts and combinations illegal, if in restraint of trade or commerce among the states; and such act does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable, and such as would have rendered the contract invalid at common law. The only question in each case where the validity of a contract or combination under the law is involved is whether or not its necessary effect is to restrain interstate commerce.

2. SAME—CONTRACTS AFFECTING INTERSTATE COMMERCE.

   A contract by which a corporation agrees to take the entire product of a number of independent persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "Western shipment" over a leading route of transportation, to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds, above a fixed sum per ton to be retained as "compensation,"—the stated purpose being to "enlarge the Western market,"—and under which the shipments are made into other states, is one affecting interstate commerce, and is subject to the provisions of the anti-trust law.

8. SAME—COMBINATIONS IN RESTRAINT OF TRADE.

By a contract between a fuel company and an association composed of 14 persons, firms, and corporations independently engaged in producing coal and coke in a certain district on a line of a railroad, the company was to handle for a term of years the entire output of the members of the association intended for the Western market, and shipped over such line of railroad, and bound itself not to sell the product of any competing mines. A minimum price at which the coal and coke should be sold was to be fixed by the executive committee of the association from time to time, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for all of the same, above a fixed sum per ton, which it was to retain as compensation. The amount to be furnished by each member of the association was also to be fixed by the executive committee, and each was to receive payment at the same rate, to be based on the average price realized for the particular grade furnished during the current month. It was also provided that any other producer of coal to be shipped on such line of railroad might become a party to the contract by a majority vote of the members of the association. *Held*, that such contract was illegal, under the anti-trust law, as in restraint of interstate commerce, and as tending to create a monopoly.

4. SAME—REQUISITES OF ILLEGAL COMBINATION—PREVENTING INDIVIDUAL COMPETITION.

It is the declared policy of congress, which accords with the principles of the common law, to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members, or between such members as individuals and outside competitors; and it is no defense to a suit to dissolve such a combination as illegal, under the anti-trust law, that it has not been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field.

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

This case arises from the filing of a bill in the circuit court by the district attorney of the United States for the Southern district of Ohio, by direction of the attorney general, against the defendants, to enjoin them from selling or shipping coal or coke into any state other than the one in which they reside, under or by virtue of a certain agreement set forth and attached to the bill. The complainants ask that the defendants be restrained from further conspiring, agreeing, combining, and acting together in the manner set out in the agreement, which it is prayed be declared null and void, and the unlawful trust and combination thereunder be dissolved by decree of court. The agreement which it is alleged evidences the combination is as follows:

"This agreement, made this 15th day of December, 1897, between the C. & O. Fuel Company, a corporation created, organized, and existing under and pursuant to the laws of the state of West Virginia, and hereinafter called the 'Fuel Company,' of the first part, and the St. Clair Company, a corporation of West Virginia; John Carver and Enoch Carver, partners in business under the firm name and style of Carver Brothers; W. R. Johnson, M. T. Davis, doing business as M. T. Davis & Co.; John Carver and Enoch Carver, partners in business under the firm name and style of the Mecca Coal and Coke Company; S. H. Montgomery, doing business under the name of the Montgomery Coal Company; the Chesapeake Mining Company, a corporation of West Virginia; the Belmont Coal Company, a corporation of West Virginia; the Kanawha Splint Coal Company, a corporation of West Virginia; the Robinson Coal Company, a corporation of West Virginia; Harry B. Smith, special receiver of the Lens Creek Coal and Coke Company; Joseph Renshaw, special receiver of the Big Black Band Coal

Company; the Charlmore Coal Company, a corporation of West Virginia; and Robert Brabbin, Jr., and L. N. Perry, partners in business under the firm name and style of the Brabbin Coal Company; Jasper McCallister, Samuel Moore, and James Kelsoe, doing business as McCallister & Co.,—and together constituting the C. & O. Coal Association, and hereinafter collectively mentioned as the 'Coal Association,' of the second part. Whereas, the members of the said coal association are all miners and shippers of coal, and part of them makers and shippers of coke, on the line of the Chesapeake & Ohio Railway, in Fayette or Kanawha counties, West Virginia, and have formed and organized said association for the promotion of their common business interests in the mining of Kanawha coals and cokes; and whereas, the said fuel company has been incorporated and organized for the purpose of placing said Kanawha coals and cokes upon the Western market,—its prime object to promote the sale of, and enlarge the Western market for, said coals and cokes: Now, therefore, this agreement witnesseth:

"(1) That the parties of the second part agree, in consideration of the covenants and agreements on the part of the party of the first part herein contained, each firm, individual, or corporation, severally, for themselves, himself, or itself, and not for any other, and each of them doth hereby agree to sell to the said fuel company exclusively the entire coal and coke output of the mine or mines operated by each of them, respectively, on said C. & O. Ry., or branches thereof, for Western shipment, for a period of not less than five years from and after the date of January, 1898, subject to all the provisions, terms, and conditions hereinafter contained, except as to such coal as may be sold by any member of said coal association to the Chesapeake & Ohio Railway Company for the consumption of said railway company, which said coal such member shall have the right to sell to said railway company direct; it being understood that this contract applies only to the coal and coke to be sold west of the respective mines of the members of said coal association, and shall not in any way apply to, or interfere with, the Eastern trade of the members of said association.

"(2) The minimum price f. o. b. mines of all the various grades of coal and coke sold and to be shipped West by the members of said association, and embraced in this contract, shall be fixed by the executive committee of said coal association from time to time, as it shall see proper, after consultation with the executive committee of the fuel company. The said fuel company covenants, agrees, and binds itself that it will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum prices to be fixed by such committee, and further that it will at all times endeavor to obtain the maximum price for such coal and coke. It is understood and agreed that the minimum prices hereinbefore mentioned are net prices f. o. b. mines, and not including any profit to the said fuel company, which is to get its profit over and above said prices.

"(3) That the said fuel company shall make its sales direct, and shall not make any contract for the sale of coal and coke to a third party in the name of any member of the said coal association, and shall have no right by any contract to bind any member of said association to any third party, except for river business, as hereinafter provided for.

"(4) The executive committee of said fuel company, who shall administer and have charge of its affairs, shall be composed of three (3) persons, one of whom shall at all times be a member of, or officer of a member of, said coal association, and shall from time to time, according to the by-laws or articles of association of said association, be designated as a member of such executive committee, and shall thereupon be appointed such member of such executive committee by said fuel company in the place and stead of the member of, or officer of a member of, said coal association previously occupying such office. The executive committee of said coal association shall consist of three members of, or officers of members of, said coal association, to be selected as such from time to time by the members of said coal association according to their by-laws or articles of association.

"(5) The said fuel company covenants, agrees, and binds itself to sell for shipment by rail via the said Chesapeake & Ohio Railway, and pay for, to the members of said coal association as hereinafter agreed, not less than 600,000 tons per annum of coal, and 75,000 tons per annum of coke; such sales and shipments to be disposed of in as nearly equal monthly quantities as possible. But in case said fuel company is unable for any time to make sales of coal or coke by reason of the failure or inability of the members of said association to make prices sufficiently low to enable said fuel company to meet the prices in the market where said coal or coke is sought to be sold, and to compete with other sellers of coal or coke in such markets, then there shall be an abatement of the minimum amount of coal or coke hereinbefore agreed to be taken annually by said fuel company, bearing the same proportion to such minimum amount of coal or coke as such time during which such inability to meet such market prices shall continue does to one year. The executive committee of said coal association shall, not later than the 20th day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month, which apportionment so made shall be furnished the general manager of said fuel company not later than the 20th day of said first-mentioned month, and all orders received to be shipped by rail as aforesaid during such succeeding month shall be distributed between the members of said coal association by said general manager according to such apportionments: provided that, if any member of said coal association shall be unable or shall not desire to ship West the full amount of any kind or grade of coal or coke apportioned to such member for any month, the said fuel company shall distribute the order for the deficiency so caused among the other members of said association who are shippers of such grade of coal or coke in the proportion as between such other members fixed by said committee for such month: provided, further, that only actual inability shall excuse a member of said association from shipping so much of the apportionment for any month as shall be required by the said fuel company for contribution to contracts previously taken by said fuel company.

"(6) The said fuel company shall make and render to the members of the coal association accurate and complete reports of all coke and coal shipped by rail as aforesaid, as follows: (a) A daily report of all sales, showing the net prices of such sales. (b) A monthly report showing the tonnage of the various kinds of grades of coal and coke shipped by members of said coal association and weighed during the month, or weighed during such month though shipped during a preceding month, together with the average price for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said fuel company to the members of said coal association according to the average prices, determined as aforesaid, and upon the sale after the end of each month of any coal or coke shipped and weighed, or weighed but not sold during such month, the surplus, if any, arising after deducting from the actual price received the minimum price for such kind and grade of coal or coke for such month, and profit, shall be paid forthwith to the shippers of such grade of coal or coke for such month according to their tonnage of such kind or grade of coal or coke for such month. And the said fuel company agrees and binds itself to pay as aforesaid, in cash, on or before the 20th day of each month, for all coal and coke during the previous calendar month.

"(7) The said fuel company further covenants, agrees, and binds itself to handle only such coal and coke as are produced by the above-mentioned members of said coal association, and not to handle, buy, or sell, for itself or on commission, any coal or coke produced by any other operator

along said Chesapeake & Ohio Railway, or branches thereof, or any coal or coke, wherever produced, of the same grade as, or competing with, coal or coke produced by any of the members of said association, the prime object of this contract being to enlarge the sale of, and extend the Western market for, Kanawha coal and coke; and this shall not prevent the said fuel company from dealing in anthracite coal or New River coal or coke: provided, that New River coal or coke shall not be dealt in to the prejudice of, or sold as a substitute for, Kanawha coals and cokes; and, provided, further, that in an emergency, and when absolutely necessary, other coals and cokes may be handled by said fuel company to meet such emergency. But no dealing in such anthracite, New River, or other coal or coke shall be done by said fuel company to an extent or in a manner incompatible with the prime object of this agreement, as hereinbefore recited.

"(8) That at any time, by a vote of two-thirds (⅔) of the members of said coal association, said fuel company may be allowed to handle any other coal or coke for such time and upon such terms and conditions as may be prescribed by such vote.

"(9) The said fuel company is to receive a gross profit on all rail coal and coke sold, which shall not exceed ten (10) cents per ton of two (2,000) thousand pounds on any sale, which compensation shall be retained by said fuel company out of the monthly settlements of coal and coke sold; the true intent and meaning of this clause being that the fuel company shall get its profit over and above the net minimum price of said coal and coke f. o. b. mines as hereinbefore fixed, and, if the price at which said coal and coke is sold by said fuel company shall be sufficient to yield a sum exceeding said minimum price and gross profit of ten (10) cents per ton as aforesaid, then the difference shall be paid over to the members of said association in the manner and at the time hereinbefore mentioned, as they may be entitled under this agreement, as part of the purchase price to be paid for coal and coke by said fuel company.

"(10) The members of said association shall not be required to mine and ship coal when hindered or prevented by causes beyond their own control, such as strikes, accidents, refusal or inability of the carrier to provide transportation, &c.

"(11) The said coal association shall have the right, once per month, through a committee not exceeding three in number, or a person designated by said committee, to examine the order, sales, and tonnage books of said fuel company.

"(12) The coal or coke of members of said coal association shipped in barges by river shall be handled by the said fuel company, as an agent, on the same terms and under the same conditions as are now established or may be hereafter established and prevail in Cincinnati market for the sale of river coal, but the said fuel company shall not make time sales or extend credit without the consent of the shippers of such coal.

"(13) All settlements for coal or coke shipped by rail as aforesaid shall be made upon the scale of weights of the Chesapeake & Ohio Railway Company, as ascertained at its weighing stations now established, or that may hereafter be established.

"(14) It is distinctly understood that nothing herein contained shall be construed to render the said members of said association liable as partners, in any way, manner, or form, either as between themselves or with the said fuel company; each of said firms, corporations, and individuals contracting herein for themselves, itself, or himself, and not one for the other.

"(15) The said fuel company further covenants, agrees, and binds itself that neither it, nor any of its officers, employés, or servants, will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said coal association, except under the terms and conditions of this agreement.

"(16) The members of said coal association above named, each for himself, itself, or themselves, and not one for the other, covenant and agree

that the said members of said association will not sell or consign any coal or coke bound to points west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement, and that there shall be no pretended sale or lease of the property of the members of the said association made to evade this contract; but it is further understood and mutually agreed that this contract shall not be construed to prevent any bona fide sale, assignment, or lease of the respective properties operated by the members of said association, respectively, or the interest therein of any member of said association. And in case of such sale, assignment, or lease, the members of said association are not to be held responsible under this contract for the sale and delivery of any coal from such properties after such sale, assignment, or lease takes place. But in case the vendee, assignee, or lessee of any coal or coke property of any member of the coal association desires, he shall have the right to take the place of such member in this agreement.

"(17) And whereas, some of the members of said association have contracts for the sale of coal or coke, which cannot be completed until after this agreement goes into operation; and whereas, it is to the advantage both of such members and of said fuel company that such contracts be filled through said fuel company: It is further agreed that the members of said association having existing contracts to be completed during the period of this agreement shall on or before the 24th day of December, 1897, file with the general manager of said fuel company a memorandum of each of said contracts, and such of said contracts as are uncompleted on the first day of January, 1898, shall be completed through said fuel company; the fuel company to make no charge for its services in connection with such contract, and collecting the proceeds of the same; said fuel company not to guaranty the collection of such proceeds, or be responsible for same unless collected by it. Such coal or coke so shipped on existing contracts shall not be taken into account in any way as a part of the traffic hereinbefore provided for in this contract, nor its prices taken into account in computing the average price for any month, but such as shall be shipped by rail shall be considered part of the minimum tonnage mentioned in the fifth clause of this agreement for the year in which it is shipped.

"(18) The said fuel company shall keep at its own expense one or more inspectors to examine and inspect from time to time, as often as may be necessary, the coal and coke produced, with a view of keeping up a proper standard of excellence. Should said inspector find coal or coke badly or improperly prepared, he shall immediately report all the facts in writing to the fuel company and to the operator preparing such coal or coke, and shipments from mine or mines producing such alleged improperly prepared coal or coke may be suspended after five (5) days' notice in writing to such operator, at the discretion of the executive committee of the fuel company, until such time as such operator may prepare such coal or coke properly. In any case such operator shall have the right to refer the question whether such coal or coke is improperly prepared or not, or, if not so prepared, whether the same be so prepared at reasonable cost, to arbitration, as herein provided, which decision as to the preparation of such coal shall be final and binding on both parties; and in case said arbitration shall find such coal or coke improperly prepared, and shall further find that it is impossible or impracticable for such operator to remedy such faults at reasonable cost, he shall have the right to withdraw from, and have this agreement annulled as to him. If said fuel company shall make default in payment for any coal or coke shipped under this agreement according to the terms hereof, and said default shall continue for the space of fifteen (15) days, unless payment shall be withheld by reason of attachment, suggestion, garnishment, or other legal process against the member of said coal association on whose claim default is so made, such default shall, at the option of such member on whose claim such default is so made, work an annulment of this contract as to such member: provided, such member shall within ten (10) days after the expiration of said fifteen (15) days give notice in writing to said fuel company of the election of such member to exercise such right of annulment; and a failure to exercise this right

for any such default shall not prevent the exercise of the same for any subsequent default. And a violation or failure to keep, observe, and perform any covenant or covenants herein contained by any party to this agreement shall, at the option of the party or parties thereby aggrieved, work an annulment of this agreement as to such party or parties on thirty (30) days' notice in writing. And no waiver of this right, in case of any violation or failure to keep, observe, and perform any covenant hereof, shall prevent the exercise of the same for any subsequent violation of, or failure to keep, observe, and perform, the same, or any other covenant hereof: provided that, upon any notice for the annulment of this agreement as hereinbefore provided being given by any parties or party, the party or parties to whom it is so given, if desiring to contest the rights of the parties or party giving said notice to annul this agreement, shall have the right to submit the question to arbitration, as herein provided, and the decision of such arbitrator shall be final and binding on all parties to such arbitration. But any withdrawal or annulment as to any member or members under this, or clause No. 18 hereof, shall not affect this contract as to the parties remaining, between themselves.

"(19) Any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railway may become a party to this contract by signing the same, or an exact copy hereof, with the fuel company, or by an indorsement attached hereto may accept the provisions hereof; and, upon becoming such party hereto, such person, firm, or corporation shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities, hereunder, the same as if he, it, or they had been named in said contract as one of the parties of the second part, and had duly signed and executed it with the others named therein provided, that said association shall agree to such person, firm, or corporation becoming a party hereto by a majority vote of a quorum of its members.

"(20) It is understood and hereby agreed that in any matter or thing connected with this agreement, where any party hereto shall assert, maintain, or set up any claim, right, privilege, liability, or penalty in his, its, or their favor, or against any other party or parties hereto, and thereby a controversy shall arise hereunder, then and in that event either party or parties to such controversy shall have the right to submit the said controversy to arbitration in the manner hereinafter set forth. There is hereby constituted and appointed an arbitration committee, which shall be composed of two persons and such third person as shall be by such two selected from time to time as any controversy may arise. Such two persons shall be selected as follows: Each and every year during the continuance of this contract the said fuel company shall appoint some person to serve upon said arbitration committee, and the parties of the second part shall also appoint one to serve upon said committee, of which appointment the fuel company and the association shall have notice, and the two persons so appointed shall continue to serve until their successors shall be appointed in the same manner. Whenever a controversy shall arise hereunder, the party desiring to submit such controversy shall notify the other party or parties to such controversy of the same, in writing, and shall designate in such notice the time and place when said two arbitrators shall meet to hear the matter in controversy, and he or they shall also notify the said arbitrators to meet at said time and place. And at the time and place so designated said two arbitrators shall meet, and they shall select a third arbitrator, who, with the other two, shall constitute the full arbitration committee to hear and determine the said controversy, and whose award in all matters of law and fact shall be final, and shall be binding upon each and all of the parties to that controversy. Such notice may be served as a legal notice is served, or it may be mailed to the party, to be served at his or their post-office address. And any notice to any one or more of the parties of the second part may be served upon, or sent by mail to, the president and secretary of said association. If at the time and place said two arbitrators are required to meet, either one or both of them should fail or refuse to attend or serve, then the fuel company, by its agent or attorney, on the one side, may fill the vacancy caused by its arbitrator being absent or

refusing to serve, and the association, by its officer, agent, or attorney, may fill the vacancy caused by the absence of its arbitrator, or his refusing to serve; and the arbitrator or arbitrators so selected by either or both of said parties as aforesaid shall select the third, which three shall, for that controversy, constitute the arbitration committee, and shall have the same powers, and their award shall be as final, as if the two arbitrators herein first provided for had attended and selected a third. If, upon having notice to attend at a time and place to settle a controversy, either party shall fail or refuse to attend, or shall fail or refuse to select an arbitrator when required hereunder so to do, the said association, by its president, other officer, or attorney, may select an arbitrator in the place or stead of the absent one; and, if such association shall fail or refuse to make such appointment, in that event the fuel company, by its agent or attorney, may make such appointment or appointments, and the two, when so appointed in any of said modes, shall select a third, and the three shall constitute the arbitration committee to hear and determine said controversy, whose award shall be final. A notice to arbitrate hereunder shall not fix a time longer than fifteen (15) days, nor less than five (5) days, from the time of giving said notice, unless by mutual consent. The place of such meeting of the arbitrators shall be at Cincinnati, Ohio, or Charleston, W. Va., unless by mutual consent. Said arbitrators shall have the right to adjourn their session from time to time, or to such place or places as they may determine. And they shall make their award in not less than three days from the time the evidence is finally taken before or submitted to them; such award to be valid if signed by two of the arbitrators. Every award shall be executed in duplicate, and a copy thereof furnished to each of the executive committees herein mentioned. The failure of a regular arbitrator to attend at a time and place designated in any notice to him, and the appointment of another in his stead for any controversy, shall not for that reason vacate his general appointment as an arbitrator until his successor is appointed. If the two arbitrators appointed as above provided shall at any time fail or refuse for two days to appoint the third arbitrator, the latter shall be appointed by the judge of the circuit court of Kanawha county, West Virginia.

"Witness the following signatures:

"The C. & O. Fuel Co.,
"Donald McDonald, Pt.
"Robinson Coal Co.,
"By Neil Robinson.
"W. R. Johnson.
"The Kanawha Splint Coal Company,
"By F. E. Lair.
"Carver Bros.
"Enoch Carver.
"Jos Renshaw,
"Special Receiver Big Black Band Coal Co.
"Charlmore Coal Co.,
"Herndon & Renshaw, Mgrs.
"McCallister & Co.,
"Per James Kelsoe.
"Mecca Coal & Coke Co.,
"By John Carver.
"Chesapeake Mining Co.,
"By J. B. Lewis.
"Coalburg Colliery Co.,
"By J. B. Lewis.
"Montgomery Coal Co.,
"By S. H. Montgomery.
"Belmont Coal Co.,
"By T. E. Embleton, Pt.
"Harris B. Smith,
"Spl. Receiver Lens Creek Coal & Coke Co."

The defendants answered, admitting the making of the contract, and taking issue upon the other allegations of the bill, and seeking to justify the making of the agreement for lawful purposes, for reasons set forth in the answer, which are noticed in the opinion. The complainant offered no testimony, but certain evidence was introduced by the defendants for the purpose of showing the legality of the transaction, and did tend to establish certain facts,—among others, the following: The 14 parties to the agreement are carrying on trade and business in what is known as the "Kanawha district," in West Virginia. These parties are miners and shippers of coal and manufacturers of coke in that district, and the mines covered by the contract are on the south side of the Kanawha river. They do not own all of the mines on that side of the river. One Donald McDonald had been the agent of the various coal companies in the sale of coal and coke at Cincinnati, Ohio, prior to the formation of the Chesapeake & Ohio Fuel Company, which company is one of the parties to the agreement in controversy, and of which he became the president. His business, before the formation of the fuel company, was largely confined to local points west of the Chesapeake & Ohio Railroad, and to Cincinnati and vicinity. After the making of the contract, coal and coke were sold thereunder in West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Arizona, and small quantities in Mississippi. Of the parties to the agreement, which relates only to rail shipments west on the Chesapeake & Ohio Railroad, seven in number have river tipples for shipping coal by the Great Kanawha river. Other miners, not parties to this agreement, also have tipples for shipping coal on this river. The mines embraced in the agreement have a capacity of about 5,000 tons a day, and the mines of the Kanawha district not parties to the agreement have a capacity of about 11,000 tons a day. The coke ovens in this district represented by parties in this agreement are about 226 in number, with a daily capacity of about 450 tons, to about 347 in number, with a daily capacity of 525 tons owned by others than the parties to the agreement. Competition in the Western market is keen with the coal mines shipped along the line of the Chesapeake & Ohio Railroad, in the Kanawha district. This competition comes from the Flat Top coal fields on the line of the Norfolk & Western Railroad, from the coal fields all along the line of the Baltimore & Ohio Railroad, West Virginia & Pittsburg Railroad, and West Virginia Central Railroad; also competition by rail and water from all of the great coal fields of western Pennsylvania, the Hocking, Welston, and Nelson fields of Ohio, the coal fields of Kentucky and Tennessee, northern and southern Illinois, and the fields of Iowa, and some competition from Missouri. The aggregate of all these fields is about 115,000,000 tons annually. The competition in the Western market is severe, with the coke produced in the Kanawha district. The twelfth clause of the agreement, which provides that the Chesapeake & Ohio Fuel Company shall handle the coal shipped in barges, was rescinded by all the parties to the agreement in June, 1898. The business of the operators had not been satisfactory, and it was agreed with McDonald, the former sales agent, that a company should be formed for the sale of the coal, which should use every practicable means to push the sale of the coal, and to enlarge its market. There were large contracts, which no single operator could take. The minimum of 600,000 tons of coal and 75,000 tons of coke per annum, which it is provided shall be taken under the contract, was considerably in excess of the previous year's shipments. In making the contract, the coal was placed at about 60,000 tons in excess of the previous year's production, and the coke at 30,000 tons. It is testified that larger contracts had been obtained for the sale of coal than theretofore, and larger than any of the operators could fill. And better preparation of the coal for the market had been secured, together with a more equitable distribution of the cars for the shipment of the coal. Since the fall of 1898 an agent, termed the "equalizer," has been employed to attend to the distribution of the orders sent in by the fuel company. The price to consumers has been reduced, and there has been no intention to control the market or enhance prices. The circuit court made a decree in favor of the complainant (105 Fed. 93), and the defendants appealed.

Malcolm Johnson and A. C. Cassatt, for appellants.
Wm. E. Bundy and Sherman T. McPherson, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge (after stating the facts as above). This action involves the construction and application of Act Cong. July 2, 1890 (26 Stat. 209). This statute makes illegal "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The act further makes it a misdemeanor to monopolize or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. This suit was brought under cover of the fourth section, giving to the circuit court jurisdiction of proceedings in equity brought by the United States district attorney, under the direction of the attorney general, to restrain violations of the law.

Is the contract in restraint of trade, within the meaning of the law? As we understand the decisions of the supreme court of the United States, the construction of the statute is no longer an open question. At the common law, contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts. See opinion of this court, per Taft, Circuit Judge, in U. S. v. Addyston Pipe & Steel Co., 29 C. C. A. 141, 85 Fed. 271–279, 46 L. R. A. 122. By the constitution of the United States, congress is given plenary power to regulate commerce between the states and with foreign nations. In the exercise of this power, congress may prevent interference by the states with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammeled flow of such trade. In the exercise of this right, congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the states. U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

While this is the general rule to be deduced from the authorities cited, it is to be remembered that the supreme court has also declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect commerce." U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259.

The question is, in each case, does the contract or combination have the necessary effect to restrain interstate commerce? A contract or combination which interferes with the freedom of interstate commerce,

and hinders or prevents its free enjoyment, to the extent that it does so, restrains that commerce, and is illegal. It was the policy of the common law to discourage monopolies, and to refuse to enforce contracts which had the effect to suppress competition. It was believed and declared by those who built up that system of jurisprudence that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part. It was in the same spirit, and with the same end in view, that congress passed the act under consideration, which is aimed to maintain interstate commerce upon the basis of free competition, and contracts which have the necessary tendency to restrain that freedom are within the condemnation of the law. The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer, have been productive of more good than evil to the public. The constitution has delegated to congress the right to control and regulate commerce between the states. In the exercise of this right, it has declared for that policy which shall keep competition free, and leave interstate commerce open to all, without the right to any to fetter it by contracts or combinations which shall put it under restraint.

Looking, then, to the contract in question, we find 14 of the coal producers of this district, whose aggregate production is 5,000 tons a day, entering into an agreement which, without making a partnership, undertakes to control the entire output of the several mines for shipment west by a leading route. Examining its provisions, we find that these 14 independent operators, who theretofore were competing in the open market for the trade which is the subject of this contract, are now prevented from any independent action in fixing prices, but are obliged to sell at a price fixed by the executive committee, or not to sell at all. One of the witnesses introduced by the defendants said in the course of his testimony:

"I suppose before this contract went into effect the operators were not generally informed as to what each other were receiving, and that each received his own price."

Undoubtedly the market price was generally controlling, but the price was not fixed by arbitrary agreement, and was left to the operation of the natural laws of open competition. Under this agreement no member of the association is permitted to sell coal or coke bound to points west on the railroad except under the terms and conditions of the contract, and the fuel company cannot directly or indirectly become interested in the buying or selling of bituminous coal or coke of any members of the association, or coal or coke in competition with coal or coke of members of the association, except under the terms of the agreement. Monthly reports are to be made, showing the tonnage of the various kinds of coal and coke shipped by the various members of the association, and weighed during the month, together with an average price of each grade of coal or coke so shipped and weighed, which average price is to be computed upon the basis of the actual

price, less gross profits, if any, received for all coal and coke sold, and the minimum price as fixed by the contract for coal and coke not sold in such month, and settlement to be made with the members of the association according to the prices fixed. The fuel company is to receive a gross profit of not to exceed 10 cents a ton, and the amount realized each month in excess of said profit, over and above the minimum price, is to be paid to the members of the coal association. The executive committee of the coal association is required, not later than the 20th day of each month, to designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of the association under the terms of the contract.

A consideration of these provisions, assuming that the contract relates to interstate commerce, would seem to make plain the violation of the statute of 1890. Here are 14 dealers who have neither formed a corporation nor a partnership, but have limited to the terms of this agreement their rights for five years in the mining and shipping of coal upon one of their main outlets to the market. They have restricted their right to produce coal for such shipment to the amount designated by the committee. They have restricted sales to this purchaser to a price to be fixed by the committee. They have eliminated competition in the market among themselves. They have restricted the purchaser so that he may not buy from others in competition with themselves. If we correctly interpret the decisions of the supreme court, these provisions clearly restrain the freedom of interstate commerce, which it is the purpose of this statute to maintain unfettered by such contracts and combinations. While it is admitted that some restraint may result upon commerce by these provisions, it is strenuously argued by the learned counsel for the defendants that such restrictions among a portion of the coal dealers of a district are only ancillary to a main lawful purpose, resulting in larger competition, and greater freedom and volume of interstate trade, and do not violate the act. In support of this contention, Judge Taft's opinion in the Addyston Pipe Co. Case, supra, is cited, in which, after summarizing the five instances in which the common law upheld covenants in partial restraint of trade, the learned judge said:

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

And the judge quotes from Chief Justice Tindal in Horner v. Graves, 7 Bing. 735, to the effect that in such cases it is to be considered whether the restraint imposed by the contract is only fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. If the unreasonable restraint, as at the common law, was the test of the validity of such contracts, we might inquire whether this agreement

did not contain certain restrictions entirely unnecessary to the protection of the fuel company in acquiring the coal from the association, which restrictions are inimical to the public interest. But it is to be remembered that the test of the common law as to the reasonableness of the restraint of commerce is not the test of the validity of such agreements, within the provision of the statute. This proposition was decided by the supreme court in the Trans-Missouri Case, supra, and affirmed in later cases. Not that every case of incidental restraint makes a contract void, but the question is, is it the effect of the contract to directly restrain interstate commerce? Upon this question the supreme court has said (Joint Traffic Ass'n Case, 171 U. S. 567, 568, 19 Sup. Ct. 31, 43 L. Ed. 287):

"Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment, of two or more producers, of the same person to sell their goods on commission, was a matter in any degree in restraint of trade.

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

And in the Addyston Case, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149, the court says:

"All the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce."

And it is argued that the main purpose of this agreement being to increase the trade of the parties, to enhance competition in a larger field, and improve the character of the product, these objects are beneficial to the public, as well as to the private parties, lawful in their scope and purpose, and justifying the indirect and partial restraint of trade involved in the execution of the agreement. The argument here advanced would be available to nearly every combination of this kind. Wider markets and more trade may be the inducements to such agreements, but they are purposes which the act of congress does not permit to interfere with the freedom of interstate traffic. It would, however, be closing our eyes to the situation and the terms of the contract not to perceive that the limiting of competition was a moving purpose in entering into this agreement. Not only are the 14 operators who signed the agreement limited in prices and trade and production to the governing action of the executive committee, but in the nineteenth paragraph of the contract it is provided that any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railroad may become a party to the contract by signing the same; such parties to be ad-

mitted, by a majority vote of the members, to full participation in the benefits and obligations of the contract. The parties may well be concluded to have intended, in what they did, to put an end to competition in the district in shipments to the Western market to be reached by the Chesapeake & Ohio Railroad, by getting all the operators into an agreement to sell for a single price, to be fixed by a committee of their number, and to limit competition among themselves in markets near and remote, within the scope of the agreement. It is to be remembered in this connection that it is the effect of the contract upon interstate commerce, not the intention of the parties in entering into it, which determines whether it falls within the prohibition of the statute. The Trans-Missouri Case, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; the Addyston Case, 175 U. S. 234, 20 Sup. Ct. 96, 44 L. Ed. 136. It is, moreover, contended that the effect of this agreement has been the reduction of prices to the consumer. In determining whether a combination restrains interstate commerce, it is not only the effect upon consumers which is to be considered, but, as well, the effect upon others in the business, who, from choice or necessity, are left outside of the organization. As is said in the Trans-Missouri Case, 166 U. S. 323, 17 Sup. Ct. 552, 41 L. Ed. 1021:

"In business or trading combinations, they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital."

In the present case, if the scheme of this combination shall prevail, until nearly all of the operators in this district have availed themselves of the opportunity contained in the contract and become parties to it, the effect upon dealers who have not its large facilities, and may be unable to compete for the contracts and meet the prices fixed by the committee, cannot be otherwise than disastrous. And when the small dealer has been driven out, the combination is one step nearer to the power to control the market.

It is further contended that the competition is such in the market for which this coal is intended, and the coal produced by the operators, parties to this agreement, is such a small fraction of the quantity sold, that it cannot affect prices materially. It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement. In U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, Chief Justice Fuller said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition." Quoted with approval in the Addyston Case, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136.

The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity.

Again, it is argued that the features of the contract which fix the minimum to be taken by the fuel company in excess of the former production of the mines, and permit a proportionate reduction of the minimum quantity to be taken when the price is fixed so high that the fuel company cannot meet the market, are evidences that this is no more than an agreement to make the fuel company the common agent of the parties for the sale of the product of the mines at the market price. The answers to this position are obvious. In the constitution of such an agency the restrictive features of this contract are unnecessary. Should the fuel company be unable in all cases to meet the price fixed, the parties are nevertheless prohibited, during the life of the contract, from dealing with others, or selling at a less price than the committee has fixed, and the purchaser is not at liberty to deal with competitors for a supply of coal for this market. "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity that is regarded." The Addyston Case, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149.

We think this contract, within the meaning of the statute, is in restraint of interstate commerce, and tends to create monopoly.

That the contract under consideration has relation to interstate commerce, within the meaning of the act, we think not doubtful. The coal was contracted for to be sold in the Western market. It is declared to be a main purpose of the contract to extend that market. The coal was in fact shipped to a number of Western states. The payments were to be made for the coal upon the basis of a 10 per cent. profit to the fuel company, and the excess to go to the members of the coal association. These sales were made, as it was intended and stipulated that they should be, in the Western states. Upon this subject, speaking for the court in the Addyston Case, 175 U. S. 241, 20 Sup. Ct. 107, 44 L. Ed. 147, Mr. Justice Peckham said:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. The power to regulate such commerce—that is, the power to prescribe the rules by which it shall be governed—is vested in congress; and, when congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent intrenches upon the power of the national legislature and violates the statute."

Within this principle, we think the contract and combination under consideration have relation to interstate commerce

The judgment of the circuit court is affirmed.

JOHNSON v. CHISHOLM et al.

CHISHOLM et al. v. JOHNSON.

(Circuit Court of Appeals, Third Circuit. April 2, 1902.)

Nos. 10, 9.

1. PATENTS—ANTICIPATION—PROCESS FOR HULLING PEAS.
The Chisholm patent, No. 421,244, for a method of hulling peas, is void for anticipation by the process disclosed in the Faure French patent of May 15, 1883, and the first certificate of addition thereto. Gray, Circuit Judge, dissenting.

2. SAME—INVENTION.
The Scott patent, No. 499,397, for a process of gathering and hulling green peas from the vines, claim 2, is void for lack of patentable novelty, in view of the prior art.

3. SAME—PEA-HULLING MACHINE.
The Scott & Chisholm patent, No. 500,299, for a pea-hulling machine, claims 1 to 6, are void for lack of patentable invention, in view of the prior art.

4. SAME.
The Scott patent, No. 387,318, for a machine for hulling and separating green peas, claim 5, construed, and *held* not infringed.

Appeals from the Circuit Court of the United States for the District of Delaware.

This was a suit in equity for the infringement of four letters patent: No. 421,244, issued February 11, 1890, to Charles P. and John A. Chisholm, for a method of hulling peas; No. 499,397, issued to Robert P. Scott, June 13, 1893, for a process of gathering and hulling green peas from the vines; No. 500,299, issued June 27, 1893, to Scott and the Chisholms, for a pea-hulling machine; and No. 387,318, issued to Scott, August 7, 1888, for a machine for hulling and separating green peas.

For former opinions, see (C. C.) 84 Fed. 384; (C. C.) 106 Fed. 191.

R. S. Taylor, for Zachariah Johnson.

Gustav Bissing and Henry A. Seymour, for Chisholm-Scott Co.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. Charles P. Chisholm, John A. Chisholm, and Robert P. Scott brought a suit in equity in the court below against Zachariah Johnson for the infringement of four patents. The decree of the court was in favor of the complainants upon three of the patents. As to the fourth patent, the decree was in favor of the defendant. Both parties have appealed. As the main appeal is that of Zachariah Johnson, we will consider it first, taking up the three patents involved in the order of their dates.

The first of these patents is numbered 421,244, is dated February 11, 1890, was granted to Charles P. Chisholm and John A. Chisholm

upon an application the original of which was filed January 3, 1887, and is for an improvement in "the method of hulling peas." This patent has two claims, which are as follows:

"(1) The improvement in the art of hulling green peas, which consists in removing the same from the pods by impact, substantially as described. (2) The improvement in the art of hulling green peas, which consists in carrying the filled pods to an elevated position, and impacting the filled pods while falling, so as to sever the connections of the two half shells of the pod and of the peas with the pods at one operation, substantially as described."

The specification of this patent states that by "impact" is meant the striking of a solid body against the pods while the latter are so situated that nothing but the resistance of the air holds them against the action of the solid body, and it is stated that the impact may be given by a "variety of apparatuses." The specification proceeds to state: "For instance, a paddle, beater, or impact opener in the hands of a workman swung with just the proper velocity, impacting the peas while falling through the air, would execute the process." But the patentees in their specification say, "We prefer the apparatus in the accompanying drawings." The machine shown in the drawings consists of an exterior hexagonal drum, A, having upon its interior surface six ribs, B, extending a short distance inwardly. Inside of this is a shaft, E, carrying upon projecting arms four beaters, F. The drum and beaters are exhibited as rotating in the same direction. The drawings show that the unshelled peas, when thrown into the drum, are lodged upon the inwardly projecting ribs, and carried upwardly by the revolving drum. As the ribs approach the top of the cycle of their revolution, the pods fall off toward the interior of the drum, and as they fall they are struck by the revolving beaters. The blows burst the pods, and the peas escape from the drum through perforations therein. The beaters have a spiral inclination with reference to the axis of the drum, and so gradually work the pods from the feed end to the exit end of the drum. After referring to the drawings, the specification contains the following description of the apparatus and its mode of operation:

"In this apparatus the peas are carried to an elevated position in the upper portion of a revolving cylinder, from whence they drop, and while falling through the air they are struck by the beaters, which revolve preferably in the same direction as the cylinder, but at a much greater rate of speed. The cylinder should revolve at just such a speed as not to carry the pods around by centrifugal force, but carry them up and then drop them; and in falling through the air they are struck by the beaters, which may or may not be covered by some soft material (as rubber or leather) to soften the blow. The pods must be struck by a sharp quick blow, which should be just sufficient to crack them open,—that is, to sever the connection of the two half shells of the pod, the connection of the peas with the pods being severed by the same operation. The air naturally confined in the pods protects the peas from being bruised. In the machine which we have shown, and which, by preference, we employ to execute our process, the inside diameter of the cylinder is about thirty-six inches, the length of the cylinder is eight feet, and the length of each beater or impact opener, measured from the geometrical axis of the cylinder, is sixteen inches. With a machine of these dimensions, the revolutions of the cylinder should be about eighteen

per minute, while the beaters should make about one hundred and eighty revolutions in the same time. These dimensions and speeds are given so as to enable a workman to carry out this process without further experiment. They are in no way to be taken as limiting us to any specific dimensions or to the precise speed. Should, however, the speed be increased to five hundred to six hundred revolutions per minute, the principle of operation would be changed, and the peas could not be successfully hulled."

The defenses set up to this patent are: (1) That the patent is invalid: (a) For want of patentability in the subject-matter as a process; (b) for want of novelty. (2) That the defendant does not infringe.

The defendant put in evidence an authenticated copy from the original record of a patent No. 155,471, dated May 15, 1883, granted by the French government to Madame Faure for a machine for hulling green peas, beans, etc., and three certificates of addition thereto, the first of these certificates of addition being dated October 26, 1883, with the drawings therein referred to. There is also in evidence a copy of an article published at Paris, France, on April 11, 1885, in La Nature, describing this Faure machine, and containing a picture of the machine at work, and also a copy of a republication in the United States of the La Nature article and picture in the Scientific American of June 6, 1885. Upon a comparison of the Faure machine, as shown by this evidence, and the machine shown and described in the patent in suit (No. 421,244), the substantial identity of the two machines is obvious. The Faure machine has an outer hexagonal drum supported on rollers. Upon the interior surface of this drum are six inwardly projecting elevating ribs. Mounted upon a central shaft are four beaters, which revolve rapidly, while the outer drum revolves slowly. Both, as shown, revolve in the same direction (although the patent states they may revolve in opposite directions). The drum of the Faure machine is perforated so as to permit the escape of the hulled peas, while by a spiral arrangement of the beaters the pods are gradually worked along from the feed end to the discharge end of the drum. The first certificate of addition (dated October 26, 1883), in describing the operation of the Faure machine, states as follows:

"The beater is moved at a speed of about a hundred and fifty to two hundred revolutions in a minute, or more or less, the speed corresponding with the quality of the peas, while the counter-beater has only a speed of about ten to forty revolutions in a minute, revolving, as will be seen, in the same direction as the beater, or, if necessary, in the opposite direction. The peas, having been put into the hopper, fall in the empty space where the beater moves, and are conducted gradually to the other end, where they escape; but during this time—in consequence of the spiral form given to the beaters—they are crushed and shelled between the beaters and counter-beaters. The counter-beater renews, in revolving continually, the contacts, lifts up the mass, throws it back on the beater and acts in such way that all husks are crushed and emptied without accumulating towards the bottom, and also without the peas being smashed, or even damaged."

In this connection it seems to be appropriate to quote the description of the Faure machine and its operation contained in the above-mentioned article published in La Nature, of Paris, on April

11, 1885, and which, as already stated, contained a picture accurately exhibiting the machine at work, to wit:

"This curious machine, which we have seen with great interest operating at the last agricultural exposition, is composed of a frame having a parallelopipedal form, in which turns a hexagonal drum or counter-beater. This drum, which is surrounded by a cloth of which the meshes have 0.1 mm. of opening, is supported by travelers, and receives its movement of rotation by aid of a pulley. A shaft concentric with this drum carries palettes lightly turned in helical form. The shaft and its palettes turns in the same sense as the drum, but at a much greater velocity. The palettes pass within a small distance of the rods which form the angles of the drum. Below the system which we have described passes an endless apron, which turns constantly. The peas are placed upon the platform of the machine, and fed by hand into the drum by a conduit shown at the top of our engraving. Then they are submitted to the action of the palettes, which produces a kind of threshing. The peas, hulled by this threshing, pass through the cloth and by reason of the helical form of the palettes, the pods continue to advance to the opposite end of the drum, when they fall by a special conduit. The peas not hulled are raised to the upper part of the drum by the rods which form projections into the interior. The pods, thus raised, are struck by the palettes in such a way that the hulling is complete before they have traversed the length of the drum. The hulled peas pass through the cloth, and fall with the débris of the pods upon an endless apron. This débris adheres to the apron, which rejects it at the upper part, and from then into a receiving box. The peas, on the contrary, roll to the lower part into a longitudinal box, where a man may gather them. This box is divided into several compartments to facilitate matters. These compartments are emptied by openings at the lower part. It is easy to understand that by this procedure the peas fall into the box freed from débris and hulls, and in consequence ready to be delivered for consumption. The results obtained with this machine are remarkable, and its performance is important, since it will do about as much work as several hundred women."

It will be remembered that this article and the picture exhibiting the Faure machine at work were reproduced in this country in the Scientific American of June 6, 1885. The drawing accompanying the first certificate of addition to Madame Faure's patent (and here in evidence) is made to a scale, and thereby the actual dimensions of the machine shown and described in and by her patent is readily ascertainable. As we have seen, also, her first certificate of addition mentions working speeds for the beater and counter-beater. From the data thus furnished it is demonstrable (as the expert evidence shows) that the length of each beater in the machine of the Faure patent is 13.1 inches, and that, when rotating at a speed of 200 revolutions per minute (as is stated may be the case), the speed of the outer ends of the beater would be 22.86 feet per second. Now, according to the testimony of Robert P. Scott (one of the complainants), the impacting speed of beaters for the hulling of green peas ranges between 18 feet per second and 35 feet per second, and he names a velocity of "about 24 feet per second" as giving the best results "for the kind of green peas most commonly met with." It is very certain, then, that Madame Faure, in her first certificate of addition, describes a machine capable of operating within the range of impacting speeds required for the successful hulling of green peas. Furthermore, it is equally clear that the pea-hulling machine shown and described by Madame Faure and the machine of this Chisholm

patent (No. 421,244) are substantially identical in form and organization and in mode of operation. It will be perceived that neither of these patents undertakes to fix definite limits as to dimensions or speeds. Madame Faure says: "The beater is moved at a speed of about a hundred and fifty to two hundred revolutions in a minute, or more or less, the speed corresponding to the quality of the peas; while the counter-beater has only a speed of about ten to forty revolutions in a minute." The Chisholms say: "With a machine of these dimensions, the revolutions of the cylinder should be about eighteen per minute, while the beaters should make about one hundred and eighty revolutions in the same time;" but the Chisholms are careful to add that the dimensions and speeds given "are in no way to be taken as limiting us to any specific dimensions or to the precise speed." As to dimensions and speeds, both these patents leave something to the good judgment of the constructor or operator. The directions of each patent are sufficiently certain for practical purposes. No skilled constructor or operator would have any difficulty in carrying out the directions given by either patent so as to attain the best results. It is said it was Madame Faure's conception that her machine would operate by abrasion. Perhaps this was so at the start. But after an experience of several months we find her using the language in her first certificate of addition quite consistent with the idea of shelling by blows or impact. "The peas," she states, "having been put into the hopper, fall in the empty space where the beater moves. * * * They are crushed and shelled between the beaters and counter-beaters." And she significantly adds: "The counter-beater renews, in revolving continually, the contacts, lifts up the mass, throws it back on the beater, and acts in such way that all hushs are crushed and emptied without accumulating toward the bottom, and also without the peas being smashed, or even damaged." This description of the modus operandi and stated result negative an abrading operation. But, after all, it is a matter of no moment that Madame Faure may not have understood the true theory of the operation. Her opinion is not material. The great fact is that she devised and described a machine for hulling green peas capable of operating by impact and incapable of operating (at least to any considerable extent) in any other way. The organization of the Faure machine and the speed of its beaters are such as to render hulling by abrasion practically impossible. In the nature of the case, the operation of the Faure machine is by impact. This is the principle of the apparatus. How clear this is appears when we contemplate the Chisholm machine of patent No. 421,244. The machine of that patent in form, parts, combinations, and organization is the duplicate of Madame Faure's machine. If it be true that the Chisholms have improved on the Faure machine by widening a little the space between the beaters and bars, thus avoiding any possible abrasion, such improvement does not entitle them to monopolize the whole art of hulling green peas by impact, as the patent in suit attempts to do. In view of the French patent to Madame Faure and first certificate of addition thereto, we are of opinion that the claims of the Chisholm patent, No. 421,244,

are invalid for want of novelty; and, having reached this conclusion, we do not think it necessary to consider the other defenses urged against this patent.

The Chisholm patent we have discussed above is designated in this record as the "podder process" patent. The patent to which we now turn, the second in this series, is distinguished in this record by the designation "viner process" patent. This patent is numbered 499,397, is dated June 13, 1893, was granted to Robert P. Scott upon an application filed November 12, 1892, and is for gathering and hulling green peas from the vines. The second claim of this patent was sustained by the court below, and held to be infringed by the defendant. That claim is as follows:

"(2) The process of gathering and hulling green peas consisting in removing the vines from the ground with the green peas attached, subjecting the vines and attached peas while green to impact of the character described and separating the hulled green peas from the refuse."

The machine described in this patent for hulling the peas on the vines is the machine of the podder-process patent (No. 421,244), with such slight modifications as are necessary for the treatment of the larger mass of material. The method pursued in the two instances is the same, the only difference being that in the former case the blows by the beaters are applied to the pods after being stripped from the vines, while in the latter case the blows are given to the pods when still attached to the vines. The two processes, although slightly differing in respect to the form of the material treated, are strictly analogous. The work is done substantially by the same means and with the like result. Now, after the podder process was successfully practiced, the application of impact to the pods while still on the vines was a step naturally taken. The advance did not involve original conception in a patentable sense. Our clear conviction is that the so-called "viner process" of patent No. 499,397 is a case of double use of an old process.

But the claim here in question, we think, also lacks novelty in view of an earlier patent,—No. 399,702, dated March 19, 1889, granted to Robert P. Scott and John A. Chisholm. The machine described in that prior patent consists of an exterior slowly revolving hexagonal drum having elevating ribs and interior "impact openers" or beaters revolving at a high rate of speed. The machine operates by impact upon the pea pods while they are still attached to the vines. The specification thus states one of the objects of the invention, namely, "First, to provide means for hulling green peas from their pods without first removing said pods from the vines, so as to dispense with the time, labor, and expense incident to the old method of first picking the pods from their vines, and then feeding them into the machine for being hulled or opened." And the operation of the apparatus is described in the specification as follows:

"The vines and the peas in the pods attached thereto are fed into the feed end of the separating cylinder, which receives them between its longitudinal bars or ribs and carries them slowly upward until they are caught by the beaters of the more rapidly revolving hulling drum, and carried over the

edges of the curved knives, which cut them into suitable lengths for proper treatment within and passage through said cylinder. The relative speeds of the separating cylinder and the hulling drum are preferably about as fifteen is to one hundred and sixty. The beaters of the rapidly revolving drum strike the pods on the vines with sufficient force to open them and release the peas, which then pass out through the perforations in the covering of the separating cylinder. The beaters, as stated, are adjustable upon the periphery of the drum, so as to assume more or less obliquity or spirality by means of the slotted transverse bar, which, by loosening the set screws, can be turned upon the drum shaft, and thus said beaters made to assume more or less obliquity with respect to the periphery of the hulling drum. It follows from the construction and arrangement of the parts just named that the vines and pods will be fed toward the open discharge end of the separating-clyinder with more or less rapidity, according to the degree of obliquity or spirality that is imparted to said beaters."

Now, it will be noted that this earlier patent (of March 19, 1889) to Scott and Chisholm disclosed the so-called "viner process," and disclosed a machine for practicing it. That machine was operative. It is true, it was improvable, and it soon gave way to a better machine. But, the process itself having been disclosed, and an operative machine for executing it shown, in and by the patent of 1889, it seems clear to us that a valid claim for the process could not be granted to Scott upon an application by him made more than two years afterwards.

Now we pass to the consideration of the third patent here involved, —No. 500,299, dated June 27, 1893, granted to Robert P. Scott, Charles P. Chisholm, and John A. Chisholm, upon an application filed May 2, 1891, for improvements in pea-hulling machines. At the date of this application the art of hulling green peas by machinery was in a forward state. As to apparatus, little, if anything, in the way of invention remained to be done. Besides the pea-hulling machine of Madame Faure, the Chisholm machine of patent No. 421,244, and the Scott-Chisholm machine of patent No. 399,702, belonged to the prior art. As we have heretofore seen, the Chisholm machine was applicable primarily to the podder process, the Scott-Chisholm machine to the viner process. What the general character of the improvements covered by the patent (No. 500,299) now more immediately under consideration were will best appear by quoting the six claims of the patent which the court below sustained and held infringed, namely:

"(1) A machine for hulling green peas from the vines, comprising the combination of an inner revoluble drum provided with beaters and an outer revoluble drum, the latter being opened, thus having an uninterrupted passageway from end to end thereof for the transit of the vines therethrough substantially as described and for the purpose set forth. (2) A machine for hulling green peas from the vines comprising the combination of an inner revoluble drum provided with beaters and an outer revoluble, spokeless, shaftless, and open-ended drum provided with interior longitudinal vine-elevating ribs, substantially as described, and for the purpose set forth. (3) A machine for hulling green peas from the vines, comprising the combination of a revoluble outer drum and an interior revoluble beater carrying drum, the inner drum being prolonged beyond the discharge end of the outer drum substantially as described and for the purpose set forth. (4) A machine for hulling green peas from the vines, comprising the combination of an inner revoluble drum provided with beaters, an outer revoluble,

spokeless, shaftless and open-ended drum, a frame in which the drums are mounted, and a covering upon the framework inclosing the outer drum with the exception of a feed aperture, substantially as described, and for the purpose set forth. (5) A machine for hulling green peas from the vines, comprising the combination of a revoluble outer drum and an inner revoluble beater carrying drum, the inner drum being prolonged beyond the discharge end of the outer drum, a supporting framework, and rollers pivoted on the said framework under each end of the outer drum, substantially as described, and for the purpose set forth. (6) In a machine for hulling and cleaning green peas, the combination of an endless traversing apron, revolving reels supporting the said apron, transverse cleats secured to the said apron and extending from edge to edge thereon, fixed convex-faced guide pieces in general line with the apron on each side thereof and having their convex surfaces toward the respective edges of the said apron, substantially as described, and for the purpose set forth."

These improvements plainly related to mere details of mechanism to better the working of the prior pea-hulling machines. They introduced no new principle of action. No devices in themselves new are disclosed here. At the most, easily perceived remedies were applied to manifest defects. Thus more convenient means for feeding and discharging the mass of vines were provided. An open-ended outer drum and a prolonged inner drum were obvious expedients. They were well-known devices for analogous purposes. All the improvements, changes, and additions here in question were obvious to mere mechanical skill. None of them involved invention in a patentable sense. Upon the proofs we have no hesitation in holding that the above-cited six claims of patent No. 500,299 lack patentable novelty, and are invalid. Aron v. Railroad Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; Iron Works v. Fraser, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734; American Road Mach. Co. v. Pennock & Sharp Co., 164 U. S. 26, 17 Sup. Ct. 1, 41 L. Ed. 337; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

The cross appeal of Charles P. Chisholm, John A. Chisholm, and Robert P. Scott involves only claim 5 of patent numbered 387,318, dated August 7, 1888, granted to Robert P. Scott, upon an application filed November 7, 1887, for "improvement in machines for hulling and separating green peas." The court sustained the claim, but held that it was not infringed by the defendant. The claim is as follows:

"(5) In a machine for hulling and separating green peas, an endless inclined separating apron provided with transverse slats arranged on the inside thereof, in combination with the rollers and the vertical side boards arranged at the sides or edges of said apron and operating to keep the same straight upon said rollers, substantially as described."

The specification describes hinged and overlapping slats, and says:

"These slats, although overlapping at their adjacent ends, serve the same purpose as would solid slats, so far as guiding or keeping the apron straight is concerned; but at the same time, owing to their peculiar construction and arrangement, they will bend out of a straight line, but not sufficiently to prevent their ends from forcibly pushing against the side boards. This bending or hinging action of the slats at their ends also permits the apron to be raised at its sides or edges, so as to roll the peas toward its center, and also it allows said apron to receive a greater vertical throw or toss than

would be incident to the use of solid or unjointed slats running its entire width, since, were the latter used, their solid ends would rest upon the inclined guide flanges of the side boards, and thus prevent the full drop of the apron, and diminish its vibration."

In the machine used by the defendant there are straight transverse slats on the inner side of the apron extending in continuous pieces from edge to edge. They do not overlap, and are not hinged, but solid. Now, if this claim, in view of the prior art, is sustainable at all, it must be construed very narrowly. The specification virtually disclaims solid slats. The court below undoubtedly was right in holding that there was no infringement of this claim by the defendant.

The decree of the circuit court is reversed (except in respect to claim 5 of patent No. 387,318, as to which alone it is affirmed), and the cause is remanded to that court, with direction to enter a decree dismissing the complainants' bill, with costs to the defendant.

GRAY, Circuit Judge. I dissent from so much of the foregoing opinion of the majority of the court as relates to patent No. 421,244, granted to Chisholms, for an improvement in the method of hulling peas, and commonly called the "podder process." I am of opinion that this patent should be sustained as a true invention of a patentable process. Its usefulness cannot be disputed, nor do I think its validity is open to attack. A careful examination of the Faure machine convinces me that it cannot be sustained as an anticipation of the invention of the patent here in suit. I do not find, either in the original patent of Madame Faure nor in the specification and claims of the first addition thereto, any hint of the method of hulling peas by impact. I admit that the drawings of the Faure machine and the arguments of counsel, make it probable that a large portion of the peas that went through it were hulled by impact, but that is an inference only from an examination of the machine itself. It does not appear in evidence that the thought of hulling by impact had ever occurred to her, and the machine of her patent was built to act in a different way; that was, to hull peas by attrition and abrasion. "One who accomplishes a result by a process which is only partially or not at all understood by him, has invented nothing, and cannot deprive another, who afterwards discovers and proclaims the true principle of the operation, of the right of an inventor." In other respects, I am in accord with the majority of the court.

STREAT v. AMERICAN RUBBER CO.

(Circuit Court, S. D. New York. April 30, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—MODE OF PRESENTING JURISDICTIONAL QUESTIONS.
In a suit against a corporation of another state for infringement of a patent, the question whether it has been shown that the article complained of, conceding it to be an infringement, was sold by defendant within the district, so as to give the court jurisdiction, may properly be presented by a motion to dismiss made at the close of plaintiff's proofs.

2. SAME—ADMISSIONS IN PLEADING.
An undenied allegation, in a bill for infringement against a nonresident corporation, that defendant "has a regular and established place of business" within the district, relates to the date of the suit, and establishes such fact for jurisdictional purposes.

In Equity. Suit for infringement of patent. On motion to dismiss.

Joseph L. Levy, for complainant.
Livingston Gifford, for defendant.

LACOMBE, Circuit Judge. The practice of moving to dismiss before putting in defendant's proofs with the expectation that, if the application be denied, the defense will be put in, and the questions argued over again on the whole case, is not one to be encouraged. Where, however, a question of jurisdiction is sharply presented, such course may be followed, as tending sometimes to save unnecessary expense. The question whether a particular article is or is not an infringement may best be considered when the whole case is in, but, assuming that it is an infringement, the question whether it was sold in this district can be settled as well now as at a later stage of the case. In order to give the circuit court in this Southern district of New York jurisdiction of this suit against a Massachusetts corporation, two things must appear, viz.: First, that defendant has a regular and established place of business in the district; and, second, that it has committed acts of infringement within said district. The pleadings dispose of the first of these propositions. It stands admitted that defendant "has a regular and established place of business in the city of New York, within the Southern district of New York, with an agent engaged in conducting said business within said district"; also that "it has a regular and established place of business, with William Morse & Co., at 72 Reade St., in the city and Southern district of New York, as its agent or agents engaged in conducting such business." These admissions of the answer deal with conditions existing when the suit was brought,—May, 1899. The complaint charges infringement "since the 31st day of March, 1882, * * * within the Southern district of New York." The answer denies that "subsequent to March 31, 1882, and prior to March 31, 1899 (when the letters patent expired by effluxion of time), it ever made, sold, or used, or caused to be made, sold, or used, or threatened to make, sell, or use, within the Southern district of New York or elsewhere," any infringing articles. Under these pleadings the burden rested upon the plaintiff to show an act of infringement in this district. The only act

relied on is the sale of a coat in the fall of 1896 to one Whitford by a clerk or salesman of Morse & Co. The evidence does not dispute the sale, and shows that prior to March, 1894, Morse was the regular agent doing business for defendant here. It is further shown, however, by the same witness, that in March or April, 1894, Morse moved to a new store, where he went into business for himself, buying goods from defendant, and selling them on his own account as an ordinary jobber; the rent and all other expenses of the business being paid by himself. He bought and sold also the goods of other manufacturers. The testimony seems to fall short of establishing an act of infringement here, and the bill should be dismissed with costs, for lack of jurisdiction.

EATON v. LEWIS.

(Circuit Court, S. D. New York. February 17, 1902.)

1. PATENTS—DESIGNS—LIMITATION AS TO SUBJECT-MATTER.
A design patent cannot be sustained on the ground that the article has mechanical utility, but, to be valid, it must relate to a matter of ornament, and the design must have an æsthetic value. A fastening for machinery belts is not an appropriate subject for such a patent.

2. SAME—BELT FASTENINGS.
The Eaton design patents, Nos. 30,518, 30,519, and 30,520, each for a design for belt-fastener plates, for uniting the ends of machinery belting, are void because the article is not a proper subject for a design patent.

In Equity. Suit for infringement of letters patent Nos. 30,518, 30,519, and 30,520, issued April 11, 1899, to Andrew L. Eaton,—each for a design for belt-fastener plates.

John H. Hazelton, for plaintiff.
Robert H. Racey, for defendant.

WHEELER, District Judge. This suit is brought upon three patents, Nos. 30,518, 30,519, and 30,520, dated April 11, 1899, and granted to the plaintiff for designs for belt-fastener plates. They are used for holding the ends of belting together to form machinery belts, and their operation is wholly mechanical. The specifications respectively refer to drawings on which straight parallel sides or ends are marked A; semicircular ends or swells, A'; midway projecting points at the sides, A^2; easy curves between these points and swells, A^3; and holes for rivets in the centers of the circular ends and swells, a; and that of 30,518 sets forth:

"The plate is longer in one direction than the other, with rounded ends and parallel sides, having an outwardly extending point or projection on each of the latter at the transverse center line. The leading feature of my design is the contour above described, consisting of the straight parallel sides, A; semicircular ends, A^1; and the points, A^2, arranged oppositely at the mid-length, with the hole, a, at the center of each of the rounded ends."

That of 30,519:

"The plate is of a general rectangular form, having oppositely extending semicircular portions on the ends at each corner, and an outwardly pro-

jecting point on each side on the transverse center line. The leading feature of my design is the contour above described, consisting of the straight parallel ends, A; the semicircular swells, A', arranged oppositely at the corners on said ends and extending outwardly; the points or projections, A^2, at the mid-width on each side, joined by easy curves, A^3, to the swells; the holes, a, at the center of each of the latter; and the holes, a', on the longitudinal center line."

That of 30,520:

"The plate is of a general rectangular form, having oppositely extending semicircular portions at each corner, and an outwardly projecting point at each end on the center line. The leading feature of my design is the contour above described, consisting of the straight parallel sides, A; the semicircular swells, A', arranged oppositely and extending outwardly; the points or projections, A^2, on each end at the mid-width, joined by easy curves, A^3, to the semicircular swells; and the holes, a, at the center of each of the latter."

This case was argued December 20th. Rowe v. Blodgett (upon a design patent for the shape of a removable calk for a horseshoe) 98 O. G. 1286, 50 C. C. A. 120, 112 Fed. 61, in the circuit court of appeals of this circuit, had been decided November 14th, but had not appeared, except from the circuit court (103 Fed. 873), and was not cited, nor has it been noticed till now. The circuit court of appeals said:

"Several defenses were urged, but Judge Townsend, at circuit, held as follows: 'I decide this case upon the broader ground that 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. The advantage claimed by complainant for the increased flat surface afforded by the curved line, which is the essential feature of his patent, is to enhance the mechanical utility of the calk, by thus making a stouter shoulder, which would not so readily become bruised out of shape, and which, therefore, could be more easily removed with a wrench, when worn, from the shoe. It is significant, in this connection, that the patentee first applied for this essential feature of downward-projecting curved lines on the sides of the base as a mechanical invention, which application was rejected, and that he then attempted to cover the same feature by a design patent. Design patents refer to appearance, not utility. Their object is to encourage works of art and decoration which appeal to the eye, to the æsthetic emotions, to the beautiful. A horseshoe calk is a mere bit of iron or steel, not intended for display, but for an obscure use, and adapted to be applied to the shoe of a horse for use in snow, ice, and mud. The question an examiner asks himself while investigating a device for a design patent is not, "What will it do?" but, "How does it look?" "What new effect does it produce upon the eye?" The term "useful," in relation to designs, means adaptation to producing pleasant emotions. There must be "originality and beauty. Mere mechanical skill is not sufficient." Northup v. Adams, 2 Ban. & A. 567, Fed. Cas. No. 10,328, approved in Smith v. Saddle Co., 63 O. G. 912, 148 U. S. 679, 13 Sup. Ct. 768, 37 L. Ed. 606; Ex parte Parkinson (1871) Dec. Com. Pat. 251.' We prefer to rest our affirmance on concurrence with these views."

That case seems to cover and control this. The projecting points at the middle of the sides of the fasteners of each of these patents serve to mark where to place the fasteners equally upon the ends of the belting to be joined; but that advantage is mechanical, and not æsthetic. Here, as there, a mechanical patent was applied for, and here one was obtained; and here, as there, the appearance of the

articles in use would be wholly immaterial. According to the principles of that case, as understood, this suit cannot be maintained.

Bill dismissed.

On Reargument.

(May 8, 1902.)

Upon reargument it appears, as before, that the patents involved cannot be sustained without departing from Rowe v. Blodgett (C. C.) 103 Fed. 873; Id., 98 O. G. 1286, 50 C. C. A. 120, 112 Fed. 61.

Decree for defendant.

COATES et al. v. BOKER.

(Circuit Court, S. D. New York. March 1, 1902.)

PATENTS—INFRINGEMENT—HAIR-CLIPPING MACHINE.

The Lee patent, No. 382,288, for a hair-clipping machine having ball bearings between the reciprocating cutter-plate and the cap, was not anticipated, and is valid. Claim 4 also *held* infringed.

In Equity. Suit for infringement of letters patent No. 382,288, for a hair-clipping machine, issued to Lewis S. Lee May 1, 1888. On final hearing.

Stewart Chaplin, for plaintiffs.

S. L. Moody, for defendant.

WHEELER, District Judge. This suit is brought upon the fourth claim patent No. 382,288, dated May 1, 1888, and granted Lewis S. Lee, one of the plaintiffs, for a hair-clipping machine. The drawings show a stationary cutter plate; a reciprocating cutter plate, B, between that and a broad cap, C, covering nearly the length of the cutter plates; balls, K, in grooves, J, with edges, j, turned over the balls. The specification, as to this matter, sets forth:

"The object of my invention is to reduce the friction between the cap and the reciprocating cutter, whereby the machine may be operated with less power. In carrying out my invention I interpose between the cap and the cutter plate two or more spheres or balls, preferably free to roll in suitable grooves parallel with the longitudinal reciprocation of the cutter plate. To reduce the friction between the reciprocating cutter plate, B, and the cap, C, I provide two or more balls or spheres, K, interposed between the said plate and cap. As shown, the balls are placed in longitudinal parallel grooves, J, which are preferably provided with edges, j, Fig. 7, bent over sufficient to hold the balls to the cap when the parts are removed; and these grooves, J, are made considerably longer than the diameter of the balls, whereby, as the balls rotate, they may travel over the cutter plate, B, and the cap, C, may travel over them. The result of this would be that the friction between the cap and the cutter plate would be reduced far more than if the balls were held in semispherical pockets."

This claim is for:

"(4) In a hair-clipping machine, the combination of the reciprocating cutter, the stationary cap, and interposed ball or spherical bearings, with guides to hold the balls against lateral movement, but to allow of longitudinal movement with respect to both the cutter and cap."

The principal defense is want of patentable novelty in view of the 15 exhibits of patents showing anti-friction rollers and ball bearings

in use in various ways in mowing and hair cutting and other machines set up as anticipations. The nearest of them to this patent appear to be No. 394,251, dated August 31, 1889, to James S. Smith and John Coder, for an improvement in harvester cutters; No. 379,881, dated March 20, 1888, to John Clement Voss, for a cutting apparatus; and No. 335,956, dated February 9, 1886, to Thomas Lovell Phipps and William Burman, assignors to Louis S. Lee,—apparently the patentee of the one in suit,—for a hair clipper; and a British patent preceding and a reissue following it for the same invention. That to Smith and Coder seems to show anti-friction rollers between the stationary finger bar and the reciprocating cutter bar, and between the reciprocating cutter bar and the inner sides of passages for it through the shoe guides. Those between the finger bar and cutter bar have no relation in principle to this invention. The shoe guides are separate, and, while they might be useful in a mowing machine, they would not answer the purpose of the balanced cap over the whole in this finely adjusted hair-clipping machine. In the Phipps and Burman patents the rollers do not appear to be arranged for moving along their pockets freely, but must move axially within them. These rollers in their places do not appear to be the equivalent of the balls of the patent in their grooves permitting them to be rolled therein in the proper line and at the right distance for holding the cutters together for effective cutting. The other exhibits well show balls rolling in grooves to prevent friction in various ways and devices, but none of them arranged in such a combination for this or any kindred purpose. In this view this claim of the patent seems to be valid. In the defendant's machine the groove for the balls is bored in from the ends of the plate, where they are kept by screw plugs. This may be an improvement upon the plaintiffs' arrangement for constructing the grooves and retaining the balls in them, but, if so, it is none the less taken against the plaintiffs' exclusive right.

Decree for plaintiffs.

HALL SIGNAL CO. v. UNION SWITCH & SIGNAL CO.

(Circuit Court, W. D. Pennsylvania. February 6, 1901.)

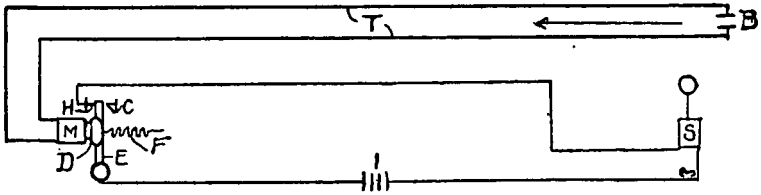
1. PATENTS—VALIDITY—CLAIM OF JOINT INVENTION.
   A patent issued to a single individual is prima facie evidence that he was the inventor of the device shown, and it can only be overthrown on the ground that the invention was joint by the clearest and most reliable evidence.

2. SAME—VALIDITY AND INFRINGEMENT—RAILWAY SIGNALING DEVICE.
   The Buchanan patent, No. 497,489, for an improvement in circuit-controlling devices for use in automatic railway signaling apparatus, and designed to overcome the dangers resulting from lightning fusion in the Robinson system, was not anticipated, shows invention, and is valid; also *held* infringed.

In Equity. Suit for infringement of letters patent No. 497,489, granted to John P. Buchanan May 16, 1893, for a circuit-controlling device.

Alan D. Kenyon and Wm. Houston Kenyon, for complainant.
Marshall A. Christy and George Christy, for defendant.

BUFFINGTON, District Judge. This bill charges infringement of letters patent No. 497,489, granted May 16, 1893, to the complainant, as assignee of John P. Buchanan, for an improvement in circuit-controlling devices. The patent relates to automatic railway signaling apparatus. Its principal object was to overcome the dangers resulting from lightning fusion in the ordinary Robinson closed track circuit system. That system is illustrated in the accompanying sketch:

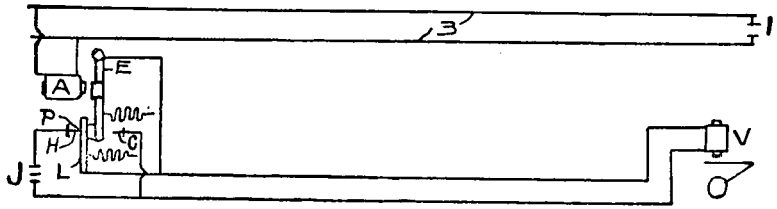


The rails composing the sides of block T are electrically connected at their abutting ends, and the two continuous lines thus made are, at the block ends, transversely connected electrically with each other, and insulated from the abutting blocks. An unbroken electric current path covering each entire block is thus made. A galvanic battery, B, the opposite poles of which are connected to the opposite rails, is placed at one end of the block, and the terminals of the coil of an electro-magnet, M, are attached to the opposite rails at the other end. When the block is free from trains, or in a condition of safety, there is a continuous current flowing from the positive pole of the battery, B, thence through one rail line the entire block length, thence transversely and through the magnetic coil, M, to the other rail line, thence by the latter to the end of the block, and thence transversely to the negative pole of the battery. This safety condition is automatically signaled to the engineer by a signaling apparatus actuated by this electric current. The current passes through the coils of the electro-magnet, energizes it, and puts it in a magnetic condition, so that the armature, D, is attracted to it against the tension of the retractile spring, F. Attached to such armature is a bar, E, pivoted at the lower end, and adapted to be moved between the stops, H and G. It will thus be seen that, so long as the current flows, the upper end of the bar will rest against the front contact, H. When the current ceases, the bar will be drawn by the spring from H, and rest against the back stop, G. The armature bar, E, and the front contact, H, are both made of conducting material, and are members of a secondary circuit embracing a battery, I, and a signal magnet, S. This mechanism is so controlled by the magnet, S, that when that magnet is energized and in magnetic condition, a safety, and, when de-energized, a danger, signal will be displayed. When the block is clear, the path of the secondary current is from the positive pole of the battery, I, to the foot of the armature bar, E, front contact, H, through one terminal of the signal-operating magnet, S, through coils of said magnet to its other terminal, and thence by wire or ground to the negative pole of battery I. It will thus be seen that, so long as the primary current flows in the path described, and holds the armature bar, E, against the front

contact, H, the secondary current is closed, the magnet, S, energized, and the signal held at safety; thus indicating to the engineer of an approaching train that the block, T, is vacant. When his train enters the block, the wheels and axles establish a new electrical connection between the rails, which, during the train's passage through the block, affords a current path of less resistance than through the electro-magnet, M. The current from the battery is therefore shunted or short-circuited through the wheel-axle connection, the magnet of M is demagnetized, and this releases the armature bar, E, which is drawn by the spring, F, from its front contact, G. The break of the contact between H and E breaks the current path from the battery, I, of the secondary circuit, de-energizes the signal-operating magnet, S, and throws the danger signal. When the train leaves block T, the current will again flow through M, H and E will re-engage, the secondary circuit be restored, and the signal returned to safety position.

But this mechanism was open to a grave objection. If the wires were struck by lightning, and received a greater charge of electricity than they could carry, a high heat would be generated at these contacts, and the stop, H, and armature bar, E, become fused and welded together. When this happened, and thereafter a train entered the block, although the current would short-circuit through the wheel-axle transverse connection and electro-magnet M be de-energized, the spring, F, was powerless to break the welded contact of H and E, and the secondary circuit would still continue to display a safety signal, although a train was upon the block. It will be seen that the mischief was not alone that the signaling system was rendered inoperative, but that it was left in a misleading condition, where it represented safety when the actual condition of the block was that of danger. To obviate such danger from fusion, as well as when too fine an adjustment or other cause had closed fixedly the controller of the secondary circuit, the device of the patent in suit was intended. Not only does it do this, but it enables the signaling system to continue its work in spite of such permanent closure.

The accompanying sketch will explain its operation:



The main relay circuit runs through the magnet V, which operates the signal, and through the lever L. This lever, L, and its contact point, H, are the normal or primary circuit controllers. Such control is effected by making or breaking the circuit of battery J through V, thus energizing or de-energizing the magnet and operating the signals. Lever E is the armature bar of magnet A, and is the secondary circuit controller. When magnet A is energized, lever E pushes lever L against contact point, H, thus closing the circuit through V. When

magnet A is de-energized, E is retracted by a spring, not shown in the patent sketch, but an obvious mechanical expedient, and L by a like spring. This breaks the circuit at H. A piece of nonfusible insulation, P, attached to one of them, prevents the current from passing through L and E. A piece of insulation on magnet A (designated in the patent as Q of Fig. 1) prevents E from sticking to such magnet. This magnet is connected to the track system as shown in the Robinson sketch, and is affected by the wheels of the trains on the block in the manner already shown. When this block is clear, the passing current energizes magnet A, lever E is drawn to it, lever E pushes lever L to point H. This closes the circuit, energizes magnet V, and displays the safety signal. When a train enters the block, the magnet A is de-energized, E and L are retracted, the circuit through L, H and V is broken, and the danger signal thrown. Now, if lightning fuses L and H, or too fine adjustment prevents their effective operation, the useful function of the secondary circuit controller, E, comes at once into play. If the train enters the block after such fusion or other permanent union of H and L, the magnet A is at once de-energized, and the lever E is drawn to its back stop, G. Owing to its then separation from the back stop, G, and the insulations, P and Q, the lever E was not affected or fused by the lightning stroke. In falling back to its back stop, G, it is obvious that E makes a shunt circuit around magnet V, that magnet is de-energized, and the danger signal displayed. The course of the shunt current is from left of battery I to H, down L, and up to the fulcrum of E, thence through E and G to the other side of battery I. But not only does this simple expedient serve when a train enters the block to throw the signal to danger in spite of the fusion of H and L, but when the train leaves the block, and the magnet A is energized, E moves forward, breaks the shunt current at G, and the main current, owing to the fusion of H and L, resumes its course through magnet V, and throws the safety signal; or, in other words, continues the general efficiency of the system.

The patent sets forth that the invention "relates to circuits and to means for controlling the current therein," and the object of the controlling means "is to provide a path for the current through a translating device, included in a circuit, and to exclude the current from said translating device at the proper time with a greater degree of certainty than has heretofore been attained." The controlling device, which the patentee defines as "a relay," "comprises two or more pairs of contact points connected with a circuit, any pair of which will act, when in one position, to exclude the current from the translating device, and when all the pairs of contacts are in their other position a path through the translating device will be provided." The essential elements of the invention are again defined by the patentee as following:

"As long as the pairs of contact are so arranged that when all are in one position a path for the current is provided through the circuit, and when either pair is in the reverse position current is excluded from the circuit, it is obvious that there is no departure from the true spirit of my invention."

The device was self-operative, and it is clear that in its operation the invention provided for two, and only two, positions or conditions of the pairs of contacts. One position was such that, when both pairs of contacts were in that position, the current would necessarily whole-circuit. The other, which he defined as the "reverse position," is one such that when either pair of contacts was in such reverse position, the current would necessarily short-circuit. In other words, the joint action of both pairs of contact was essential to long-circuiting, the separate action of either pair could effect short-circuiting. Not only was the invention defined as relating to these two positions, but it was illustrated and applied to a mechanism where there were but two positions. Railroad signals are thrown into and rest in but two positions, viz., safety and danger. When they were placed in one position, the object of the device was to leave them there until electric movement changed them to another. This change was made, and was only made, when one or both pairs of contacts were in the reverse or nonreverse position. The reverse and nonreverse were the only regular positions. There were no other or intermediate ones. Now, it is quite clear that no such result was produced by any of the patents cited in anticipation; neither do any of them disclose the means or method by which Buchanan produced this result. The same may be said of the electric publications cited. Although the dangers resulting from lightning fusion were known, no one found in these alleged anticipations a mechanism susceptible, by mere mechanical improvement, of barring such danger. Resemblance to Buchanan's device, and, indeed, anticipation thereof, by these publication devices, are now alleged; but it is clear to us that such alleged resemblances are fancied, and not substantial. These devices must be considered not in the light of Buchanan's subsequent advance, but apart from it. Suppose Buchanan's patent were earlier, could it be held that these devices infringed it? While both were electrical devices, it is clear that their purpose and office were wholly different. These appliances were used by operators for duplex telegraphy, and it was only when operators were present that they were of use. They were not automatic. Their purpose was not to avoid or counteract fusion from lightning. If the apparatus, with its delicate and accurate adjustment, was fused by lightning, it was at once replaced. In the nature of things, there would be no special attention paid to its working when it was so struck. It is not shown that the supposed case of the welding of the sliding spring and the upper contact point ever happened, or was known, or even thought of. Moreover, it will be noted that the practical use of the mechanism contemplated but two positions,—one when the key was depressed, the other when it was raised. The instantaneous transitory passage of the current over the shunt course during the instant the key is moving between its two positions was an incidental matter, and served simply to provide, for the briefest time, between the breaking of one contact and the making of the other. It was simply intended to secure circuit continuity. The more the time be minimized, the better. Thus it is said:

"If the springs are adjusted too far apart, there will be a break in the circuit, as the lever will break contact with one spring before it touches the other; if too near together, the battery will be placed on short circuit too long, from one contact being made before the other is broken. By careful adjustment this period can be reduced to almost nothing, and, the more accurate this adjustment, the better will be the performance of the apparatus."

It will thus be seen that, while there is a general resemblance, in that in both a shunt current is used, the objects to be attained were wholly different. In one the shunt current is used to avoid a momentary break of current continuity through the entire mechanism. In the other the shunt current is maintained for an indefinite time, and during such time the current effected the positive result of operating the signaling mechanism. In the one device, the permanent maintenance of the shunt current would result in suspending the practical working of the mechanism, to wit, the transmission of messages; in the other, it had the positive effect of displaying the desired signal. The wide divergence between these two devices in form, object, and operation was such that the change from the one to the other was more than mechanical improvement. The only thing in common was the perfectly familiar function of a shunt current, but, in our judgment, the mechanism used by Buchanan to short-circuit the current for the purposes he used it would not suggest the use of a shunt current, and the mechanism employed in maintaining circuit continuity, in the duplex system. E converso the duplex system did not suggest its use or the method of its use in the Buchanan. Be it observed that the use of a shunt current per se was not the novelty of Buchanan's invention, but its use in connection with pairs of contacts so arranged that when both pairs were in one position the current did not shunt, but when either was in the other it did. The alleged anticipation shows no such mechanism and no such object.

Another defense, to which brief reference will suffice, is that the patent in suit is void, because the invention was the joint work of one Scott and Buchanan, the patentee. The patent, issued to Buchanan alone, is prima facie correct and valid, and the defendant can overthrow it only by the clearest and most reliable testimony. 3 Rob. Pat. § 1032, and cases cited; Walk. Pat. § 516. The proofs in this case do not reach that standard. The alleged joint inventor, Scott, is dead, and we are without testimony from him in that regard, but his explicit disavowal of any such claim is clearly shown. Mr. Hall, the president of the complainant company, testifies that during his negotiations with Buchanan for the purchase of the patent he asked Scott as to Buchanan's interest; that Scott told him Buchanan was the sole inventor, and that the only interest he had in it was a prospective one, viz., a half interest in the sale of the invention which he hoped to make to the Union Switch & Signal Company on Buchanan's behalf. S. M. Young, apparently a wholly disinterested witness, testifies to hearing Mr. Scott make this same disavowal of joint inventorship. And the witness White, who was present when Buchanan first showed his invention to Scott, testifies that Scott there accredited the invention to Buchanan, and that a joint

interest in the proceeds of its sale was then arranged. In view of Mr. Scott's own disclaimer of joint inventorship with Buchanan, but of his (Scott's) conditional joint sharing of the proceeds of the sale of the invention to the Union Switch & Signal Company, the use of certain ambiguous statements by both Scott and Buchanan would seem to apply rather to their joint interest in the proceeds of the sale of the invention, and not to their joint inventorship. The several sketches found in Scott's possession after his death have received due consideration. When they were made, for what purpose, or the circumstances under which they were made, are not shown. Viewing them in the strongest light, the most that can be said of them is that they throw some uncertainty on the inception of the invention. But even such uncertainty is far from the measure of positive proof required to overcome the prima facies of the patent. It is to be noted, however, that these sketches would rather seem to have been simultaneously prepared, and that by one person, than to have been drawn at the times alleged. Although having dates months apart, they are drawn on the same kind of paper. A further difficulty arises when the testimony of White is considered. His testimony, at least negatively, proves the sketch of May 2, 1890, which is in ink, was not exhibited that day. White states that before Scott came in Buchanan made a pencil sketch to show the witness. The sketch dated June 9th, which is now claimed to embody the invention, was evidently not made at that interview. White says that Scott's suggestions were made in a pencil sketch. This seems probable. That Scott should then have at hand and use the same kind of paper as Buchanan's sketch of May 2d, that he should carefully do it in ink (and seemingly the same ink), and with the elaboration of border, finish, and detail shown, is quite improbable. Then, too, we have the explicit testimony of White that even in the pencil sketch of Scott Buchanan showed him at once wherein such design was lacking, and at Buchanan's suggestion the essential parts were added. To avoid this patent on a finding based on surmises instead of proofs, upon suggested doubt instead of proved certainties, would be at variance with the well-grounded principles of the patent law, and dangerously affect the stability of many patents in that regard.

In view of the stipulation in the case as to the devices sold to the Central Railroad Company of New Jersey, and the uncontradicted testimony of the complainant's expert as to the same, we deem it needless to further extend this opinion by discussing the subject of infringement. We find infringement of all the claims except the tenth.

Let a proper decree be drawn.

WESTINGHOUSE et al. v. NEW YORK AIR BRAKE CO. et al.

(Circuit Court, S. D. New York. May 7, 1902.)

1. PATENTS—INFRINGEMENT—PROFITS AND DAMAGES RECOVERABLE.
Profits and damages recoverable for infringement of a patent must be limited to those directly and naturally arising from the invasion of complainant's monopoly, and cannot be enhanced by the fact that the use of the infringing device as one element of a combination enabled defendant to sell the entire combination, which was not covered by the patent.[1]

2. SAME.
Defendant built and sold air brake equipments for railroad cars, in which it used a valve infringing a patent owned by complainant, which covered the valve alone. The equipment consisted of a combination of devices, some of which were covered by other patents. *Held*, that the profits and damages recoverable by complainant must be limited to those arising from the sale by defendant of the valves alone, and could not include the profits made by defendant from the sale of the entire equipments, nor the damages caused complainant by the loss of profits which it would have made from the sales of such equipments, although it was found that, but for the use of the infringing valve, defendant's equipments would not have been salable.

In Equity. Suit for infringement of patent. On exceptions to master's report.

Frederick H. Betts, for plaintiffs.
Charles Neave and William A. Jenner, for defendants.

WHEELER, District Judge. This cause has now been heard on exceptions to the master's report of profits and damages pursuant to a decree of this court (59 Fed. 581, affirmed by the circuit court of appeals, 11 C. C. A. 528, 63 Fed. 962) sustaining claims 1, 2, and 3 of patent No. 376,837, dated January 24, 1888, and granted to Westinghouse for an emergency valve improvement in fluid-pressure automatic brake mechanism used for railroad trains. The systems of which this improvement forms a small, but very important, part consist of many other parts, some of which are covered by patents and others are not. A motion has been made to amend the proceedings to set forth that another patent on another of the devices has been adjudged invalid; but that does not seem to be material, for what is not covered by these claims of the patent in suit is either free, or the subject of liability elsewhere; and whether it is free or subject to such liability elsewhere can make no proper difference as to the amount recoverable here. This necessarily stands by itself as to all else. The motion is therefore denied.

The master reports that:

"Transportation demanded long freight trains controlled by automatic pressure brakes and operated at the will of the man in charge of the locomotive. Practical railroad operation required that when the engineer set the brakes it should be done throughout the whole length of the train with reasonable uniformity as to time. Before the invention of the valve in suit it had not been possible to satisfy the master car builders that any

[1] Accounting by infringer of patent for profits, see note to Brickill v. Mayor, etc., 50 C. C. A. 8.

braking system met these demands. * * * The judgment of those master car builders influenced the market. They were practical, experienced, and interested men, whose verdict upon practicability and feasibility of any device of this nature would be regarded in the car building and operating world as wholly reliable. What they approved would be saleable; what they rejected would be unsaleable. * * * The result was the patent in suit. It met the requirements of the master car builders so fully that, as the proofs show, there was no demand in the market for any system that did not include this special mechanism. * * * I am compelled by the proofs to invest the patented valve during the period of the accounting with the attribute of wholly controlling the market of railroad braking systems, and to find and report that, but for the infringement in question, the defendant company would have found no market for the various accompaniments in car-braking equipments which it caused to be sold, amounting, with the triple valves, to the sum of $679,054.96. In other words, the unison of the infringed triple valve with the other articles found and supplied the market, and the manufacture of such other articles would have been an absolute loss but for the infringement."

He finds the expense of manufacture and sale of the 18,107 car equipments containing this valve to have been $575,257.35, which, deducted from the amount of sales, leaves a profit of $103,797.61, which, after deducting a bad debt of $54,264, leaves a net profit of $49,533.61.

As to damages he reports that:

"The dominating character of the patented device upon which the foregoing findings as to profits have been predicated is of equal importance and value upon the question of damages. It is decisive of this question also, and determines the elements and factors that must enter into the assessment. As matters of fact, therefore, I find that the complainant was prepared to meet and supply the demand for car equipments in braking apparatus which included the quick-action triple valve involved in this suit; that the demand was for an equipment that included the triple valve; that there was practically no demand for single and independent valves, and its marketability was in association with the requisite accessories to make up a full car equipment; that the defendant was able to supply a portion of the demand only by reason of the infringement, coupled with the fact of a lower selling price. I further find as questions of fact that the selling price of complainant's equipment for passenger cars including the patented device was $95, and that the cost of manufacture and sale was $34.50, which left a net profit on each of such equipments of $60.50; that the selling price of each freight-car equipment including the patented device was $39, and that the cost of manufacture and sale was $28.75, which left a net profit of $10.25 on each such equipment. As matter of fact I further find that the presence in the market of the defendant as a competitor deprived the complainant of the foregoing profits, respectively, on each sale made by the defendant. From these findings of fact it logically follows that, applied to the findings previously made as to the extent of defendants' business, the assessment of damages must be as follows:

177 passenger equipments at $60.50	$ 10,708 50
17,930 freight equipments at $10.25	183,782 50
Total damages	$194,491 00

"But it appears from the proofs that fifty freight-car equipments were purchased by the complaining company for test and equipment. It is evident that a sale of this character did not displace an equal number of such equipments in the market manufactured by the complaining company, and therefore damages at the ascertained rate of $10.25 upon that amount of equipment were not sustained. From the foregoing amount of damages the sum of $512.50 should be deducted, which leaves the sum of $193,978.50 as the actual assessable damages."

The principal question now made is raised by the defendants' first and eleventh exceptions, which are directed against the allowance of profits and damages upon the complete car equipments, instead of upon the patented device only. It is whether the plaintiffs are, upon the facts reported, entitled to recover profits and damages substantially as if these claims of the patent covered the whole air brake equipment, or the damages from the sales of complete equipments are such a direct consequence of the infringement of these claims as to be recoverable therefor to their full extent. Perhaps the patent might have covered the whole equipment on which the profits and damages are found as a new combination with this emergency valve; but, if so, it did not. It was granted only for this one device. It cannot now be made to cover more than comes within its bounds. These great damages are said to follow from the infringement by the use of this device through the loss of sales the plaintiffs would have made of whole equipments but for the infringement, because no one would buy any equipments without the device, and no one could sell equipments with the device without infringing. But no one would buy the device without the rest of the equipment any more than the rest of the equipment without the device; and, if any one should, the damages would be the loss of profits on the device sold, and not the loss of profits on the equipment not sold. The question is not whether the defendants should have been enjoined from selling the device in any manner, but what, having sold it, are the damages flowing naturally from the infringement of these claims of this patent only by the sale of that which is the only infringement in question. The loss of the profits on the sales of the rest of the equipments seems, on the findings of fact reported, to follow from the attitude of the master car builders, and from trade conditions and relations, rather than from this single infringement of this patent. These advantages are not monopolies afforded or conferred by the patent which protects the patented device only, and furnishes grounds for the recovery of profits and damages for the use or sale of that. The sales of the rest of the equipment are new causes of damages that came in and brought about a large and principal part of those found and reported. They seem to be too indirect, and too remote from the patent. Only such damages as follow the wrongful act raising the liability, without any new cause intervening to produce them, are understood to be recoverable. According to these views, these exceptions must be sustained, and as the plaintiffs must show the distinct profits and damages of the infringement in order to recover them, but have not done so, a decree for nominal profits and damages only can now properly be entered.

The master reports that "it is possible to compute the profit made by the defendants upon each separate valve." The report will, of course, be recommitted for such computation, if the plaintiffs so desire.

First and eleventh exceptions sustained.

BRUNSWICK-BALKE-COLLENDER CO. v. KOEHLER & HINRICHS.

(Circuit Court, D. Minnesota, Third Division. February 25, 1902.)

1. PATENTS—PRELIMINARY INJUNCTION AGAINST INFRINGEMENT—PRIOR ADJUDICATION.

A decision sustaining the validity of a patent, where the only defense made was that the device did not disclose invention, but was an obvious one, involving only mechanical skill, is not sufficient to warrant the granting of a preliminary injunction against infringement by a court in another circuit, where the defense of anticipation is made in good faith, and supported on the preliminary hearing by affidavits which show a reasonable probability that it may be established on the final hearing.

2. SAME—BOWLING APPARATUS.

A preliminary injunction denied against infringement of the Reisky patent, No. 599,477, for a returnway for bowling alleys, upon the showing made by defendants in support of the defense of anticipation.

In Equity. Suit for infringement of letters patent No. 599,477, issued February 22, 1898, to Emil Reisky, for an improvement in bowling apparatus. On motion for preliminary injunction, based on the decision of the circuit court of appeals for the Second Circuit, sustaining the patent sued upon in this case. Brunswick-Balke-Collender Co. v. Thum, 50 C. C. A. 61, 111 Fed. 904.

A. C. Paul and C. C. Linthicum, for complainant.
John E. Stryker and P. J. McLaughlin, for defendant.

LOCHREN, District Judge (orally). It appears in this cause that the complainant and defendant are both engaged in the manufacture and sale or construction of bowling alleys, and that they both use at the present time a returnway substantially similar in form and idea, and performing the same functions. The complainant claims the sole right to use that device, by reason of the patent that was issued to one Emil Reisky (being patent No. 599,477, dated February 22, 1898), which has been introduced in evidence.

Realizing the great advantage to our people, and to humanity in general, that has arisen from the advances made in the arts and mechanics by inventors, and for the purpose of encouraging and rewarding such persons, patent laws have been enacted, giving to inventors a monopoly for a limited time, fixed by the statute, of their inventions, with the right to dispose of the articles, and to have and enjoy the profits; and there is no doubt but that they and their assignees are entitled to such profits as the law gives them. Now, the complainant here, as the assignee of the inventor and patentee, claims that its rights are infringed by the use of this device by the defendant, and seeks to have defendant prevented, by injunction, pending the action and pending the determination of the suit, from carrying on the business of constructing this device in bowling alleys. In order to succeed in this application for a temporary injunction, it is necessary that the right of the complainant should be fairly clear, and that there should remain in the mind of the court no reasonable or substantial doubt as to its right to the relief asked, because an injunction is a harsh remedy, which prevents a person enjoined from doing, unless

the other party has a monopoly, something that he would naturally and ordinarily have a right to do. That is, an injunction should not issue simply because the party complainant has obtained a patent describing the machine or appliance, for the reason that it is well known that mistakes are made, and, while the obtaining of a patent is prima facie evidence of its validity and of invention, it is not so convincing, standing alone, that courts will enjoin other parties from using the same appliance until the right of the patentee is established by something further than the patent itself. This is ordinarily done by a trial in a suit upon the patent. When that has been done, if it appears that there was nothing collusive about the suit; that the defense covered all reasonable defenses, and was strenuously made,—then the decision of another court will usually be regarded as giving the complainant a right to an injunction, and as establishing his right so nearly without doubt that a court will be authorized in enjoining an infringer, if the infringement is apparent or admitted, as it is in this case, where no question is made as to the infringement. Of course, the decision that is relied upon as giving a right to a temporary injunction on the commencement of a subsequent suit is one that should be examined by the court, when the application is made, for the purpose of seeing whether it is a judgment that has followed a contest of the character that I have indicated,—one that was bona fide, made strenuously, and made to cover all the points and defenses that are urged in the present suit, at any rate.

I do not think there is any question but that, so far as appears from the case, the prior suit was honestly defended, and there does not appear to be any evidence of collusion. The case seems to have been defended upon the single idea that the so-called invention was not an invention, and was not patentable; that it was a device that would have occurred to any ordinary mechanic, upon the necessity being shown to him, or upon being asked to obviate the objections to previous devices of that kind. That seems to have been the idea of Judge Thomas in both his decisions. It appears that the defendant did not introduce any testimony in support of that defense. The first time it was presented to Judge Thomas, it did not differ very much from a demurrer to the bill; but the complainant in that case was permitted to introduce further testimony, and the testimony so introduced was for the purpose of showing that the need for such a device was apparent to those who were in the habit of using bowling alleys; that they had endeavored to correct the objections to the returnway in bowling alleys before that; that therefore it had been called to the attention of mechanics, and that they had adopted various devices for the purpose of obviating these objections, by what has been called "shot bags," "whisk brooms," and other appliances that are referred to in the opinion of Judge Lacombe, but they had not hit upon this appliance for which Mr. Reisky obtained a patent. Therefore, in view of that evidence, showing the need of some appliance of that kind, it was obvious that a remedy had been sought, and had been attempted to be made, and that this plan of Reisky's had not been hit upon. It was held by the court (and, it seems to me, very properly) as sufficient to show that although this was simply an application of an ordi-

nary law of gravitation, and that the appliance would seem so obvious that it was a matter of wonder that it had not been hit upon before, the very fact that it had not been hit upon before, when remedy was sought, was sufficient to give it the character of an invention, so as to entitle it to a patent. I may say that inventions of this kind have been quite numerous, and are referred to by courts in various decisions found in the reports of patent cases. Apparently, the only issue that was contested or litigated in the prior case was as to whether the device was patentable, or as to whether it was so obvious a contrivance that any skilled mechanic, upon a necessity for something of the kind being suggested to him, upon the objection to the devices in use, would have almost certainly hit upon it; and the question as to its being anticipated was not contested in that case. Now, in this case the defense is made, and is urged strenuously, that the defendant will be able to establish that defense of anticipation when the time comes for producing the evidence. The question is whether the court, under these circumstances, simply by reason of the patent having been issued, and of this decision in the court of appeals of the Second circuit upon the question that was before it, is warranted in awarding a temporary injunction at this time, and before this defense can be heard. It is true that the rule is that it should be made to appear fairly that this is a bona fide defense, that there is some reason to believe that it may be successful, and that it is proposed in good faith; and if this is true, as this question was not litigated before, it ought to be sufficient to prevent the issuance of a temporary injunction.

Now, the evidence on the part of the defendant is made up of affidavits which are necessary in applications of this kind, and many of them are contradicted by affidavits of other persons who had similar opportunities for observing in relation to the same matters. Some of them, perhaps, of themselves, do not carry very strong weight to the mind of the hearer. For instance, I do not think very much weight ought to be given to the affidavit (it did not impress me, though the complainant has not been able to contradict it) of Mr. Montgomery as to a device of this kind having been used at the hotel in the Catskill Mountains a long time ago. He himself being a builder of bowling alleys, and, of course, of returnways, the very fact that since this Reisky patent has been obtained, and constructions have been made in accordance with it, it at once arrested the attention of the persons engaged in constructing bowling alleys, so that it disposed substantially of everything that went before, would make it seem certain that, if a person engaged in the bowling-alley business had seen a contrivance of this kind up in the Catskill Mountains, he would immediately have adopted it in the construction of his own bowling alleys afterwards, and not allowed it to remain unused for a long time, and that the knowledge of it would have spread more rapidly than it appears to have spread. There is also this case of the bowling alley of Albachten, in St. Paul. From the drawing of it, it is apparent that although it embodies, perhaps, the conception of this patent, it was constructed in a manner which might not attract the attention of a person observing it, as much as it would if it had been constructed exactly according to the design which is shown in the drawings of the

patent. That is, it is nearly a straight incline, and the variation from that might not very readily be observed by a person casually looking at it, and not stopping to consider it. And it is hard to discredit the testimony of a person who owned the building and worked about it, both as a bowler and in setting up the pins, for the long time that it is claimed to have existed at this place, although its form might not be observed by a person who casually came there. And while it seems to have included the idea of the patent, still, there was so little of it, —it was so nearly a regular slope,—that even its peculiarity might not have attracted the attention of those who were using it. Of course, the fact that it was not brought in here, I do not attach any weight to, because, if it was torn down, it would be impossible to show how it was put up, even if they brought the pieces here. Neither the boards nor the brackets themselves would show that; but, if the walls remain, they would be more likely to explain how it was constructed, by observing how these brackets were attached to the walls, from what would remain at this time. There is also this patent of Van Oeyen, which seems to have had a peculiar returnway, although this was a mere toy or machine, and perhaps entirely unfitted to be used, in all the details of its construction, in an ordinary bowling alley. Nevertheless, it seems to contain, to some extent, at least, and perhaps in full, the idea of the patent in question. There is a returnway, there is a descent, then a horizontal movement, and an opposite incline for a ball to pass up, which would tend to retard its movement, and a place for the balls to pass into and remain. It seems to have the features of the Reisky patent. I do not think that the contrivance of this man in Toronto has that idea, because, although it has a sharp descent, and also an incline the other way, which would retard, and perhaps stop entirely, the movement of the balls, there would be a backward movement, different entirely from the Reisky patent, from not having a level place or a proper receptacle at the players' end for the balls to run onto and remain quiescent. In fact, this incline backwards, instead of being a benefit, would seem to be worse than a straight incline, as the balls would acquire force in running back, which would meet the balls coming the other way, and make a concussion, I should think, greater than if there were no contrivance of that kind at all.

It does not seem to me that the questions raised in this case have been passed upon in the case in New York, or that the defense raised here has been passed upon at all. The defense, if made out, is a sufficient defense to defeat the patent, and show that there has been anticipation. As long as that defense has not been litigated, and is urged in good faith, there is here some evidence I cannot avoid considering. The Van Oeyen patent has been a matter that has been of record for a long time, and there is no question but that that patent was taken out bona fide. That does not rest upon any fault of memory or recollection. The testimony as to this other device in the city here is such that I cannot brush it aside and say that I discredit it entirely.

I am inclined to think that the motion should be denied. Ordered accordingly.

UNITED STATES v. MOY YIM. SAME v. CHUNG YOU. SAME v. DONG WAR. SAME v. FEE TOY. SAME v. MOY SHANG. SAME v. LEONG HAN CHE.

(District Court, D. Rhode Island. April 29, 1902.)

Nos. 564–570.

CHINESE—RIGHT TO REMAIN IN UNITED STATES.

The fact that during the six months immediately following the passage of the Chinese exclusion act (Act Nov. 3, 1893; 28 Stat. 7) appellants were merchants, as defined in section 2 of said act, and therefore not required to apply to the collector of internal revenue for a certificate of residence, would not be conclusive of their present right to remain in the United States, where they afterwards left the country, disposing of whatever business they had during the six-months period, and without any proven intention of returning, and then returned and engaged in business as laborers.[1]

Charles A. Wilson, U. S. Dist. Atty.
Mr. Smith, for defendants.

BROWN, District Judge. These are appeals to the district judge from a United States commissioner's orders of deportation. In each case the commissioner, upon a hearing, adjudged that the Chinese person was a Chinese laborer unlawfully within the United States, and made an order of deportation, and in each case an appeal was duly taken to the district judge. Upon the trial of the appeals it was admitted in each case that the United States had established a prima facie case, and that the Chinese person, at the time of his arrest, was engaged in the occupation of a laborer. It was contended for the Chinese persons that the exclusion act was inapplicable, for the reason that during the period of six months immediately after the passage of the act of November 3, 1893 (28 Stat. 7), each of these persons was a "merchant," as defined in section 2 of said act, and was therefore not required to apply to the collector of internal revenue for a certificate of residence. I am of the opinion that the evidence was unsatisfactory and insufficient in each case to establish the fact that any one of these persons was a merchant during this period; and there is no evidence to show that any one of them was engaged in a business "conducted in his name," whatever liberality of construction may be given to those words. The names of these persons do not appear to have been known or used in any way whatever, whether in a firm designation, partnership articles, or otherwise, in connection with a business. The decision of the circuit court of appeals for the Ninth circuit in Lee Kan v. U. S., 10 C. C. A. 669, 62 Fed. 914, is, therefore, not applicable in favor of the appellants, since they do not bring themselves within the statute as liberally construed in that case. The decision in the case of U. S. v. Pin Kwan, 40 C. C. A. 618, 100 Fed. 609, cited on behalf of the United States, is more closely applicable to the present cases. But even if we should accept the view of counsel for the appellants, and hold that each of these persons was, during the period from November 3, 1893, to May 3, 1894, a merchant, this

[1] Citizenship of Chinese, see notes to Gee Fook Sing v. U. S., 1 C. C. A. 212; Lee Sing Far v. U. S., 35 C. C. A. 332.

would not be conclusive of their present right to be within the country, for the reason that each one of them left the country and went to China after having disposed of such interest in any business as he claims to have had during the six-months period; and there is no evidence that any one of them left the country for temporary purposes, animo revertendi, as was the case in Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340. There is no evidence that they returned to this country to resume a business as merchants, but, on the contrary, it appears that from the time of their return they have been continuously engaged as laborers, and, so far as appears, returned as laborers. If we were satisfied of the truth of the contention that these persons were ever merchants with a commercial domicile in this country, it would be necessary to consider various other questions of law arising from their departure from this country after disposing of any business interest, and from their return without proven intention to engage in business as merchants, and without evidence of their status at the time of their re-entry into this country. These questions, however, do not properly arise upon these appeals. Nor is it necessary to decide as to the competency and sufficiency of the testimony of the Chinese persons themselves, for, assuming the truth of the facts to which they testify, these facts are insufficient to prove that any one of these appellants was at any time a "merchant" as that term is defined in section 2 of the act of November 3, 1893.

The finding and judgment of the commissioner was, in my opinion, right, and a like judgment and order of deportation will be made in each case.

SCHWARZCHILD & SULZBERGER CO. v. PHŒNIX INS. CO. OF HARTFORD.

(Circuit Court, S. D. New York. May 2, 1902.)

1. INSURANCE—CANCELLATION OF POLICY.

Plaintiff held a policy of insurance, issued by defendant company, which provided that it might be canceled by either party by giving the other five days' notice. Defendant's agent telegraphed plaintiff's authorized representative to cancel the policy, confirming the notice by letter, stating that defendant insisted on immediate cancellation. Plaintiff's representative delayed acting, and entered into correspondence with defendant and its agent, in an attempt to induce them to continue the policy in force; but the notice of cancellation was at no time withdrawn or modified, and a few days later defendant's agent again telegraphed imperative instructions to cancel immediately. Thereupon plaintiff's representative notified it of the cancellation and procured other insurance, but before the policy had been returned to defendant the property was destroyed by fire. *Held*, that under the terms of the policy the first notice operated as a cancellation, and the policy ceased to be in force five days after its receipt.

2. SAME—RETURN OF PREMIUM.

Under a policy of insurance, providing that it may be canceled by either party by notice to the other, and that in case of cancellation the unearned premium shall be returned "on surrender of the policy," it is not essential to the effectiveness of a notice of cancellation by the insured that the unearned premium be returned or tendered before the surrender of the policy.[1]

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[1] See Insurance, vol. 28, Cent. Dig. § 510 [a, g].

William Vannamee, for plaintiff.
Wheeler H. Peckham, for defendant.

WALLACE, Circuit Judge. This is an action upon a policy issued by a Connecticut corporation, through an agent at Kansas City, insuring the plaintiff against loss by fire, in the sum of $50,000, upon property in the state of Kansas. The question in the case is whether there had been a cancellaton of the policy prior to October 6, 1899, the date of the fire.

The policy contains this provision:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal,—this company retaining the customary short rate,—except that, where this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

The cancellation, if there was one previous to the fire, was effected by the telegrams and letters exchanged between Merriam, the local agent of the defendant, and Anderson, who had full authority to represent the plaintiff. The former was the agent of a number of insurance companies at Kansas City. The latter was an insurance broker at New York City, carrying a line of insurance amounting to several hundred thousand dollars with Merriam. There was an open account between them, and throughout the period of the correspondence between them there was a balance on Anderson's books to the credit of Merriam of over $2,000. Prior to September 20, 1899, there had been correspondence between Merriam and Anderson about the unwillingness of Merriam's companies to carry insurance upon the plant of the plaintiff at the existing rate of premium; and Merriam had been instructed by Magill, the general agent of the defendant, that the policy must be canceled. September 20, 1899, Merriam, apparently in reply to a telegram received from Anderson, sent Anderson a telegram as follows:

"No; our companies won't carry. Cancel Phœnix fifty thousand."

The same day Merriam wrote Anderson as follows:

"We had to reply to your telegram * * * that it would be necessary for us to call for the immediate cancellation of the 50,000 in the Phœnix of Hartford. It does not appear to us, from what information we can get from our insurance companies, that companies are open to write this risk at 1%. In fact, though we were enabled to hold the Phœnix on over the union meeting, since then they appear to be more anxious than ever, and have telegraphed us four times in four days about the policy. We regret very much to lose the business, but, on the other hand, when they insist upon an immediate cancellation we are powerless."

September 20th, Anderson, hoping to induce the defendant's general agent to countermand his instructions to Merriam, wrote to Magill, and on September 23d wrote Merriam as follows:

"We note your communication in regard to the Phœnix of Hartford's $50,000 policy. We wrote Mr. Magill a long letter, explaining this matter, and stating to him that we were now receiving applications from various companies to accept of this business at 1%. * * * We think he will,

no doubt, either advise you or ourselves of his intention to write the line. This we say in confidence."

September 27th Merriam wrote to Anderson as follows:

"Mr. Magill, of the Phœnix, has telegraphed us very urgently for their policy on this line, and it is necessary that it be promptly canceled. The last telegram we had from them was subsequent to your letter to them. * * * It is impossible to hold them on, as they do not deem that the rate is sufficient for the risk."

On October 3d Anderson wrote to Merriam as follows:

"Mr. Magill has made no reference to our letter regarding his policy. * * * We wrote Mr. Magill by last night's mail again, asking him if he had not decided to retain the policy."

October 4th Merriam sent the following telegram to Anderson:

"Cancel immediately Phœnix Hartford Schwarzchild. Your action is absolutely necessary."

Upon the same day he wrote to Anderson as follows:

"The special agent of the Phœnix of Hartford has been here twice to see us in reference to that policy, and is strenuously objecting to staying on so long after cancellation order has been given us. Owing to an urgent telegram from Mr. Magill, he insisted upon our notifying the insured of our decision to cancel, but this we did not do; simply wiring you that the case was urgent, and that there must be an immediate cancellation. This we beg to confirm."

On the same day Anderson wrote to Merriam:

"We have requested the insured to send us the policy, when we will have it returned to you."

On the same day he instructed his principal that the policy had been "ordered canceled," and procured a policy for $50,000 in another insurance company in substitution of the policy in suit.

It appears that on September 22d Merriam prepared a letter to Anderson which read as follows:

"We must insist upon an immediate and absolute cancellation of the general form policy—Phœnix insurance policy—on plant of Schwarzchild & Sulzberger Company in this city. This matter must have immediate attention."

This letter was prepared by Merriam because of instructions from Magill to wire Anderson, "insisting upon immediate return of the Schwarzchild & Sulzberger policy, regardless of rate or action of others." Merriam testifies to his belief that he probably sent its contents by telegram to Anderson. Anderson denies receiving either a letter or a telegram of this purport. The evidence does not authorize the conclusion that either the letter or the telegram were sent.

It was not necessary, to effect a cancellation of the policy, that it be surrendered by the plaintiff, though that circumstance would be quite conclusive evidence of a cancellation; and it suffices if there was a notification by Merriam to Anderson, which the latter understood, or should have understood, signifying an election by Merriam to terminate the insurance forthwith and unconditionally. If there was such a notification, five days thereafter the policy ceased to exist, and the plaintiff became entitled, upon surrendering it to the defendant, to a return of the unearned premium.

The correspondence between the two agents began with a telegram and letter from Merriam to Anderson, stating that the insurer would no longer carry the risk, and containing the instruction, "Cancel the policy." Read together, they constituted an explicit and unequivocal notification, although the terms were not formal or peremptory, as perhaps they would have been if the business relations between the correspondents had been other than they were. They informed Anderson that the defendant insisted upon an "immediate cancellation" of the policy. The instruction to "cancel the policy" was, in substance, a request to Anderson to procure it from the plaintiff and forward it to Merriam, as in no other way could he have been expected to cancel it. Anderson, doubtless, would have done this if he had not hoped to induce Merriam's principal to reconsider and recall the election to terminate. The subsequent correspondence shows that Anderson was delaying compliance in the hope of a favorable response from Magill, while Merriam was reiterating his original notification, and pointing out to Anderson the futility of delay. While the correspondence may suggest Merriam's desire to co-operate with Anderson so far as he could without prejudice to the defendant, it also suggests Anderson's purpose not to compromise Merriam with his principal, and it does not contain a word calculated to lead Anderson to believe that Merriam did not intend to abide by his original notification. Anderson continued to take the chances of delay until October 4th, but his action on that day in procuring a new policy in substitution of the old one shows that he then recognized that the old one was no longer in force. If he had merely instructed his principal that the policy had been ordered canceled, it could be plausibly urged that he did so because of Merriam's telegram of October 4th.

It is immaterial what phraseology was employed by Merriam in his communications to Anderson, so long as it conveyed notice to the latter of his intention to avail himself immediately and absolutely of the privilege to have the policy canceled. Fabyan v. Insurance Co., 33 N. H. 203; Emmott v. Insurance Co., 7 R. I. 563. That Anderson was not misled, and understood perfectly what Merriam meant, does not seem open to fair doubt.

It was unnecessary for the defendant to return or tender the unearned premium to accomplish a cancellation. The condition is carefully expressed to require the return of the premium only upon the surrender of the policy by the insured to the insurer. Straker v. Insurance Co., 101 Wis. 413, 77 N. W. 752; Norris v. Insurance Co. (S. C.) 33 S. E. 566, 74 Am. St. Rep. 765. The decision of the court of appeals of New York holding the contrary in respect to a similar condition is entitled to great consideration (Tisdell v. Insurance Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765), but is not controlling upon this court; and the view of the minority of the court, expressed in the dissenting opinion, commends itself to me as presenting the better reasoning. The present policy is not a New York contract, and its construction does not depend upon the meaning of a statute of New York.

Judgment is ordered for defendant.

AMERICAN NAT. BANK OF DENVER v. SUPPLEE et al.

(Circuit Court of Appeals, Third Circuit. April 30, 1902.)

No. 23.

1. CORPORATIONS—ACTION AGAINST STOCKHOLDERS—CONCLUSIVENESS OF JUDGMENT AGAINST CORPORATION.

A judgment against a Kansas corporation, rendered in that state, is conclusive upon a stockholder in an action against him to enforce his individual liability under the constitutional and statutory provisions of the state, unless impeached for want of jurisdiction or for fraud and collusion in its procurement.[1]

2. JUDGMENT—IMPEACHMENT FOR FRAUD.

To impeach such a judgment sued on for fraud and collusion, where it is fair and regular on its face, the burden rests on the defendant to prove his allegations by evidence that is clear, precise, and indubitable, and such proof must establish fraud on the part of both plaintiff and defendant in the judgment. A finding against the validity of the judgment is not supported by evidence which leaves the question of fraud as to either of the parties to rest alone on suspicion or surmise, nor can any inference of fraud be drawn from the fact that no defense was made to the action, unless it is clearly shown that a valid defense existed.

3. SAME.

Evidence considered, and *held* insufficient to warrant the submission to a jury of the question of the validity of a judgment attacked by defendants on the ground that it was procured through fraud and collusion.

Gray, Circuit Judge, dissenting.

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

H. T. Ames, for plaintiff in error.

G. M. Tustin and James Scarlett, for defendants in error.

Before GRAY, Circuit Judge, and BRADFORD and J. B. McPHERSON, District Judges.

BRADFORD, District Judge. This is a writ of error to the circuit court for the western district of Pennsylvania, in an action of assumpsit, wherein judgment was rendered on the verdict of a jury in favor of the defendants in error, Horace G. Supplee and Albert Girton, executors of George W. Supplee, deceased. The action is founded on a judgment recovered in the United States circuit court for the district of Kansas, by the plaintiff in error, the American National Bank of Denver, against the Western Farm Mortgage Trust Company, a corporation of Kansas, June 1, 1896, for the sum of $5,933, besides interest and costs, and was brought to enforce against the executors an alleged statutory liability of George W. Supplee as an owner of stock of the Kansas corporation of the par value of $5,000. Section 2, art. 12, of the constitution of Kansas provides as follows:

"Dues from corporations organized and existing under the laws of the state of Kansas shall be secured by individual liability of the stockholders equal to the amount of stock owned by each stockholder, and such other means as shall be provided by law."

[1] See Corporations, vol. 12, Cent. Dig. § 1024.

Section 32, c. 23, of the General Statutes of 1889 of that state, provides as follows:

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

Under the foregoing constitutional and statutory provisions it is settled that a judgment creditor of a Kansas corporation, other than a railway, religious or charitable corporation, may on the return of an execution unsatisfied, maintain in any court of competent jurisdiction an action founded on his judgment to enforce the statutory liability of one who was a stockholder when the claim against or indebtedness of the corporation accrued or was created. To such a stockholder or his estate the statutory liability attaches, and a judgment rendered against the Kansas corporation is binding and conclusive, unless the judgment is void for want of jurisdiction of the court over the parties or subject-matter, or it has been procured by fraud and collusion of the parties. If the judgment against the Western Farm Mortgage Trust Company, hereinafter referred to as the Kansas corporation, was valid, it on the return of an execution unsatisfied conclusively established the right of the plaintiff in error to enforce against the stockholders of such corporation, as in privity with or under contractual obligations to it, their statutory liability under the laws of Kansas. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. In the first mentioned case the court, through Mr. Justice Brewer, said:

"This case brings to our consideration the same constitutional and statutory provisions of the state of Kansas which were before us in Whitman v. Oxford National Bank, ante, 563 [20 Sup. Ct. 478, 44 L. Ed. 619]. In that case we decided that a plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, could maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock. It is unnecessary to rediscuss the questions there considered. * * * The Constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that Congress may not only prescribe the mode of authentication but also the effect thereof. Section 905 prescribes such mode, and adds that the 'records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' * * * What then is the faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation? What is the effect of such a judgment as there established? This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by

an examination of the decisions of the courts of Kansas. The law and usage in Kansas, prescribed by its legislature and enforced in its courts, make such a judgment not only conclusive as to liability of the corporation, but also an adjudication binding each stockholder therein. We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it. Ball v. Reese, 58 Kan. 614 [50 Pac. 875, 62 Am. St. Rep. 638]. In that case it was said, correcting an inference which was sought to be drawn from language in the case of Howell v. Manglesdorf, 33 Kan. 194 [5 Pac. 759], in respect to the effect of a judgment against a corporation (pp. 617, 618 [58 Kan., and p. 876, 50 Pac., 62 Am. St. Rep. 638]): 'The general holding in this court has been that a judgment is final and conclusive between the parties and their privies; and we think it must be held that every stockholder in a corporation is so privy in interest in an action against the corporation that he is bound by the judgment against it. In the absence of fraud and collusion, the judgment must be held to be final and conclusive against the stockholder if the court rendering it has final jurisdiction. As the judgment was valid, the court committed error in allowing the defendant to go behind it and contest matters which were conclusively settled by the judgment against the corporation.' This representative character of the corporation has been affirmed by this court in several cases. * * * Now, as the judgment rendered in the Kansas court is in that State not only conclusive against the corporation but also binding upon the stockholder, it must, in order to have the same force and effect in other States of the Union, be adjudged in their courts to be binding upon him, and the only defences which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island, to a judgment in those courts against a corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured."

It thus appears that "in the absence of fraud and collusion" the judgment recovered against the Kansas corporation is not liable to attack here. It is not sufficient that there be fraud on the part of the defendant alone. The court in Kansas having jurisdiction over both the parties and the subject-matter, it is necessary that the judgment should have been procured by fraud and collusion in order that such judgment may be held open to attack by stockholders of the Kansas corporation. This proposition finds support in this court in Warrington v. Ball, 33 C. C. A. 609, 90 Fed. 464, where it was said:

"Several defenses are set up, one of which is that the judgment sued upon is fraudulent; the allegation being, substantially, that it was obtained by collusion between the plaintiff and the representatives of the bank; that the bank was not indebted to the plaintiff, the certificate of deposit on which he sued having been issued for money furnished to the cashier personally; and that the object of collusion was to avoid a defense, enable the plaintiff to obtain judgment by default and pursue the defendant and other stockholders. The circuit court entered judgment for the plaintiff —holding the affidavit of defense to be insufficient. * * * If the averment of fraud was confined to the certificate of deposit, as the learned judge of the circuit court seems to have believed, a different question would be presented. * * * The fraud averred, however, as we have seen, involves the judgment itself. * * * To bind one by a judgment

to which he is not a party, as provided for by the statute, is barely tolerable. To bind him by such a judgment obtained by fraudulent collusion (as here averred) would be intolerable."

The affidavit in the above case expressly averred that the Kansas judgment on the instrument sued on "was fraudulent and collusively obtained by the said plaintiff." The same doctrine was recognized by the learned circuit judge in the court below in charging the jury, when he said:

"If you find from the evidence that that indebtedness was the indebtedness of the Kansas corporation, your verdict should be for the plaintiff, because if it was the indebtedness of the Kansas corporation that judgment was right. But if you find from the evidence that that indebtedness was in fact the indebtedness of the Colorado corporation, and that the Kansas judgment against the Kansas corporation was obtained by fraud and collusion between the plaintiff bank and Barker, who represented the Kansas corporation, your verdict should be for the defendants."

The Kansas corporation against which the plaintiff in error recovered judgment, as above stated, was incorporated under the laws of that state November 28, 1887, with its principal office in the city of Lawrence, Kansas, with power to establish branch offices elsewhere. Subsequently between September 28, 1889, and October 3, 1889, a branch office was established in Denver, Colorado, as its principal place of business in that state. Thereafter the Kansas corporation carried on business at this office in Denver for some time, the exact duration of which was and is in dispute. Another corporation bearing precisely the same name as the Kansas corporation, namely, the Western Farm Mortgage Trust Company, hereinafter referred to as the Colorado corporation, was created under the laws of Colorado, September 1, 1891, with its principal office in Denver, Colorado. The causes of action in the suit brought by the plaintiff in error against the Kansas corporation in the circuit court for the district of Kansas, were two instruments, one of which was as follows:

"Certificate of Deposit.

The Western Farm Mortgage Trust Company.

(4000)

$4,000.00–100. Denver, Colorado, Dec. 17th, 1891.

City National Bank, Denver, has deposited with this Company forty hundred 00–100 dollars, payable to the order of itself ninety days after date, in current funds, with * * * per cent. interest per annum, from date of the return of this certificate properly endorsed. No interest after maturity.

No. 9342. Due Mch. 16–19.

No. 4142. This certificate not subject to check.

F. M. Perkins, Secretary."

This certificate was endorsed:

"City National Bank, by Jno. J. Hanna, President."

The other of the two instruments sued on was as follows:

"The Western Farm Mortgage Trust Company.

(500)

$500.00–100 Denver Colorado, Nov. 14. 1891.

Ninety days after date pay to the order of myself five hundred 00–100 dollars, value received, and charge to account of T. C. Henry.

To the Western Farm Mortgage Trust Company,

No. 9185. Denver, Colorado."

This order was on its face accepted, as follows:

"Accepted: The Western Farm Mortgage Trust Co., by F. M. Perkins, Secretary."

It also bore the following endorsement:

"T. C. Henry, Jno. R. Hanna, Feb. 15th, 1894. Int. paid 80. May 8, 1895, Int. paid to Feb., * * * 1895."

No question has been raised, nor is there any doubt that the execution of such instruments of indebtedness as those above quoted was within the corporate authority of the Kansas corporation and of the Colorado corporation. Some stress seems to have been laid by the court below on the fact that the judgment recovered by the plaintiff in error in Kansas against the Kansas corporation was by default for want of a demurrer or answer. The defendant, however, had been duly served with process and was in court by its attorney, and the merits of the case were considered by the court before rendering judgment. The judgment was not by confession. The following appears from the record of the Kansas suit:

"And now, on this 1st day of June, 1896, comes the above named plaintiff, The American National Bank of Denver, by Stebbins & Evans, its attorneys; and said defendant, The Western Farm Mortgage Trust Company, appeared by its attorney, George J. Barker. And thereupon the plaintiff shows to the court that said defendant, The Western Farm Mortgage Trust Company, has been duly served with summons in this action by the United States marshal for the district of Kansas, and that said defendant has failed to demur to or answer the said petition of the plaintiff filed in this action, and has made default. And thereupon this cause came regularly on for trial and the plaintiff, with the consent of the court, waives a jury herein and submits this case to the court; and the court, being fully advised in the premises, finds that said defendant has been duly served with summons herein in the manner provided by law; and the court does hereby approve such service as aforesaid made; the court further finds that all of the allegations in the plaintiff's petition are true, and that there is now due from said defendant to said plaintiff upon the cause of action set forth in said petition, the sum of five thousand nine hundred and thirty-three dollars ($5,933). Wherefore it is by the court considered, ordered and adjudged that said plaintiff, The American National Bank of Denver, have and recover of and from the said defendant, The Western Farm Mortgage Trust Company, the sum of five thousand nine hundred and thirty three (5,933) dollars, together with interest thereon at the rate of eight (8) per cent. per annum from this date, and the costs of this action, taxed at $22.96. Hereon let execution issue."

The principal question before us arises on the third assignment of error. It is based on the refusal by the court below to charge the jury, as requested by the counsel for the plaintiff in error, as follows:

"(2) That the judgment recovered by the American National Bank of Denver, Colorado, the plaintiff, against the Western Farm Mortgage Trust Company of Lawrence, Kansas, in the circuit court of the United States for the district of Kansas, on June 1, 1896, is a valid, binding and subsisting judgment and there is no sufficient evidence in the case to show that said judgment was obtained by collusion and fraud."

The defendants in error claim that the Kansas judgment was by fraud and collusion obtained solely on instruments of indebtedness of the Colorado corporation, and that neither of the said instruments represented any indebtedness of the Kansas corporation. There can be

no doubt that, if the Kansas judgment was not procured by fraud and collusion, it conclusively established the indebtedness of the Kansas corporation to the plaintiff in error upon the instruments sued on. The learned circuit judge properly affirmed the fourth point of the plaintiff in error to the effect that if the Kansas judgment "was not secured through the fraud of the plaintiff, then said judgment is conclusive and binding in this case as to the fact of the indebtedness of the Western Farm Mortgage Trust Company, of Lawrence, Kansas, to the American National Bank of Denver, Colorado, the plaintiff"; adding that the Kansas judgment "of course, would sustain this present action, unless it is shown to the satisfaction of the jury to have been fraudulently and collusively suffered." He also properly affirmed the third point of the plaintiff in error which was to the effect that, the defendants alleging that the Kansas judgment was collusive and fraudulent, "the burden is upon the defendants to prove their allegations by evidence that is clear, precise and indubitable." The question, therefore, is whether the defendants in error have shown by "evidence that is clear, precise and indubitable," or by satisfactory and convincing evidence, that the Kansas judgment was obtained by fraud and collusion; for no less measure would be "sufficient evidence." The learned circuit judge evidently thought that such a degree of evidence had been adduced; otherwise he could not have refused to charge the jury in accordance with the point of the plaintiff in error set out in the third assignment. Certainly there was nothing in the record of the Kansas judgment or of the proceedings relating thereto which show or tend to show fraud and collusion between the plaintiff and the defendant therein or between any of their respective officers or representatives. On the filing by the plaintiff in error of the petition in the Kansas suit setting forth the instruments of indebtedness in question, a writ of summons duly issued April 2, 1896, to, and was served April 7, 1896, on, the Kansas corporation, notifying it to answer such petition by May 4, 1896. This the Kansas corporation omitted to do, but, as already stated, was represented in court by George J. Barker, its attorney, June 1, 1896, when the court, after examining the merits of the case, found that "all the allegations in the plaintiff's petition are true," and entered judgment accordingly. The petition expressly alleged that both of the instruments of indebtedness had been executed by the Kansas corporation, and it does not appear that, save in the present suit, the validity of the Kansas judgment has ever been denied or questioned. Execution on the judgment duly issued and the marshal June 6, 1896, returned that "after due and diligent search I am unable to find any goods or chattels or lands and tenements, belonging to the within named defendant, the Western Farm Mortgage Trust Company, in my district upon which to levy to satisfy this execution or any part thereof. I now therefore return the same wholly unsatisfied." There is a presumption of honesty and fair dealing in the acts of men which is not to be brushed aside by court or jury through mere suspicion or unfounded surmise. The mere fact that no defence was made by the Kansas corporation through its attorney amounts to nothing. Aside from other circumstances, it is indicative that the Kansas corporation had no defence to

the claim rather than that, having such defence, it fraudulently suppressed it. We are unable to agree with the learned circuit judge in his statement that "the instruments sued on * * * indicated upon their faces that they were liabilities of the Colorado corporation." Upon their face they might have been liabilities of the Kansas corporation, on the one hand, or, on the other, of the Colorado corporation. It is true that they purported to have been executed at Denver, Colorado. The certificate of deposit is headed:

"Certificate of Deposit.

The Western Farm Mortgage Trust Company.

(4000)

$4,000.00–100 Denver, Colorado, Dec. 17th, 1891."

And the order is headed:

"The Western Farm Mortgage Trust Company.

(500)

$500.00–100 Denver, Colorado, Nov. 14, 1891."

On neither of these instruments does the location of the office in Denver appear, nor that they were executed by the Colorado corporation and not by the Kansas corporation. It is not disputed, but admitted, that the Colorado corporation had its principal office in Denver, and also the Kansas corporation had its principal Colorado office in Denver, where it carried on business for several years; and there was, as before stated an identity of name as between the two corporations. There was thus nothing on the face of the instruments indicating which of the two corporations executed them. The Kansas court, however, determined, under the circumstances already mentioned, that they had been executed by the Kansas corporation. It is, therefore, necessary in order to determine whether the Kansas judgment was procured by fraud and collusion between the parties to go back of that judgment and the proceedings thereon, which are fair and innocent on their face, and ascertain whether it was based on an indebtedness of the Colorado corporation which by fraud and collusion was made to appear to the court in Kansas an indebtedness of the Kansas corporation. One of the principal questions of fact in the case is whether the securities sued on were executed by the Colorado corporation, on the one hand, or, on the other, by the Kansas corporation. It appears that the Colorado corporation, created September 1, 1891, had authority, among other things, "to buy and sell * * * the capital stock and good will of any other corporation"; that its charter was obtained at the instance of the stockholders of the Kansas corporation who desired to avoid the statutory liability to which as stockholders in a Kansas corporation they might be subject with respect to claims thereafter originating against that corporation; and that the Colorado corporation acquired all the stock and assets and assumed all the liabilities of the Kansas corporation. The two witnesses who speak on the subject of the purpose for which the Colorado corporation was created are R. A. French and F. M. Perkins. French says:

"The Western Farm Mortgage Trust Company, of Denver, Colorado, was organized at the request of the stockholders of The Western Farm Mortgage

Trust Company of Lawrence, Kansas, as there was no stockholders' liability under the laws of Colorado. The Colorado Company was organized about the first of October, 1891, and all the assets of the Kansas Company of every description was transferred by the Kansas Company to the Colorado Company, the Colorado Company assuming all the debts and liabilities of the Kansas Company. The stockholders of the Kansas Company surrendered their certificates of stock for new certificates of stock in the Colorado Company, and certificates of stock were issued to these stockholders by the Colorado Company for the same amount of stock held by them in the Kansas Company, plus 11 per cent. due to the stockholders of the Kansas Company as dividends on their stock. The stockholders of the Colorado Company were the same and the business was the same and methods the same. The Colorado Company occupied the same offices, kept the same books and records and retained the same employees, the only change being in the organization, making the Company a Colorado organization instead of a Kansas organization. The business and offices of the Company were removed to Colorado. * * * The Colorado Company did not receive to exceed five thousand dollars of the assets of the Kansas Company that were not pledged or encumbered and were available to meet the obligations assumed by the Colorado Company."

Perkins says:

"The main purpose was to have the home offices of the corporation in Denver, which was considered as a more central point for the business of the Company. * * * The Colorado Company purchased the assets, good will and property of all kinds of the Kansas corporation and these assets were turned over to the Colorado corporation."

He further states that the Colorado corporation continued the business which the Kansas corporation had been conducting and that, in so continuing the business, it did not use the same offices which the Kansas corporation had previously occupied but "took new offices in the Boston building, in Denver." French states that the Colorado corporation occupied the same offices used by the Kansas corporation. Perkins states that the Colorado corporation in continuing the business which the Kansas corporation had been conducting used different offices. Both of these allegations may well be true. French does not allege that after the Kansas corporation had entirely ceased business it occupied with the Colorado corporation the same offices. Nor did Perkins state at what time the Colorado corporation moved its offices to the Boston building. He states that the Kansas corporation before it suspended business had an office in Denver "for about two years or two years and a half," and that it took some time to complete the transfer from the Kansas corporation to the Colorado corporation,—"perhaps a month or two." French does not state that immediately or forthwith on the organization of the Colorado corporation the assets or liabilities of the Kansas corporation were transferred to or assumed by it. We have discovered no satisfactory evidence that the two corporations did not occupy the same offices until after the transfer from the Kansas corporation to the Colorado corporation had been fully completed. The evidence on the contrary strongly points to the fact that the same offices were used by both corporations until after the transfer had been made. With respect to the precise date when the Kansas corporation fully completed such transfer the evidence is by no means conclusive. Perkins states that he was a director of the

Kansas corporation from the time of its organization in 1887 until it "sold out to the Colorado Company, about the first of October, 1891"; that the transfer was made in "the fall of 1891 at the time of the organization of the Colorado Company"; and that it took "perhaps a month or two" to complete the transfer. Perkins so testified October 31, 1898, which was nearly seven years after the execution of the instruments sued on, and this evidence, standing alone and given so long after the transaction to which it relates, is not, in our opinion, of much weight in determining the question whether the instruments sued on were or were not executed in the offices jointly occupied by the two corporations. It is contended by the defendants in error that the Kansas corporation did not and could not have executed such instruments because it had theretofore suspended business. It is true that Perkins, and he alone, states that the Kansas corporation did no business after its assets were turned over to the Colorado corporation "any further than that was necessary to make the proper transfers." But it is clear that the mere suspension of the business of a corporation, without dissolution, does not destroy it as a legal entity capable of resuming business, and it does not appear how much or what proportion of the shares of stock of the Kansas corporation had been transferred to the Colorado corporation or its shareholders prior to the time of the execution of the instruments of indebtedness. It does not appear that at that time the Kansas corporation was incapable of contracting an indebtedness. But it is contended that Perkins who executed both instruments as secretary, signed them as secretary of the Colorado corporation and not as secretary of the Kansas corporation; because, as alleged, he was at that time secretary of the former but not of the latter corporation; and that therefore, the indebtedness represented by the instruments must have been the indebtedness of the Colorado corporation and not of the Kansas corporation. But the evidence, including all inferences fairly to be drawn from it, does not sustain such contention. As before stated, the date of the certificate was December 17, 1891, and that of the order November 14, 1891. Perkins, though a witness and the person who signed as secretary both instruments, nowhere states that they did not represent indebtedness of the Kansas corporation, nor that they or either of them represented indebtedness of the Colorado corporation. He was in a position to know, and the burden of establishing fraud and collusion rested on the defendants in error. Further he nowhere states that he signed the instruments as secretary of the Colorado corporation, nor that he was secretary of that corporation at the time of their execution, or that he was ever secretary of that corporation. On the contrary it clearly appears from his own statements that he was secretary of the Kansas corporation at that time. A portion of his testimony is as follows:

"Q. What position did you hold in the Kansas Company, and during what period? A. I was director all the time from its organization in 1887, until the Kansas Company sold out to the Colorado Company, about the first of October, 1891. I held the office of Vice President part of the time and Secretary part of the time.

Q. Were you Secretary of the Kansas corporation in 1891? A. I was. * * *

Q. Who was the officer that had in charge this matter of sending out new certificates in the Colorado Company and receiving the old certificates in the Kansas Company? A. That was in charge of the Secretary.

Q. And you were the Secretary at that time? A. Yes, sir. * * *

Q. Did you know George W. Supplee in his lifetime? A. I did.

Q. Do you know whether he was a stockholder in The Western Farm Mortgage Trust Company of Lawrence, Kansas? A. Yes; my recollection is that he was.

Q. Did you know Mr. George W. Supplee personally? A. I did.

Q. I will ask you to state whether the stock ledger of the Western Farm Mortgage Trust Company of Lawrence, Kansas, was in your custody while you were Secretary of that company? A. It was.

Q. Were you acquainted with the manner in which that book was kept and in which accounts were kept by the company with its stockholders in that book? A. I was. * * *

Q. If on the left-hand side, or credit side, of the account of George W. Supplee in the stock ledger of the Western Farm Mortgage Trust Company, of Lawrence, Kansas, there is the entry, 'December 18th, 1891,' can you explain, from your knowledge of the way this book was kept, the significance of that entry? A. I can.

Q. What was the significance of that entry? A. It shows the date of the return of the certificate for cancellation. * * *

Q. Who had charge of the stock ledger of the Kansas Company under your general control? A. Warren Wood."

The uncontradicted evidence of Perkins thus shows that he was secretary of the Kansas corporation until December 18, 1891, or thereafter, covering the period during which the two instruments sued on were executed; and it clearly appears from the documentary and oral evidence that the fifty shares of stock of that corporation theretofore held by George W. Supplee were not surrendered until after the instruments had been executed, namely, December 18, 1891. Now what was the position of George J. Barker, who represented the Kansas corporation in the Kansas suit? He was one of the promoters, incorporators and directors of the Colorado corporation and had also been one of the promoters, incorporators and directors of the Kansas corporation. It does not appear when his stock in the Kansas corporation was surrendered for stock in the Colorado corporation. He is accused of fraud and collusion with the plaintiff in error in procuring the Kansas judgment, involving a violation of trust and of his obligations as a sworn officer of the court. From his position it may fairly be assumed that he knew whether the indebtedness sued for was that of the Colorado corporation, on the one hand, or, on the other, of the Kansas corporation. He treated it as the indebtedness of the latter corporation. If his stock in that corporation had not been surrendered for stock in the Colorado corporation, and if it be assumed —an assumption which, in our opinion, cannot fairly be indulged in—that he was a dishonest man, it is difficult to perceive what motive he could have had in fraudulently procuring a judgment upon which he might have been subjected to the statutory liability under the laws of Kansas. But what is there in the case to justify any finding of fraud against him? There is a primary presumption of honesty and fair dealing on his part. And that presumption should be respected unless it has been overcome by clear and satisfactory

evidence of fraud. But the only ground on which fraud might possibly be predicated is that he knew or had reason to believe that the indebtedness on which the Kansas judgment was rendered was not the indebtedness of the Kansas corporation, but of the Colorado corporation. The facts previously adverted to, however, utterly negative all idea that it has been established by "evidence that is clear, precise and indubitable" that the instruments sued on did not represent indebtedness of the Kansas corporation. It might with equal reason be contended that French, the acting secretary of the Kansas corporation, upon whom service of the writ of summons in the Kansas case was made, was guilty of fraud and collusion in not promptly informing that corporation that suit had been brought against it for an indebtedness it did not owe; thus disregarding the presumption of honesty and fair dealing on the part of both French and Barker. We cannot go to this length, even if it was unnecessary to show fraud on the part of the plaintiff in error. But to defeat the plaintiff in error it was necessary to show collusive fraud between Barker and the former. Fraud on the part of Barker would not have been sufficient. It was necessary to show collusive fraud on the part of the plaintiff in error by clear and satisfactory evidence. We do not agree with the learned circuit judge when he says:

"There was evidence to justify a finding that both the plaintiff in the suit against the Kansas corporation and the attorney who appeared for the Kansas corporation and suffered judgment to go by default against it knew all the facts. It is difficult to understand how that judgment could have been suffered and taken in good faith to the Kansas corporation and its stockholders. At any rate, the jury have found, I think upon sufficient evidence, that the defense which existed was collusively and fraudulently suppressed."

On careful examination of the evidence we have failed to discover a scintilla of proof of fraud on the part of the plaintiff in error. Both the Kansas corporation and the Colorado corporation had been engaged in business in Denver. Both of them had occupied the same offices. Both of them had precisely the same name. The authorized capital stock of each of them was $3,000,000, divided into the same number of shares. It does not appear that the plaintiff in error prior to the execution of the instruments of indebtedness ever had directly or indirectly any business with either of the corporations, or knew that two corporations existed with the same name, the same capital stock, the same officers, and engaged in the same business. It is quite possible or probable, in view of the fact that the Kansas corporation had been carrying on business in Denver for "about two years or two years and a half" before it suspended, the plaintiff in error may have known of its existence and had business with it. The instruments sued on were signed by Perkins as secretary of "The Western Farm Mortgage Trust Company," and although the burden rested on the defendants in error to satisfactorily establish fraud on the part of the plaintiff in error, there is absolutely no evidence showing or tending to show that the plaintiff in error did not take the instruments with the knowledge or belief that they represented indebtedness of the Kansas corporation. Nor is there any evidence tending to show any

fraud on the part of the plaintiff in error or any of its officers or representatives in the proceedings in the Kansas suit. Fraud must be shown by proof and cannot be established by mere surmise in opposition to the presumption of honesty and fair dealing. We are satisfied that there was no evidence which should have been submitted to the jury on the question of fraud and collusion, and that there was error on the part of the court below in refusing to charge the jury as requested in the second point of the plaintiff in error. The third assignment of error embodying that point is sustained. It is unnecessary to consider questions raised by other assignments of error.

The judgment below is reversed, with directions that the plaintiff in error be accorded a new trial.

GRAY, Circuit Judge (dissenting). I am compelled to dissent from the majority of the court in this case. I think the court below was justified in submitting to the jury the question in the form in which it did. Its language was as follows:

"Was the indebtedness which was the foundation of that suit represented by the four thousand dollars certificate of deposit of December 17, 1891, dated at Denver, Colorado, and the draft for five hundred dollars, dated at Denver, Colorado, November 14, 1891, and accepted by the Western Farm Mortgage Trust Company, by F. M. Perkins, secretary, the indebtedness of the Kansas corporation, or was it the indebtedness of the Colorado corporation? What does the evidence in this case show? That is a question for your determination, and you will determine it upon a consideration of the evidence in the case. If you find from the evidence that that indebtedness was the indebtedness of the Kansas corporation, your verdict should be for the plaintiff, because, if it was the indebtedness of the Kansas corporation, that judgment was right. But if you find from the evidence that that indebtedness was in fact the indebtedness of the Colorado corporation, and that the Kansas judgment against the Kansas corporation was obtained by fraud and collusion between the plaintiff bank and Barker, who represented the Kansas corporation, your verdict should be for the defendants."

Whether the judgment against the Kansas corporation was procured by fraud and collusion between the plaintiff and defendant in that judgment was thus properly made to depend largely upon the question submitted to the jury, as to whether the indebtedness was the indebtedness of the Kansas corporation, or not. If it were, then, as the court told the jury, their verdict should be for the plaintiff. If it were not, the fact that it was not, was most strongly evidential as to such fraud and collusion, as would invalidate the judgment upon which the suit now before us was brought.

The state of the case upon the testimony was peculiar. The Kansas corporation and the Colorado corporation had precisely the same corporate name. They both had offices in Denver, Colo. It is in evidence, however, that the Colorado corporation had been formed September 1, 1891, and that immediately thereafter, the Kansas corporation transferred to it all its business and assets, the Colorado corporation assuming all the debts and liabilities of the assignor. There was also testimony, that was not directly contradicated, that no business was done by the Kansas corporation after the formation of the Colorado corporation and the transfer to it of the assets of the former. No reason has been suggested why the Kansas corporation should

have received the deposit for which it issued its certificate, two months after it had gone out of business. Presumably upon the evidence, the Colorado corporation was the one which should have received the deposit and given the certificate therefor at the time at which it was dated. No testimony was introduced to rebut this presumption. Perkins, who signed the certificate of deposit, had been an officer in both corporations; so also was French. Both were examined in behalf of the plaintiff, but no question was put to them as to the regularity of this transaction. They did not testify, nor were they specifically interrogated, as to which corporation received the deposit and gave the certificate, a fact peculiarly within their knowledge. This was a matter, also, that should have been peculiarly within the knowledge of the plaintiff bank, or the bank from which it received the negotiable paper in suit. No testimony by the officers of either was offered on this point. Barker, who was counsel for the defendant in the Kansas suit, was a promoter and director of the Colorado corporation. The judgment was by default, and recited that Barker, counsel for the defendant, was present, interposing no demurrer, plea or answer. There is no suggestion that any testimony was presented to the court, other than the papers sued upon, which bore the name of the Kansas corporation, the suit being in a Kansas court. No other proof of the identity of the corporation would, in the natural course of things, have been required, counsel for said corporation being present and silent. The character of this judgment, while by no means conclusive, is not without weight, when taken in connection with the other evidence adduced in the case now before us.

On the whole case, a state of things was shown so suspicious, as to require explanation on the part of the plaintiff. The rule as to burden of proof, does not forbid this requirement. The absence of explanatory testimony on its part, tended strongly to confirm such suspicions.

It is admitted that the court below properly charged the jury as to the burden of proof, and as to the necessity of showing fraud and collusion between plaintiff and defendant in procuring the judgment in the Kansas suit.

I do not think the court below could have done otherwise than submit the question, as it did, to the jury, and am of opinion, therefore, that its judgment should be affirmed.

AMERICAN STEEL BARGE CO. v. CHESAPEAKE & O. COAL AGENCY CO.

(Circuit Court of Appeals, First Circuit. April 16, 1902.)

No. 391.

1. SHIPPING—TIME CHARTER—RESERVATION OF LIEN ON SUBFREIGHT.

A provision of a charter party that "the owners shall have a lien on all * * * subfreight for charter money due under this charter" cannot be applied, as against a cargo owner other than the charterer, beyond the amount of freight stipulated in the bill of lading; but to

such extent it is valid and enforceable, as creating an admiralty lien on the freight, even where the charter is a demise of the ship.

2. SAME.

It is competent for a time charterer, by a provision in the charter, whether it is or is not a demise of the vessel, to pledge the freight to be earned by her during the term to secure the payment of the charter hire; and such a provision gives the owner an equitable lien in admiralty, as of the date of the charter, on any freight subsequently stipulated to be paid under a bill of lading, and subrogates him to the lien of the charterer for the freight, and to the remedies of the charterer to enforce its payment.

3. SAME—PROCEEDING TO ENFORCE LIEN—ARREST OF CARGO.

The proper proceeding by a shipowner to enforce the lien given by such charter provision is by a libel, in conformity to admiralty rule 38, against the subfreight alone, with process requiring the holder of the bill of lading or owner of the cargo to bring the amount of the freight into court. If not so brought in, a summary process may issue against the owner of the cargo, or against the cargo. A proceeding against the cargo is not justified until after an order to pay in the freight; but, if a warrant of arrest has prematurely issued, and it is afterward ascertained that there is a contest which would probably have ultimately resulted in its issuance, the arrest will be retained, and compensation made in costs for the fact that it was premature.

4. SAME—PAYMENT OF FREIGHT TO CHARTERER.

A cargo owner, who, on the issuance to it of a bill of lading, paid to the charterer a portion of the freight, in good faith, is protected in such payment as against a lien on subfreight reserved by the shipowner in the charter, of which the shipper had no knowledge or notice.

5. SAME—PRIORITY AS BETWEEN LIEN AND RIGHT OF SET-OFF.

A lien on subfreights reserved by a shipowner in a time charter will be given preference over a general right of set-off existing in favor of a cargo owner against the charterer, especially where, so far as appears, his lien, which relates back to the date of the charter, is prior to the charterer's indebtedness to the cargo owner.

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

For opinion below, see 107 Fed. 964.

Frederic Dodge, for appellant.

Joseph B. Warner, for appellee.

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

PUTNAM, Circuit Judge. This appeal will be found not to concern the cargo of coal, as the title of the case would indicate, but the freight thereon.

The steamer City of Everett, belonging to the American Steel Barge Company, the libelant, was chartered by it, under a time charter, on March 1, 1898, to the Atlantic Transportation Company; the charter money being payable in monthly installments in advance. The controversy now existing arose over the installment due on December 5, 1898, which remains unpaid. At or about that time the Atlantic Transportation Company became insolvent and went into the hands of a receiver, and has since so remained. The charter, barring its formal parts, is given at length in the opinion of the learned judge of the district court. That opinion discusses very fully the question whether its legal effect is merely a chartering of

the entire space of the steamer, or a proper demise, and the same question has been argued before us at great length. The libel alleges that the owners "let" the steamer to the charterers, which, in a libel, or in other judicial pleading, can be properly construed only as a demise. If it were important to the case, we would have no question that the libel properly construed the charter in this respect.

Whether or not the charter operated as a demise, the master was, for all the purposes of this case, the agent of the charterer. This is particularly emphasized by the fact that the charter closed a provision that the master should be under the orders and direction of the charterer, as follows:

"And the charterer hereby agrees to indemnify the owners from all consequences and liabilities that may arise from the captain signing bills of lading, or not otherwise complying with the same."

Indeed, the libel alleges, and it is not controverted, that the bill of lading covering the cargo in question was signed by the master "by the direction of said charterer or its agents." There can be no question that, so far as the controversy before us is concerned, the master was the agent of the charterer, and the bill of lading of the cargo in question was given by him as such agent.

The case turns on the following expression in the charter: "That the owners [meaning the owners of the vessel] shall have a lien upon all cargoes and all subfreight for charter money due under this charter." In Baumwoll Manufactur von Carl Scheibler v. Furness [1893] App. Cas. 8, Lord Chancellor Herschell spoke of this clause as one "which is a provision as between charterer and shipowner," apparently having in mind in that connection the case where only a ship's space is chartered. Neither the origin nor the history of the clause on which this case turns can be clearly traced. The learned judge of the district court suggested that it was framed when charterers intended ordinarily to freight ships with their own property; but it is to be noted, however, in this connection, that it attempts to give a lien on cargo, and also a lien on subfreights. The former (that is, on the cargo) was originally regarded as existing merely at common law. It has been largely so discussed in the case at bar. It is now held that the relation of the vessel to the cargo does not create a merely common-law lien, but an admiralty lien, good until it is either expressly or impliedly waived. This was explained by us in Wellman v. Morse, 22 C. C. A. 318, 76 Fed. 573. Nevertheless it may be that it was because of the old impression that the lien for freight arises at common law, and so depends on possession, that, so far as this clause gave a lien on the cargo, it was thought by some applicable only to a charter for space, or to cases where the charterer owns the cargo. That, however, it was not framed simply with reference to furnishing a lien on a cargo belonging to a charterer, seems to follow from Paul v. Birch, 2 Atk. 621, where, as early as 1743, it was held sufficient to bind to the owner of the ship a cargo in which the charterer had no interest.

Bearing in mind, however, that the clause gives a lien on subfreights as well as a lien on cargo, it will be found that we are relieved on this appeal from any investigation of the rules of the common law with reference to liens, so extensively argued before us, or from any investigation of the nature of liens for freight, further than referring to Wellman v. Morse, as we have done. We must also add that, whatever obscurity attends the origin and history of the clause in question, there is none in that portion of it which relates to subfreights, and no difficulty in its application to the case at bar, whatever the character of the charter in question.

It is certain, however, that this clause cannot be applied, as against the cargo owner, beyond the amount of freight stipulated in the bill of lading. We understand that this is conceded by the libelant; but, in any event, the rule is fully established by Scrutton on Charter Parties and Bills of Lading (4th Ed.) at pages 285 and 286, and by the decisions cited in the note thereto, as well as by many other cases not there cited, among which are Paul v. Birch, ubi supra; Shand v. Sanderson, 4 Hurl. & N. 381; and Gilkison v. Middleton, 2 C. B. (N. S.) 134. Paul v. Birch is very badly reported, as is well said in Carv. Car. by Sea (3d Ed.) 774. It was, however, carefully explained in Abb. Shipp. (5th Eng. Ed.; the last edition, revised by Lord Tenterden), at page 171, and is there shown to be clear on this point.

Inasmuch as the clause in question is clear so far as relates to subfreights, and can receive to that extent full effect without difficulty, no legal tribunal is authorized to strike it out of this charter, even though it was primarily intended for use in one which did not demise the ship. It is true that in all the English cases which we have found, including especially those cited in the note to page 286 of Scrutton's Charter Parties and Bills of Lading, the charter was to load the vessel, which, of course, is only a contract for space; yet Leggett's Charter Parties (1894) 530, lays down a broad rule, that it never seems to have been disputed that a shipowner can hold the goods to the extent of the bill of lading freight, and that, "Where the vessel has been put up by the charterer as a general ship, the same rule holds good." While probably this must be qualified with reference to the shipowner who has demised a ship, so far as holding the goods by a common-law possessory lien is concerned, it need not be qualified where he has been given by the charterer an interest in the bill of lading freight, thus carrying the incidental admiralty right to pursue the goods for that freight in the event it remains unpaid.

Strictly speaking, the charter money of a ship chartered on time is not freight. Yet it is such in common parlance, and also such in the law of insurance. This fact is sufficiently explained in Abb. Merch. Ships (14th Ed.) 662, 663. Therefore it cannot reasonably be questioned that "subfreights," which is an expression in common use and easily understood, embraces all freights which a charterer stipulates to receive for the carriage of goods, whether he takes the ship by demise or otherwise. It follows that we must hold that the parties to this charter intended to bind to the owner

of the vessel the freight, under this bill of lading. We need not trouble ourselves on the question whether there was any intention to pledge the cargo, or whether the cargo could be pledged directly, because the freight is the principal thing, and it is sufficient for all the purposes of the clause in question that the cargo is held incidentally to secure its payment. In determining whether, on this libel, the intention of the parties to pledge the freight can be practically worked out, we are to remember that it is the clear law that admiralty proceeds on equitable principles, regardless even of many peculiarities which control the chancery courts. O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; The Iris, 40 C. C. A. 301, 100 Fed. 104, 114. Inasmuch as the questions involved in this appeal relate both to the right and the method of procedure, we may as well observe here that it is thoroughly understood that the equitable rules of the admiralty apply to each.

Even at common law it has long been settled that the owner of a vessel can sell or pledge the future freights to be earned by virtue of an enterprise which she has entered on, although in an inchoate condition. The text writers are to this effect, and also the courts. Leslie v. Guthrie, 1 Bing. N. C. 697, explaining in this respect the earlier case of Robinson v. Macdonnell, 5 Maule & S. 228. The rule is, of course, so settled in equity. Lindsay v. Gibbs, 22 Beav. 522, 528. It must be even more freely admitted in admiralty, which proceeds on broad equitable principles, as we have already stated. It requires no line of argumentation to demonstrate that this rule reaches the relations of the owner to the charterer, whether the charterer enters into the possession of the vessel or not. In the present case, if the charterer did not enter into possession, the clause in question merely reaffirmed a lien which the owner already had, even at common law. If the charterer entered into possession of the vessel, he stood as owner, and could, as such, pledge inchoate freights. His charter was, moreover, in this particular, a qualified one, and his title to all freights accruing thereunder necessarily qualified as of the date of the charter, and in this respect precisely analogous in principle to one who obtains a qualified title to a chattel. Applying either of these lines of reasoning, the rights of the owner of the vessel under the clause in question reverted to the date of the execution of the charter, and did not accrue as of the date of the giving of the bill of lading, as now supposed by the owner of the cargo.

As, therefore, on the broad rules of the admiralty, the owner of the vessel had a lien on this freight, which accrued as of the date of the charter, he stood, in the eyes of the admiralty, which requires no formal instrument, with all the rights of an assignee under a deed of assignment. In the admiralty, his position and rights are exactly those of the holder of a bottomry bond of both ship and freight, who may, if his bond comes due, discharge the cargo from the lien therefor by receipt of the freight (Benson v. Chapman, 2 H. L. Cas. 696, 721), or may proceed in his own name in admiralty against the freight for the collection thereof, as was explained, under

very special circumstances, in Place v. Potts, 5 H. L. Cas. 383. Scrutton, Charter Parties (4th Ed.) 275, 277.

The proper remedy in admiralty, which does not have the strict regard to parties which is had by the chancery courts, is a libel, in the name of the party holding the bottomry bond, or other lien on freight, against the freight. It is not necessary to make party to the proceeding the assignor, or whomsoever has the remaining beneficial interest in the freight, as is required in equity, for the reason that the admiralty has no strict rules as to parties, and because, also, the proceeding being in rem, all the world are parties thereto. In accordance with admiralty rule 38, which only reiterates the uniform and ancient practice of the admiralty, the appropriate primary process is a monition to the holder of the bill of lading, or owner of the cargo, requiring him to pay the freight into the registry of the court. It is of interest to refer to the earlier stages of Place v. Potts, 8 Exch. 705, 707, as pointing out fully the method of proceeding. In view of these observations, the libelant correctly states the case when he argues that the lien asserted is primarily the lien reserved on the subfreight, and that it is not a lien on the cargo simply as cargo, but on it as representing the bill-of-lading freight, and as bound to the vessel therefor. The obscurity of the case has come mainly, if not entirely, from the fact that the proceedings in the district court apparently followed the terms of the charter, and claimed, not merely a lien on the subfreight, with a lien incidental thereto on the cargo, but directly a lien on both freight and cargo. The proper proceeding would have been to file a libel against the subfreight alone, naming the party charged with the possession thereof, who in this case was the holder of the bill of lading, or the owner of the cargo, and asking process requiring him to bring into court what would be due from him on discharge of the vessel, all as provided in admiralty rule 38. Then, if the freight according to the bill of lading had not been brought into court, or sufficient cause shown to the contrary, summary process would have issued on a supplemental libel or petition against the holder of the bill of lading, or against the cargo if the lien for freight had not been lost. At the proper time, and under the proper circumstances, a libelant holding a lien on subfreight becomes subrogated to all the remedies of the charterer, which includes a proceeding in personam against the holder of the bill of lading, or against the cargo in the event the lien for freight has not been lost; but also, like the charterer, he could not properly institute this proceeding until there had been default in payment of the freight, unless under very peculiar circumstances, which do not arise in the case at bar.

All expressions, if any such there be, that any party, whether the holder of bottomry, or a seaman, or a formal assignee, or other lienor, having a right to proceed against freight, may properly at once libel the cargo therefor, must be considered with regard to the circumstances of the particular case. One of the leading authorities relied on by the libelant, and understood by him to be cited to this effect in Williams & B. Adm. Prac. (2d Ed.) 251, is The

Lady Durham, 3 Hagg. Adm. 196, 200, where the rule is laid down exactly to the contrary. Sir John Nicholl there starts with the proposition that a mariner has, of course, a lien for his wages on freight, if earned; but he states that he has "no lien on the cargo as cargo," and that "his lien is upon the ship, and on the freight as appurtenant to the ship." He adds that, "so far as the cargo is subject to freight, he may attach it as security for the freight that may be due," but he does not say when he may attach it. The next citation in Williams & Bruce is The Victor, Lush. 72. The real question which Dr. Lushington considered in that case was whether the cargo was holden with the vessel for damages in collision. It is true that the cargo was arrested, and was stated to have been arrested for freight; but, its owner having paid in the freight to the account of the court, Dr. Lushington pronounced for the release of the cargo, with costs and damages. So the general expressions of Dr. Lushington in The Leo, 6 Law T. (N. S.) 58, to the effect that the cargo may be arrested under like circumstances, were aside from the real question in the case, were purely incidental, and were not the result of any proposition brought before him by the parties. In The Roecliff, L. R. 2 Adm. & Ecc. 363, Sir Robert Phillimore merely held that, on a motion for the release of a cargo aboard a vessel which had been attached in a case of collision, the cargo and vessel belonging to the same owner, the freight must be paid into court before the cargo could be discharged. The only question there was whether, inasmuch as the ship and cargo belonged to the same person, there could be any freight which, as freight, was liable to the injured vessel. No question arose as to the order of proceeding against the cargo. The decree as to payment of freight was strictly analogous to a decree which, under like circumstances, an admiralty court would prudently make with reference to freight due from cargo under a bill of lading, to the effect that, after the cargo was unladen, and before the lien was lost, the freight be paid into court. But it is not worth while to examine further the cases cited in Williams & Bruce, because it is clear that the reference to the text made by the libelant cannot be understood as understood by it; and, if it could be so understood, it would be, in our admiralty courts, superseded by admiralty rule 38, which does not justify any proceeding against the cargo, under circumstances like those on this appeal, until after an order to pay in the freight, unless in peculiar cases. A suitable precedent for proceeding against freight by one holding a lien thereon is found in Ben. Adm. (2d Ed.) 556. This conforms in all respects to the observations which we have made.

But on the whole, the question involved in this branch of the case is merely one of the order of procedure, and it could affect only the costs. Under the broad rules of admiralty, if a warrant of arrest issues prematurely, and it is afterwards ascertained that there is in fact a contest which would probably have ultimately resulted in its issue, the arrest will be retained, and the fact that it is premature compensated for in costs. Moreover, on this appeal the cargo was not, in fact, arrested; but, on a warrant for arrest issuing, bail was

given. Prior to the giving of the bail, the parties filed a stipulation by virtue of which the libelant agreed to limit its claim against the cargo to the freight earned thereon. Further, bail was given only for the agreed value of the freight. It is true that the stipulation was without prejudice to the defense that there was no lien on the cargo; but, in view of the principles which we have stated, this was immaterial. We have shown that, even if the practical result of the proceedings on the libel had been to attach the cargo, it would not have affected the case, except on the question of costs; and the fact is that the practical result is in effect the same as though the freight had been brought into court by the owner of the cargo, and afterwards paid out again on stipulation. As admiralty looks mainly to practical results, we would not have considered this branch of the case so fully, except for the fact that it seems to have become confused with the merits, to which, indeed, it has no relation whatever. The merits involve the simple and clear proposition which we have fully explained, —that the owner of the vessel was entitled to proceed against all subfreights, including that now in question, by virtue of the lien thereon given him in the charter.

This brings us to the only difficult propositions in the case. The answer, as amended, alleges that on December 30, 1898, which was the date of the bill of lading, the owner of the cargo, in whose interest the bill of lading was held, paid the master, on account of the freight to become due, $201.64, in order to provide money for trimming charges, and also on the same day, on account of freight, the further sum of $1,500. It further alleges that both payments were made in good faith, and that at the time the payments were made the owner of the cargo had no knowledge as to the ownership of the vessel. These facts are not disputed, and, indeed, it cannot be denied that the owner of the cargo had not at that time been advised that the owner of the vessel had reserved in the charter any lien on the subfreight. Probably a knowledge of these facts would not have affected the propriety of the payment of the $201.64 required by the vessel to enable her to get out of port with her cargo; and the absence of that knowledge protected the holder of the bill of lading in the payment of the $1,500, on rules so well settled and so universally known that it would be a waste of words to discuss that particular proposition. We will, however, refer to The Karnak, L. R. 2 P. C. 505, clearly asserting it. The earlier case of The Salacia, Lush. 578, held, perhaps, otherwise; but, of course, the decision of the privy council in The Karnak must be accepted as the last statement of the law in England. It is so accepted in Abb. Merch. Ships (14th Ed.) 209. Therefore, so far as the two items of $201.64 and $1,500 are concerned, they must be allowed to the claimant of the cargo as against the freight reserved in the bill of lading.

By amendment to the answer, made several weeks after the original was filed, the claimant of the cargo, who is its owner, alleges that on or before December 30, 1898, the charterer (that is to say, the corporation known as the Atlantic Transportation Company) was indebted to the claimant in a sum largely exceeding the freight in question; that the Atlantic Transportation Company became insolvent

before the filing of the libel, so that a receiver of its assets was appointed by the decrees of the courts of several states; that said receiver is still in charge of its assets; and that therefore the claimant was unable to obtain payment. It is not stated precisely which way the balance would stand on an accounting of all matters between the claimant and the Atlantic Transportation Company, but the case has come to us on the assumption that it would be in favor of the former, and that such is the fact is not questioned. Neither does it appear how long before December 30, 1898, the debt in question accrued. There is nothing to show that it existed on March 1, 1898, when the charter before us was made. If such were the fact, inasmuch as the claimant of the cargo demands a set-off, the burden rests on it to show it. As the record stands, we are not justified in finding that the indebtedness to the claimant existed on March 1, 1898.

This brings us to the question whether the claimant of the cargo is entitled to a general set-off against this freight, notwithstanding the libelant's lien. We have shown that the owner of the cargo was entitled to look to the charterer as the party with whom it was dealing with reference to the cargo and the freight thereon. Moreover, the rule, of course, is well settled that, inasmuch as the Atlantic Transportation Company has gone into judicial administration as insolvent, all set-offs are to be allowed, so far as can be done with due regard to the equities of strangers. Hutchinson v. Le Roy, 113 Fed. 202, decided by us in January, 1902. Neither can it be questioned that, as an ordinary rule, every assignee of a chose in action not in its nature negotiable takes it subject to all equities, including, of course, the rights of set-off existing between the original parties. Many authorities sustaining this well-known proposition may be found in Pom. Eq. Jur. (2d Ed.) § 704. Yet after all, in cases like that at bar, not governed by express statute provisions, the equities of other parties must be considered before all the rights of set-off can be determined; and the result of the consideration must be in favor of the one having the greater equity, or, if equities are balanced, then in favor of the one having priority. This rule is too well settled to need discussion. We have said that the burden rests on the party claiming a set-off to maintain it, so that he must fail if the equities are otherwise equally balanced, unless he shows that his equity is the earlier. On this appeal the claimant of the cargo, as we have stated, has not shown that its equity was prior in date to that of the libelant.

In Wilson v. Gabriel, 4 Best & S. 243, the queen's bench held that the assignee of a freight in the course of being earned is subject to the rules of set-off which we have stated to be the usual ones; but this case must be regarded as rendered inapplicable to admiralty proceedings, or as reversed by the house of lords in Weguelin v. Cellier, L. R. 6 H. L. 286, where it was held that in admiralty there can be no set-off against freight which by the terms of the bill of lading is payable on delivery of cargo, to the prejudice of one who had become an assignee thereof before the unlading. Inasmuch as, on this record, the libelant intervened before the delivery of the cargo had been completed to the extent of discharging the lien for freight, the case seems to come within Weguelin v. Cellier, last cited. Nevertheless it

can be disposed of on clearer rules. We have already shown that the right of the libelant relates back to the date of the charter, and that, on the record, we must assume that its equity is earlier than the equity of set-off of the owner of the cargo. Each party proceeded in good faith, and each in ignorance of the equitable rights of the other. In those respects their equities were balanced, but on this record the equity of the libelant was earlier. In addition to that, it is a specific equity, relying on the pledge of this particular fund, while the equity of the owner of the cargo is not specific, but only general, without anything to show that reliance was placed on this freight with the view of applying it to the diminution of the charterer's indebtedness. We need not determine what would have been the equities if the set-off claimed by the cargo owner had risen out of credits given on the expectation of offsetting them against this freight. Under the circumstances, the equity of the libelant must prevail against a general set-off, and the decree of the district court must be reversed to that extent.

This opinion has pointed out sufficient circumstances to make it plain that, from the equitable positions held by the admiralty with reference to costs and interest, neither party is entitled to either the one or the other.

The decree of the district court is reversed, and the case is remanded to that court, with directions to enter a decree in favor of the libelant for the amount of the freight according to the bill of lading, less the sum of $1,701.64; and neither party will recover any interest or costs in either court.

CUNARD S. S. CO., Limited, v. KELLEY et al.

(Circuit Court of Appeals, First Circuit. April 18, 1902.)

No. 419.

1. SHIPPING—BILLS OF LADING—RATIFICATION OF UNAUTHORIZED ISSUANCE.
   A steamship company, whose agent has without authority issued bills of lading for goods then in a public warehouse, does not ratify such act and make the bills its own by receiving on board one of its vessels goods purporting to be those described in the bills, where by reason of a fraudulent substitution in the warehouse, of which it was ignorant, the goods actually delivered to it are not the same.

2. SAME.
   The unauthorized issuance by an agent of a steamship company of bills of lading to a purchaser for goods then in a public warehouse, subject to the orders of the seller, who is bound by the terms of the sale to deliver the same on board, does not bind the company, so as to make it responsible for the goods while in the warehouse and before their actual delivery into its custody; and even an acceptance of the goods on board ship is a ratification of the contract of carriage made by the bills of lading only from the time of such delivery.

3. SAME—AUTHENTICATION OF BILLS OF LADING.
   Bills of lading do not prove themselves, and the burden rests upon a shipper relying thereon to prove their execution by a duly authorized agent of the carrier.

4. SAME—BILL OF LADING AS RECEIPT—CONCLUSIVENESS.
A bill of lading is both a receipt and a contract of carriage, and as a receipt it is open to explanation.[1]

5. SAME—CARRIAGE OF GOODS—ACTION FOR NONDELIVERY.
In an action by a shipper against a steamship company for nondelivery of goods, the burden rests upon the plaintiff to prove delivery of the goods to defendant for carriage; and bills of lading, signed for the master, and acknowledging the receipt of goods on the ship, even though shown to have been executed by a duly authorized agent of defendant, are insufficient for that purpose, where plaintiff's evidence further shows that when they were executed the goods had not been received on board ship, nor consigned to the care of a master, but were in a public warehouse, registered in the name of a third party, and that there was no vessel in port.

6. SAME.
Goods were purchased by an agent, to be exported to the purchaser; the sellers contracting to deliver the same on board ship at their expense, which was required to be done by means of lighters. The sellers deposited the goods in the name of their own agent in a public warehouse, from which they could be removed only on the order of the agent. While so stored bills of lading for the goods were executed by an agent of a steamship company to the purchaser's agent; no vessel of the company being then in port. On arrival of the ship on behalf of which the bills were executed, goods purporting to be those sold and covered by the bills of lading were delivered on board by the sellers, and accepted. In a subsequent action by the purchaser against the steamship company for nondelivery of the goods, the authority of defendant's agent to issue the bills of lading, under the circumstances shown, was in dispute. Defendant also introduced evidence tending to show that a fraudulent substitution had been made in the warehouse, and that the goods received on board were not in fact those covered by the bills of lading. *Held*, that it was error to instruct the jury as a matter of law that the execution of the bills of lading, taken in connection with the subsequent acceptance of the goods on board thereunder, operated to place them in the constructive possession of defendant from the date of the bills, making it responsible for their care and protection thereafter, but that the questions of the agent's authority to issue the bills, and whether there was an actual delivery of the goods to defendant, were under the evidence both questions for the jury, upon which plaintiff had the burden of proof.

7. SAME—ACCOMMODATION BILL OF LADING—EFFECT AS RECEIPT.
The giving of a bill of lading as a matter of accommodation, before the actual delivery of the goods, does not impose upon the carrier an obligation to make an effort to get possession of the goods wherever they may be, when the owner has contracted to deliver them on board the carrier's vessel; but as proof of the actual taking of possession by the carrier the bill stands as a mere receipt, subject to rebuttal or explanation, by showing that it was not the intention of the parties to make any change in the actual or legal custody of the goods until loaded.

8. SAME—EXEMPTIONS IN BILL OF LADING—CONSTRUCTION AND VALIDITY.
A general clause in a bill of lading, exempting a shipowner from liability for loss of goods while on the quay, or loss by thieves, is not to be construed as applying to cases where such loss arises through the carrier's negligence or failure in proper custody or care, so as to render it invalid, under section 1 of the Harter act (27 Stat. 445), providing that "any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void," nor is it rendered void, under such provision, by a subsequent clause extending all exemption provisions to cases of negligence, the two clauses being separable; but the carrier is entitled to the benefit of the exemption, unless it is found that its negligence or fault contributed to the loss.

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[1] See Carriers, vol. 9, Cent. Dig. § 148.

9. EVIDENCE—COMPETENCY—SIMILAR FACTS IN CONNECTION WITH SAME TRANSACTION.

In an action against a steamship company for nondelivery of goods, it appeared that plaintiffs' agent purchased a quantity of goods from a firm in a foreign port, the sellers contracting to deliver the same on board ship at their expense; that the sellers stored the goods in a public warehouse, where they remained subject to their order only, until removed by them for delivery on board the vessel; that on delivery of the packages to plaintiffs they were found not to contain the goods purchased and described in the bills of lading. Defendant offered evidence to show that other packages, constituting a part of the same purchase and stored in the warehouse at the same time, which had been shipped by a vessel of another carrier, were found on delivery to plaintiffs to have been similarly tampered with, and their contents changed. *Held*, that such proof was strong and legitimate evidence to support defendant's contention that the substitution had been made by the sellers, who had the same motive and opportunity in both cases, and that the pendency of a similar action against the other carrier, involving the goods shipped by its line, constituted no ground for its exclusion.

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

George Putnam (James L. Putnam, on the brief), for plaintiff in error.

Sherman L. Whipple (Whipple, Sears & Ogden, on the brief), for defendants in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This writ of error is to review the rulings of the circuit court, in an action at law for failure to deliver at Boston 53 bales of goatskins alleged to have been delivered to the Cunard Steamship Company, at Naples, Italy, for transportation to Boston, Mass. The chief defense of the steamship company was that the goods were not delivered to it for carriage.

The rulings of the circuit court relating to the question of delivery present the principal questions before us.

It is agreed that:

"The Cunard Company had no dock at Naples, and goods shipped by its steamships had to be put on board in lighters. The Punto Franco is a wharf and warehouse owned by a limited company called the 'Societa Meridionale dei Magazzine Generale,' a 'Societa Anonima' or limited company, in which goods intended for shipment are deposited by the owners or shippers until they should be put on board.

"It was a frequent practice of steamship agents in Naples to give bills of lading to shippers of goods deposited in the Punto Franco to await the arrival of steamships."

Garsin, the agent of the plaintiffs, brought from Petriccione Bros. in Naples two lots of goatskins,—the first of 38 bales, and the second of 15 bales. By agreement, the Petriccione were to make delivery of the bales on board steamer, and the price paid was free on board. Both lots of goods were entered at the Punto Franco in the name of Ricciardi, the Petriccione's shipping agent. The Petriccione were to bear the expense of lightering the goods from the Punto Franco to the steamer. Goods entered in the Punto Franco are registered

in the name of the depositor or his shipping agent, are given a number on the books, and can be taken from the Punto Franco only by the direction of the person in whose name they stand. While the goods were thus on deposit in the Punto Franco, and standing in Ricciardi's name, two bills of lading were issued to Garsin. The bill for the lot of 38 bales contained the following statement:

"Shipped in good order and condition by A. Garsin & Co., in and upon the good steamship called the Aleppo, whereof ——— is master for the present voyage, * * * and now lying in this port and bound for the port of Liverpool, for Boston, Mass."

This bill of lading was signed, "For the master, p. Nicola Ferolla, Ettore Rondino." The bill for 15 bales acknowledged receipt of the goods upon the Tarifa, and bore a like signature.

It was agreed that Ferolla was the agent of the Cunard Company, "with authority to sign for the master bills of lading for the transportation of merchandise delivered on board the steamships of that company at Naples," and "Rondino was Ferolla's clerk, with power to exercise his authority."

At the time of signing and delivery of the bills of lading, no vessel was in port.

The stipulated facts did not show that Rondino was authorized to receive goods on behalf of the company at the Punto Franco, or to give bills of lading for goods deposited there.

The circuit court instructed the jury that the bills of lading were the bills of lading of the Cunard Company, irrespective of any direct evidence in the case as to the authority of Rondino, saying:

"The Cunard Company received the freight called for by them, and assumed to deliver the goods they described, and therefore it accepted the papers as its bills of lading."

In these instructions we find substantial error.

The Cunard Company contended that, after the delivery of the bills of lading to Garsin by Rondino, and while the goods were in the Punto Franco, and before they had come into the possession of any authorized agent of the company, a fraudulent substitution of goods was made; that bales of sheepskins were substituted for the goatskins described in the bills of lading; and that, though the Cunard Company did receive aboard the steamship Tarifa 53 bales, which, by their marks, purported to be the goods described in the bills of lading, they were not in fact the same goods.

There certainly was evidence to support this contention, and to entitle the Cunard Company to a finding by the jury thereon.

If, in receiving goods aboard the Tarifa, the company's agent was deceived or misled by fraudulent marks, and took aboard, carried, and delivered other goods than those described by the bills of lading, such acts cannot amount to an acceptance or ratification of bills of lading previously unauthorized.

If the act which is relied upon to establish a ratification was itself induced by deceit or mistake, it cannot amount to ratification.

Unless the fact of substitution of goods was known to the company, it did not ratify. Bennecke v. Insurance Co., 105 U. S. 359, 360, 26 L. Ed. 990; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933.

The case was sent to the jury upon the theory that the question of actual authority was immaterial. Let us consider the case upon this view.

Unless authorized, Rondino's acts were not an acceptance of the goods at the Punto Franco. While in the Punto Franco, and in the possession of the Punto Franco for the owners, or for Ricciardi, or perhaps for Rondino, the goods were at the risk of one or more of these persons. The Cunard Company, on this view, was under no obligation to care for the goods; and for all that occurred during the period when the goods were at the Punto Franco the Cunard Company was without liability, either for negligence or for breach of contract.

During this time a substitution of goods was made. This was a fraud practiced upon the persons then in possession. If the Cunard Company subsequently received the substituted goods as and for the goods originally deposited, in ignorance of the fact that through the misfortune or fault of the shipper or his agent they had been changed, are we to say that this innocent mistake makes it responsible, on the ground that it voluntarily assumed responsibility for a loss which occurred entirely through the fault of others? Its acceptance of goods aboard ship was at best a ratification of the written contract of carriage, but cannot be held to amount to a ratification of a previous receipt of goods. The contract of carriage, if ratified, is still conditional upon the actual delivery of the goods.

In The Idaho, 93 U. S. 582, 23 L. Ed. 978, it was said:

"A delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery."

The receipt of goods not corresponding in substance to the bill of lading could not make the bill of lading good from the date it was delivered.

There would be absolutely no consideration to support a promise by the Cunard Company to pay for goods which it did not in fact receive, and which were lost at a time when the company was not responsible for their custody.

The burden was on the plaintiffs to prove delivery of the goods to the Cunard Company.

We are of the opinion that neither party is entitled to require that this court, upon the evidence before it, should decide whether the goatskins in question were actually received upon the Tarifa. This was a question of fact for the jury. This question was taken from the jury and therefore the defendants in error must support the verdict by showing that the goods were delivered to, and accepted by, the Cunard Company at the Punto Franco.

The circumstantial evidence as to Rondino's actual authority to receive goods at the Punto Franco, and to give bills of lading for goods there deposited, was, at least, insufficient to justify a direction that the bills were the bills of the Cunard Company.

The bills of lading did not prove themselves, and the burden rested upon the plaintiffs to prove execution by a duly authorized agent.

We are of the opinion that there was evidence from the plaintiffs

which entitled them to go to the jury upon the questions of Rondino's authority, and the due execution of the bills of lading, and that the question of authority was one for the jury.

But, even if the bills of lading were issued by a duly authorized agent of the Cunard Company, this would still be insufficient to justify the direction of a verdict for the plaintiffs. A bill of lading is both a receipt and a contract of carriage. As a receipt, it is open to explanation.

The plaintiffs had the burden of proving the allegation that they had delivered these goods to the defendant for carriage. They offered certain bills of lading, which, if duly executed, were evidence of what appeared on the face of the bills, to wit, an acknowledgment of the receipt of goods on board the ship by the master. The prima facie case created by these bills was overthrown by evidence offered by the plaintiffs themselves, to the effect that the bills of lading were executed and delivered before the goods were received aboard ship, or consigned to the care of a master, and while no vessel was in port. The burden of proof still remained upon the plaintiffs to show a delivery to the company. Upon the whole case, the burden was not upon the defendant to show that it had not authorized the receipt of goods in the Punto Franco, but upon the plaintiffs to prove that it had.

The court further instructed the jury, as follows:

"While the goods were in the Punto Franco, after the bills of lading were given, they were, by the effect of the bills of lading, held by that public warehouse for the defendant corporation and as its representative, except so far as, in accordance with the understanding between the parties, the persons from whom the goods were purchased were to take a part in transporting them from the wharf to the vessel. If there was neglect with reference to them on the part of the Punto Franco, it is to be presumed that the defendant has its remedy over against that association."

The court further instructed the jury that, the defendant having given bills of lading for the goods while in this public warehouse, it was its duty to make efforts to have the goods transferred on the books of the Punto Franco to itself, or otherwise to see to it that there was no intermeddling with the goods during their custody by the Punto Franco. In these instructions we think the circuit court was in error.

While a public warehouse may become the agent of various persons, and may become the agent for whom it may concern, there is no conclusive evidence that relations were established between this warehouse and the Cunard Company. The possession of Ricciardi seems to us inconsistent with possession by the Cunard Company.

To effect a complete delivery to a carrier, goods must be put into the carrier's absolute control. Before these goods were ready for shipment, it was necessary that they should be withdrawn by Ricciardi, the person known to the Punto Franco, carried to the vessel on lighters, and put on board. Ricciardi testified that the bales could not be touched or examined without his authorization. The Petriccione were to pay charges for the entry and the exit of the goods in the Punto Franco. Garsin testified that to withdraw the goods required the authorization of the custom house, of the Punto Franco, and of Ricciardi. Therefore, before the Cunard Company could have had a

complete control and custody of the goods, it must have procured the assent of Ricciardi, the agent of the vendors, of the custom house, of the Punto Franco, and could not have loaded the goods save by paying or making satisfaction for all fees and also paying the charges of lightering. As it assumed no obligation to do these things, its contract was conditional upon their being done by others.

The giving of a bill of lading does not of itself amount to an actual taking of possession of the goods described, nor by itself effect a constructive change of possession; nor, if it be given as a matter of accommodation before the actual delivery of the goods, does the giving of a bill of lading impose upon the carrier an obligation to make an effort to get possession of the goods, wherever they may be, when the owner has contracted to deliver them to the carrier. As proof of the actual taking of possession, the bill stands as a mere receipt, subject to rebuttal or explanation; and the plaintiffs' evidence in this case furnished the explanation of the actual occurrence.

We do not think that the case of Railroad Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944, supports the instruction that the giving of a bill of lading for goods in a public warehouse works a constructive change of possession. While in that case there was a reservation of opinion as to what would be the rule of law if the goods had been constructively delivered to the carrier through the compress company, the question of what amounts to constructive delivery of goods in the possession of a third person was not involved. It is clear that, had these goods been in the shop of the Petriccione at the time of the giving of the bills of lading, there would have been no change of possession; and we are not prepared to say that the situation is altered by the fact that they were delivered by the vendor to a warehouse, wherein it is agreed, "Goods are deposited by the owners or shippers until they should be put aboard."

As the case was left upon the evidence, the actual possession and custody was in a third person; that is, the Punto Franco Company. Upon the question of agency of the Punto Franco, the evidence shows that there was custody for and in behalf of the Petriccione's agent, Ricciardi; and assuming that the title to the goods had passed to Garsin, Ricciardi, as agent of the Petriccione, must be regarded as the agent of the owners and shippers of the goods. As no steps were taken to have the record in the Punto Franco changed, and as the record of title was entirely consistent with an intention that the Punto Franco should continue to hold the goods on behalf of the shipper until the goods were actually shipped, it was error to rule, in effect, that such evidence as was afforded by bills of lading showed conclusively, and as a matter of law, a constructive change of possession.

In one view of the evidence, the transaction amounted to this: The goods were in the hands of the Punto Franco to hold for Ricciardi, who was in no wise the agent of the Cunard Company. Ricciardi undertook, not only to withdraw them and put them aboard at the cost of the Petriccione, but also to store them at his own charge until he should do this. Under these circumstances, and in the reasonable expectation that the goods would come aboard the ship, and at the request of the shipper, who was cognizant of all the circum-

stances, Rondino gave a bill of lading, stating that the goods had been actually shipped. Upon the view most favorable to the plaintiffs, they might be entitled to go to the jury for a determination of the question of fact as to whether or not it was the intention of the parties to cast upon the Cunard Company responsibility for the care of the goods while in the Punto Franco. They were not entitled to an instruction that a bill of lading, given while goods are in a public warehouse, by itself works a constructive delivery of goods, or that, upon the evidence in this case, there had been a delivery to the Cunard Company.

While we incline to the view that the evidence was insufficient to prove a delivery to the Cunard Company at the Punto Franco, yet, as the plaintiffs contend that the goods actually went aboard the Tarifa marked in accordance with the bills of lading, a decision that there was no delivery at the Punto Franco would not be a final decision as to the rights of the parties. It is, therefore, sufficient for us to say that the evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or the legal custody of the goods until loaded. St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co., 139 U. S. 227, 238, 11 Sup. Ct. 554, 35 L. Ed. 154. The direction of a verdict was, therefore, erroneous.

The defendant also contended at the trial below that, even if the goods were received at the Punto Franco, it was not liable, by reason of exemptions in the bills of lading, against loss by thieves and loss while goods were on the quay.

The circuit court held, as to these exemptions, that it felt bound to follow the rule laid down in Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, and that it was prohibited from giving effect to so broad an exemption as the provisions called to its attention.

While that case is an authority to the effect that a common carrier cannot, by exception in a bill of lading, exempt himself from liability for loss to which the negligence of himself or his servants has contributed, the case does not seem to us decisive of the validity of the exemptions here involved.

That the common-law liability of a carrier may be limited by special contract, as to losses not due to negligence or fault, is well established. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465; York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall. 107, 18 L. Ed. 170; The Victory, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; The Queen of the Pacific, 180 U. S. 49, 56, 57, 21 Sup. Ct. 278, 45 L. Ed. 419.

With reference to the exemptions of loss of goods while at the quay, and as to loss by thieves, the defendants in error contend that the exemptions are invalid, so far as they are exemptions against negligence, and that, as the defendant failed to offer any evidence to account for their loss, it will be presumed to have arisen from negligence.

There was, however, sufficient evidence to have warranted the jury in finding as a fact that the substitution of goods was made by the Petriccione at the Punto Franco; and, under all the circumstances, it could not have been ruled, as a matter of law, that the Punto Franco,

or the steamship company, was negligent in not guarding against a fraudulent scheme of this unusual character, committed by a person whose duty to put the goods aboard ship may have facilitated the commission of a fraudulent scheme by substitution of marks and labels. Such access to the goods as rendered the fraud possible seems to have been due to the fact that the Petriccione were the shippers' agents.

Nor does it seem to us that these exemptions are invalid, as a matter of law. Chapter 105 of Act Feb. 13, 1893 (27 Stat. 445), provides that it shall not be lawful to insert in a bill of lading provisions relieving from liability for loss arising from negligence or failure in proper custody or care, and that "any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

While there is, in these bills of lading, a general provision that goods on the quay shall be at the sole risk of the shipper, this provision is not accompanied by any clause in terms exempting from negligence; and the proper construction of such general language restricts it to cases where the carrier is not at fault for negligence or failure of due care.

In Compania de Navigacion La Flecha v. Brauer, 168 U. S. 104, 123, 18 Sup. Ct. 12, 17, 42 L. Ed. 398, it was said:

"The words 'on deck at owner's risk' cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or willful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading."

See, also, Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Constable v. Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903.

Properly construed, therefore, the exemption is not invalid.

So, also, a general exemption against thieves is valid, and is not to be construed as including or applicable to a case where there was negligence on the part of the ship which contributed to the theft, or facilitated it. The Saratoga (D. C.) 20 Fed. 869.

While this bill of lading, in connection with the exemption of "thieves," contains the clause:

"Whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error of judgment of the owners, pilot, master, officers, crews, stevedores, or other persons whomsoever in the service of the ship, etc., or otherwise,"—we think that the existence of this clause does not require us to hold the exemption entirely invalid, since by the terms of the statute, only "words or clauses of such import" are made null and void.

As the clauses exempting from negligence are separable, they do not entirely invalidate the exemption. The Saratoga (D. C.) 20 Fed. 869, 870.

We are therefore of the opinion that there was error in the ruling that the exemptions were to be given no effect; but we are

also of the opinion that the defendant was not entitled to a direction that, by these exemptions alone, it was freed from liability.

The jury, in our opinion, should have been instructed that the defendant was entitled to the benefit of these exemptions, unless upon the facts in evidence the jury should find that the negligence of the company or its agents contributed to or facilitated the substitution of goods, if it should be found that a substitution was made at the Punto Franco.

The third assignment of error relates to the exclusion of evidence. The defendant offered evidence tending to show that the Petriccione had perpetrated a similar fraud upon Garsin in relation to a previous shipment of 37 bales of goatskins by the steamship Scindia of another line. The plaintiff Kelley testified, against objection of plaintiffs' counsel, that 37 bales, shipped to the plaintiffs by the Petriccione upon the Scindia, were also found, upon delivery to the consignee, to consist of sheepskins and refuse goatskins, instead of the goods called for by the bill of lading.

The defendant contended that evidence of this previous fraud was admissible, since both lots of skins were parts of the same purchase made by Garsin from the Petriccione, and that the shipment upon the Scindia and the shipment on the Tarifa were parts of a continuous scheme of fraud, and parts of one transaction. It was argued that Garsin had already been tricked once, and that this supported the inference that he was tricked out of the goods now in question in a similar way; in other words, that the fact that the Petriccione had cheated Garsin out of one part of his purchase pointed to the Petriccione as the persons who had cheated him out of the goods in question in this case.

We think that proof that the Petriccione had made the substitution of sheepskins in the Scindia shipment would lead to a strong and legitimate inference, under the circumstances of this case, that it was they who did the same thing with the Tarifa shipment. The shipments were by steamers of different lines. Both lots of goods were deposited in the Punto Franco in the name of the Petriccione's agent. Both shipments being under the same control at the Punto Franco, both having been treated in the same way by an unusual trick, the alternative is either that on two steamers the same unusual trick originated from different persons, or that both tricks were perpetrated by the same person. The similarity of the occurrences pointed to one person as the author, and to a person who had access to both lots of goods while in the Punto Franco.

Were the question between the Petriccione on the one side and their vendee on the other, and were it proved that, upon delivery at Boston, the Scindia bales and the Tarifa bales both contained sheepskins, instead of goatskins, we have no doubt that direct proof that the Petriccione had tampered with a portion of the goods, even a single bale, and had access to all, would be competent and sufficient evidence to prove them to be the author of the entire substitution, and to support an allegation that they had not shipped the goods which they agreed to ship.

While the defendant is directly concerned with only a part of the entire purchase, we fail to see why it is not entitled to the same scope of evidence as would be open to the plaintiffs, were they sued by the Petriccione, for the price of the goods, and made defense on the ground that the goods had not been shipped.

In Steph. Dig. Ev. art. 3, it is said:

"Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority, and on which single judges have given different decisions."

We are of the opinion, however, in the present case, that the fact that goods bought for the plaintiffs from the Petriccione were sent in two shipments by different lines of steamers does not alter the fact that there was, as between the plaintiffs and the Petriccione, what may be regarded as a single transaction, to wit, the sale and agreement to ship the amount of goods covered by the bills of lading for both shipments. All the goods in both shipments had been tampered with in the same way. It was improbable that this was done on two different steamers by different persons. The true boundaries of the main transaction, so to speak, were, on the one side, the sale and agreement to deliver aboard ship all the goods purchased, and, on the other side, the failure to receive any of the goods purchased and the receipt of substituted goods. The intermediate and subordinate transactions were the separate shipments on separate steamers. These shipments were traceable to a common source, the Petriccione, who had the opportunity to make the change at the Punto Franco. Proof, therefore, that a part of the substitution had been effected there by them would be, in our opinion, strong and legitimate evidence to support the contention that the remainder of the substitution had also been accomplished by the same persons and at the same place.

We are of the opinion that the evidence was competent. It is nevertheless necessary to consider the precise ground upon which it was excluded.

The objection was as follows:

"On the ground that the events connected with the Scindia are a subject-matter of another suit, which is to be tried in this court, the counsel for the defendant in which case are now present, very properly, of course, to hear such disclosures as may be made in this case concerning the Scindia lot. We are not trying the Scindia case here now, and it is not material in this case, and I prefer not to go into it, because, if we do, we must go into it at length."

We think these reasons insufficient for the exclusion of the evidence. If, in the trial of each suit, the evidence should be strictly confined to the goods directly involved, the result would be to split up the actual main transaction between the Petriccione and the plaintiffs into two distinct and artificial parts. Each subordinate part of this main transaction would then stand alone, and would receive no light from the other. Neither case would then comprehend the whole business transaction, nor the important facts that both lots of goods had been tampered with in the same way, that one person had the motive and opportunity in both cases, that the trick in each case indicated a com-

mon author, the Petriccione, and negatived two authors, the two steamship lines. We think that the exclusion of the evidence for the reason assigned by counsel was error.

We are of the opinion that the judgment should be reversed, and the verdict set aside, for the reasons set forth in the third, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error.

The eleventh request for instructions, referred to in the fourth assignment of error, in our opinion, should have been granted, but with additional instructions that the exemption was inapplicable if the defendant had received the goods and was guilty of negligence in relation to their custody.

The remaining assignments of error are either insufficient or too broad to raise the questions argued in connection therewith upon the brief, or called for instructions as to the effect of evidence to which the defendant was not entitled.

The judgment of the circuit court is reversed, the verdict set aside, and the case remanded to the circuit court for further proceedings not inconsistent with this opinion, and the costs of appeal are awarded to the plaintiff in error.

DUPLAN SILK CO. v. SPENCER.

(Circuit Court of Appeals, Third Circuit. May 7, 1902.)

1. BUILDING CONTRACT—CONSTRUCTION.
   A provision of a building contract that the owner may, in case of default by the contractor, proceed to finish the building himself, and, to that end, use materials brought by the contractor on the ground for the purposes of the building, being accountable to the contractor for any excess of the unpaid contract price over the cost of completion, is not one for a forfeiture, which must be strictly construed against the owner, since it does not involve the taking of any property of the contractor by way of penalty or punishment, but is in the interest of both parties, and is to be fairly construed to effect its purpose.

2. SAME—LIEN OF OWNER ON MATERIALS DELIVERED.
   Under such a provision, materials brought by the contractor upon the owner's premises, and appropriated to the building contracted for, are to be considered as so far delivered into the possession of the owner as to make them a security for advances made by him on the contract, and to vest in him a qualified right of property in the same, consistent with the right of the owner to use them in the fulfillment of his contract.

3. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—VALIDITY OF LIENS.
   The owner of a building in course of erection by a contractor, given by the contract a general lien on all materials which are delivered on the premises for the fulfillment of the contract, who makes advances to the contractor upon an oral agreement that materials previously so delivered shall stand as security therefor, does not thereby make a new contract which can be held to give him an unlawful preference under the bankrupt law; but its effect is merely to render specific a previous general lien, and his possession is such that the property cannot be disposed of by the contractor, or levied upon by his creditors, and it will not, therefore, pass to the latter's trustee in bankruptcy by virtue of Bankr. Act 1898, § 70; nor will his failure to record the lien, in view of such possession, render it invalid under a state statute of frauds, or as against the trustee in bankruptcy under section 67a.

4. SAME—ACTION BY TRUSTEE TO RECOVER PROPERTY—DEFENSES.
A trustee in bankruptcy, seeking by a proceeding at law to enforce the title of the bankrupt to personal property, will be subject to all legal and equitable claims of others to the property which exist against the bankrupt, and which are not in fraud of the bankruptcy law or the rights of general creditors.

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

R. C. Dale, for plaintiff in error.
T. M. B. Hicks, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This was an action of trover, called under the Pennsylvania practice act of 1887 an action of trespass. It was brought by the defendant in error, as trustee in bankruptcy of the estate of Bennett & Rothrock, who were contractors and builders, against the Duplan Silk Company, charging the conversion of certain chattels, consisting principally of lumber, iron work, nails, cement, brick and sundry builder's utensils, of which a complete schedule is given in plaintiff's statement. There is little or no dispute about the essential facts in the case, as disclosed by the evidence. They are substantially as follows:

Bennett & Rothrock were builders, and, as such, entered into a written contract with the Duplan Silk Company, bearing date August 30, 1899, to erect a silk mill for the defendant at Hazleton, Pa., providing all materials and performing the work mentioned in the specifications and shown in the drawings prepared by the architect. By this contract, it was provided that the sum to be paid by the owner to the contractor, for said work and materials, should be $76,000, payable in installments as the work progressed to certain specified stages, the first installment being $5,000 and the remaining ones $10,000 each. On the same day, a supplemental contract, according to the form of contract recommended for general use by the American Institute of Architects, was executed between the parties.

About December 15, 1899, when the excavations and foundation walls and piers had been completed, and the brick walls partly built, work on the building was lagging. Although, according to the terms of the contract, only the first installment of $5,000 had become due, and it had been paid, Rothrock, one of the contractors, came to Emory J. Lipps, general manager of the Duplan Silk Company, and through whom, as its agent, the building contract was made, and asked whether certain moneys could not be advanced beyond what the contract called for. Lipps told him that, personally, he could not advance any money, but that if he presented his case to the board of directors of the Duplan Silk Company, they might be willing to do so. Accordingly, on December 16th, there was a meeting in New York City, between Rothrock and those representing the company, at which Rothrock stated that he was very short of money, and that unless he could get some from the company in advance, he could not pay for the material he had ordered, and the men would put him into bankruptcy. They had already made him a payment of $5,000 and no

other installment was then due. The testimony of Lipps, as to the transaction between the parties, proceeds as follows:

"We had a meeting in New York City, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000, he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we consequently gave him the $15,000. That was on December 16th. * * * Q. So the amount you had paid to the fifteenth of December was $20,000, although he was entitled to but $5,000? A. Yes, sir; he was entitled to $5,000 when the excavations were done, and $10,000 when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5,000, and we advanced him $15,000 more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground."

After this money was advanced, work was continued for a short time, and by Christmas, or a day or two thereafter, it was practically abandoned. On the 13th of January, 1900, Bennett & Rothrock, on their own petition, were adjudicated bankrupts, and W. H. Spencer, defendant in error, was duly appointed and qualified as trustee of their estate. The chattels in controversy were scheduled among their assets, and there were numerous judgments against them, and executions issued thereon, when the petition was filed and the adjudication made.

On January 11, 1900, certain letters from the Duplan Silk Company were sent to and received by Bennett & Rothrock, and, as they appear in the record, are as follows:

"South Bethlehem, January 11, 1900.

"Messrs. Bennett & Rothrock, Williamsport, Pa.—Gentlemen: We hereby notify you that on account of your failure or inability to prosecute the work on our silk-mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above-named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

"Yours truly, Duplan Silk Company,
"E. J. Lipps, General Manager."

"South Bethlehem, January 11, 1900.

"Duplan Silk Company, New York City, N. Y.: I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein. E. J. Lipps."

"South Bethlehem, January 11, 1900.

"Messrs. Bennett & Rothrock, Williamsport, Pa.—Dear Sirs: Inclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton. Yours truly, Duplan Silk Company."

It is admitted by counsel for plaintiff in error that these letters were intended to be pursuant to the fifth article of the supplemental contract, which provides as follows:

"Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after ——— days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificates thereof shall be conclusive upon the parties."

On January 15th, the plaintiff in error took exclusive possession of the building materials and tools, which constitute the property in controversy in this action, and which had been brought upon the premises by Bennett & Rothrock for the purpose of being incorporated in the mill, for the building of which they were contractors. The plaintiff in error then proceeded to use the materials in the erection of the building, upon which Bennett & Rothrock had defaulted. Thereafter, Spencer, defendant in error, as the trustee of the bankrupt estate, demanded from the plaintiff in error these materials. The demand was refused; whereupon, this action of trover for the recovery of the same was commenced by the said trustee.

Upon this evidence, the court below gave a binding instruction in favor of the plaintiff below, reserving the question of law, whether there was any evidence to go to the jury in support of the plaintiff's claim, and subsequently, on the motion of defendant below for judgment, non obstante veredicto, directed judgment to be entered for the plaintiff and against the defendant. (C. C.) 112 Fed. 638.

The question for the court here is whether the court below was right, upon this state of facts, in refusing the defendant's motion for judgment non obstante veredicto, and in directing judgment to be entered for the plaintiff and against the defendant.

The learned judge of the court below regarded the notices given by the owner to the contractor, on the 11th of January, and the subsequent taking possession, on the 15th of January, of the materials brought on the premises by the contractor for the purposes of the building, as proceedings to enforce a forfeiture under article 5 of the supplemental contract, and as such to be strictly construed. Taking this view of the character of the provisions of said article 5, he decided that there had not been such a strict compliance by the owner with

the requirements of said article 5, as to entitle it to claim a forfeiture, and that the unqualified and absolute property in the materials in question, passed to the trustee of the bankrupt contractor on the date of the adjudication of the bankruptcy. It was on this view, principally, that the judgment was entered which was equivalent to peremptory instructions to the jury to find for the plaintiff. On the undisputed facts, however, of this case, we think there was fundamental error in the position thus taken by the court below.

We do not think that the notices given by the owner, on the 11th of January, and the certificate of the architects on the same day, or the taking exclusive possession of the materials on the ground, on the 15th of the same month, are to be regarded as steps to enforce a forfeiture, nor that the right reserved to the owner under article 5 of the supplemental contract, is to be held as a stipulation to that effect. The contract between the parties, contained in said article 5, is to be construed by its plain terms. So construed, it provides a particular mode, by which the owner of the premises may enforce the general security, evidently intended to be given him, by the materials brought on to the ground by the contractor, and appropriated by him to the purposes of the building under construction. In this, we discover no features of a technical forfeiture. The strictness with which it is sometimes said that a contract involving forfeiture must be construed, is not applicable here. The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building, no suggestion of loss of property to the contractor, by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described, would tend to minimize the loss that would otherwise accrue to the contractor from his own default. Looking, then, at article 5 to discover the intent of the parties as to this stipulation, we think it is clearly apparent to have been, that the materials brought by the contractor upon the premises, and appropriated to the building contracted for, should be considered as so far delivered into the possession of the owner, as to make them a security for the advances made by the owner. A quasi or qualified right of property in these materials by the owner of the soil, and a possession not inconsistent with the builder's right and duty to incorporate them in the building, would thus result from their delivery by the contractor on the premises, and their appropriation to the construction of the building.

In this view of the case, we are not here concerned with the question, whether the plaintiff in error precisely complied with all the requirements of article 5, in taking steps to make effectual the security furnished by the materials brought by the contractor on the ground. The general contract as to this matter must be taken to mean something, and it would be of little avail to say that the plaintiff in error can take the steps prescribed in article 5 to make this security available, if the materials themselves could be taken away,

as claimed by defendant in error, by the execution of a creditor or the action of a trustee in bankruptcy. The effect of the whole contract between the parties, including article 5 of the supplemental contract, in whatever terms it may be described, was to affix to the materials brought upon the ground and appropriated to the building by the contractor, a charge or interest in favor of the plaintiff in error, consistent with the qualified ownership of the defendant in error, but commensurate with the requirement, that they should furnish security to the plaintiff in error for the performance of the contract and for advances made.

The special oral agreement of December 16, 1899, as set forth in the testimony of Mr. Lipp, general manager for the plaintiff in error, which is not contradicted or disputed, may be taken as a specific appropriation of the materials at that time delivered on the premises of plaintiff in error, as security for the advances then made, freed from the requirements of notice and certification by the architect, contained in the fifth article of the supplemental agreement; and as making effective and available at once the inchoate lien or title of the plaintiff in error to said materials. In other words, by this oral agreement, the qualified possession of these materials by plaintiff in error, was made immediate and unqualified. The security originally intended by the parties, was perfected as to the advances then made.

Nor in this view of the mutual rights of the parties, can it be contended that this oral agreement of December 16, 1899, was an unlawful preference, in fraud of the bankrupt law. It was not a new and independent contract, but a recognition of the old contract, and in furtherance and consummation of its intent. A mortgagor, who puts his mortgagee into actual and unqualified possession of the chattels mortgaged, instead of compelling him to take the formal steps for a foreclosure, is acting in furtherance of the original contract, not making a new one, in the sense that would, in this case, transgress the inhibition of the bankrupt law as to preferential conveyances.

Unquestionably, the defendant in error could not have been heard to challenge the legal and binding effect of this contract, as above described; but their counsel now contend that, even though it be good between the parties, their immediate representatives and volunteers, this contract cannot bind third parties without notice, and that bona fide judgment creditors could have levied upon and sequestered the materials here in question, unaffected by the contract, even though admitted to be binding between the parties. And if creditors could have so attached the property, free from any claim on the part of the plaintiff in error, then it is argued that, under the provisions of section 70 of the bankrupt law, which gives to the trustee any property which might have been levied upon and sold under judicial process against the bankrupt, the unqualified property in these materials vested in the trustee. The statute of Elizabeth, as in force in Pennsylvania, is invoked to declare illegal against creditors any conveyance, pledge or charge of property, unaccompanied by delivery or change of possession, and the court below, taking this view, relies upon section 67, cl. "a," of the bankrupt law, which provides that "claims which for want of record, or for other reasons, would not have been valid liens

as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under judicial process against the bankrupt, either generally, or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But this assumption is not warranted. The goods delivered by the contractor upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties to the contract. They were in the possession of the owner of the freehold as fully as they could be, consistently with the right of the contractor to incorporate them in the building. In this respect, this case differs from those cited by defendant in error, in which the materials furnished by the contractor, and in litigation between the parties, were in the exclusive possession of the contractor, never having been delivered upon the premises of the owner. Materials delivered as in this case, are notoriously to all the world, in the qualified possession and ownership of the owner of the freehold, and the creation of a lien or charge, or the making of a conveyance, would not require, or indeed be susceptible of, any further delivery or change of possession, in order to take the case out of the mischiefs of the statute of frauds. To merely say that these materials could have been levied on by judgment creditors of the bankrupt, and thus bring them within the description contained in section 70 of the bankrupt law, of property that, upon the adjudication of bankruptcy, passed to the trustee of the bankrupt, is begging the question. These materials would not, in our opinion, after their delivery on the premises by the contractor, have been liable to such a seizure, for the reasons that we have already stated. The situation of the parties, as the result of the contract between them, was such, that the contractor could have made no disposition of this property, inconsistent with his obligations under the contract, and he could have been prevented in equity, by injunction, from so doing; and equally so could a creditor have been prevented from asserting a right of seizure inconsistent with the interest of the plaintiff in error. In this respect, we think the case is quite within the ratio decidendi of Hauselt v. Harrison, 105 U. S. 401, 407, 26 L. Ed. 1075. The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt, to personal property so situated, will be subject to all legal and equitable claims of others, which exist against the bankrupt, not in fraud of the bankrupt law or the rights of general creditors. Hauselt v. Harrison, supra; Cook v. Tullis, 18 Wall. 341, 21 L. Ed. 933; Yeatman v. Institution, 95 U. S. 764, 24 L. Ed. 589; Stewart v. Platt, 101 U. S. 739, 25 L. Ed. 816; Lumber Co. v. Ott, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136; Chattanooga Nat. Bank v. Rome Iron Co. (C. C.) 102 Fed. 755.

The law of the contract, as we view it, supports the claim of plaintiff in error, that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request

of the contractor for an advance of $15,000, upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor, to enforce the original contractual right and to apply the materials to the use to which they had been specifically appropriated by the contractor, in delivering them on to the premises of the owner for use in fulfilling the contract.

We disagree, also, with the position taken by the learned judge of the court below, in regard to the effect of the oral agreement of December 16th, when he says:

"Even assuming, however, that a contract of pledge was actually made, it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privileges reserved under the 5th article, would also be stricken down by the Pennsylvania law in favor of other creditors."

What we have already said, as to the effect of the delivery by the contractor of the materials upon the premises of the silk company, in giving it a possession that would protect the lien which we think was intended to be created by the parties in their general contract, and especially in the fifth article of the supplemental agreement, is applicable to the proposition of the learned judge, just quoted. There is no intimation in the testimony that, if this oral agreement was a distinct and independent pledge, it was not, to use the language of section 67, cl. "d," of the bankrupt act, "given or accepted in good faith faith, and not in contemplation of or in fraud upon this act and for a present consideration." The only question, then, is the one upon which the court below expressed itself in the opinion just quoted, to wit, that there was no sufficient delivery or change of possession, to deprive the transaction of the character of a secret lien, as denounced by the law of Pennsylvania in that behalf, in favor of attaching creditors, and therefore of the trustee in bankruptcy. The intention to pledge being clear, and the consideration being substantial and adequate, what other act was necessary, to give the requisite possession to avoid the mischiefs aimed at by the law of Pennsylvania, as founded on the statute of Elizabeth? The materials were already on the land and premises of the company, for the purpose of being incorporated into the building. Could that possession, in pursuance of the pledge, be made more notorious and open by moving them away and bringing them back, or by removing them to other land of the silk company? We think not. Goods pledged or conveyed, while so situated, are within none of the mischiefs of the statute of frauds, and can be the occasion of no deception to a creditor of the contractor, any more than if fully incorporated into the building, in which case, no assertion of a right in a creditor to attach is suggested.

On the whole case, therefore, we think the learned judge of the court below erred in not granting defendant's motion for judgment, notwithstanding the verdict. The judgment below is therefore reversed, with directions to enter one in favor of the defendant.

UNITED STATES v. WALSH et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1902.)

No. 120.

1. CONTRACT FOR CONSTRUCTION OF GOVERNMENT WORK — CONSTRUCTION — WAIVER OF BREACH BY OFFICERS.

A contract for the construction of a dry dock for the United States required such construction to conform in all respects to the plans and specifications which were attached and made a part of the contract, and provided that such plans and specifications should not be changed in any respect except upon a written order of the bureau of yards and docks, and by written agreement between the parties. It further provided that the government should have a competent civil engineer in charge of the work, who should have the privilege of inspecting at all times the materials and work, with power to reject either materials or work deemed by him unsuitable or not in conformity with the contract or plans and specifications. *Held*, that such engineer could not bind the United States by consenting to deviations from specific requirements of the specifications as to workmanship or materials, which fact the contractors were bound to know, and that no action or neglect of his or his subordinates could operate as a waiver or estoppel on the part of the government to relieve the contractors from liability for such departures from the requirements of the contract.

2. SAME—EFFECT OF ACCEPTANCE—IGNORANCE OF DEFECTS.

The contract further provided that the contractors should not be entitled to full and final payment until the dock had been tested by officers designated by the government, and accepted after their approval. *Held*, that an acceptance and payment of the contractors after such test did not conclude the government if made in ignorance of facts which, if known, would have led to a refusal to accept, and that, where the final test was made under conditions which did not permit structural departures from the specifications to be discovered by the officers making it, the government was not chargeable with notice of such defects, to preclude it from holding the contractors liable therefor on their subsequent discovery, because of the knowledge of or consent to the same by its engineers in charge of the work, who, as the contractors were bound to know, had no authority in the premises.[1]

3. SAME.

The acceptance by the engineer, or his acquiescence as the work proceeded, and the final acceptance of the dock by the board of officers designated by the navy department, are important evidential facts tending to prove that the work and materials complied with the contract; but they are not of controlling effect, and neither such acceptance nor the payment of the contract price necessarily deprives the government of its right of action for a breach of the contract in material and substantial particulars.

4. SAME—DISCHARGE OF SURETY—MODIFICATION OF PLANS.

A surety for the performance by the contractor of a building contract, which provides that changes may be made in the plans and specifications by written agreement of the parties, is not discharged from liability by modifications so agreed upon which are not so extensive as to radically change the contract and substitute a different one.

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

Henry L. Burnett, Arthur M. King, and George H. Gorman, for the United States.

Howard A. Taylor and James A. Soley, for defendants in error.

Before WALLACE and TOWNSEND, Circuit Judges.

[1] See Contracts, vol. 11, Cent. Dig. §§ 1464, 1467, 1468, 1469, 1473, 1474.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendants entered upon a verdict rendered by the direction of the court. 108 Fed. 502.

The action was brought to recover damages sustained by the United States for a breach of a contract for the construction of a dry dock at the navy yard, Brooklyn, N. Y., made May 8, 1895, to which contract the defendants Thomas and Augustin Walsh, as principals (named therein as "contractor"), and the defendant Crimmins, as surety, were parties of the first part, and the bureau of yards and docks, United States navy department, representing the government, was the party of the second part. The important clauses of the contract which concern the liability of the defendants are these:

"First. The contractor will * * * construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part; and will at his own risk and expense furnish and provide all labor, materials, tools, implements, and appliances of every description necessary or requisite in or about the construction of said dry dock and the steel caisson, pumping machinery, pump house, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part. It being further mutually stipulated and agreed that the officer or officers, person or persons, thus designated, shall and may, from time to time during the progress of the work, inspect all materials furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down by and at the expense of the contractor; and that all such rejected material shall be at once removed from the station, and replaced by material satisfactory to such inspector; and that all such inferior or unsafe work shall be replaced by satisfactory work by and at the expense of the contractor. Such inspectors shall at all times during the progress of the work have full access thereto, and the contractor shall furnish them with full facilities for the inspection and superintendence of the same."

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of the contract with the like operation and effect as if the same were incorporated herein. No omission in the plans or specification of any detail, object, or provision necessary to carry this contract into full and complete effect in accordance with the true intent and meaning hereof shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express conditions, that the said plans and specifications shall not be changed in any respect, except upon the written order of the bureau of yards and docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive.

"Eighth. The aforesaid dry dock and its accessories and appurtenances, and each and every part thereof, shall be constructed of approved materials, and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans, and specifications, to the satisfaction of the party of the second part."

"Tenth. It is mutually understood, covenanted, and agreed by and between the parties hereto that the said dry dock shall not be accepted, and that the contractor shall not be entitled to the final payment or to reservations previously made, until twenty days after a complete test of said dock shall have been had under the direction of such officers as may be designated by the party of the second part, such test to consist of a full duty test of the pumping machinery, and the docking of such vessel as the party of the second part may direct; the emptying of the dock, the refilling of the dock, and the removal of such vessel, without any indications whatever of any defect, weakness, or settlement due to faulty material or workmanship in said dock, or either of its accessories, and the result of such test to be in all respects to the full and complete satisfaction and approval of the officers designated to superintend the same. Such test shall be made within thirty days after the contractor shall have notified the party of the second part of the completion of the dock, and a decision upon the question of acceptance made within twenty days thereafter."

"Twelfth. (6) When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the contractor, he shall be entitled, within ten days after the filing and acceptance of his claim, to receive the said reserve, and any sums not covered by the monthly estimates, or so much thereof as he may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the chief of the bureau of yards and docks, of all claims of any kind or description under or by virtue of this contract."

Other provisions of the contract, which are read into it because contained in the specifications, are as follows:

"Superintendence. The contractor shall at all times during the construction of the dock have competent engineers and superintendents in charge of all parts of the work. The government will have also a competent civil engineer in charge of the construction of the dock. The contractor will, at all times when called upon by the civil engineer in charge of construction, furnish him full facilities for inspecting workmanship and material, and will furnish him also a daily statement of material received for the work, so that said material may be inspected by him and accounted for. The contractor will also make daily report to the engineer in charge of the work of the amount of material worked, excavation removed," etc.

"Test. After the dock structure has been completed in all its parts, connection made with the pumps, the drainage pump put in place, entrance way cleared, etc., the dock structure shall be tested by having one of the largest and heaviest vessels of the government placed in it. Should any weakness or defect become apparent during such trial test, due to defective or improper materials or workmanship, the weakness or defects shall be made good by the contractors before final settlement and release from the contract."

The complaint alleges that the work, labor, and services performed and material furnished by the contractors in constructing the dock were not in accordance with the terms of the contract, and departed from the requirements of the specifications in various particulars, and in consequence it became necessary for the government to expend the sum of $171,360 in order to put the dock in proper condition for use.

Upon the trial it appeared that the contractors entered into the work of constructing the dock in May, 1895, and prosecuted it until February, 1897, when they notified the bureau of yards and docks that it was ready to be tested. Throughout the progress of the work it was

under the supervision of the engineer in charge, or his subordinates, upon the part of the navy department. They frequently required the contractors to make changes in method and in detail of performance to conform to their views; and their observation was so constant as to have enabled them, if they had so desired, to discover at the time any material departure which the contractors could have made from the specifications. Upon receiving the contractor's notice that the dock was ready for testing it was examined by a board of officers designated by the navy department, and the board reported it to conform "in all respects with the requirements of the contract, plans, and specifications," with certain exceptions, which were pointed out, and recommended that it be accepted by the government upon compliance by the contractors with the requirements mentioned in their report. The contractors made compliance, and in April, 1897, the bureau of yards and docks notified them of its acceptance of the dry dock, and instructed them that upon execution of the release provided for by the contract they would be paid the amount due under the contract. They executed the release, and were paid in full. In the following month a leak in the dry dock was discovered, which led to an examination of the structure by a board of engineers appointed by the navy department. The leak originated in that part of the structure known as the "table end" of the dock. Evidence was offered upon the trial tending to show deviations in construction from the plans and specifications in various important particulars at that part of the structure, and of a character sufficient to account for the leak. The principal deviations consisted in an improper alignment of the piles, in the omission to use piles of the length required, in the improper driving of the piles, in not having them in contact either with the cross-caps or the ends of the decking, in not bolting them to the cross-caps, in so fitting the floors to the sheet piling that openings extended between the floors and piling in places of a width of 12 or 13 inches, and in insufficiently calking the floors. The evidence tended to show that, where piles were required by the specifications to be 47 feet long, some were only 12 feet, some 16 feet, and some 18 feet long, and that dummy piles were used in places. In September, 1897, the government entered upon the work of repairing the dock, and subsequently expended in putting it in proper condition the sum of $171,360.

It further appeared upon the trial that at the time the examination was made in March, 1897, and the dock tested by the board of officers appointed by the navy department, the caisson was in place, and the table end was about 27 feet below the surface of the water, and that there was a cement floor over the bottom, and the evidence was such as to permit the inference that the surrounding conditions were sufficient to account for their failure to discover the deviations and defects in construction.

The trial judge, upon the motion of the defendants, directed a verdict in their favor. He placed his ruling upon the ground that the testimony did not warrant the conclusion that there was not knowledge on the part of the government, through its officers, of the deviations from the contract; that the government was charged with such knowledge at the time of its final acceptance of the dock; and that the

plaintiffs were not entitled to recover after such acceptance. The principal assignment of error is based upon this ruling.

In view of the undisputed facts, and the facts which the jury would have been authorized to find upon the evidence, the government was entitled to recover the damages sustained by the breach of the contract, unless what took place during the progress of the work was a waiver of more complete performance, or unless the cause of action did not survive the acceptance of the dock and the final payment made by the government. The first inquiry is whether the engineer in charge of the work had any authority to sanction or permit the deviations from the specifications made by the contractors during the progress of construction. The contractors undertook to construct a dry dock according to the plans and specifications. The contract provided that the construction should conform in all respects to the specifications, and that there should be no change or modification of the specifications in any respect except upon the written order of the bureau of yards and docks. The authority of the engineer in charge was only that conferred by the contract, and the contractors were informed by the instrument under which he exercised his authority of its extent and limitations. If he had expressly consented to an unauthorized performance, his acts would not have bound the government. Much less is the government bound if he consented to an improper performance of the contract by neglect or mistake. He had no power to authorize a departure from the requirements of the specifications, unless it was delegated by that clause which provides that the work is to be subject to his approval and inspection, and permits him to reject any materials or work which he may deem unsuitable. That provision was one for the benefit of the government. It is to be construed as an additional safeguard against noncompliance with the specifications by the contractors, and against a literal but unsatisfactory compliance. An instructive authority in point is Glaucius v. Black, 50 N. Y. 145, 10 Am. Rep. 449. That was a case where, by the terms of a contract for the repair of a building, it was stipulated that the material should be of the best quality, and the work performed in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted; and it was held that the acceptance by the architect of a different class of work, or of inferior materials, did not bind the owner, and did not relieve the contractor from the agreement to perform according to the plans and specifications. See, also, Woodruff v. Railroad Co., 108 N. Y. 39, 14 N. E. 832. Undoubtedly the contract made the engineer in charge the appointee of both parties, and contemplated that his decision should be final in respect to all details of performance which were left to his decision by the specifications; and the promise of the government to "have a competent civil engineer" always in charge emphasizes this interpretation. Under a contract containing similar provisions, but where the specifications provided that certain sandstone to be used in the dock should be of a "quality approved by the engineer," it was held in U. S. v. Barlow (Sup. Ct., Feb. 24, 1902) 22 Sup. Ct. 468, 46 L. Ed. ——, that the engineer's decision, when properly exercised, was final as to

the quality of the sandstone, and that the contractor was entitled to recover for sandstone delivered, inspected, and approved by the engineer, notwithstanding it had been subsequently rejected by the government.

The departures from the specifications in the present case were not in any matters of performance which were left to the discretion of the engineer. They were deviations from specific requirements of the specifications. As the contract did not authorize the engineer or his subordinates to permit any such departures from the specifications as would appear to have been made, and as the contractors were bound to know that it did not, what occurred during the progress of the work furnished no defense to the action either upon the ground of waiver or estoppel.

The acceptance of the dry dock after the final test did not conclude the government if it was made in ignorance of facts which, if known, would have led to a refusal to accept. The government did not contract that the acceptance should be conclusive evidence of the contractor's performance of the contract, or entitle them to be paid in full. It did contract that the contractors should not be paid in full without such acceptance. In this respect the contract is unlike some building contracts in which the parties agree that the certificate of an architect, or his acceptance of the work, shall be conclusive, and as to which it has been held that they cannot withdraw the decision of the question of compliance or noncompliance from the architect, and offer it to the decision of a court. Butler v. Tucker, 24 Wend. 447; Smith v. Brady, 17 N. Y. 176, 72 Am. Dec. 442; Railroad Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; Kennedy v. Poor, 151 Pa. 472, 25 Atl. 119. The evidence in the case certainly warrants the conclusion that at the time of the acceptance the government ought to have been informed of the departures from the specifications made by the contractors by some of its officers who were in constant supervision, and had every opportunity to discover them during the progress of the work. The final test was made under conditions which did not permit them to be discovered by the exercise of ordinary expedients, and the evidence does not warrant even the inference that the government was actually aware of the deviations when the dock was accepted, or when the final payment was made to the contractors. Knowledge is not imputed to a principal of the unauthorized acts of his agent. A principal is never charged with the consequences of the misconduct of his agent in violating his instructions except for the protection of some third person who has been misled by reliance upon the ostensible authority of the agent; and his responsibility in such cases rests upon the ground of ratification or estoppel. The contractors had no right to suppose that the engineer in charge or his subordinates were authorized to permit the deviations; the government did not know that they had taken place; and the acceptance of the dock and the making of the final payment under these circumstances did not prejudice the right of the government upon the discovery of the truth to maintain its action for the breach of the contract.

Even if the government should have been aware that the contract had not been complied with when the dock was accepted and the final

payment made, it is not apparent that its right of action did not survive. In Briggs v. Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63, where a sale was made with warranty of quality, the goods to be delivered at a time several months subsequent, it was held that a cause of action for a breach of the warranty survived the acceptance and retention of the goods by the purchaser, with ample opportunity to ascertain their defects and the payment of the purchase price. See, also, Story Sales, §§ 405, 406, and Benj. Sales, § 901. Payment of the contract price does not of itself constitute a waiver of the defects in the articles paid for, even though the party paying is at the time actually aware of the defects. Plannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Moulton v. McOwen, 103 Mass. 587.

The owner of real property, who has employed another to erect a structure on his land, does not, by taking possession and appropriating the structure to the uses for which it was built, preclude himself from insisting that the builder has not properly performed his contract. The results cannot be separated from the necessary consequences of ownership; and as he cannot, without prejudice to himself, reject them or refuse to retain them, the law does not imply any promise from his acceptance of them. This being so, it matters not whether at the time he is or is not aware of the defects. Mohney v. Reed, 40 Mo. App. 99; Stewart v. Fulton, 31 Mo. 59. "Each material, as it is placed in the work, becomes annexed to the soil, and thereby the property of the owner. * * * As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudicing his rights." Smith v. Brady, 17 N. Y. 173, 189, 72 Am. Dec. 442. Acceptance without objection is evidence that the contract has been satisfactorily fulfilled, and, when there is an obligation to reject or accept, raises an implied promise from the reception of the benefits of the contract to pay for their value. This is the only effect of acceptance. If there is such an implied promise, performance of the original contract is waived, and it is treated as having been duly performed, or the recovery proceeds upon the new contract. It is true that slight deviations or unimportant omissions in the performance of a building contract will not defeat a recovery by the contractor, and, if he has substantially performed, he can recover what is justly due, making allowance for the value of the deviations; but this right of recovery is wholly independent of any act of acceptance by the owner.

The acceptance by the engineer, or his acquiescence as the work proceeded, and the final acceptance by the board of officers designated by the navy department, were important evidential facts tending to establish that the work and materials were supplied conformably to the contract. In other respects they were not of controlling effect. There was evidence which might have authorized the jury to find that in some particulars the departures were so serious that the contractors must have known at the time that they were likely to endanger the integrity of the structure. Without intending to intimate that the evidence was cogent enough to compel such a finding, it is sufficient to say that there was a question of fact for the jury, and that the case should not have been taken from them by the court.

It is insisted in behalf of one of the defendants in error, the surety for the contractors, that as to him the judgment should be affirmed, because he was released from his obligation by changes and modifications made in the requirements of the contract by supplemental contracts made between the contractors and the government during the construction of the dry dock.

The undertaking of the surety was entered into at the time of the execution of the contract, and was conditioned that the contractors should "well and truly perform the stipulations" of the contract. During the progress of construction various supplementary contracts were made between the bureau of yards and docks and the contractors in respect to additional work to be done upon or about the dry dock. Of these contracts three only are in question. The first one was made July 22, 1895. It provided that the contractors should be at liberty to deposit 5,000 to 8,000 cubic yards of clay (material excavated to make room for the dock structure) in front of the quay wall immediately in front of the dock entrance; that they should maintain in the channel of the Wallabout opposite the dock entrance the same depth of water as then existed until the completion of the dock; and that they should remove all the material deposited in front of the quay wall upon the completion of the dry dock. It further provided that no claims for compensation should be made by either party upon the other for the work thus to be done, and that "in default of the maintenance of the channel or the removal of the deposited material by the contractors" the bureau of yards and docks might maintain the channel and remove the material, and "deduct and withhold a sum equal to the entire cost thereof from any payment due or to become due" to the contractors for constructing the dry dock under the original contract.

June 12, 1896, the contractors and the bureau of yards and docks made a further contract. After reciting that the party of the second part deemed it necessary to make some modifications in the plans and specifications attached to and forming a part of the original contract, and that the contractors had consented to such modifications, it provided for building "the quay wall and the approach to dry dock No. 3, and cutting off the point of the old quay wall," in accordance with plans and specifications attached, and for paying the contractors therefor the sum of $47,529, in monthly payments, reserving 10 per cent. until the completion of the work to the satisfaction of the engineer in charge.

August 29, 1896, the contractors and the bureau of yards and docks made a further contract. It recited that the party of the second part deemed it advantageous to the government that the original contract be modified so as to include "a timber superstructure for the track of the 40-ton locomotive crane," and it provided that for doing the additional work according to plans approved the contractors should be paid the additional sum of $27,821.

The surety was not a party to any of these supplemental contracts, and was not consulted in respect to them, but we are of the opinion that he consented in advance to the modifications which they introduced into the original contract. It was the meaning of the seventh

clause that if, at any time, it should be found advantageous or necessary to make any change, alteration, or modification in the plans and specifications, this could be done upon the written agreement of the parties to the contract. It is true that the provision requires the agreement to set forth fully the reasons for such change, and in two of the supplemental contracts the reasons were not set forth in detail, the recitals being merely that the changes were deemed to be advantageous for the government. This feature of the provision, however, was a mere formality, and a failure to comply with it did not affect the substantial rights of the parties. In the supplemental contract of July 22, 1895, the reasons for the change were stated in full. Except for the provision in clause 7, we do not doubt that the surety would have been discharged, because the undertaking as modified would have been no longer the one for which he originally became answerable. It is not contended that the modifications made in the original plans and specifications by the supplemental contracts were not advantageous. They were not so extensive as to substitute a new or radically different undertaking in the place of that originally contemplated, and, as it was provided that they might be made, the surety cannot complain.

The judgment is reversed.

THE HELIOS.

(Circuit Court of Appeals, Second Circuit. April 22, 1902.)

No. 140.

1. SHIPPING—BREACH OF CHARTER.

A finding that the master of a vessel violated a charter by abandoning a wrecking expedition before completion of the work or expiration of the charter, without sufficient cause, affirmed.

2. SAME—CONSTRUCTION OF CHARTER—LENGTH OF TERM.

A charter of a steamer for a wrecking expedition limited the time of the voyage to "about six weeks," which was the time the charterer estimated would be required. At the end of about three weeks the master refused to stay longer at the wreck, but through delays, in part resulting from such abandonment, the vessel was not returned to the owner until eight weeks after the beginning of the term, and he was paid the charter hire for that time. *Held*, that the charter could not be construed as one for such time as might be required to complete the enterprise, but, under the evidence as to custom, it did not entitle the charterer to retain the vessel more than ten days beyond the six weeks specified; and that in an action by him to recover damages for abandonment of the work before the expiration of the term the owner was not estopped from relying on such limitation by his acceptance of the charter hire for a longer time.

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

For opinion below, see 108 Fed. 279.

This is an appeal from a decree of the district court, Eastern district of New York, in favor of libelants for damages sustained by

breach of a charter party whereby the Helios was hired for one round trip to the West Indies, of about six weeks, to assist in salving cargo from the S. S. Framnes, which had been wrecked on Hogsty Reef, one of the Bahama Cays.

Everett P. Wheeler, for appellant.
Edward Benedict, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The district judge has written a careful and most exhaustive opinion, and, inasmuch as we concur with his conclusions (except on a point hereinafter referred to), it will be unnecessary to rehearse the facts here. The Helios did not find as safe a harbor at Hogsty Reef as she would have found at Tompkinsville, in the upper bay of New York, but we are satisfied from the proof that the harbor was what the parties must have expected it would be, and was in entire conformity to the terms of the charter party. No movement of the tide imperiled her, nor prevented her lying always afloat. She was exposed to more risks than she would have encountered had she remained tied up to the wharf in her home port, but risks were to be expected. They were expected; they were in the minds of both parties; they were so thoroughly appreciated by the master that he would not leave on the voyage until he had obtained from the libelants an absolute guaranty against those risks of the ship's safety to her full value. In view of this last circumstance, the conduct of the master in abruptly leaving the reef before the term of the charter had expired was especially reprehensible. We concur with the district judge also in the conclusion that the language of the charter, "one round trip to the West Indies, of about six weeks," cannot be changed so as to cover the enterprise of salving the whole cargo; but we do not concur in the further conclusion that, because the owners accepted the stipulated per diem for the whole eight weeks, they are estopped from relying on this language of the charter party. The evidence, however, warrants an extension of the term to ten days beyond the six weeks. The difference is four days only, in which proportion the damages should be reduced.

The respondent disputes the allowance of damages for one day lost at Mole St. Nicholas because the ship went there to send a telegram asking to terminate the adventure, and for some nine or ten days at Havana, because that delay was occasioned by waiting for the coming of underwriter's agent. But, if the master had followed out the contract, he would not have had to ask unnecessary questions by telegraph; and, if he had kept the ship at the reef, where it was his duty to keep her under the contract, the presence or absence of an underwriter's agent in Havana would have made no difference.

The cause is remitted to the district court, with instructions to reduce the damages in the proportion that four days bears to the amount. In all other respects the decree is affirmed, but without costs to either side as against the other.

In re EWING.

(Circuit Court of Appeals, Second Circuit. April 22, 1902.)

Nos. 127, 128.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PETITION.
A petition alleging payments to a creditor while insolvent as an act of bankruptcy is demurrable unless it further avers that such payments were made with intent to prefer such creditor over the other creditors of the defendant.

2. SAME.
Averments in a petition in involuntary bankruptcy intended to show that the indebtedness of defendant to one of the petitioners was fraudulently contracted are impertinent, and, on motion therefor, should be stricken out.

Petitions to Review Orders of the District Court of the United States for the Southern District of New York.

On petitions for revision of orders in bankruptcy proceeding.

Austin G. Fox, for petitioner.

H. N. Avery, opposed.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We are of the opinion that the demurrer to the petition for the adjudication of Ewing as a bankrupt should have been sustained because the petition omits to aver that any of the payments alleged to have been made by Ewing, the alleged bankrupt, to Bouvier, were made with intent to prefer Bouvier over his other creditors. We are also of the opinion that the averments in the petition of facts intended to show that the debt of Ewing to one of the petitioners was fraudulently contracted were impertinent, and should have been stricken out. The questions seem too clear to require discussion.

The order overruling the demurrer is reversed, with costs, and with instructions to the court below to make an order sustaining the demurrer, and, at its discretion, authorizing an amendment of the petition.

JONES v. VANCE SHOE CO.

(Circuit Court of Appeals, Seventh Circuit. February 28, 1902.)

No. 791.

CONTRACT—VALIDITY—VAGUENESS OF TERMS.
A written contract between two stockholders in a corporation, by which one agreed "to provide as a loan to the said (corporation) whatever additional capital is needed to provide a working fund," is too uncertain and vague to be enforceable in a court of law by an action to recover damages for its breach.

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

M. A. N. Eastman, for plaintiff in error.

M. Nathan and G. Moore, for defendant in error.

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

BUNN, District Judge. This an action of assumpsit upon a written contract between two stockholders in a corporation, to recover damages. There was a general demurrer to the declaration, which was sustained by the court below, and a judgment rendered in favor of the defendant. The writ of error is brought to reverse that judgment. The decision of the court seems to us manifestly correct. Among many other reasons, this one seems conclusive: that the contract is quite too vague and indefinite in its terms to be enforced in a court of law. There are three counts in the declaration, all setting out substantially the same supposed cause of action. The third count sets out the contract in full, which, so far as is material to the questions involved, is as follows:

"The said party of the first part hereby agrees to pay into the treasury of the said Smith & Jones Company the sum of twenty thousand dollars ($20,000) cash, and to guaranty, in lieu of the present guaranty of J. P. Smith, the notes of the Smith & Jones Company now held by the Continental National Bank of Chicago, to the amount of twenty-five thousand dollars ($25,000), and to provide, as a loan to the said Smith & Jones Company, whatever additional capital is needed to provide for a working fund."

The breach alleged is the failure to "loan to the said Smith & Jones Company whatever additional capital is needed to provide for a working fund." This stipulation is quite too uncertain and indefinite in many ways, and in all ways, within the well-established rule which has obtained in these cases since and before the days of Chitty.

Other allegations are that on June 1, 1896, the plaintiff was the owner of 500 shares of the stock of the Smith & Jones Shoe Company with a capital of $125,000. That the defendant was a stockholder in the sum of $5,000, and desired to acquire enough additional stock to become the owner of two-thirds of the capital. That plaintiff and defendant entered into an agreement that the plaintiff should deliver to the defendant 208 shares of his own stock and enough more to make two-thirds of the entire stock of the corporation, and to cancel all claims against the company. In consideration thereof, the defendant agreed to do and perform certain things, and among others to pay into the treasury of the company $20,000 in money. That this agreement was carried into effect, so that defendant became the owner of two-thirds of the stock, the plaintiff retaining 250 shares. That the business was continued two years, but the defendant did not (as alleged in one count) after six months continue to provide as loans to said company such additional capital as was needed to provide a working fund; whereby was lost to the plaintiff his 208 shares of stock so transferred, of the value of $20,800; also the claims of the plaintiff against the company of the value of $10,000, and his 208 shares of stock retained, to his damage $50,000. It also appears by recitals in the contract that the plaintiff had purchased all the merchandise indebtedness of the Smith & Jones Company, and was to get the money back that he had paid therefor from the funds to be

provided by the defendant. In other words, the company had failed and settled with its creditors, and Jones was the owner of all the claims against it, which he had purchased at some price not specified. The allegation in the third count which sets out the breach of the contract by defendant is as follows:

"And the said defendant, through its officers and agents, came into the management and control of said company, its affairs and business, and so managed the same, for a period of, to wit, two years, but wholly refused and neglected during said time to provide as a loan to said company whatever additional capital it needed to provide for a working fund, but on the contrary thereof caused it to incur a large amount of indebtedness to undertake and transact business beyond and in excess of its financial ability, by means whereof the credit, good will, and business of said company was destroyed, and that said defendant caused the same to be liquidated and wound up, and the said company, by reason of said failure of the defendant to keep its said promises, undertakings, and agreement, was unable to prosecute or continue the same, by reason whereof there was lost to the plaintiff the debt of said company to him," etc.

There are some allegations in the declaration charging negligence, but the action can only be held to be in assumpsit upon the contract. It appears by all three counts that the defendant was the owner of two-thirds of the capital stock of the company, and the plaintiff the owner of less than one-third. The defendant then had a stronger interest than the plaintiff in the success of the company. By the allegations of the declaration, defendant was the one who suffered most by the failure of the company. It put $20,000 in cash into the treasury of the company when the contract was made, and for six months it furnished all the money the company needed to carry on its business. If the business was being carried on at a loss, why should the defendant continue to pour in more money for an indefinite time? Certainly the contract by its terms did not require it. Under such a contract, how long must the defendant be held to a losing venture? As no time was agreed upon by the parties, it would certainly seem, if there were nothing but losses upon losses, that six months would be a reasonable time. And if the directors were not to determine that question, who should it be left to? Certainly not to a jury, for they would know nothing of the needs of the business. But by law it belonged to the directors to determine all these things. Sellers v. Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; Durkee v. People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340. How long credit was to be given, what the rate of interest, and what security for the repayment of the loans? None of these things are provided for in the contract, and it would be quite impossible for a court or jury to determine them and so make a contract for the parties. The proper management of a corporation is in the hands of the directors. The scope of the business, the amount of money required to conduct it, the wisdom and propriety of borrowing money at all for that purpose, and how long to continue the borrowing, would belong exclusively to them. But there is no allegation that they determined on anything or asked for or demanded more money than the company received from the defendant to con-

tinue the business. It is certainly not the province of a minority stockholder to determine any of these things. Again, there being no time fixed for the various loans, they would be due immediately upon demand, so there could be no damage more than is merely nominal for not making the loans. As was said in a very similar case by the United States circuit court of appeals for the Eighth circuit in Kelly v. Fahrney, 38 C. C. A. 106, 97 Fed. 176:

"Since no agreement appears to have been made by the defendant to make a loan to the White Cliffs Company for any definite period, the law implies that the borrower was under obligation to return it on demand (Thompson v. Ketchum, 8 Johns. 190, 5 Am. Dec. 332; Purdy v. Philips, 11 N. Y. 406); and no substantial damage was occasioned by a refusal to loan money which the corporation was legally bound to repay forthwith (Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116)."

It is also well adjudged in that case that a judgment will not be reversed by an appellate tribunal and a new trial granted when it appears from the statement of the cause of action that the plaintiff in error is only entitled to nominal damages, citing many cases. Again, suppose the money had been advanced to pay off all the indebtedness of the company. It would be only substituting one creditor for another, and there would be no substantial damage for such a breach of contract. But we are content to place the affirmance of the judgment upon the one ground of the entire uncertainty and vagueness of the stipulations in the contract. See Chitty, Cont. (11th Am. Ed.) 92; Erwin v. Erwin, 25 Ala. 236; Van Schaick v. Van Buren, 70 Hun, 575, 24 N. Y. Supp. 306; Hart v. Railroad Co. (Ga.) 28 S. E. 637; United Press v. New York Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288. In this case the court of appeals of New York lays down the rule as follows:

"The difficulty with this instrument lies deeper. It lacks support in one of its essential elements—in the absence of a statement of the price to be paid. That was a defect which was radical in its nature and which was beyond the reach of oral evidence to supply, for, if the intention of the parties in so essential a particular cannot be ascertained from the instrument, neither the court nor the jury will be allowed to make an agreement for them upon the subject. It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to."

Marble v. Oil Co., 169 Mass. 563, 48 N. E. 783.

In that case the contract was about as indefinite as it is in the case at bar. The oil company had contracted to sell to the plaintiff its oil "on such reasonable terms as to enable him to compete successfully with other parties selling in the same territory." The court in its opinion says:

"We are of opinion that it was too indefinite and too general to be enforceable as a contract. * * * The plaintiffs were never bound to buy their oil from the defendant for a single day longer than they chose to. So far as appears, the arrangement was to continue only during the pleasure

of the parties. It called for no formal notice to terminate it. * * * We are of opinion that there was no evidence of liability under either of the contracts set out in the declaration."

Flaherty v. Cary (Sup.) 70 N. Y. Supp. 951.
Judgment affirmed.

BRADFORD v. BELKNAP MOTOR CO.

(Circuit Court of Appeals, First Circuit. April 18, 1902.)

No. 389.

PATENTS—INFRINGEMENT—ELECTRICAL APPARATUS.

The Bradford patent, No. 535,158, for a method of, and apparatus for, regulating electric circuits, construed, and *held* not infringed by the device of the Chapman patents, Nos. 599,892 and 613,853.

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

For opinion below, see 105 Fed. 63.

Clifton V. Edwards and Edward P. Payson, for appellant.
Edward M. Rand (Seth L. Larrabee, on the brief), for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This appeal raises the question of infringement of patent No. 535,158, to Julien M. Bradford, dated March 5, 1895, for "method of, and apparatus for, regulating electric circuits." Claims 1, 2, 4, and 5 are in issue.

The appellant contends that the patent is essentially for a new method of utilizing an electric current, and that the method claims are of first importance. They are:

"(4) The method of governing the action of a current-varying apparatus, which consists in simultaneously releasing and actuating said current-varying apparatus by differential power the instant the force of current controlled by said apparatus varies from the required degree.

"(5) The method of regulating an electric circuit, which consists in simultaneously releasing and actuating current-varying apparatus by differential power the instant the force of current controlled by said apparatus varies from the required degree, and in opposing the action of said current-varying apparatus by alternation of said power the instant the required force of said current is restored."

Bradford's problem was, broadly, to so manage the faults in a working current as to make the current control and correct itself. Its own variations or irregularities are used to actuate mechanism which counteracts the variations. These faults or variations automatically, and through intervening means, actuate a "current-varying" device. For our purposes, we may consider the current-varying device as a

rheostat with a lever arm. As objectionable variations of the main current occur, this arm is moved in one direction or the reverse, as the current weakens or strengthens, and by the lever movement the main current is kept substantially normal.

"Mechanism responsive to changes in the current to move the current-varying device in the right direction to counteract such changes" is acknowledged by the patentee to be in the prior art; and the specification states that the apparatus therein described "differs from other apparatus for the same purpose in the means employed to cause instantaneous connection and disconnection between the current-varying device and an auxiliary motor by which it is moved in response to incipient changes in the current to be regulated."

To understand the "method" of the patent, we must examine the action of Bradford's apparatus. A solenoid, consisting of a coil of wire surrounding a metal core, is the first device operated by and responsive to variations of the main current. As the current in the coil weakens or strengthens, more or less magnetic pull is developed, and movement is imparted to the core. The core will move in one direction or the other, as its magnetism is weaker or stronger. An objection to making a direct connection between this core and the rheostat lever is that the extent of movement of the lever would be directly proportionate to the extent of variation of the current. Such a device would be dependent upon the development of a considerable fault in the main current, and therefore would not perform with desirable promptness the function of checking the fault. The fault must be substantial before the counteracting power is applied. Bradford, therefore, employs the solenoid, not to impart corresponding and proportional movement to the lever arm of the rheostat, but to connect and disconnect a relay current.

A slight variation of the amount of current produces a slight movement of the solenoid core, but a slight movement is sufficient to make contacts by which a relay current is cut in and out, and sent in one direction or the other through intermediate apparatus. Bradford thus secures a positively acting electrical force which can operate in one direction or the other immediately upon the occurrence of a variation of the main current.

We have next to consider the manner in which Bradford uses this relay current. He does not apply it as a power adequate by itself to cause desired movements of the lever arm. As he uses the variations of the main current to establish connection with his auxiliary relay current, so, again, he uses his relay current to connect and disconnect power derived from pulleys.

Bradford's lever arm is moved by power derived from shafting operated by independent and external means. His apparatus includes two loose pulleys revolving in opposite directions upon a shaft, and means for causing the revolution of the pulleys. Between the two loose pulleys is a middle pulley directly connected by gearing with the lever arm. While the main current is normal the moving pulleys are out of contact. A weakening of the main current causes the relay to so magnetize one pulley that it is attracted to and adheres to the middle

pulley, imparting to the middle pulley motion in one direction. On the other hand, should the main current strengthen, the other pulley is so magnetized as to make connection with the middle pulley, and give it motion in another direction.

Bradford employs his relay current to operate an electric clutch. Two different paths are provided for the relay current. By one connection the relay flows through one path to the right-hand pulley; by the other connection, through another path, to the left-hand pulley. Reviewing the whole operation: A variation of the main current moves the solenoid in one direction or the other; a contact is made on one side or the other; the relay current flows to one side or the other, and develops in one pulley or the other a magnetic force. This magnetic force connects one pulley or the other, thus imparting mechanical energy to the lever arm in either direction as is desired.

We will next consider the views presented by the counsel for complainant as to the nature and substance of Bradford's "method." This, in the brief, is said to be:

"Bradford's method of balancing two opposing electrical forces, and operating the current-varying device by a difference between these forces caused by variations in the main current." Also:

"The essential feature of the invention was the method of using a differential power in such manner that the current-varying device was instantaneously connected and disconnected with the solenoid core, under control of the relay current."

It is said, further, that what Bradford brought into the art was—First, the method of controlling a dynamo current by opposing unequal electric forces, and using their resultant force to move the current-varying device; and, second, the combination of instrumentalities, including unequal opposing coils to effectuate this method.

The charge of infringement is based principally upon the allegation that the defendant uses, in an automatic current regulator, Bradford's differential power. The meaning of this term "differential power" must be investigated. The complainant defines it as differential electric power,—the difference in effective power of two unequal electric forces operating as needed. From this, and from the complainant's presentation of the case, we do not understand that it is now contended that Bradford's patent is broadly for the use of a relay current applied alternately in one direction and the reverse to govern current variations.

The specification applies this term first to the mechanical power which stands ready for instant application in the two oppositely revolving pulleys. This is called the "driving power," and the specification says:

"It may be called 'differential power,' since it is expended in one direction or the reverse with different effect."

The specification also refers to "controlling power," produced by an electric current which alternates, or acts by turns, and says:

"This also may be called a 'differential power,' since it is expended in one direction and the reverse with different effect."

If we construe the term "differential power," used in the fourth and fifth claims, to include merely the mechanical power, or driving power, there is obviously no infringement.

The first and striking difference between the device of the patent and that of the defendant is that the defendant does not use an auxiliary mechanical force, but moves the lever arm by magnetic pulls. If, therefore, the method of Bradford includes, as an essential feature, the use of a mechanical relay as well as an electrical relay, the defendant omits an essential element of Bradford's combination, as well as of his method.

It is contended, however, that in the defendant's device, as in the complainant's, there stand ready forces which may be instantaneously applied to the lever arm,—in Bradford's machine, the mechanical force generated from shafting; in Chapman's, magnetic force created by an electric current. It is said that the substance of the invention resides in the use of differential electric power to govern the application of force to the lever arm, and not in the kind of force applied to the lever arm; and that, in this view, a magnetic force generated by an electro-magnet must be regarded as a mere equivalent for the mechanical force from moving pulleys.

If it be true that power developed from an electro-magnet may be regarded as the equivalent of power developed from moving pulleys,—if it is immaterial whether the force whose application is to be governed is mechanical or electrical,—we are at once confronted with the consideration that a complainant can hardly be entitled, in the electrical field, to monopolize combinations of forces which could not be monopolized in the mechanical field.

In this view, the breadth of a claim that the defendant is an infringer because it balances two electrical forces against each other, and operates by the difference, is apparent. What would be said of the claims of a patentee of a machine driven by steam power, who should claim the balancing of mechanical forces, generated by steam, against each other, and operating by the difference; or of a mechanic who should claim to monopolize balancing the force of one spring against the force of another spring, and operating by the difference between the two opposing forces? A patent for the use of a resultant force in a particular art is no more possible in electrical apparatus than in ordinary mechanical appliances. The defendant has the right to oppose forces generated either by electricity, or by steam, and to operate by their difference, provided this is not done in a specific manner covered by the patent, or in a manner substantially similar. Broad generalizations of this character cannot be accepted as a proper test of infringement. If the claims are of such breadth, they are invalid.

We will consider, however, whether the defendant makes use of the substance of what is disclosed in Bradford's apparatus, and we will first compare the devices of Bradford and Chapman when out of action.

In Chapman's apparatus, as in Bradford's, while the governor is not in action, the current is divided into two branches. Bradford's current at that time generates magnetism which acts to separate his

three pulleys. The current passes through a coil upon the middle pulley, giving to one side positive magnetism, to the other negative. The current also passes through coils on each of the side pulleys, creating the same magnetic polarity in these pulleys as exists in that side of the middle pulley, which they respectively face. Similar magnetism causes repulsion, and the pulleys stand apart; and, though the side pulleys are in motion, no action of the lever arm follows. The purpose of generating these four magnetic forces is to hold apart the members of a magnetic clutch. Chapman does not use the current for this purpose, or for any analogous purpose. His regulator consists of a differentially wound solenoid, the core of which is directly connected with the arm of the rheostat. The movements of the core move the lever arm. The current is divided, and is led to oppositely wound coils surrounding each end of the solenoid core. These coils are equal, and, being equally energized, but in opposite directions, pull on each end of the core with equal force. They stand ready, while the regulator is not in action, as Bradford's pulleys stand ready, to move the lever arm in either direction. Bradford uses his normal division of the current to separate the parts of his clutch. Chapman uses the two branches of his current to provide two stores of energy adequate to move his lever arm in either direction. In this respect his apparatus and use of the current are substantially dissimilar from Bradford's.

It is said, also, that Chapman's divided current holds his solenoid core in a state of stable equilibrium, and it is said that this is substantially what is done by Bradford's divided current when it holds apart the members of the magnetic clutch.

With Chapman, the important reason for dividing the current is to provide two reservoirs of energy adequate for the operation of the lever arm. If, in addition, his coils perform the function of holding the solenoid core still while the machine is not called upon to act, this does not seem to us to embody the substance of Bradford's invention, or to be substantially similar to holding the three pulleys apart.

We think, therefore, that a divided current is used by Chapman in his apparatus for a purpose substantially different from the purpose for which Bradford uses it. The differences in apparatus are substantial.

The question of infringement, we think, must be tested, then, by a comparison of what occurs in the operation of the respective machines while engaged in regulating the current, and of the coils which are energized during action; and this brings us to the question whether Chapman uses "differential power," as defined by the complainant's counsel, substantially as Bradford uses it.

When the relay current is admitted into Bradford's right-hand pulley, its first work is to destroy the positive magnetism of that pulley, and its next work to give it negative magnetism. It is necessary first to neutralize the magnetic effect of the current in coil A, on the right-hand side of the right-hand pulley. Each of the side pulleys has, in addition to the coil A, which acts to keep the pulley out of contact, another, oppositely wound, coil, B. There is no current in

either of the coils B when the governor is not in action. Coils B receive current alternately, as a variation of the main current makes connection with the relay on one side or the other. Only one coil B is energized at one time. As the relay connection is made, the relay current flows into coil B on the left-hand side of the right-hand pulley; the branch of the normal current which formerly was in coil A is divided between coil A and coil B, coil A receiving one half of what it received before, coil B receiving the other half. Coil B, however, has an additional turn or turns. Therefore, not only is coil A neutralized, but additional and opposite magnetism results from the additional turns on the differentially wound coil B.

The active factor, then, or differential power, of the complainant, is the energy resulting from the additional turns on coil B after coil B has neutralized coil A. Bradford's apparatus, therefore, brings upon one pulley by the relay current power which cannot work until it has overcome a resistance. Chapman has no such resistance to overcome. By his arrangement he has dispensed, not only with the mechanical relay, but with electro-magnets to produce repulsion, and with the use of the relay current to overcome such magnetic repulsion.

Throwing out of consideration such use by Bradford of his relay current as has no corresponding use by Chapman, we may, for purposes of comparison, describe the action of Bradford as magnetizing first the pulley on one side to connect it with the middle pulley, and next magnetizing the pulley on the other side for a similar purpose.

The "differential" power of Bradford which arises after neutralizing opposition of coil A is expended on one side only, and in one direction only. Bradford's differential power arises after variation of the main current by energizing additional turns of coil B, and after neutralizing coil A. The moving residue is the "differential power" of complainant's counsel.

It is apparent, then, that Bradford operates his whole apparatus by alternating "differential power." The differential power which operates at one time has no direct effect upon, or relation to, the differential power which operates at another time.

In the complainant's brief it is said that:

"Inasmuch as coils A, A, each have an equal number of turns, they each exert an equal force, and therefore the force exerted on core 16 by one magnetic core or wheel 15 is counterbalanced by that of the other wheel 15, and consequently no action of core 16 results, and the latter is held in stable equilibrium."

We think this method of showing a similar balancing of electric forces is unsound. Pulley 16 is in equilibrium because not in contact with any mechanism which can move it.

Bradford's machine does not come into action because wheel 15 on one side is so magnetized as to overcome any power or force exerted by wheel 15 on the opposite side. Therefore Bradford's whole combination of three magnets does not exhibit an electrical operation corresponding to that in the working solenoid of Chapman.

Our comparison, to find a similar electrical operation producing

movement, must be between the electrical operation which occurs upon one wheel 15 of Bradford's device and the electrical operation which occurs in Chapman's device as a whole. It may be possible that Chapman, by using a new electrical operation or a new electrical device, which was employed in duplicate by Bradford, would infringe, though Chapman used it, not in duplicate, but singly, for the same purpose.

To repeat, the electrical operation which moves the lever arm of Bradford's device in one direction is as follows: Magnetic repulsion is first overcome by introducing the relay current until it neutralizes the previous magnetism, and then by adding current in the additional turns, which produces magnetism in the opposite direction. The movement given to wheel 15 is a very slight movement in one direction only. When the relay has finished its work on that side, the current ceases to flow through coil B, which ceases to operate; and coil A resumes its work to keep the apparatus quiet on that side.

In Chapman's device there are two coils additional to those which produce power for the movement of the lever arm. They act alternately at each end, and not simultaneously. As the relay is admitted to one, it neutralizes the permanent magnetism at the same end. The relay current energizes a coil at one end. This neutralizes the other coil at that end, leaving the permanent electrical power, which has no counterpart in Bradford's device, free to act. The active factor of Chapman is the permanent magnetism at one end of the coil. No new active power is introduced by the relay. When it has acted, and the current is restored, the additional coil is no longer energized. Wheel 15 of Bradford's device operates positively in one direction, not alone by neutralizing the previous power, but by adding new power. Chapman operates solely by neutralizing one force in order to free the other. Each neutralizes power by the relay, but neutralizing power alone is inadequate to move Bradfords device, and adequate to move Chapman's.

In the additional brief for the appellee it is said:

"Bradford's magnets are unequally as well as differentially wound. If Bradford's coils had an equal number of turns, he would have none of his new differential power, and consequently his method would not work."

We think this points out a substantial difference, and the unsoundness of the present contention as to differential electric power.

It is also pointed out that in the file wrapper appears the statement that Bradford's available magnetic energy was that which arose in coil B after neutralizing coil A; and that Chapman uses no "differential power," using the term in the sense in which it was used in communications to the patent office.

We have next to consider the method claims. Bradford's method claims call for releasing and actuating by differential power. Complainant's expert Wolcott says:

"The discovery or invention of Bradford consists in the actuating of the current-varying apparatus * * * by differential power which acts instantaneously and which simultaneously releases and actuates said current-varying apparatus."

We are unable to see that differential power, as defined by the complainant, releases the current-varying apparatus of either complainant or defendant. If differential power does not arise until after the coils have been neutralized, the differential power merely actuates, and does not release. The new definition of differential power does not accord with the claims, which require that it should perform a function which, by the complainant's own definition, it cannot perform. Chapman does not release his apparatus by the difference between unequally wound coils. He releases his apparatus by the action of the relay, which occurs before differential power is developed. The operation which moves his core does not correspond at all with that which moves Bradford's wheel 15 into contact with the middle pulley.

Considering also claim 5, this employs the language, "opposing the action of said current-varying apparatus by alternation of said power." We fail to see how this language is applicable, if we are to use the term "differential power" as defined by complainant's counsel. We are of the opinion that the theory upon which the case was argued to this court is a departure from the patent, and from the true interpretation of the claims.

We are also of the opinion that infringement cannot be based upon the fact that Chapman uses a solenoid with differential winding. Bradford testifies that Chapman suggested to him the use of winding consisting of two equal coils running in opposite directions; that when but one of the coils received current magnetic force would result, but that when both of the coils received current at the same time they simply neutralized each other, and no action resulted. He testifies that, after considering the plan of causing action by a single electro-magnetic force,—that is, a force not differentiated by another electric current,—he abandoned that idea.

We think, upon this evidence, that Chapman was entitled to use differential winding for his working solenoid, and to use one magnetic force to neutralize the other. This involved a division of the current and the use of the relay. Chapman added to what he had suggested to Bradford a second coil at each end, whose function it was to neutralize the action of the first coil at that end. Bradford was compelled to neutralize an electric force for an entirely different reason. He was obliged to put in magnetic repulsion for a purpose entirely foreign to anything in Chapman's device. It was necessary, before his relay could operate as an active factor, that he should neutralize this force. He cannot monopolize the idea of neutralizing one force in order that another force may act. Upon his own admission, Chapman suggested to him the neutralizing of one force by another, and the idea is applied in a substantially different way in each machine. It is also in evidence that differential winding for the purpose of preventing sparking was old, and Chapman was entitled to use it for this purpose. It appears, moreover, that differential magnets and a relay current were old in the art.

There is no suggestion in Bradford's specification that his method was applicable without auxiliary mechanical power. He used differential winding to neutralize magnetic repulsion and to secure magnetic

attraction. While his ultimate object was to govern the action of the current, his immediate object was to govern the application of mechanical power by an ingenious electric clutch.

We do not think that Bradford's patent can fairly be construed to cover broadly all methods of governing an electrical current through the use of electrical magnetism which operates after the current has overcome other magnetism; but that his patent must be limited substantially to the combination therein described, which includes, as essential elements, an auxiliary mechanical power and an electric clutch to apply the power.

We think there are the following substantial differences: The defendant divides its normal current for the purpose of storing up energy in both ends of the working solenoid core, intending to use this energy to move the rheostat arm. The complainant divides his main current to create energy to hold the parts of an electric clutch out of contact. The complainant introduces his relay current to release the mechanical parts, and also for the purpose of producing positive action by his unequally wound coils. The defendant uses the relay current for the purpose of neutralizing one of the two forces which move the rheostat arm, thereby permitting the other force to act. The complainant's method does not involve the neutralizing of one of the forces, either mechanical or electrical, which is to move the lever arm. The action of the defendant's apparatus does not arise from energizing additional turns, but from neutralizing one coil of a differentially wound magnet.

The general considerations which require a limited construction of the patent are sufficiently dealt with in the opinion of the circuit court. We have, therefore, in this opinion, dwelt more particularly upon the method claims and the complainant's limited definition of "differential power."

Upon the whole case, we adopt the view of the defendant's experts that the complainant and defendant were proceeding upon opposite and diverging lines of experiment, and that each has produced an essentially different combination.

As a result, we regard the defendant's device as an independent invention, which does not embody the substance of what the complainant is entitled to monopolize, and therefore there is no infringement.

The judgment of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

FAIRBANKS, MORSE & CO. v. C. A. STICKNEY & CO.

(Circuit Court, D. Minnesota, Third Division. February 26, 1902.)

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
Where it is admitted that the device of complainant's patent consists entirely of a combination of old and well-known elements, the burden rests on him to show that such combination produces a new and better result than that produced by prior combinations to sustain the claim of patentable invention.

2. SAME—FRICTION CLUTCH MECHANISM.
The Hobart patent, No. 655,440, for a clutch mechanism, *held* void, on the evidence, for lack of patentable invention.

In Equity. Suit for infringement of letters patent No. 655,440, granted to Frank G. Hobart, February 7, 1900, for a clutch mechanism. On final hearing.

Paul Synnestvedt, for complainant.
John E. Stryker, for defendant.

LOCHREN, District Judge (orally). The complainant is the owner of letters patent No. 655,440, that were issued on the 7th day of February, 1900, to Frank G. Hobart, for a clutch mechanism, and it brings this suit against the defendant, claiming that it has infringed this patent, seeking the usual relief in a suit in equity by injunction and damages.

The first question is as to the validity of the patent, and next as to the alleged infringement. It is not contended but that the device of the complainant is an operative and valuable one, but it is contended that there is no invention in its construction; that it is a mere combination of old elements, performing the same functions, in the same way, as older machines; and also that the defendant's device differs substantially from that of the complainant, and does not infringe; that it does not have certain elements which are essential, and as such described in the claims of the patent.

I do not think there is any doubt that, if the device of the complainant were a new construction, it is such a one as would be patentable; and in that case, if it were entitled to a liberal application of the doctrine of equivalents, it would seem that the defendant's device is so nearly like it in all elements and parts that it would be held to infringe. But this is not claimed by the complainant to be a new device, but only a combination of old elements, and one question is whether it shows invention, so as to be patentable, under the decisions of the courts.

It has been held that a new combination or arrangement of old and well-known devices, provided that a new and useful result is attained thereby,—as when the combination makes the machine more effective than those preceding it, and being, for that reason, accepted by the public as an obvious improvement upon what has been before used, and so comes into general use,—shows such an advance in the art as to be recognized as patentable, and that changes producing such results are sufficient evidence of invention as to be admitted as such.

The first and most serious question in this case is whether the evidence shows that complainant's device is one of that character. It is admitted to be a combination of old elements. It also appears that there have been before a good many machines constructed by others, and some of them patented, to perform the same work. Friction clutches have been in use for various purposes for a long time, and they are constructed in many ways,—either by having substances, whether of wood or metal, on shafts, moving together by friction, by touching and rubbing, whether they are simply cylindrical, or, as in this case, conical in form; the latter being, where it can be used, apparently the favorite form, by reason of the fact that it can be detached so readily, and the friction removed.

Now, is there any evidence in the case that this device performs the functions any differently from those of machines that had gone before, or that it produces any different or useful result? These are matters that should be shown at the outset to establish the fact that there is invention in the machine such as would warrant its being patented. There seems to be no direct evidence, at least none has been referred to by counsel, as to that particular subject,—as to the efficacy of the machines that have gone before this; no comparison between this present machine and its predecessors. All that has been mentioned is the statement that during the first year when it was put in use there were some 500 of the machines disposed of. There is no evidence as to the amount of other and similar machines which had been disposed of, or whether this number comprises nearly all that have gone into use in the country, or only a small fraction. I have no means of determining that the result attained was different from that in other cases, or that it was reached in a different way. I think, without dwelling upon the matter further, that I must hold that this patent fails, and that the machine is not patentable, being simply a combination of old devices, reaching old results in substantially the same way.

It is not necessary, in order to defeat a patent of this kind, as I understand the law, that it should be shown, as it would have to be for a patent for a device that was claimed to be entirely new,—a new invention,—that it had been preceded by some machine that was exactly or substantially like it in all respects, and anticipated in that way. It is not necessary that this should be shown in the case of a patent for a combination of old devices, where it is admitted that the devices are old, as there is no invention in merely assembling the different old elements. But, in order to sustain such a patent, it must appear that there was invention in so putting them together that it produced a new result,—a new and valuable result,—and not merely the old result in substantially the old way. There is no invention merely in a change in the form of uniting the constituent elements, or in the manner of assembling them together, to form the machine, if the result is the same as in prior machines.

For these reasons, I think the decree must be for the defendant in this case, dismissing the bill. Ordered accordingly.

WOOSTER v. TROWBRIDGE et al.

(Circuit Court, S. D. New York. March 7, 1902.)

1. INSOLVENCY—CONTRACT MADE BY TRUSTEE—VALIDITY.
A trustee for an insolvent corporation, who had instituted a suit to recover damages for infringement of a patent owned by the corporation, subsequently entered into an agreement with complainant, who had a similar suit pending, by which the latter was to take charge of both suits, employ counsel, make settlement, and indemnify the trust estate against liability for costs, and the net proceeds recovered in the two suits were to be equally divided between them. At that time neither the trustee nor his counsel believed that any damages could be recovered. Complainant lost his own suit, but he and his counsel pressed that of the trustee with such energy and success that after a long litigation a decree for substantial damages was recovered. *Held*, that in the absence of any statute making the contract of the trustee illegal, or proof of bad faith on his part, the creditors of the corporation would not be permitted, after nearly 20 years' acquiescence, to attack its validity on the ground that it was improvident and ultra vires, for the purpose of defeating complainant's claim to a share of the net proceeds, but that the contract would be enforced as an equitable assignment of the fund to the extent of the share agreed upon as his compensation.

2. SAME—POWERS OF TRUSTEE—EQUITABLE ASSIGNMENT OF FUND.
It is the duty of an assignee or trustee in insolvency for the benefit of creditors of an insolvent corporation to prosecute meritorious claims to judgment, but he is not required to prosecute a doubtful claim; and a court of equity will not exact higher care or judgment in that regard than he would use for himself in the exercise of proper care for his own interests. A contract by which such a trustee gave to another full power to prosecute, compromise, or settle a doubtful suit at his own expense,—his compensation to be a stipulated share of the net amount realized,—is not an improper delegation of powers vested in the trustee alone, and will be sustained as an equitable assignment of a portion of the fund realized through the services and expenditures of the assignee.

3. PATENTS—INFRINGEMENT — DISTINCTION BETWEEN PROFITS AND DAMAGES RECOVERABLE.
A contract between the owners of two patents, covering similar inventions, by which joint licenses were to be issued at request of the second party, who was to recover a share of the license fees for the use of the patent of the first party, and also of the "damages" payable from infringers of such patent, does not entitle him to share in a sum recovered by a suit in equity as "profits" realized by an infringer, where no damages were allowed.

4. ASSIGNMENT—RECOVERY IN PENDING SUIT—EVIDENCE TO ESTABLISH.
Evidence considered, and *held* insufficient to sustain a claim to a fund recovered for infringement of a patent, based upon an alleged verbal assignment of the patent and the recovery, while the suit was pending, to a solicitor for the complainant therein.

In Equity. Suit for distribution of fund in court.

Shearman & Sterling (John A. Garver, of counsel), for complainant Wooster.

Edmund Wetmore (John K. Beach, of counsel), for defendant Trowbridge.

A. Nelson Lewis (Henry W. Taft, of counsel), for defendant Lewis.

HAZEL, District Judge. The complainant, as assignee of George H. Wooster, deceased, brings this suit in equity, and prays for a de-

cree declaring and adjudging her to be the owner and entitled to three-quarters of the balance of a fund amounting to $24,063.41, with accrued interest, remaining in the custody and control of this court. The deposit of the original fund of $43,557.27 was made to await the determination of all claims thereto pursuant to an order made and entered April 19, 1897. Subsequently, by order of this court, there was paid therefrom for counsel fees, master's report, and disbursements incurred by complainant's assignor, the sum of $19,493.86, leaving the aforesaid balance on deposit in this court. The fund was realized as a result of perplexing and protracted litigation in a suit commenced in this court July 10, 1878, by Theodore A. Tuttle, trustee in insolvency for the benefit of creditors of the Elm City Company, a corporation organized under the laws of the state of Connecticut. The right of the trustee to bring the suit without first obtaining leave of court having jurisdiction of insolvent estates is clear. By the general statutes of Connecticut (Revision of 1875), trustees in insolvency are expressly empowered to sue in their own names any claim belonging to an insolvent debtor's estate. The Elm City Company, at the time of the appointment of a trustee for the benefit of its creditors, owned many patents,—among them, the Crosby & Kellogg patent, so called, No. 37,033, granted December 2, 1862; being a device for plaiting and ruffling attachments to sewing machines. The Elm City Company became its owner by assignment. This was the patent relied on in the suit commenced by Tuttle, trustee, against Horace B. Claflin et al. for its infringement. This suit was terminated in favor of the trustee, and resulted ultimately in the recovery of a substantial sum for profits of Claflin arising from the illegal use of the Crosby & Kellogg patent. There are four claimants to the fund. The complainant, as already stated, claims three-quarters; Lewis, cross claimant, three-quarters; Mrs. Tillinghast, cross claimant, one-quarter; and Trowbridge, defendant and trustee of the Elm City Company, vice Tuttle removed, claims that he is entitled to the entire fund, for the benefit of the insolvent estate.

It is essential to a complete understanding of the controversy that the status of the claimants, the amount of money which they claim, and the source of the title which they assert, be made as clear as possible. The claim of complainant will first be considered. She claims title from two separate sources, to wit, to one-half interest in the fund by reason of a contract entered into June 16, 1883, by and between Tuttle, as trustee, Charles B. Stoughton, his attorney and solicitor at the time in the suit brought against Claflin & Co. to sustain the validity of the Crosby & Kellogg patent, and George A. Wooster, complainant's husband, and assignor of the claim sought to be established by this suit. This contract, for convenience, will hereafter be referred to as the "Three-Party Agreement." At the time of its execution, and prior thereto, Wooster was the owner of the Pipo reissue patent for an improvement in sewing machines for making band ruffling,—a device similar to that of the Crosby & Kellogg patent. The Pipo reissue was also claimed by Wooster to be infringed by Claflin & Co. It had been sustained at final hearing (Wooster v. Blake [C. C.] 8 Fed. 529), and in 1881 Wooster obtained an inter-

locutory decree in a suit which he had brought against Claflin & Co. to restrain infringement of the Pipo reissue. The initiatory success attained by Wooster against Claflin was tenaciously and aggressively combated by able counsel. The contention was that reissuing patents for the purpose of enlarging their claims was invalid, on the authority of James v. Campbell, 104 U. S. 356, 26 L. Ed. 786, and Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783, and that the Pipo reissue came within the scope of these authorities. Justice Blatchford, who heard the case, dismissed the bill, and declared the reissue of the Pipo patent invalid as to essential claims. Wooster v. Handy (C. C.) 21 Fed. 51. This was in July, 1884. The three-party agreement was entered into one year prior thereto, and provided that Wooster and Tuttle would, at their own expense, push both suits against Claflin & Co. to a final determination; Wooster to receive the gross proceeds, and make equal division thereof between Tuttle and himself. It was further provided that Wooster should be empowered, at his election, and at his own expense, to proceed with both the Pipo and Tuttle suits, and that he alone should have power and authority to make settlements. The basis for complainant's claim to an additional one-quarter interest in the fund arises out of an agreement made September 7, 1877, by Tuttle, as trustee for creditors, and Alexander E. Kursheedt (hereinafter referred to as the "Kursheedt Agreement"). Kursheedt was interested in the Arnold patent for a similar device to that of the Crosby & Kellogg patent, and, by the terms of the agreement, Tuttle and Kursheedt united their interests in both patents, and agreed to grant joint licenses. It was agreed that the licenses were to be issued by Tuttle, at the request of C. B. Stoughton, and by him delivered to Kursheedt. Negotiations for licenses were to be conducted solely by Kursheedt, the terms of the grants to be approved by Stoughton. The license fees under the Crosby & Kellogg patent, and sums payable for damages for infringement thereof, were, by the terms of the agreement, made payable to Kursheedt, and from the sums so received by him he was authorized and empowered to retain 25 per cent.; the balance to be paid to Stoughton, who was authorized to retain $2,500 to meet any expenses of litigation or other disbursements necessarily incurred to enforce the Crosby & Kellogg patent. On February 20, 1890, Kursheedt assigned his interest arising from the foregoing agreement to Wooster. Subsequently, on February 27, 1888, a further agreement was made in writing by and between Tuttle, as trustee, and Wooster, by which the three-party agreement was modified, and the intent of the parties explained. Stoughton is not a party to this agreement. It provides that Wooster shall have exclusive right and power to settle, adjust, and continue or discontinue the suits specified in the three-party agreement upon such terms as Wooster may deem proper and just. Tuttle agrees that Stoughton, his attorney, shall execute such papers as may be necessary to effect the settlement. Wooster is given the authority to execute all necessary conveyances and instruments to bring about that end, and to employ counsel to represent Tuttle in the suit brought by him against Claflin. Simultaneously with the execution of the foregoing agreement, Wooster, in writing, indemnified and holds

Tuttle harmless from all costs and expenses arising out of the prosecution of either the Pipo suit or Tuttle suit. The agreement further provides that Wooster shall be reimbursed for expenditures made in the prosecution of said suits, or either of them, and that his expenditures be deducted from the proceeds before division thereof, in accordance with the three-party agreement. The effect of these latter instruments was to grant to Wooster absolute control of the then pending litigation between Tuttle and Claflin. It satisfactorily appears from the record that the claim for profits earned by Claflin & Co. by reason of wrongful use of the Crosby & Kellogg patent, and the right to recover the same, was viewed with more or less doubt and skepticism. It was regarded as worthless by the trustee and his advisers. Eminent counsel, learned in the patent law, looked upon the claim as difficult to establish by proper and sufficient proof. Overtures of settlement of the Pipo and Tuttle suits, made by Wooster to Claflin & Co., on a basis of $2,500, were declined. It was fairly assumed that, owing to a change in the fashions and style of dress then prevalent, extreme difficulty would be experienced in obtaining evidence justifying a recovery of profits resulting from the illegal use of this device. Its utility was dependent on fashion, and was therefore of short duration. The profits were earned and damages sustained a number of years prior to the suit. Notwithstanding apparent obstacles to success, Wooster, in 1890, acting upon the authority of the agreements with Tuttle, stimulated, doubtless, by the additionally acquired interest of the Kursheedt agreement, employed solicitors and counsel to energetically prosecute claims for profits arising from the infringement of the Crosby & Kellogg patent. The proofs show that intricate and complex questions of law and fact were involved and judicially determined. This phase of the controversy, however, is only important to elucidate the hesitation with which the trustee was imbued, and the prevailing motive and intent which prompted and induced the Wooster agreements. It is unnecessary to point out in detail the valued and extensive services which Wooster undoubtedly rendered. It is sufficiently proven that he was the main, if not the sole, factor in quickening enervated legal machinery. After more than a decade, by the expenditure of time and means, dilatoriness of procedure disappeared. The three-party agreement and subsequent agreements, in clear, precise, and unambiguous language, to which Tuttle gave assent, constituted his warrant of authority, and may be justly construed in the nature of an employment to aid the trustee in the performance of a duty devolving upon him. Wooster was given no right or power to bind the estate in a transaction which, in the then state of affairs, was not advantageous to the creditors. Through his vigorous and well-directed energy, the patent suit, pronounced by the circuit court of appeals for this circuit as "both remarkable and unique," came to final judgment, only to again become the subject for judicial determination by reason of adverse and conflicting claims to the final award. The contentions insisted upon with much earnestness by counsel for trustee, Trowbridge, to defeat Wooster's right to a distributive share under the three-party agreement and subsequent agreements are (1) that such agreements

were improvident and ultra vires, and have never been ratified or sanctioned by the creditors of the Elm City Company, or the probate court of the city of New Haven, and therefore cannot be enforced; and (2) that the consideration for the agreements is inadequate and speculative, and based upon a gross breach of trust and fraud upon the creditors, and that no recovery can be had here upon a quantum meruit.

The circuit court of appeals for this circuit (Judge Shipman speaking for the court), when the case of Tuttle v. Claflin, 31 C. C. A. 419, 88 Fed. 124, was before that court on review of a report of the master allowing counsel fees, etc., to be paid out of the fund, said:

"The appellants insist that the contracts made by Tuttle as trustee were improvident and ultra vires, and that the entire fund should be sent to the probate court of New Haven, which has charge of the settlement of the estate of the Elm City Company, and which should make the proper allowance, if any, for services. Inasmuch as Wooster was fully clothed with the apparent power to employ counsel, as the trustee took no part in the litigation, paid and proposed to pay nothing to relieve the estate from all liability in case of nonsuccess, and as the fund was obtained by the disbursements of Wooster and the services of those whom he employed, they have an equitable lien upon it; and the circuit court, which properly has control of the fund, should adjust the amount of the liens for these services before transmitting it to another jurisdiction."

The services specified in the foregoing excerpt from Judge Shipman's opinion were performed by counsel employed by Wooster at a fixed percentage of the gross amount recovered. The contention insisted on at the hearing before the circuit court of appeals, in opposition to allowing counsel compensation pursuant to contract with Wooster, was similar to that urged on this hearing. The decision of the circuit court of appeals upholding the contract that Wooster made with his counsel seems to me to be clear authority in favor of the trustee's power to make the agreements in suit. A trustee for the benefit of creditors is merely the representative of the debtor, and obtains his power from the assignment and the statutes. Perry, Trusts, 597. Therefore, whenever it is urged that an assignee or trustee for the benefit of creditors has done an act outside of the scope of his authority, it is pertinent to make inquiry as to the nature and extent of that authority. It is clear that such a trustee is limited to the performance of such duties and powers only as are contemplated by the trust. The rights of creditors which flow from the creation of the trust are of primary concern. When a trustee omits the performance of those duties which the law demands, a court having jurisdiction may compel such recalcitrant trustee to observe a proper and faithful stewardship. I do not think that after the lapse of a score of years, during which period of time the creditors must be presumed to have had knowledge of acts performed by the trustee within the purview and scope of his authority, creditors can be heard to say to a court of equity that the trustee exceeded his powers. During all of these years the litigation against Claflin & Co. was carried on in the name of the trustee. No opposition was made on the final accounting of the trustee in the probate court. The entire subject-matter was allowed to lie dormant by the creditors until after the

award. The services rendered by Wooster were of such value that a court of equity will not deprive him of the fruits of his labor. He was guilty of no wrongful act. None of Tuttle's powers and responsibilities as trustee are committed to another by any of the agreements to which reference has heretofore been made. The poverty of the Elm City Company reasonably justified the act of the trustee in making what seemed to him to be the best and most advantageous arrangement for the cestui que trust, in the light of all the circumstances; and in the absence of a statutory provision prohibiting such agreements, or proof of bad faith on the part of the trustee, this court will require fulfillment of the terms of the contract. New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; Semmes v. Whitney (C. C.) 50 Fed. 666; Randall v. Dusenbury, 39 N. Y. Super. Ct. 174, affirmed in 63 N. Y. 645.

In no sense can the three-party agreement, and the agreement ratifying or modifying the same, be construed as an improper delegation of the powers vested in the trustee alone. Undoubtedly it was Tuttle's duty to actively prosecute any meritorious claims to judgment, but the law does not require him to prosecute a doubtful claim. Harrington v. Ketaltas, 92 N. Y. 45.

It follows, therefore, that a court of equity will exact no other or greater care and circumspection in behalf of a cestui que trust than the trustee, in the exercise of proper care, would exert for himself. Moreover, such agreements are more than mere undertakings to pay a stipulated sum for services performed (Tuttle v. Claflin, 31 C. C. A. 419, 88 Fed. 122); and the court of appeals of the state of New York has held (Fairbanks v. Sargent, 117 N. Y. 329, 22 N. E. 1039, 6 L. R. A. 475) that contracts by which a specific share in a specific fund or specific property is created for services rendered and to be rendered, coupled with exclusive power to settle or compromise, operate as equitable assignments of the stipulated shares so transferred, and such shares are the measure of equitable interest of the assignee in any recovery. Other authorities abound wherein a similar doctrine is applied. I therefore hold that complainant's remedy was dependent on the contract. The amount for the services of Wooster was definitely determined upon, and no claim upon quantum meruit can arise where, as in this case, the effect of the agreement makes Wooster the equitable assignee to the extent of his claim to the fund.

The question of the power of Tuttle to make the three-party agreement and subsequent agreements, ratifying and extending Wooster's authority, having been decided, another problem presents itself: Is Wooster entitled to recover an additional one-fourth of the recovery by virtue of the Kursheedt contract, and his ownership thereof? The agreement clearly entitles the beneficiary solely to a share in damages for an infringement of the Crosby & Kellogg patent. The sum to which Tuttle was found by the master to be entitled, and which is now here for distribution, was not for damages, as defined in the patent law, but for profits earned by defendants Claflin et al. from the illegal use of the patent in suit. The distinction clearly appears in

the language used in section 4921 of the Revised Statutes of the United States. By that section the complainant, upon a decree being rendered in his favor for infringement, is entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court is given power to increase such damages, in its discretion, and to make assessment thereof, or cause the same to be assessed under its direction. The authorities construing section 4921 uniformly recognize a distinction between profits and damages. They require a defendant to account for what he has gained by the unlawful infringement, and, in addition thereto, damages may be awarded. Vulcanite Co. v. Van Antwerp, 2 Ban. & A. 254, Fed. Cas. No. 5,600; Birdsall v. Coolidge, 93 U. S. 64, 23 L. Ed. 208; Walker, Pat. §§ 572, 573; Covert v. Sargent (C. C.) 42 Fed. 298. In the former case the court said:

"The terms 'profits' and 'damages,' as used in the act, are hardly convertible. They seem to mean different things. The latter are to be awarded 'in addition' to the former. Profits doubtless refer to what the defendant has earned by the unlawful use of the patented invention, and damages to what the complainant has lost. Before the act of 1870, it was incumbent on the patentee to make his election of remedies, and to proceed at law for the damages which he could show had been sustained from infringement, or in equity for the gains and profits that the defendant realized by the authorized use of his property."

In Covert v. Sargent (C. C.) 42 Fed. 298, the distinction was clearly recognized in this circuit. In that case the complainant recovered no damages, and the master found that he was entitled to the recovery of profits. The court said:

"As complainant has not recovered damages, he must be content with such indemnity for violation of his rights as he will receive by recovery of the profits which the master has found were realized by the defendant."

The master in the case at bar, in his report making the award, expressly states that no assessment against the defendants for damages for their infringement of the patent is made. The circuit court of appeals, on appeal from the master's report, states in its decision that the complainant shall "recover from the defendants the sum of $40,000,—their profits." The Kursheedt agreement contemplates no such payment, and, being asserted here in derogation of the rights of creditors, must be strictly construed. Moreover, the agreement empowers the issuance of licenses and payment of license fees, as well as damages for infringement to be paid to Kursheedt. I am unable to escape the conclusion that the true intendment of this contract was merely to obtain damages from past infringers, whenever such damages could be collected without resort to law, and possibly to induce, or aid in inducing, infringers to accept licenses for unexpired terms of the patent. Certainly, by its terms it fails to contemplate the recovery of gains and profits as the measure of damages in equity suits. The claim under the Kursheedt agreement is therefore disallowed. This conclusion renders it unnecessary to advert to any other reasons advanced for disallowing to complainant this one-quarter interest in the fund dependent thereon.

I am now brought to a consideration of the Lewis and Tillinghast claims. Their basis appears to rest upon facts and circumstances of

an extremely unusual as well as unsatisfactory nature. The intimation on argument by counsel for all parties that Stoughton, through whom both Lewis and Tillinghast claim title, was lacking in rectitude at the time of the transfer by him to Logan and Tuttle, predisposes the court to a faithful examination of the evidence. Therefore careful consideration is given to the testimony of Tuttle. The alleged corroborating circumstances are weighed and sifted with much caution, so as to insure an equitable solution of this controversy. The conclusion arrived at is that the testimony on the part of the claimants Lewis and Tillinghast has not removed a reasonable doubt which arises as to the sufficiency and cogency of the testimony offered to establish a verbal assignment of any recovery that might be had in the suit against Claflin. The facts upon which these claimants chiefly rely for their claim to equitable relief from this court show that Charles B. Stoughton was counsel in various patent litigations for the Elm City Company prior to its insolvency. He continued as such counsel in various patent suits after the appointment of Tuttle as trustee for creditors. Tuttle testified that Stoughton presented a bill to him for services rendered to the Elm City Company amounting to $5,000, and that thereupon he consulted with various creditors, and obtained their consent to satisfy the claim of Stoughton by assigning to him the Crosby & Kellogg patent, and the claim to recovery arising from the infringement. Subsequently this settlement is claimed to have been made, and Tuttle, at some time thereafter, which does not clearly appear, wrote upon one of his account books, as trustee of the estate, the words, "Sold to C. B. Stoughton for counsel fees." No assignment in writing of the patent or claim is relied on. Other facts appearing may be stated chronologically. The trustee commenced suit against Claflin et al. (Stoughton acting as his solicitor) July 10, 1878, nearly two years after his appointment. In 1879 Tuttle's accounts were allowed by the probate court. He charged himself with the sale for $606 of patents valued at $10,000, and credited himself with the loss of $9,394. No specific mention of the sale to Stoughton is made, nor does the account show any payment of Stoughton's claim for services, nor the receipt by him of any dividends on account thereof. The three-party agreement, wherein Stoughton is described as attorney, was made on June 16, 1883. On March 10, 1884, Judge Wallace, on final hearing, ordered a reference to a master for an accounting. October 30, 1884, Stoughton gave Mr. Logan, his associate counsel, a written assignment of all his interest and title in the claim and recoveries had. In the assignment, Stoughton declares that he is the owner of one-half of the claim by reason of an assignment to him from Tuttle. In November, 1886, Stoughton exhibited to cross claimant Lewis a pretended assignment, under date of November 2, 1886, of all claims for damages and profits that might be recovered. This instrument, it is conceded on all sides, was a forgery, and no claim is made thereunder. Lewis, having no knowledge of the Logan assignment, purchased half of Stoughton's interest, paying $2,500 therefor. At about this stage of the proceedings Stoughton disappeared, and has since died. Lewis on July 7, 1887,—nearly a year after the Stoughton assignment to him,—wrote to Tuttle, stating that he had an assignment of Stough-

ton's interest in the Claflin suit, and inquired whether there were any other conflicting interests. Tuttle replied that he had sold the patents to Stoughton previous to the ending of the suit. August 7, 1887, in reply to a letter from Lewis, he again wrote:

"I, as trustee, or any stockholder of said company, have no interest, as the patents in suit, when the affairs of the Elm City Company were settled, were sold to Mr. Charles B. Stoughton of New York."

And again, on October 14th of the same year, at Mr. Lewis' request, Tuttle signed a certificate stating that on or about November 2, 1878, he sold the patent and claim to Stoughton. Nine years had elapsed since the commencement of the suit against Claflin, when these letters were written, and five years had elapsed since the reference to the master for an accounting. On February 9, 1888, Logan and Lewis appeared personally and by counsel before the master, and attempted, by reason of the assignments, to control its procedure. Wooster contended before the master that by the three-party agreement he was in control. The master decided in favor of Wooster, although Logan continued in the case as associate counsel. On February 28, 1888, Tuttle again wrote Lewis. He stated that he had forgotten the three-party agreement, and that, inasmuch as his attention had been called thereto by Wooster, he felt bound to protect Wooster in the case. He further stated:

"Wooster said he will turn the one-half of the net proceeds over to me when the case is settled, and as it does not belong to me, and as proof can be shown whom it does belong to, I will turn it over to the right party."

Stoughton's appearances before the master ceased after June, 1885, and other counsel were employed by Wooster, who have been heretofor allowed compensation out of the fund. The master filed his report August 24, 1893, and found that the profits made by the defendants by way of infringement of the Crosby & Kellogg patent were $76,215.85. Judge Coxe overruled the master, and on appeal to the circuit court of appeals the award was fixed at $40,000,—the fund in court. Tuttle v. Claflin, 22 C. C. A. 138, 76 Fed. 227.

The contention on the part of the claimants Wooster and Trowbridge is that no title in this claim was ever in Stoughton,—in other words, that the trustee never made a verbal assignment to Stoughton,—and, further, that if such assignment was made it was invalid. The question whether a court of equity, in the exercise of its powers, should uphold the various mesne assignments through which Tillinghast and Lewis claim a lien on the fund, must be determined upon the weight of the evidence submitted in their support. Tuttle testified that he had made a verbal assignment to Stoughton of the patent and recovery. On his cross-examination of May 10, 1900, he testified that he made an affidavit in the Claflin suit on the 27th day of February, 1888, asserting that Stoughton on or about June 25, 1885, had abandoned the cause, departed from the district in which it was pending, and that his whereabouts were unknown. He reiterated at this time the truth of this affidavit taken in 1888, and testified further that his recollection of the facts in connection with this suit of Tuttle and Claflin was clearer in 1888, when the affidavit was made, than at the

time of the hearing. December 1, 1896, he again made affidavit in that case, in which he stated that after refreshing his recollection by referring to certain documents, papers, and records, he was convinced that he had never made any assignment to Stoughton, or to any one else, of the Crosby & Kellogg patent. He further testified as follows:

"Q. And did you not at the same time state, after examining those agreements, that you were inclined to think that Mr. Stoughton's lien upon the proceeds of the suit against Claflin & Co. was to extend only to services rendered in that suit? A. I presume I did. Q. That was true? A. I think so."

In 1897 another affidavit was made, contradicting the affidavit of December 1st. So that we find that this witness upon whose evidence claimants Lewis and Tillinghast are forced to rely has, during the progress of the litigation, made statements under oath of so contradictory a nature as to preclude the court from giving any credence to his testimony.

The foundation and stability of our jurisprudence depends upon the ascertainment of the truth in all controverted matters. Well-settled rules afford guidance in cases where the evidence of a witness is in hopeless conflict, and assuredly such is the case at bar. True, the transactions to which it relates occurred fully a score of years ago; and, while testimony of this nature may not be willfully false, yet it must be the subject of the severest scrutiny. Whether it be willfully false, or that of a forgetful, weak, or vacillatory man of 69 years, the standard of proof must be supplied which the law requires to satisfy the mind of the court, before relief can be granted. The burden of proof is upon the cross complainants to show, by competent and sufficient evidence, wherein the court, in the exercise of its beneficent equity powers, should raise its arm in their protection. No relief can be afforded by a court of equity in a case where the facts and circumstances forming a basis for the relief sought are left in a doubtful, confused, or uncertain state. Counsel for cross complainants earnestly contend that the proofs are not entirely dependent upon the evidence of Tuttle, but that corroborating circumstances and earmarks of truth to be found in the case are such that the court would be justified in believing the testimony of Tuttle given at a later date. It is insisted that the memorandum of the sale to Stoughton of the patent, made in the trustee's book of accounts, is strongly corroborative of his testimony. This memorandum, however, is without date, and Tuttle testified that he had no recollection as to when it was made. The inference fairly to be drawn is that it was not a contemporaneous entry. Although Stoughton received no dividend, the facts are not convincing that he was a creditor. His name does not appear in the list of creditors reported by the commissioner appointed by the probate court to decide upon claims. Other payments made by the trustee for legal services were reported and acted upon. Argument that at this time the assignment of the patents had been made, and that therefore it was deemed unnecessary to show the transaction on the books of the trustee, or make reference thereto in his account, is not convincing. The letters written by Tuttle to Lewis do not alter my conclusion. True, it is stated unequivocally in his first letter that he had sold the

patent and everything pertaining thereto to Stoughton. A fair interpretation of the language employed would include any recovery under such patent. He subsequently, again and again, in letters to Lewis, disclaimed any interest in the patent or recovery. Moreover, he never made any claim thereto, and, even after his execution of the ratifying agreement with Wooster, he deemed it necessary to disclaim ownership in any amount which might be recovered. This very properly may be regarded as a strong corroboration of cross claimants' contention. In the light of Tuttle's subsequent affidavits denying having made an assignment, however, I am still constrained to believe that the interest which Tuttle had in mind as the interest which Stoughton had at the time the letters were written was such lien or right in the recovery as a faithful counsel might legally have in the amount recovered by a client, due to his zeal and ability. It is not unlikely that Tuttle, acting as trustee, without means or authority from creditors to continue the Claflin litigation, continued the services of Stoughton with the understanding that a recovery subject to the Wooster agreement should inure to his benefit. Assuming this to be the fact, it would in no event accrue to the benefit of Lewis and Tillinghast, who hold simply under their assignment.

The result of all the evidence justifies the conclusion that Stoughton committed a wrong upon those to whom he assigned. The forged assignment hereinbefore alluded to is a circumstance strongly persuasive of the nonexistence of a verbal assignment, and of the theory advanced by complainant and Trowbridge. It is therefore quite unnecessary to further consider at length the alleged corroborative evidence, since it is insufficient for that purpose without better evidence, in support of which it might be offered. Such testimony cannot receive approval on the ground that contradictory statements were erroneously made, in good faith, through lack of memory. The transaction itself under which Lewis and Tillinghast claim title is interwoven with obscurity. No adequate reliance can be placed on the honesty of Stoughton, from whom they claim.

The record discloses that legal services were performed in the Claflin suit by Stoughton prior to his abandonment thereof. No claim, however, is here made on behalf of those who claim under Stoughton to recover on an adequate lien created for legal services rendered. The right of Lewis and Tillinghast to recover depends upon a claim of a verbal assignment by Tuttle to Stoughton of profits in the Claflin suit, and, no such assignment having been found by the court to have been made, it is unnecessary to consider any claim to the fund which Stoughton's representatives may have for such services performed.

It is insisted by counsel for the trustee that the division of gross proceeds provided for by the three-party agreement, as subsequently modified, precludes an equal division of the fund between Wooster and the trustee, and that payments of counsel and solicitor's fees dependent upon a contingent amount recoverable were not expenditures for which Wooster became liable. The circuit court of appeals, when the appeal granting allowances to counsel, and directing payment to Wooster for expenses incurred, was before it, decided that Wooster

had authority, pursuant to the contracts with Tuttle, to employ solicitors and counsel. I think that a fair and reasonable interpretation of the terms of the contract requires me to hold that the payment of the sums of money paid to counsel pursuant to direction of the circuit court of appeals was an expenditure chargeable to the fund, and not Wooster, and therefore the trustee must bear an equal share.

Finally, it follows from the foregoing that cross claimants Lewis and Tillinghast are not equitably entitled to have any sum whatever by reason of the pretended verbal assignment to Stoughton from the trustee of the Elm City Company; that, out of the fund now in the custody of the court, Emma C. Wooster, complainant, shall have and receive one-half of an entire fund amounting to $24,063.41, with accrued interest; the remaining half, together with accrued interest, shall be paid to Charles H. Trowbridge, trustee of the Elm City Company, with accrued interest. No costs are allowed against cross claimants Lewis and Tillinghast. The costs and disbursements of Wooster and Trowbridge, trustee, to be paid out of the fund.

WESTINGHOUSE ELECTRIC & MFG. CO. v. ROYAL WEAVING CO.

(Circuit Court, D. Rhode Island. May 12, 1902.)

No. 2,599.

1. PATENTS — PRELIMINARY INJUNCTION AGAINST INFRINGEMENT—EFFECT OF PRIOR ADJUDICATIONS.
   The decision of a circuit court sustaining the validity of a patent, affirmed by the circuit court of appeals, should be accepted as controlling by a circuit court of another circuit on an application for a preliminary injunction against infringement, in the absence of contrary decisions, unless it is shown not only that new matters and new issues are presented, but that the new matter is such as might require a different decision as to the validity of the patent.

2. SAME.
   Where the owner of a patent has established its validity in ably contested litigation, he is entitled to protection of the rights thus established, and should not be refused a preliminary injunction against another infringer merely because of voluminous or complicated matters of defense.

3. SAME—ANTICIPATION—ELECTRO-MAGNETIC MOTORS.
   The Tesla patents, No. 381,968 and No. 382,279, each for electro-magnetic motors, and No. 382,280, for a method of electrical transmission of power, considered on an application for a preliminary injunction, and *held* not anticipated by the French patents, No. 161,564, to Dumesnil, or No. 168,172, to Cabanellas.

In Equity. Suit for infringement of letters patent Nos. 381,968, 382,279, and 382,280, issued May 1, 1888, to Nicola Tesla, each relating to electro-magnetic motors for the electrical transmission of power. On motion for preliminary injunction.

Kerr, Page & Cooper and Horatio E. Bellows, for complainant.
Clifton V. Edwards and Arthur Stern, for defendant.

BROWN, District Judge. This is a petition for a preliminary injunction against infringement of patents No. 381,968, No. 382,279,

and No. 382,280, granted May 1, 1888, to Nicola Tesla. These patents have been sustained, after full consideration, by the circuit court of the United States for the district of Connecticut in New England Granite Co. v. Westinghouse Electric & Mfg. Co., 103 Fed. 951, and by the circuit court of appeals for the Second circuit, in the same case, 110 Fed. 753.

The defendant cites the language of the supreme court of the United States in Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856:

"Comity, however, has no application to questions not considered by the prior court, or, in patent cases, to alleged anticipating devices which were not laid before that court. As to such the action of the court is purely original, though the fact that such anticipating devices were not called to the attention of the prior court is likely to open them to suspicion."

The defendant contends that this court should not be governed by the prior decisions, for the reason that it has before it new issues and new evidence.

The defendant relies principally on the French patent to Dumesnil, No. 161,564, dated August 8, 1884, and upon the French patent to Cabanellas, No. 168,172, dated April 9, 1885. It is said that the Dumesnil and Cabanellas patents disclose what was not before the courts of the Second circuit, namely, that two single-phase synchronous motors could be coupled together, as by having their armatures mounted on the same shaft, and that these two motors might be run each by its own circuit of alternating currents, which might be supplied either by two single-phase alternating current generators mounted on the same shaft, but so as to give currents out of phase with each other, or that a single generator, such as was known in the prior art, and which furnished the alternating currents of differing phases, might have been used as the source of supply. While some of the general expressions of the opinions might have been modified, had the Dumesnil and Cabanellas patents been presented to the courts of the Second circuit, a somewhat careful and laborious examination of these patents, and of the interpretations of them by experts, leads to the conclusion that those patents, if produced to the courts of the Second circuit, would not have affected their decisions as to the nature and novelty of Tesla's invention, and as to the validity of the patents in suit. Neither does it seem to me that these patents would have affected the conclusion that the invention of Tesla was one of great novelty and merit. The question whether Tesla was anticipated in the production of a rotary magnetic field for power purposes, by the use of alternating currents of different phase, was fully and elaborately argued in these cases, and fully and closely considered by the courts. By the decisions it was found that:

"Tesla's invention, considered in its essence, was the production of a continuously rotating or whirling field of magnetic forces for power purposes by generating two or more displaced or differing phases of the alternating current, transmitting such phases, with their independence preserved, to the motor, and utilizing the displaced phases as such in the motor."

Also that he was the first to produce, by alternating currents, for power purposes, the shifting of the polar line of an annular magnet.

through the entire circumference of the ring by the action of the magnetizing forces, properly related. A magnetic field wherein, by the co-operative action of two alternating currents, a resultant polar line progresses continuously towards the strengthening current, thus producing an effect as if a permanent magnet had been carried bodily around a rotatable armature, I am unable to discover in the patents of Dumesnil or Cabanellas. It is immaterial, therefore, to consider whether Tesla was the first to disclose the use of two alternating currents of different phase to rotate a shaft, or the criticism of those expressions in the opinions which may attribute to Tesla priority in the disclosure of the use of alternating currents of different phase for power purposes. The decisions upheld the Tesla patents, and these patents well describe and claim the rotary magnetic field. The sphere within which the defendant must show anticipation is narrower than that of the use of alternating currents of different phase, with an ultimate object of rotating a shaft. This renders much of the matter in the defendant's affidavits irrelevant to the question whether the prior decisions are controlling upon this petition for a preliminary injunction.

Narrowing the question, then, to whether the defendant has disclosed any anticipation of the rotary magnetic field for which Tesla's patents were upheld, we will consider the contention based upon the Dumesnil and Cabanellas patents. While the fact that these patents, though pleaded in previous litigation, were not put in evidence or brought before the courts, tends to awaken the suspicion that they have heretofore been considered too remote from the real questions presented by the Tesla patents, the defendant is still entitled to a consideration of the argument which it bases upon those patents.

Considering, first, the Dumesnil patent, and the drawings which are offered to show the "double crank action" of the alternating currents, I find in this patent no suggestion that two alternating currents could, by their combined use, produce such magnetic effects as would be sufficient in themselves to rotate an armature, much less a suggestion that, by the combined use of two currents, a continuous rotary effect could be produced like that of a magnet carried bodily around the armature. To couple two single-phase synchronous motors upon one shaft, displacing the poles of one armature angularly with respect to the other, so that one motor expends its maximum effort while the other expends its minimum effort, does not seem to me to exhibit the Tesla invention as described and claimed in the Tesla patents. In the opinion of Judge Shipman, it is stated that "Tesla must have a continuously rotating field." The combination of two single-phase machines may have a "resultant" as distinguished from a summative effect upon the shaft; but the "resultant" of the operation of two machines is a different thing from the magnetic resultant of two currents upon a common element, as a Tesla ring or an armature within that ring.

If two single-phase machines are capable of rotating a shaft better than one machine, it is because the mechanical action of each single-phase machine is communicated through a shaft to assist the other machine. The armature of one machine would then be subjected,

first, to a magnetic effort from its own field magnet, then to a mechanical effort from the shaft, which would bring it in position for the next magnetic impulse. The whole operation of the two single-phase machines in combination would be from intermittent magnetic and mechanical efforts,—neither magnetic field would be rotary.

To show Dumesnil's combination of two single-phase machines, however, it is necessary to add another factor,—the action of the magnetic poles of his armatures. Dumesnil nowhere suggests that continuous rotary action or tendency will result without the opposition of the magnetism of the armature to the magnetism of the field poles, or that by induction the field poles will properly magnetize the armature. Dumesnil, therefore, does not anticipate, since he fails to show that two alternating currents can, merely by combination of their magnetic effects, produce a continuous rotary effort, or that the action of two different magnetic forces upon a common element will give a resultant magnetic pole which exerts its force at positions intermediate of the field poles.

If we concede that Fig. 9 of the Hering affidavit might be considered as a mere mechanical consolidation of Figs. 7 and 8, we cannot accept the statement that Dumesnil shows beyond question the arrangements of Figs. 7 and 8 as adequate to produce a constant rotary effect upon a shaft. Dumesnil nowhere discloses or suggests the idea that such an electrical device as is shown in Figs. 7 and 8 can produce a rotary effect upon a shaft. The magnetic poles of the armature are described by him as features essential to rotary motion. His patent must be considered as a mere publication, giving a description and plan of operation. To make the figures of the Hering affidavit illustrate both Dumesnil and Tesla, it is necessary to ignore what Dumesnil proposes as an essential feature. Dumesnil, in my opinion, does not show a magnetic polar line, which is the resultant of two alternating currents of different phase; neither does he show any plan for producing a rotary effect merely by the unaided action of two alternating currents.

The patent to Cabanellas: This patent, upon many readings, seems to me to be fairly characterized by the complainant's counsel as "expressed in such obscure and indefinite terms as to be hopelessly unintelligible, except in a few unimportant particulars," and as requiring an exceptional exercise of the imaginative powers in translating its phrases into electrical diagrams. It is contended that Cabanellas, like Dumesnil, contemplated arranging two single-phase machines side by side with the elements displaced so as to displace the phases of the currents, and thus get a continuous rotary effort from two currents. But, like Dumesnil, Cabanellas fails to show a magnetic pole which is the resultant of two alternating currents. When, therefore, the defendant's experts say that the armatures of Dumesnil and Cabanellas are caused to rotate "by the rotation of resultant magnetic attractions set up by the joint action of two or more alternating currents of different phases," and that "these features of the prior Dumesnil and Cabanellas patents cover the ground of the Tesla patents in suit, and in substantially the same manner, when the said patents are given a broad interpretation in accordance with the decisions of the court,"

their testimony must be regarded as based upon a misinterpretation of the decisions of those courts, and upon a failure to recognize that it was expressly found that Tesla must have as a resultant of the currents a continuously rotating field of magnetic forces. The "resultant" of the decisions is that which is produced by combining upon a common element the magnetism created by two alternating currents. This magnetic resultant, applied to power purposes, I understand to be the Tesla invention. The defendant's "resultant" is not a magnetic resultant, but merely the rotation of the armature.

Conceding that Dumesnil, Cabanellas, and Tesla all rotate an armature, the point for comparison is as to the way in which this rotation is accomplished. Conceding, further, for the purposes of this petition, that all employ alternating currents of different phase, Tesla alone discloses means whereby two alternating currents may so magnetize a common element as to produce a force with a constant rotary effect. Dumesnil and Cabanellas, at best, show the combined use of two motors of an old type having the characteristic defects of such motors, and lacking the characteristics of the Tesla motors. Even if two of those motors can assist each other by so timing their mechanical efforts that one exerts its maximum effect while the other exerts its minimum effect, I do not find in such a combination of two machines the invention of Tesla, nor the "rotary field" which was apparently conceded by the defendant in the prior suits to be the proper subject-matter of controversy in determining the validity of the Tesla patent.

This defendant seeks to show anticipation by an interpretation of the prior decisions which is too broad, and does not, in my opinion, show anticipation of what was decided to be the Tesla invention and the subject-matter of his patents.

The question of infringement seems to be substantially determined by the prior decisions.

The questions of laches and estoppel do not require extended discussion. These matters were ably and carefully presented at the hearing, and the opinion formed by me at that time was adverse to these contentions. Upon an examination of the entire record relating to these points, my opinion is confirmed that this defendant decided the question of adopting its motors as a mere business proposition; that it contemplated, as a part of this proposition, the risk of infringing the complainant's patents, and took the risk with its eyes open, relying upon protection from its vendors or from others; consequently, upon this hearing, it must stand by its business proposition. I fail to see that the defendant has been in any way inequitably treated by the complainant.

It is implied by the argument that, if a patentee does not see fit to shape his business to suit the wishes of persons who desire to use his invention, this in some way creates an equity which entitles such persons to use the invention, in such specific form as they prefer, without the consent of the patentee. I see no ground for thus abridging the rights of a patentee.

The objection to granting a full preliminary injunction is the hardship which would result to the defendant and its employés from preventing the use of the motors now installed in the defendant's factory.

This objection, however, is insufficient to deprive the complainant of all right to a preliminary injunction, but goes rather to the question of the extent of the decree. The record upon this petition is voluminous, and we must recognize the possibility of error upon a subject of considerable complication and difficulty, and should seek to avoid so far as possible mischief which might arise before such error can be corrected. It is also due to the complainant that we should recognize that it has established the validity of the patents after meeting and overcoming a most skillful and elaborate defense, and that its rights, thus established, should not be evaded or rendered worthless by unnecessary delay in their enforcement. While there are objections to determining questions like those raised upon this petition, save upon final hearing, the court must also consider that it is objectionable to refuse an injunction merely because of voluminous or complicated matters of defense.

This defendant, to avoid the effect of the former decisions, should show, not only that new matters and new issues are presented, but that the new matter might require a different decision as to the character of Tesla's invention and as to the validity of his patents. Though the argument for the defendant has been presented forcibly and with ability, I am of the opinion that the defense to this petition is insufficient, since it does not seem to me to meet the points actually decided by the courts of the Second circuit.

Upon the complainant's brief, it is suggested that the order for a preliminary injunction can be granted upon terms which will impose no hardship or unnecessary damage upon the defendant, its employés, or the public. To such an injunction, with special terms as to the motors actually installed and in use in the defendant's factory, I am of the opinion that the complainant is entitled. Under all the circumstances, it would seem hardly necessary to make an immediate order permitting or requiring the gradual substitution of licensed for unlicensed motors. The complainant probably can be sufficiently protected as to these motors by a suitable bond, and by terms as to the speedy prosecution of the case to a final decision. The questions whether the defendant may be permitted to continue temporarily the use of the motors now installed, and, if so, upon what terms, are reserved.

CHISHOLM, BOYD & WHITE CO. v. ANDERSON FOUNDRY & MACHINE WORKS et al.

(Circuit Court, D. Indiana. May 7, 1902.)

No. 9,827.

1. PATENTS—ANTICIPATION—BRICK MACHINE.

The White and Boyd patent, No. 429,296, for a brick machine, claim 10, which relates to a stop mechanism to limit the descent of the plunger, but does not designate, either in the claim or specification, any particular location for the stop, was anticipated by the Brewis patent, No. 395,871.

2. SAME—INSUFFICIENCY OF DESCRIPTION.

The White patent, No. 455,374, for a brick-making machine, claim 17, covering a hopper having the function of being movable by gravity, but

which does not describe nor claim the means of constructing and making the same movable by gravity, is void for lack of invention. Claim 23, relating to rods for connecting the oscillating arms to the feed box for the purpose of transmitting the reciprocating motion of the arms to the box, but which is not limited to any particular form of rods or pivotal connections, is void as attempting to claim a function without sufficiently describing the mechanical means by which the result is attained, as well as for lack of invention in view of the prior art.

8. SAME.

The White patent, No. 488,622, for a brick machine, claims 16, 19, and 20, are void for lack of invention and anticipation.

In Equity. Suit for infringement of letters patent No. 429,296, issued June 3, 1890, to B. C. White and James A. Boyd for a brick machine, No. 455,374, issued July 7, 1891, and No. 488,622, issued December 27, 1892, each to B. C. White for brick machines. On final hearing.

Jesse Cox and Harvey, Pickens, Cox & Kahn, for complainant.

Wood, Boyd & Wood and Goodykoontz, Ballard & Campbell, for defendants.

BAKER, District Judge. This is a suit for injunction and accounting for alleged infringement of three patents, owned by complainant, relating to dry pressed brick machines, the first being patent No. 429,296, granted June 3, 1890, to B. C. White and James A. Boyd; the second being patent No. 455,374, granted to B. C. White July 7, 1891; and the third being patent No. 488,622, granted to B. C. White December 27, 1892. The first patent contains 10 claims, and of these the tenth claim is the only one alleged to have been infringed. The second patent contains 25 claims, and of these the seventeenth and twenty-third claims are the only ones alleged to have been infringed. The third patent contains 20 claims, and of these the sixteenth, nineteenth, and twentieth claims are alleged to have been infringed.

The mechanical principles embodied in the six claims alleged to have been infringed are the questions presented for consideration and determination.

The tenth claim of the first patent relates to a stop device forming a part of the pressing mechanism of the dry pressed brick machine. Claim 17 of the second patent relates to the hopper for feeding clay in a brick machine, so mounted as to be vertically movable and to rest in position by gravity. Claim 23 of the second patent relates to adjustable arms for oscillating the feed box, the novel feature being certain pivotal connections which give rigidity to the arms in movement. The sixteenth claim of the third patent relates to the construction of the front wall of the feed box of a material substantially weaker than the material of which the remaining walls are formed. The nineteenth and twentieth claims of the third patent cover the making of a brick machine in two parts for convenience in shipping, the main part consisting of the operative elements, and the other part consisting of the driving elements. It is at once seen that only a few points of comparatively minor importance are involved. The defendants' alleged infringing machine is manufactured under and in accordance with the claims of patent No. 598,554, granted to Anton Berg February 8,

1898. The defenses are anticipation, want of patentable novelty and utility, and noninfringement.

The tenth claim of the first patent is as follows:

"The combination of a mold, upper and lower plungers, toggle arms connected with both plungers and movable vertically at both ends with the plungers, a toggle operating beam fulcrumed between its ends and connected with the central joint of the toggle, and a stationary stop or stops located in position to engage the upper plunger and limit the descent of the same, and thereby operating to determine the vertical position of the plungers within the mold at the time of greatest compression, substantially as described."

The only element of the above claim alleged to be infringed is the use by the defendants of the "stationary stop or stops located in position to engage the upper plunger and limit the descent of the same." The only instruction contained in the patent as to the location of the stops is found in Fig. 2 of the drawings, in which they are shown as screw bolts tapped into the upper surface of the mold table under the upper crosshead upon opposite sides of the mold. Neither the specification nor the claim defines any preferred location for these stops, except that they should be located in the path of descent of the upper plunger. So far as the specification and claim point out, these stops might be attached to the side frame or to the upper crosshead and come down against the mold table. Nothing is said about the necessity or desirability of locating these stops on top of the mold table. It seems to me that this element of claim 10 is anticipated by patent No. 395,871, granted to J. J. Brewis January 8, 1889. In the Brewis patent a stop is described and claimed which is secured to the upper crosshead, being of such length as to strike the mold table and limit the downward movement of the upper plunger at a predetermined point. The specification says of this stop:

"In Fig. 7 I have shown an adjustable grooved shelf for giving the two pressures on opposite sides of the brick as has been indicated, while in Fig. 8 I have shown an adjustable stop A, secured to the crosshead R, which allows the upper plunger to enter the mold box a certain and predetermined distance so as to give the necessary amount of pressure to the top of the brick until stop A strikes the top table and arrests the further downward movement of the upper plunger. The lower plunger is now raised by the straining of the toggles so as to exert pressure on the brick, and in this way first a top, and then a bottom, pressure is exerted on the brick."

This operation is the same as that described in claim 10, and the stop secured in the upper crosshead is for the same purpose, and accomplishes the same result in the same way. The stop is claimed in the Brewis patent as follows:

"In a brick machine of the character described, the adjusting stop or bolt A, secured to the crosshead R, as described, whereby the downward movement of the plunger is arrested as set forth."

The only difference between the Brewis stop and the stop of claim 10 is that the stop of the Brewis patent is secured to the upper crosshead, while complainant's stop is secured to the top of the mold table. This is simply a structural difference, and is not pointed out in the specification of the complainant's patent, nor is it claimed. When it was once shown that in making dry pressed brick the downward

movement of the upper plunger should be arrested at a certain and predetermined point, it was simply a matter of mechanical selection whether the stop should be secured to the upper crosshead or to the top of the mold table. Mere change in the location of the stop from the crosshead to the mold table does not avoid anticipation, nor does it involve invention. Any mechanic would, by the application of the simplest mechanical skill, be expected to make the change without the exercise of any inventive faculty. In this view of the case it becomes unnecessary to determine whether or not the strips placed on the mold table of the defendants' brick machine act as a stop and are the equivalent of the stops of the complainant's brick machine. Nor is it necessary to determine whether or not the downward movement of the upper plunger in the defendants' brick machine is arrested by means of compression produced by the contact of the fulcrum roller with the cam block of the pitman beam, as contended by the defendants.

Claim 17 of the second patent is as follows:

"The combination, with a mold and reciprocating feed box, of a hopper resting in contact with the feed box, the part of the feed duct or hopper which is in immediate contact with the feed box being movable freely toward and from the feed box, whereby gravity tends to hold said hopper in contact with the feed box, substantially as described."

The specification describes a particular two-part hopper, the lower end of which is provided with a telescoping ring which rests by gravity on the feed box. As the feed box moves back and forth under the hopper, this ring in the hopper is free to move up and down, and thus has a tendency to prevent the clay from leaking between the hopper and feed box. The specification also says that an equivalent method is to make the whole hopper rest by gravity on the feed box, and the complainant's contention is that the claim embraces this equivalent construction. This contention, however, seems to be untenable. The language of the claim, viz., "the part of said feed duct or hopper which is in immediate contact with the feed box being movable freely toward and from the feed box," seems plainly to limit the claim to a two-part hopper; and, thus limited, the defendants' device does not infringe. If the claim is to be construed as covering every sort of hopper capable of movability by gravity, it would be invalid for want of accurate description. The claim is for a movable hopper. It does not accurately describe the means by which the hopper is made movable, but simply claims a hopper having the function of movability by gravity. It can be safely said of this claim that no information is furnished so that a licensed person desiring to practice the complainant's invention would know how to make, construct, and use the hopper. The method of making and using the hopper can only be determined by experiment, and not from an accurate description contained in the patent. So, if the claim is not for a function, it must be held invalid for want of accurate description of the mechanical elements of the alleged invention. In view of the prior art, even if the claim were not invalid for the foregoing reasons, it seems to me that no invention is shown in simply devising a hopper movable by gravity. Invention might be disclosed if some new and useful means of making, constructing, and using the hopper were accurately described, but none

such is shown. In the case of Kelly v. Clow, 32 C. C. A. 205, 212, 89 Fed. 297, 304, 60 U. S. App. 338, 365, 366, the court said:

"In regard to the other feature of novelty, it is apparent that the patent furnishes no information as to the size of the chamber, o, nor in reference to the distance back from outlet, r, at which the valve, m, should be placed. In these particulars the mechanic is left to the exercise of his own judgment. It is evident, therefore, that neither the size of the chamber, nor at what distance back from the outlet the valve, m, should be placed to dissipate the splash, can be determined except by experiment. 'Accurate description of the invention is required by law for several purposes: (1) That the government may know what is granted, and what will become public property when the term of the monopoly expires; (2) that licensed persons desiring to practice the invention may know during the term how to make, construct, and use the invention; (3) that other inventors may know what part of the field of invention is occupied.' Bates v. Coe, 98 U. S. 31, 39, 25 L. Ed. 68. The complainants cannot appropriate to themselves every size of chamber and every distance from the outlet at which to place the valve."

In other words, the complainant cannot cover by its claim, as it is sought to do, every sort of hopper and every mechanical means by which a hopper may be made so as to be movable by gravity.

Claim 23 of the second patent is as follows:

"The combination with a mold and stationary feed hopper of a reciprocating feed box, a mold table provided with a flat guide surface sustaining the feed box, oscillating arms for actuating the feed box, the connecting rods uniting the feed box to the side arms [said connecting rods being joined to the oscillating arms and to the feed box], pivotal connections constructed to rigidly hold the connecting rods parallel with the feed box, and means for separately adjusting the lengths of said connecting rods, substantially as described."

This claim relates to the rods connecting the oscillating arms to the feed box, whereby the reciprocating motion of the oscillating arms is transmitted to the feed box, so that it is moved back and forth under the hopper and over the molds. The features of the claim are means for adjusting the length of the rods and rigid pivotal connections between the oscillating arms and the connecting rods. The specification states that the object of this rigid pivotal connection is that the feed box may be reciprocated on the mold table without the use of extra guides. This feature, however, is not included in the claim, and under a familiar rule it cannot be read into the claim for the purpose of establishing novelty or infringement. The old and familiar turnbuckle is the means employed for separately adjusting the lengths of the connecting rods, and constitutes no part of the complainant's invention. The complainant's counsel, on page 144 of his brief, makes a substantialiy accurate statement of this claim as follows:

"But, as is well shown by complainant's experts, Messrs. Dayton and H. M. Cox, claim 23 is not limited to any particular form of connecting rods or pivotal connections from the feed box to the oscillating arms. Any kind of pivotal connections will answer the terms of this claim provided they are so constructed as to rigidly hold the connecting rods parallel with the feed box, and any kind of connecting rods will answer it provided that there be means for separately adjusting the lengths of the connecting rods."

This claim, thus construed by complainant, sweeps in every kind of adjustable connecting rods and every kind of pivotal connections, no matter how made, constructed, or used, provided a certain function

or result is obtained. Thus construed, the patent is invalid. There must be accurate description of mechanical means specified and claimed, and not simply devices so constructed as to produce certain results. The purpose of the specification and claim is to accurately describe the means, and not the function or result. But the device covered by this claim seems to be substantially anticipated by prior patents in the record, and, if not anticipated, there is no such advance as discloses invention.

The sixteenth claim of the third patent is as follows:

"The combination, with a mold table and a feed box or hopper, of a reciprocating feed box the front wall of which consists in whole or in part of a piece or strip which is materially weaker than the main parts of the feed box, and is detachably secured to the latter, substantially as described."

This claim relates to the making of the front wall of the feed box of wood or some material which is weaker than the rest of the box, so that, in case the box is accidentally caught by the moving plungers or otherwise, the front wall will give way and the other parts will be saved from injury. This claim, if it involves invention, is literally anticipated in the prior art as shown by the testimony of defendants' witnesses. In addition, the feed box of the Brewis patent contains a wooden front, the remaining parts being of iron. The specification says:

"T is a piece of wood or other suitable material, secured to the front end of the feed box, the front edge of the T being arranged to be in a line with the rear walls of the mold when the feed box is in its rearward position, as shown in Figs. 5, 7, and 8."

Besides, it requires nothing more than the expected skill of a mechanic to make the front end of the feed box of wood. When it was once found that the front wall of the feed box was more likely to be accidentally broken than the other parts, it would at once occur to one skilled in the art that, by making the front wall of wood or other material easily broken, the remaining parts might thus be saved uninjured.

The nineteenth and twentieth claims of the third patent cover the making of a brick machine in two parts for convenience in shipping, the main part consisting of the operative elements, and the other part consisting of the driving elements. These two claims differ in no essential particular. I do not think it important to set them out. In my opinion, in addition to being anticipated, they are void for want of invention. Besides, if any invention were shown the claims are invalid for failure to describe accurately or otherwise the mechanical elements constituting the alleged invention as required by the statute.

For the foregoing reasons, the bill of complaint will be dismissed for want of equity, at the costs of the complainant.

THE DONALD.

(District Court, E. D. Virginia. April 16, 1902.)

1. SHIPPING—CHARTER—DEFAULT IN PAYMENT OF HIRE.
A charterer, who takes a vessel for a voyage upon an agreement simply to assume a payment of charter hire for which a former time charterer was then in default, is not bound by the terms of the time charter, and, in the absence of any demand by the owner for payment of hire in advance, is not in default for nonpayment before the arrival of the vessel, so as to justify the owner in refusing to comply with the terms of his agreement.

2. SAME—RIGHT TO CHANGE PORT OF DISCHARGE—BREACH.
The charterer of a vessel, who is also owner of her cargo, has the right, in the absence of outstanding bills of lading, to change her port of destination, and the vessel is liable in rem for a breach of an agreement on the part of the owner to make such change.

3. SAME.
Evidence considered, and *held* to establish a contract between the charterer and owner of a ship by which her destination was to be changed en route, and she was to take her cargo to a different port from that originally contemplated, which agreement was broken by the owner.

4. SAME.
The fact that, at the time of the chartering of a ship by the owner to libelant for a voyage, she was technically under a time charter to another, did not preclude the owner from making an agreement with libelant to change the port of discharge, where, by reason of default in the payment of hire, the owner had the right to declare the time charter forfeited, and it was in fact so treated by all the parties, and where it moreover appeared that the time charterer assented to the change.

In Admiralty. Suit to recover damages for breach of charter.

Hughes & Little, for libelants.

Whitehurst & Hughes, for the Donald.

WADDILL, District Judge. The libel in this case is to recover damages growing out of a breach of contract on the part of the owners of the steamship Donald while said ship was on a voyage from Jamaica to Baltimore; libelants' claim being that the Donald was chartered to bring a cargo of bananas from Jamaica to Baltimore, and that subsequently, and while the ship was en route, its destination was changed, by agreement with the owners, to Norfolk, instead of to Baltimore, and of which change the ship, pursuant to understanding, was duly advised at the Virginia capes, but failed, by direction of the owner, to comply therewith, and proceeded to Baltimore, greatly to libelants' damage.

The owners of the Donald admit having chartered the ship for a continuous voyage from Jamaica to Baltimore, at an agreed price of $1,250 (being the amount that would become due them for the use of the ship during the period for which it was to be used by the Norfolk & West India Fruit & Steamship Company, the holders of a time charter for the ship), but insist that the contract for the voyage had become inoperative because of the failure of the libelants to pay the $1,250 as contemplated; and they deny that any contract was entered into to change the destination of the ship from Baltimore to Norfolk; and, by an amended answer to the libel, the further defense is inter-

posed that at the time of making the alleged contract to change the destination of the ship it was under a time charter to the Norfolk & West India Fruit & Steamship Company, and that, without the consent of said company, the contemplated change could not have been made, and, if made, it was the mere personal undertaking of John A. Donald, with whom it is claimed the contract was made, and that the ship is in no way liable.

These several questions will be considered by the court in the order named.

First. The contract to charter the ship having been confessedly entered into for a particular voyage, at the agreed price of $1,250, was the libelants' conduct, in reference to the payment of that sum, such as should cause a forfeiture thereof? Confessedly not. The amount due as of April 11th by the time charterers, for the period to be covered by the voyage, was $1,250. The telegrams by which the contract was made with the libelants provided for an assumption by the libelants of this sum; and while that amount may have been due in advance, under the terms of the time charter, by the Norfolk & West India Fruit & Steamship Company, it does not follow necessarily that the libelants were to comply with those terms; and while it does seem that the respondent treated the amount as in default, in a letter written libelants, nevertheless, in its further dealings with them, it asserted no such claim; and as late as April 19th, when the ship was en route to this country, it contracted with the libelants for a return voyage; and from the entire dealing it is manifest that it was not the then purpose of respondent to claim any forfeiture or demand immediate payment. Doubtless, had this been done, the request would have been complied with; but it by no means follows from the contract that the money was actually due until the end of the voyage, and the amount was promptly tendered upon the arrival of the ship in port at Baltimore.

Second. Was there a contract for the change of destination of the ship from Baltimore to Norfolk? This question can only be determined upon a consideration of all the evidence, and the facts and circumstances surrounding the particular transaction. The two contracting parties, Alexander Stock on behalf of the libelants, and John A. Donald on behalf of the ship, differ entirely as to what occurred in reference to this change of the voyage of the ship. They seem each to be witnesses worthy of credit, and are both gentlemen of unusual intelligence and of large business experience. This conflict will, therefore, have to be determined largely from the circumstances surrounding the transaction, and just what each did at and about that time in reference to the ship's movements. That the libelant Alexander Stock purposed to make and supposed such an arrangement had been made there can be no doubt, for he immediately returned from New York, whither he had been, among other things, for the purpose of making the change to Norfolk, and proceeded there to make arrangements to dispose of the cargo of bananas at that port, ordering large numbers of railroad cars for their transportation, among other things, and at once arranged, through means of the pilots' association, to intercept the ship at the Virginia capes, with a view of its coming to the port of

Norfolk, and upon ascertaining, some two days before the ship's arrival at the capes, that there was some question as to his ability to change the destination of the ship en route, and that Mr. Donald was taking steps to prevent his so doing, immediately communicated with him by wire and phone message, and wrote him, but could receive from him no satisfactory reason for his apparent change of position in reference to the ship's movements. The owners of the cargo, pursuant to their purpose, duly notified the ship at the capes to proceed to Norfolk, instead of Baltimore, which request on their part was ignored, Mr. Donald having given contrary directions.

That the ship actually received the notice from libelants at the capes is denied by the master of the ship, but his evidence in this regard is entirely impeached, and the fact that the notice was given is clearly established by an overwhelming weight of evidence. The conduct, on the other hand, of the witness Donald is also consistent with the fact that the destination of the ship was to be changed as claimed by the libelants, and it, moreover, shows that the witness purposely sought to prevent the ship's change in destination, after the understanding had been had, and his reason for so doing. This is the only reasonable construction that can be placed upon Donald's conduct, in the light of what he did, and of his letter of the 20th day of April to the master of the Donald, to be delivered at the Virginia capes, ordering the ship to proceed to Baltimore, which was evidently not intended to fall into the hands of the libelants. It is quite evident from this letter that some arrangement had been made in reference to the change of destination of the ship, and when the letter is read in the light of the evidence of the writer, Donald, that a mistake had been made in naming libelants the sum of $1,250 as the amount due by the Donald, when in fact some $2,900 was owing, it is quite apparent what had brought about this change of policy, and why Donald wanted the ship to go, as shown by his letter, to Baltimore, instead of to Norfolk; because, as stated in said letter, if the cargo was shipped in the name of the Norfolk & West India Fruit & Steamship Company, the time charterers, he could in Maryland attach the same for the sum of $6,000, due by said company for the hire of the ship David, as well as libel for the entire amount of $2,900, found to be due on account of the Donald.

The solicitude of Donald in reference to the bill of lading; in whose name it was made out; the fact of suddenly placing the whole matter in the hands of counsel; and that he and his counsel quickly proceeded from New York to Baltimore to meet the steamer, and there libeled and sued out a foreign attachment against the cargo, which attachment was dismissed when it appeared that the cargo had not been shipped in the name of the Norfolk & West India Fruit & Steamship Company, but, on the contrary, in the name of libelants, its real owners, and that there was no outstanding bill of lading issued for the cargo,—make this conclusion still stronger. Moreover, while it appears that the position of the Norfolk & West India Fruit & Steamship Company is favorable to the respondent, it is evident from its letter written from Norfolk on April the 22d, four days after it is claimed by libelants that the contract was made to change the destination to Nor-

folk, that such change had been made, and that they, the time charterers, anticipated the arrival of the ship at the port of Norfolk, and were then seeking in that port to dispose of the cargo themselves. From these facts and circumstances, the court has no difficulty in finding as a fact that the agreement was made as claimed by libelants to change the destination of the ship, upon its arrival at the Virginia capes, to Norfolk instead of to Baltimore; and it is equally clear that this contract was broken by the respondent, Donald, which resulted in damage to the libelants, for which they are entitled to recover in this action.

The defense set up by the respondent that John A. Donald, the owner of the ship, was without authority to make such a contract, because the ship at the time was under a time charter to the Norfolk & West India Fruit & Steamship Company, is not well taken, under the facts in this case, and should not defeat the right of recovery, for the reason that it abundantly appears that the shipowner had the right to withdraw the ship from the terms of the time charter, upon the charterers becoming in default in the payment of the hire, and that formal notice of such withdrawal was actually given on April the 22d; and as a matter of fact, in the entire dealings between the parties, by reason of the default and because of the utter insolvency of the time charterers, it is evident that for some time before the contract in question was entered into the parties, as between themselves, in dealing with the ship, were not governed by the provisions of the time charter, and that the owners, although the ship was technically under the said time charter, in dealing with the charterers and others, including the libelants, and with the full knowledge of the time charterers, practically ignored the provisions of the time charter, and, so far from the contract to change the ship's destination at the capes to Norfolk being avoided because of the position of the time charterers, it is clear from their letter of April 22, 1901, written to the libelants, and hereinbefore referred to, that they fully acquiesced in such change. The letter written from Norfolk says: "We write to notify you that, in accordance with our agreement with you, upon the arrival of the steamship Donald in this port, we will take charge of the cargo of bananas, and handle and sell the same for your account. * * *"

The position taken by the respondent, that the ship is not liable, and that only John A. Donald can be held individually for any damages sustained, is likewise untenable, as it is quite clear from the evidence in this case that Donald himself was the real owner of the ship, and that the master, the technical owner and claimant, had no real interest in it, but that the same was operated in his name only with a view of its sailing under the Norwegian flag.

The ship having been chartered by its real owner to the libelants for the purpose of taking the cargo in question from Jamaica to Baltimore, and such cargo having been owned by and consigned to libelants, they had the right to direct the place of destination of the ship, and, there being no valid outstanding bill of lading, it only became necessary to consult the owner at all because the original place of destination had been fixed at Baltimore instead of Norfolk; and upon the agreement being entered into, as herein determined, that the place

of destination would be changed, the libelants had the right to direct such destination, and it was the duty of the master, the representative of the real owner, to obey such direction, and for failure so to do the ship is liable for damages resulting.

A decree of reference may be had, to ascertain the amount of damages sustained by the libelants.

WINDMULLER et al. v. STANDARD DISTILLING & DISTRIBUTING CO. et al.

(Circuit Court, S. D. New York. April 1, 1902.)

CORPORATIONS—STATUS OF STOCKHOLDERS—RIGHT TO VOTE FOR DISSOLUTION.

A stockholder in a corporation has the right to vote for its dissolution, even though he is influenced to that course by a wish to terminate a contract beneficial to the corporation, but onerous to himself.

In Equity. On motion for preliminary injunction.

Rumsey, Sheppard & Ingalls, for the motion.
Alexander & Green, opposed.

LACOMBE, Circuit Judge. The phraseology of the contract between the Standard Company and the stockholders of the Distributing Company differs so materially from that construed in Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113, that it is not easy to see upon what theory it is contended that the dissolution of the Distributing Company would relieve the Standard Company of its obligation to pay periodically to each stockholder in such Distributing Company the stipulated amount which it expressly agreed to pay him, not during the lifetime of the company, but for the "unexpired term of the period for which it is incorporated," to wit, 50 years. Moreover, whatever defenses the Standard Company may have against such claim are equally available to it whether the Distributing Company be or be not dissolved.

Practically the whole case of the plaintiffs rests on the proposition that majority stockholders who are individually interested in the abrogation of this contract may not vote for a dissolution of the corporation, because their doing so will indirectly abrogate the contract, which minority stockholders find it for their individual interest to keep alive. If the contract be separately with each stockholder to pay him a fixed sum for a fixed term, which dissolution will not shorten, it is immaterial whether the corporation be dissolved or not. But, even if this be not so, this court is inclined to concur with Judge Kirkpatrick (Windmuller v. Standard Distilling & Distributing Co., 114 Fed. 491) in the conclusion that a majority stockholder may vote to dissolve, even if he be influenced to that course by a wish to destroy a contract beneficial to the corporation, but onerous to himself.

The motion for injunction is denied, and the stay vacated.

GRIFFEN v. SPRAGUE ELECTRIC CO.

(Circuit Court, S. D. New York. May 8, 1902.)

1. CONTRACT—BREACH—ACTION FOR DAMAGES.
Defendant was a builder of electric elevators, and plaintiff was the inventor of a safety device for use in such elevators. The parties entered into a contract by which defendant agreed to build in its shop an apparatus for giving the device a thorough test, and, if it proved satisfactory, to equip an elevator therewith, and to recommend it to its customers, plaintiff to assist in preparing for and making the tests. Before their completion, defendant sold out its business, and abandoned the contract, because it had thus disabled itself from carrying it out, and not because the tests were unsatisfactory. *Held*, that plaintiff was entitled to recover as damages for breach of the contract the value of his time lost and expenditures incurred in and about the tests.

2. EVIDENCE—STATEMENTS BINDING CORPORATION.
Plaintiff had a contract with defendant corporation, and on a number of occasions called at the office of defendant's president in regard to it. On some of these occasions the president was absent, and his son had charge of the office, and plaintiff had conversations with him in relation to the matter. After defendant had abandoned the contract, plaintiff wrote the president in regard to it, and received a visit from the son, who stated that he came at his father's request in relation to the letter to see if a settlement could not be made. *Held*, that in an action for breach of the contract plaintiff was entitled to prove statements made by the son on such occasion, which were admissible to the same extent, and entitled to the same weight as against defendant, as would have been statements made in a written answer to plaintiff's letter.

At Law. On motion for new trial.

George W. Carr, for plaintiff.
Austen G. Fox, for defendant.

WHEELER, District Judge. The defendant was an extensive manufacturer of electric elevators for sale and use in the United States and Canada. The plaintiff invented a pneumatic safety apparatus for such elevators. They made a contract June 1, 1898, by which the defendant, as party of the second part, agreed it would, "at its expense and at its shop build and operate for a thorough test" the apparatus; and the plaintiff, as party of the first part, agreed, among other things, to devote his personal time "for the test trial of the same at the Sprague Electric Company's shop." The contract contained these further provisions:

"The party of the second part reserves the right to limit these tests or to extend them in accordance with its own judgment, and to reject the apparatus finally at any time during the tests." "The party of the second part agrees that, if the aforesaid test is satisfactory to the said party of the second part, it will without unnecessary delay have built a complete apparatus in accordance with the plans of the party of the first part, or of such alterations of the same as are agreed upon, and at its expense, and equip in a building in New York City an elevator with this pneumatic safety; and that after such installation, provided its operation is satisfactory and approved, it will recommend and use the said safety in connection with its elevators wherever, in its judgment, it is practicable to do so."

An apparatus was constructed for tests at the defendant's shop under direction of the plaintiff and engineers of the defendant. In De-

cember, 1898, the defendant sold out its elevator manufacturing business, without notice to the plaintiff or reservation in respect to this contract with him, to the Otis Elevator Company, but saving to itself the right to do for that company two-fifths of the work for use in the United States and Canada. Many tests were made, and a favorable report upon them was made by the defendant's engineers, and shown to the plaintiff. In May, 1899, the defendant threw out the apparatus from the shop to the scrap heap, of which the plaintiff heard. The president of the defendant company was president of the Postal Telegraph Company, and his office was in the building of that company. The plaintiff had seen the president's son in charge of the office in the absence of his father, sitting at his father's desk, writing; and had had interviews with him about this business in the absence of his father. After the apparatus was thrown out, the plaintiff wrote a letter to the president about it, dated June 9, 1899. The plaintiff testified that the president's son called on him at his office, and (against full objection) that the son "said that his father had told him to come and see me in regard to the letter which I had sent to him, which, I believe, was dated June 9, 1899. He said: 'Mr. Griffen, I want to see if we cannot arrange this matter. We have received a report on this case, and the tests have all been carried through, and are satisfactory, but we cannot go ahead on the matter because the Sprague Electric Company has disposed of its elevator business to the Otis Elevator people. We want to see if we cannot arrange this.'" On directions, in substance, to return a verdict for the plaintiff for the value of his time and expenditures about making the tests if the defendant rejected the apparatus because it had sold out and did not want the apparatus, and not because it had come to the conclusion in good faith that the tests were unsatisfactory, the jury found for the plaintiff for $2,500, which is not claimed to be excessive. But, without waiving exception to the directions, the defendant has moved to set aside the verdict for the admission of the testimony as to the sayings of the president's son.

The sale to the Otis Elevator Company disabled the defendant from fulfilling its agreement to install this equipment in a building in New York City and recommend it to its customers. To permit him to spend his time and money on the expectation that the defendant would carry out the contract, when it had, without his consent or knowledge, so changed its circumstances that it could not do so, would seem, as a matter of law, to entitle him to recover what it had falsely induced him to so lay out. The defendant was not bound to go on unless the tests were satisfactory, but it got itself where it could not go on whether they were satisfactory or not. This view was considered somewhat at the trial, but to take a finding by the jury was deemed best. If correct, the testimony was wholly immaterial. If not, after the apparatus had been thrown out without notice to the plaintiff, it was proper for him to ascertain the attitude of the defendant in respect to the contract, and no better place for that is apparent than at the office of the president. What that attitude was is a part of the plaintiff's case, and what would properly show it would be admissible. The son had been held out by the position in which he had been placed as a proper medium of communication with the president; and the plain-

tiff had a right to rely upon what he said, as coming from the president, stating the position of the company to the plaintiff. It was not a mere hearsay statement, but an accredited message, as a letter from the president in answer to the plaintiff's letter would have been.

Motion denied.

THE CONEY ISLAND.

(District Court, E. D. New York. December 28, 1901.)

TUG AND TOW—GROUNDING OF TOW—LIABILITY OF TUG.

Evidence considered, and *held* to sustain the defense of a tug that the grounding of a canalboat which she had in tow resulted from the misrepresentation made by the master of the canalboat as to the depth of water she drew; that the captain of the tug was not negligent in failing to discover before the final grounding that she drew more than was represented; and that the tug took her on a course where she would have floated with such draught as she was represented to have, and was not in fault for the grounding, nor in failing to return to the rescue of the canalboat before she was broken up through the further negligence of her master in casting off the lines by which the tug had made her fast to a dike.

In Admiralty. Suit in rem against a tug to recover for injury to a tow by grounding.

Hyland & Zabriskie, for libelant Nelson Zabriskie.
Alexander & Ash, for claimant Peter Alexander.

THOMAS, District Judge. This action involves injury to the canalboat Quinn through the alleged negligence of the steam tug Coney Island, in Coney Island Creek. The Quinn, a canalboat some 20 years old, and, although repaired fairly, yet unduly leaking at times, came across the bay from Perth Amboy, and was taken Thursday, January 25, 1900, by the tug for delivery at the coal yards of Smith & Son, some distance up Coney Island Creek. After grounding twice while entering Gravesend Bay, she crossed the bar upon an increasing tide, but by reason of the fog was anchored in deep water before reaching the entrance of the creek. Thereupon the tugboat left her, and did not return until Sunday, January 28th, during which time the Quinn's anchor had dragged and the anchor line parted, through contact with a fishing smack, but no apparent harm had resulted. The tug took the Quinn in tow on two short hawsers, and proceeded up the creek, until about 6 p. m., when the Quinn went aground at the locality where the injury was received. The tug, having made the Quinn fast by bow and stern lines extending to a breakwater on the easterly side of the creek, left, on account of shortage of water, promising to return the next morning, Monday, January 29th. The creek is narrow and winding, and navigable only, for a vessel of the Quinn's draught, when the tide is approaching high water. A westerly wind opposes and an easterly wind favors the flood tide, the difference in the rise on a westerly or easterly wind being some two feet. Monday, January 29th, the tug did not return, prevented by a strong westerly wind, which was prohibitory of her navigation. On Tuesday the conditions of the weather were favor-

able, but it was not until Thursday, February 1st, that the tugboat returned. Meanwhile, in the early morning of Monday the 29th, McMahon, captain of the Quinn, cast off her lines, with the intention of making some progress on his own account up the creek in the face of the adverse wind, under alleged but unproven order of the captain of the tug to do so. But this resulted only in some part of the boat swinging farther into the stream, what part will be considered later. On Tuesday, January 30th, the canalboat broke up on the noon tide to such an extent that she leaked badly, and became so firmly aground that she could not be moved by the Coney Island when she came to her assistance.

Several questions were presented to the court: (1) What representations did the captain of the Quinn make to Finnegan, the captain of the tug, respecting the Quinn's draught? (2) At what point in Coney Island Creek did the Quinn ground on Sunday, January 28th, while in tow of the tug? (3) Did she ground in the channel or out of the channel? (4) Was her final injury due in any part to the throwing off of the canalboat's line by her captain? (5) Was the tug negligent in failing to return earlier, and did the injury, in whole or in part, arise from such negligence?

The voyage undertaken was through waters so tortuous and abounding in shoals that an accurate knowledge of the draught of the vessel in tow was imperative. It is admitted that the captain of the tug asked McMahon, the captain of the Quinn, respecting the draught of the latter's vessel; and Finnegan, the captain of the tug, states that McMahon replied that her draught was six feet. McMahon himself states that he represented her draught to be 6 feet 4 or 5 inches.

The evidence shows very preponderatingly (1) that the bow was 25 feet or more from the dike; (2) that the stern could swing at any time before the lines were thrown off; (3) that the bow was at all times aground. First, observe from the evidence of the several witnesses the distance of the bow from the dike:

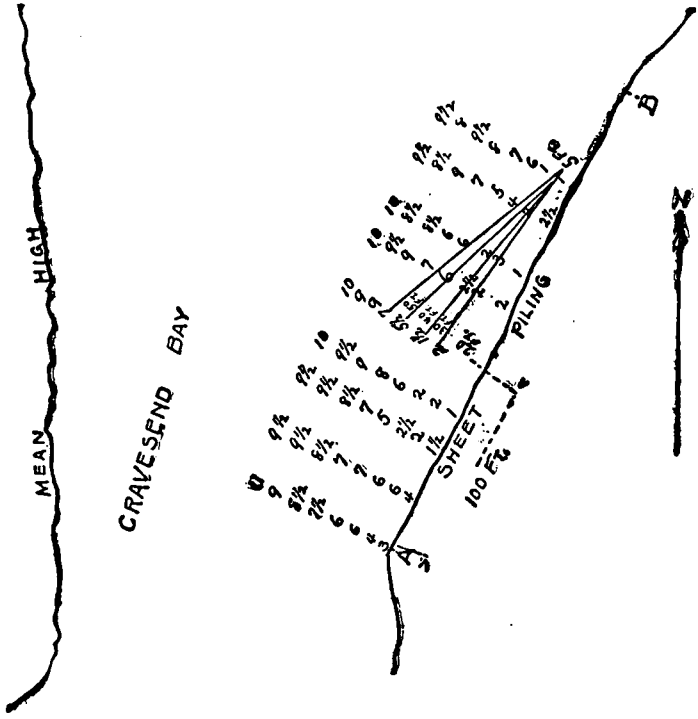
Name.	Relation to Vessel.	Bow Out.	Stern Out.
Haynor,	Engineer of Tug.	10 or 15 ft.	5 ft.
Finnegan, (He says when he returned Thursday her bow was 60 ft. off.)	Captain " "	5 "	5 "
Rafferty,	Deckhand " "	6 "	5 "
Fountain,	Pilot of tug several times passing, on day of grounding and afterward.	100 "	8 or 10 "
McMahon,	Captain of Quinn.	25 to 30 "	5 to 12 "
Flannery,	Agent for "	40 to 50 "	5 "
Riley,	Sent to pump "	30 "	4 to 5 "
Hemminger,	Wrecker "	20 to 25 "	5 or 6 "
Taylor,	" "	40 to 50 "	Stern against dike
Housell,	" "	(50 to 60 ") (40 to 50 ")	6 or 8 ft.

Now, mark the effect of these conclusions as bearing upon the selection of point A on Exhibit 2 as the place of grounding.

Twenty feet from the sheet piling at A the depth, based on measurements at intervals of 25 feet, is as follows, proceeding northerly from the exact spot marked "A" for the distance of 200 feet:

Low water—	4	6	2	2	2	2	3	2	1	ft.
High " —	9	11	7	7	7	7	8	7	6	"

The tide rises at least 5 feet, some witnesses state 5½ feet, and Cary 4 feet 8½ inches. Although Taylor, the wrecker, places her bow near A, yet if Cary's statement that the parties agreed on the place of grounding, 75 to 100 feet northerly thereof, there is no place where the Quinn could have gone aground at high water, as claimed, unless she drew over 6 feet and 5 inches, as will be seen by the following diagram copied from Cary's map and from his evidence, and, if the grounding be assumed farther south towards A, the result is less favorable to the libelant:



But now assume that she went aground, as contended by claimant, at a point 100 feet northerly of B. There the measurements, proceeding northerly along the dike, extending from a point 100 feet northerly of B for about 90 feet, are as follows:

Low water	3	2½	2½	ft.
High "	6	7½	7½	"
Ten feet from dike:				
Low water	3			"
High "	6			"
Twenty feet out:				
Low water	2½	3	2½	"
High "	7½	8	7½	"
Thirty feet out:				
Low water	2	2	2	"
High "	7	7	7	"
Forty feet out:				
Low water	2	1	1	"
High "	7	6	6	"

If the Quinn grounded in this location, it is apparent that she drew more than 6 feet and 5 inches of water.

From this it appears that the Quinn could not have gone aground at A or B had she drawn no more water than represented by her captain. Therefore the conclusion is irresistible that her draught was misrepresented.

Did the tug carry the Quinn out of the channel? If the grounding was at A, the tug carried her eastward of the deepest water. It was not obligatory upon the tug to take the deepest water, but, rather, to use care to find sufficient depth. If the Quinn drew no more than represented, there was water enough where Cary took the soundings. It will be observed that McMahon testified that, when the tug was about leaving on Sunday afternoon, she backed up between the dike and the port side of the Quinn, and made the lines fast, and it appears that the tug drew 6 feet of water.

But did the captain of the tug have notice that the Quinn drew more than the represented draught, and was he negligent in not noticing the fact on account of the groundings that had happened previous to that time? In approaching Coney Island Creek, the Quinn grounded twice crossing the bar, but this was nothing unusual. In coming up the creek itself, the Quinn touched bottom at least twice, but this was explained by stating that the turns were so sharp that vessels at all times were likely to bring up a little in rounding turns. The most troublesome evidence upon this point is that of Finnegan himself, as follows: "After I left anchorage, when I see she was grounded so, I did have it in mind she was drawing more than six feet of water." But should he have observed that she was drawing over 6 feet 5 inches, or probably nearly 7 feet? In view of the undoubted fact that boats are constantly touching in this creek, or grounding for more or less time, especially in crossing bars and rounding turns, it is considered that the captain of the tug is not shown negligent in failing to notice and guard against the misrepresentation of McMahon.

Did the Quinn go aground at A or B? The decision of this point may be unnecessary, and presents some difficulties. It will be observed that at A there are at least 120 or more feet where the water

at high tide is from 10 to over 20 feet in depth. At the point above B the channel is about 40 or 45 feet wide, and runs along the dike. The following is a statement of the width of the channel by various witnesses at the trial:

Witnesses for libelant:

Name.	Relation to the Vessels.	Distance.
Flannery,	Agent for Quinn.	30 to 40 ft.
Hemminger,	Wrecker.	(See statement below.)
Taylor,	"	40 ft.
Riley,	Sent to pump Quinn.	30 "
Housell,	Wrecker.	30 "

Witnesses for claimant:

Fountain,	Pilot of tug, who saw Quinn the day she grounded, and passed around her bow several times afterwards, on the first occasion on Thursday.	40 or 50 "
Finnegan,	Captain of tug,	35 to 40 "

Hemminger states that his pump boat and the lighter could lie outside the Quinn, whose bow was lying right in the channel, and that a tug, but not a loaded boat, could go outside, and he states that the channel was wide enough for a tug and boat to go in there side by side. He says that the channel was practically obstructed. The evidence of Taylor, Housell, and Fountain is to the same effect, although Fountain says that her bow, judging by the length of the boat, was some 100 feet out. Fountain was doubtless confused, as he says she lay angling in the stream, and that he had to push her in to get by.

From this evidence there would be no trouble in concluding that the grounding was not at A, so far as the given width of the channel is concerned. The description fits better the point B. But if the Quinn's bow was 25 feet from the dike, and her breadth be added, a considerable part of the ascribed width of the channel would be taken up, and the pump boat and the lighter, each about 17 feet wide, would have difficulty in lying outside of the Quinn, although the pump boat drew only 4 feet, and the lighter loaded drew 6 feet or over. Fountain's evidence corroborates Finnegan, and this witness, in harmony with Finnegan, Flannery, McMahon, and Riley, states that at the place of grounding the channel extends from the dike to the meadow side.

This evidence as a whole leads to the conclusion that the grounding was not at A, but more probably at or above B. The evidence of what happened at Neptune avenue a few days after the trial has not been disregarded. Cary, the surveyor, Finnegan, McMahon, Flannery, and one of the wreckers, were there. Cary states that the wrecker, and not Flannery, indicated a point 75 to 100 feet north of A as the place of grounding; that Finnegan took no part in the discussion, but did not dissent. Finnegan states that Flannery pointed out the place, as the wrecker was unable to locate it, and that he

(Finnegan) indicated the place north of B, which Flannery disputed, contending that the true location was that north of A. There is a similar bend in the dike at A and B, and it does not appear with sufficient clearness that Finnegan agreed to A, as urged. The observers were about a thousand feet from A, and still farther from B, and the conflicting statements are too uncertain for valuable aid.

In the attempt to determine the true location of the grounding, difficulty has been caused by the evidence of Taylor, Housell, and Hemminger, wreckers, to the effect that the easterly line of the channel at the place of grounding was 50 feet from the dike, that the Quinn's bow was east of the east line of the channel, and that between the Quinn and the dike the space was largely sand at low water. All these witnesses saw and had to do with the Quinn several days after the grounding. Their evidence and that of other witnesses shows that the tide had much to do with the gathering of the sand on the port side of the wreck, although it appears from the evidence of the wreckers that for some 100 feet along the general locality of A there was sand, but no water. Cary's map shows that at A, and for 200 feet northerly thereof, there is from 1 to 4 feet of water 10 feet out from the dike at low water; 1 to 6 feet, 20 feet out; 2 to 6 feet, 30 feet out; and therefore the conditions of sand stated by the wreckers could not exist unless immediately along the dike. The conclusion is irresistible that the sandy appearance, as stated by the wreckers, in large part arose after the grounding, inasmuch as the distances of the bow from the shore, given by them, would have brought the boat into deep water at the point A, according to the Cary map.

The remaining question is, was the tug in fault in failing to return before Thursday? There was no occasion for her returning, unless it was before the Quinn broke up on Tuesday. If the tug had been there on Monday she might have done some good, but the westerly wind prevented. What happened Tuesday? In this connection it should be observed that it has been found already that the Quinn grounded through the misstatement of her captain, upon which the captain of the tug relied, and had a right to rely. Therefore she came into the difficulties that existed through her own fault, and the obligation of the tug to tow her did not primarily demand that the tug should relieve the canalboat from the position in which her own fault had brought her. But, passing this, the line was let go early Monday morning, as McMahon states, and she broke up on the Tuesday noon tide. It is possible that the tug might have been of some aid, but the evidence tends to show very strongly that after the line was thrown off she became so firmly aground that the tug could not have helped her. Indeed, it is difficult to conclude that her bow did not go somewhat to starboard after the first grounding; for Taylor, Housell, Flannery, and Fountain place her bow so far out that it is difficult to harmonize the location of the bow given by them with the evidence of her position when the grounding happened.

After a careful reading and study of all the evidence that has been taken, the following conclusions are reached: (1) The Quinn could not have grounded at either A or B unless she drew more than 6 feet and 5 inches of water. (2) The captain of the tug took her over

a course where she could have floated with such draught as she was represented to have. (3) The captain of the tug was not negligent in failing to infer from his experience preceding the final grounding that the Quinn drew more than the represented draught. (4) The width of the channel is indicated by all the witnesses who saw the Quinn aground, either at about the date of the grounding or when the wreckers were there, makes it more probable that the grounding was somewhat north of B than north of A. (5) The distance of the bow from the dike, when the wreckers saw the Quinn, indicates that her bow swung somewhat to starboard after McMahon threw off the line. (6) As the grounding was primarily due to McMahon's misrepresentation and throwing off the line, the contract to tow did not require the tug to rescue the Quinn from the position in which the misconduct and misrepresentation of the Quinn's captain had brought her. (7) Even had the tug returned Tuesday, after the throwing off of the line in the early morning, the tug could not have rescued the Quinn from the position where the injury occurred. (8) The condition of sand observed to the port of the Quinn in greater part arose during the several days following the grounding, by the action of the tide.

The foregoing conclusions have not been reached without great difficulty, and are lacking in that certainty which is desirable in judicial decision, but seem to the court, upon the whole evidence, to be the more justifiable.

The libel should be dismissed, with costs.

HARVEY v. SELLERS et al.

(Circuit Court, S. D. New York. April 3, 1902.)

No. 7,520.

EQUITY—JURISDICTION—ACCOUNTING—QUASI PARTNERSHIP.

A written contract by which complainant agreed to aid and co-operate in financing and exploiting certain patent rights owned by defendants, in consideration of which they agreed that one-third of the net profits received by them from the financing and exploiting of such rights should belong to complainant and be paid over to him as received, whether cash, stock, or other securities, if it did not create a partnership in the undertaking made it a joint one, in the profits of which complainant was to share, and created a trust relation between the parties which entitled him to maintain a suit in equity in a federal court, having jurisdiction, for an accounting from defendants as to money or stocks received by them as a result of the enterprise and their joint efforts.[1]

In Equity. Suit for accounting. On bill, answer, and replication, and on motion for reargument.

Henry Clark Johnson, for plaintiff.

Samuel H. Guggenheimer, for defendants.

HAZEL, District Judge. It is sought to maintain this suit for an accounting on the theory that a copartnership is shown to have existed

[1] See Account, vol. 1, Cent. Dig. §§ 11, 21 [i], 26 [s]; Joint Adventures, vol. 29, Cent. Dig. § 7 [l].

between the parties in a "special venture of promoting and exploiting the Severy impression process rights." The case was heard on the bill, answer, and replication, and therefore the question of whether this proceeding may be maintained must be ascertained from the averments of these pleadings. It appears from the bill that on October 12, 1898, the defendants addressed the following communication to the plaintiff:

"In consideration of your co-operation and assistance in financing and exploiting of the Severy impression process rights, both home and foreign, we hereby agree that one-third of all the net profits received by us from the financing and exploiting of the said rights shall belong to you, and be paid over to you as received by us, whether cash, stock, or other securities.

"Yours very truly, [Signed] R. H. Sellers & Co.

"I agree to and accept the above.

"[Signed] Wm. S. Harvey."

The bill shows the performance of services in the nature specified by the contract, and asks for an accounting, and an injunction restraining the defendants from disposing of stock and other property received by them as promoters of the Severy Process Company, and for a receiver to take possession of all papers and documents pertinent to the formation of the company. The answer, among other things, denies the partnership, but avers that the agreement was to remunerate the complainant for services rendered and to be rendered in aid of the formation of a syndicate to finance the enterprise. The federal courts of equity will take cognizance of the trust relation existing between persons standing in such connection, and require an accounting between parties in settlement of their controversies. They will also take cognizance of suits where the accounts are mutual or complicated or intricate. Fost. Fed. Prac. (3d Ed.) 30.

It is contended by the defendant that the bill of complaint does not show a partnership, and therefore no order for an accounting of the transaction can be decreed by the court sitting in equity. The practice of the courts of the United States in cases for an accounting seems to be limited to three grounds, to wit: First, the complicated character of the accounts; second, discovery; third, the fiduciary or trust relationship of the parties. The remedy, under the latter subdivision, has reference to matters of difference arising out of partnership transactions, as well as where the parties stand in a fiduciary relationship towards each other. The question here is replete with difficulty. It does not appear by express phraseology of the contract that a partnership was intended by the parties, but a division of the profits resultant from their joint endeavor to successfully finance and exploit a certain venture is expressly stated. What was intended by the words employed in this contract? A cursory examination makes it clear that the complainant on his part was required to co-operate and aid in this undertaking. For this he was to receive one-third of the net profits, whether cash, stock, or other securities. I am quite well satisfied by the pleadings, as no evidence was offered on the hearing that no copartnership was intended. It is true the parties engaged in a common object, and that object was to interest persons in financing their projects for the formation of companies and corporations. The com-

plainant bases his argument solely upon the alleged existence of a copartnership, and a right to an accounting is claimed to spring therefrom. The view that I take of this controversy, however, renders it unnecessary to find that the relation of partnership existed between the parties to justify relief at the hands of a court of equity. Undoubtedly this was a joint enterprise for the mutual benefit of the parties engaged in it. Complainant's reward depended upon a contingency. When success was attained, he was to have and receive a division of the profits.

The right to an accounting exists where the position of the parties is in the nature of a quasi partnership, independently of the actual existence of a partnership relation. 2 Beach, Eq. Jur. 911; Marvin v. Brooks, 94 N. Y. 71; Marston v. Gould, 69 N. Y. 220. The facts here establish a joint interest in a specific undertaking. The agreed compensation of the complainant was one-third of the net profits in money, stocks, or other securities. The maze of irrelevant allegations contained in the bill, descriptive of plans and schemes for floating the enterprise, while almost beyond comprehension, does not entirely obscure the essence of the agreement for division of net profits upon which the bill is based. This, I think, entitles complainant to an accounting. How otherwise can he enforce his remedy? The proceeding is essentially in equity. A diversity of citizenship exists, and must be brought on the equity side of the court. Authorities strictly applicable to the facts shown here do not seem abundant. The case of Bentley v. Harris, 10 R. I. 434, 14 Am. Rep. 695, which is cited in Pomeroy's Equity Jurisprudence, seems to clearly apply. In that case the court said:

"Is a person who is to receive a part of the profits of the business in whole or part pay for his services entitled to an account of those profits? * * * In the present case the complainant has an interest in the profits, not as profits, but as wages. He has no agency or control, but is in all respects the servant of his employer. * * * There are a few cases where the language of the court would seem to imply that a person who receives part of the profits as pay is not entitled to account, unless connected with other things which would make him a partner. Denny v. Cabot, 6 Metc. (Mass.) 82–92; Champion v. Bostwick, 18 Wend. 175–184, 31 Am. Dec. 376; Ex parte Hamper, 17 Ves. 404–412; 1 Story, Partn. §§ 48, 49. * * * But there seems to be sound sense in the remarks of Bissett on Partnership (12–15), quoted in Colly. Partn. (4th Am. Ed.) p. 42, § 45, note. Some of the writers, and even some of the judicial authorities, on this subject, appear to think that they have surmounted the difficulty by confining the rule of liability (as a partner) to the cases where the party would have a right to an account of the profits; but to this it may be answered that in all cases where a person is to be paid for his services by a sum proportionate to the profits he must be entitled to an account of the profits; if not, how is he to ascertain that he has what he stipulated for? See 7 Jarm. Conv. (by Sweet) 11, note 'a.' In many of the cases it will be seen that, notwithstanding a clear right to an account, no partnership was held to subsist either as between the parties or as to third persons. * * * We think the complainant entitled to an account."

There are other authorities cited in this Bentley Case which strengthen this contention. The complainant is therefore entitled to maintain his bill in equity in accordance with this doctrine. The cause must therefore be referred to a master. As it is doubtful

whether an injunction or a receivership would be beneficial at this stage of the proceeding to either of the parties, no order will be made in that regard. So decreed.

Motion for Reargument.

(April 28, 1902.)

As stated in the opinion, the case was heard upon the verified bill, answer, and replication. The bill does not demand an answer under oath. It is urged by the defendants that, the complainant not having waived the defendant's oath, the bill should be dismissed, unless the equities are established by the specific testimony of two witnesses, or one witness corroborated by proper circumstances. Vigel v. Hopp, 104 U. S. 441, 26 L. Ed. 765. The cases cited were actions based on fraud (Morrison v. Durr, 122 U. S. 518, 7 Sup. Ct. 1215, 30 L. Ed. 1225; Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. Ed. 72), in which every allegation of fraud was denied. I think these are quite different from the case at bar. Taking the answer as true, the complainant performed services in financing the enterprise. The answer in this case is not entirely responsive to the bill. The gist of the averments of the complaint is the performance of services in financing and exploiting the enterprise upon which complainant and defendants embarked pursuant to written contract. It is admitted that the defendants were impecunious, and that they needed money at crucial times wherewith to meet obligations springing from the Severy contracts, and that complainant procured money, $5,000 at one time, and $10,000 at another, in aid of the enterprise. Defendants insist that these transactions were independent of the contract. But I think that the letter of April 1, 1899, is corroborative of complainant's contention. That letter was written subsequent to the exploitation of the enterprise and transfer of properties to a corporation organized to purchase the rights and patents covering the Severy process. At this time the defendants had received remuneration for their services in stock and money. Whether a profit was realized is not material. By the terms of the contract, the complainant has a right to ascertain. The letter states:

"We note what you say, and will figure up the account at the earliest opportunity. We have partially done so, but have not time to copy it off just yet. * * * We are sorry that the accumulated debts, which must be paid before any money can be divided between us, have amounted to so much that there will not be a large sum for division. There will certainly not be thirty-five hundred dollars apiece for us. We will soon have the bills paid and statement made up, with receipts and vouchers, which we wish to go over with you some time when you are here, so that we all may understand matters alike."

This is no denial of contractual obligations or claim of abandonment by complainant prior to termination of the mutual undertaking. It must be taken as admitted that complainant carried out the contract, and is entitled to an accounting. The contract does not state how much money complainant was to raise, nor the extent of the services which he was to perform. It was a joint undertaking, the success of which inured to the benefit of those associated

together. The essential allegations of the bill are set out with sufficient precision. The averments on information and belief are chiefly those of which defendants have knowledge, and not the complainant, and from which complainant's usefulness to defendants may be inferred.

Motion denied. Form of decree to be submitted to counsel for defendants.

DE HIERAPOLIS v. LAWRENCE et al.

(Circuit Court, S. D. New York. February 17, 1902.)

1. CREDITORS' BILL—MULTIFARIOUSNESS.
A creditors' bill is not multifarious, because based on two several judgments both in favor of complainant and against the same defendant, nor because it attacks as fraudulent a conveyance of property in trust from the judgment defendant to certain of his codefendants, by which an annuity was reserved to the grantor, and also an assignment of such annuity to other codefendants; the relief sought being in the alternative.

2. SAME—SUFFICIENCY OF ALLEGATIONS OF FRAUD.
A creditors' bill which alleges the ownership by the judgment defendant of certain property, that he conveyed it to his codefendants without consideration, reserving an annuity during his life, that such conveyance was made for the purpose and with the effect of hindering, delaying, and defrauding his creditors, including complainant, and was merely colorable, sufficiently alleges fraud; it being unnecessary to set out more in detail the circumstances of the transaction.

3. SAME—PROPERTY WHICH MAY BE REACHED—ANNUITY.
An annuity, reserved for the individual benefit of the grantor in a conveyance of all of his property in trust to provide for the payment of his debts and the support of his family, is liable for his debts, and may be subjected by a creditors' bill in the hands of one to whom he has assigned it, without consideration, for the purpose of placing it beyond the reach of creditors.[1]

In Equity. Creditors' suit. On demurrer to bill. See (C. C.) 99 Fed. 321.

Theodore B. Chancellor, for plaintiff.
Norman G. Johnson and John B. Talmage, for defendants.

WHEELER, District Judge. The defendant Isaac Lawrence, having a large amount of real estate in the city of New York, executed and delivered this instrument:

"This indenture, made the 28th day of July, 1893, between Isaac Lawrence, now living at Bar Harbor, Me., of the first part, and Joseph P. Bass, of Bangor, Me., and Lee Gwynn Lawrence, wife of the party of the first part, parties of the second part, witnesseth: That whereas the party of the first part is desirous of making suitable provisions for himself and his wife and children out of his property, now for such purpose, and in consideration of one dollar to the party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby grants, conveys, and transfers unto the parties of the second part, and their successors, all of the property of the party of the first part, both real and personal, wheresoever situated, in trust, neverthe-

[1] See Creditors' Suit, vol. 14, Cent. Dig. § 37 [c, d, e, h, j]; Fraudulent Conveyances, vol. 24, Cent. Dig. § 678 [k, l].

less, to and for the following uses and purposes: First, to pay all legal costs and expenses in or about the creation and execution of the trust herein contained; second, to take possession of all such real estate, and collect and receive all such personal estate; third, to receive all proceeds of the real estate of the party of the first part, if any shall be sold in the pending action for partition brought by James G. R. Lawrence; fourth, to pay all debts and liabilities of the party of the first part now existing, whether entered into for the benefit of his wife or her property, or secured by mortgage or other liens thereon, or otherwise created, and for that purpose to mortgage all or any of the real estate hereby conveyed or intended so to be; fifth, to invest and keep at interest all moneys to be realized from the property hereby conveyed and transferred; sixth, to lease and rent the real estate hereby conveyed for such time as the parties of the second part shall think best; eighth, to pay all taxes, assessments ordinary and extraordinary, repairs, insurance, or other charges upon or affecting the property hereby conveyed or transferred, and, in case of loss or injury to any building on the property, by fire or otherwise, to rebuild and repair the same with moneys realized from insurance, and, if deemed necessary by the parties of the second part, to raise other moneys by mortgage on the property hereby conveyed, and expend the same in such rebuilding; ninth, out of the income (net) of the said property to pay annually to the party of the first part during his life, if he shall die during the existence of this trust, in equal quarterly payments, the sum of three thousand dollars; tenth, to pay over to the said Lee Gwynn Lawrence the balance of the net income of said property for the support of herself and the children of her and the party of the first part so long as she shall live and remain unmarried after the death of the party of the first part."

The plaintiff brought two suits against him in the state courts, and before judgment he assigned the $3,000 annuity reserved to himself to the defendant Johnson, who assigned it to the defendant Lee Gwynn Lawrence. The plaintiff recovered judgments in his suits against the defendant Isaac Lawrence,—one in the city court of New York for $1,101.95, and one in the supreme court in the county of New York for $3,193.40, affirmed in the appellate division (67 N. Y. Supp. 1131), with $109.06 costs,—which were duly docketed, and on which executions issued and were returned unsatisfied. This suit is brought against the trustees under the conveyance, the wife and children individually, and against the defendant Johnson and the wife as assignees of the $3,000 annuity, to reach the property for the satisfaction of these judgments. The bill is demurred to for multifariousness in various ways, and for want of sufficient allegations of fraud in the conveyance and assignment to set them aside, and for want of equity generally.

The judgments are separate, and the relief would be against different persons if the conveyance should be found wholly void from those it would be against if that should appear to be valid and the assignment of the annuity of $3,000 to be fraudulent and void; but this does not necessarily make the bill multifarious, either as to parties or subjects. The judgments are between the same parties, and satisfaction of them is sought out of the same property, affected by the same transactions in the same way; and relief in respect to them may as well be sought in one suit in equity, as one suit may be maintained for infringement of two or more patents by the same machine, which it is well settled may be done. The suit arises upon the first conveyance, and all who were parties to it or who claim under it are proper parties, whether its validity respecting all the property covered by it, or its effect in reserv-

ing the $3,000 annuity, is to be tried and determined. It also arises upon the assignments of the annuity, which was a part of the property, and all who participated in them are also proper parties, although the relief may vary; for it is a province of a court of equity to adapt the remedy to the varying circumstances of parties and classes of property that may be before it, according to their respective rights and liabilities. In this view the multifariousness relied upon all disappears.

Good pleading requires that the substantial facts out of which the rights and liabilities sought to be enforced arose should be alleged, but not that the circumstances out of which these facts arise and are to be made to appear should be in detail set forth. This bill well alleges the ownership of the property by the debtor, its conveyance with reservation of the $3,000 annuity, and that the conveyance—

"Was made without any consideration, and was and is invalid, null, and void, and was made by the defendant Isaac Lawrence, and accepted by the defendants Joseph P. Bass and Lee Gwynn Lawrence, for the purpose and with the intent to hinder, delay, cheat, and defraud the creditors of the said Isaac Lawrence and the plaintiff, and to place the said property beyond the reach of the creditors of said Isaac Lawrence and the plaintiff, and to prevent the plaintiff from collecting the amount of the said judgments aforesaid, and that the effect of the said deed, conveyance, and transfer is to hinder, delay, cheat, and defraud the creditors of said Isaac Lawrence and plaintiff, and to prevent the collection of the amount of said judgments aforesaid, and that the said deed, conveyance, and transfer were merely colorable, and that the use, benefit, and enjoyment of said property, and of the rents, issues, and profits thereof, remained and still remains in the defendant Isaac Lawrence, but that the defendants Joseph P. Bass and Lee Gwynn Lawrence still possess and hold said property or its proceeds under said deed, conveyance, and transfer aforesaid, and that said property is worth approximately three hundred thousand dollars"; that the assignment of the $3,000 annuity was "made by the said defendant Isaac Lawrence to the said defendant Norman G. Johnson, was made without any consideration, and was and is invalid, null, and void, and was made by the said defendant Lawrence and accepted by the said defendant Johnson for the purpose and with the intent to hinder, delay, cheat, and defraud the creditors of the said Isaac Lawrence and plaintiff, and to place the said property beyond the reach of the plaintiff and the creditors of the said Isaac Lawrence, and to prevent plaintiff from collecting the amount of the said judgments aforesaid; that the effect of the said alleged sale and transfer by the said defendant Lawrence to the said defendant Johnson as aforesaid was and is to hinder, delay, cheat, and defraud the creditors of the said Isaac Lawrence and plaintiff, and to prevent the collection of the amount of plaintiff's said judgment aforesaid"; and that "at the time said alleged sale and transfer was made by the said Norman G. Johnson to the said defendant Lee Gwynn Lawrence the said Lee Gwynn Lawrence had knowledge and notice of all the circumstances surrounding the transfer of said interest and income by defendant Isaac Lawrence to the defendant Norman G. Johnson as aforesaid, and had knowledge of the fact that said transfer from Isaac Lawrence to Norman G. Johnson was without consideration, and was invalid, null, and void, and was made and accepted for the purpose and with the intent to hinder, delay, cheat, and defraud the creditors of the said Isaac Lawrence and plaintiff, and to place the said property beyond the reach of the plaintiff and the creditors of the said Isaac Lawrence, and to prevent the plaintiff from collecting the amount of the said judgment aforesaid, and that the effect of the said transfer by the said Lawrence to the said Johnson was and is to hinder, delay, cheat, and defraud the creditors of the said Isaac Lawrence and plaintiff, and to prevent the plaintiff from collecting the amount of plaintiff's judg-

ments aforesaid; that the said alleged sale and transfer made by said Johnson to the said Lee Gwynn Lawrence was made without any consideration, and was and is invalid, null, and void, and was made by the said defendant Johnson to the said defendant Lee Gwynn Lawrence for the purpose and with the intent to hinder, delay, cheat, and defraud the creditors of the said Isaac Lawrence and plaintiff, and to place the said property beyond the reach of the plaintiff and the said creditors of the said Isaac Lawrence, and to prevent the plaintiff from collecting the amount of said judgment aforesaid."

These seem to be fully sufficient allegations of fraudulent purposes of those concerned, respectively, in making the conveyance and assignment. This conveyance was before this court with reference to another judgment in favor of the plaintiff against the defendant Isaac Lawrence, upon questions made by demurrer as to the jurisdiction of the court and the equity of the bill, in De Hierapolis v. Lawrence (C. C.) 99 Fed. 321. No reason has now been made to appear why the conclusion then reached that at least the $3,000 annuity arising out of the property of the debtor, and reserved to and belonging to him, should not be liable for his debts, the same as any property of any other debtor, not exempt, is liable for his debts. No principle of law is known, or case asserting it shown, whereby a person can put his property liable for his debts into the hands of a trustee, and reserve any part of it to himself, and thereby make it exempt from his debts. The law of New York as settled by the state courts is conceded in the brief of defendants to be otherwise. The case chiefly relied upon in this behalf is Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254, brought by an assignee to reach property bequeathed to trustees by the mother to lay out the use of for, or transfer a part of absolutely to, the bankrupt, in their discretion. The question was whether the bankrupt had title to any of the property, and as to this it was urged that the giving of the discretion was by the policy of the law equivalent to a direction to transfer that part. Upon this question Mr. Justice Miller said:

"The two cases of Twopeny v. Peyton, and Godden v. Crowhurst, above cited from 10 Sim. [487, 642], seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no further than to hold that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee." And, further on, that "this constitutes the dividing line in the cases which are apparently in conflict."

What would go to an assignee in bankruptcy may be reached by a creditor. Here was a reservation by this judgment debtor of this annuity for himself, and of support for his wife and children, which by law rested upon him, out of his own property, which he could well enforce, and which the doctrines of that case do not cut off, but well recognize.

Demurrer overruled; defendants to answer over by March 15th.

TRICE et al. v. COMSTOCK et al.

(Circuit Court, W. D. Missouri, W. D. May 5, 1902.)

1. VENDOR AND PURCHASER—INNOCENT PURCHASER—ASSIGNEE OF EXECUTORY CONTRACT.
   An assignee of an executory contract, giving an option to purchase lands, does not occupy the position of an innocent purchaser, but takes only the rights of his assignor, either as against the vendor or third parties.

2. EQUITY—RIGHT TO RELIEF—CLAIM ARISING OUT OF FRAUDULENT CONTRACT.
   Complainants falsely assumed to be agents for the owner of a tract of land, and to have authority to sell the same for a certain price per acre. Their scheme was to sell the land secretly for a greater price, pay the owner the price demanded by him, and retain the excess. In this scheme they associated one of defendants with them to assist in making the sale. Such defendant procured an option from the owner for the purchase of the land himself, and assigned the same to his co-defendant, who made the purchase. *Held*, that complainants' scheme was in fraud of the rights of the owner of the land, whom they assumed to represent as agents, and they had no standing in equity to maintain a suit to require an accounting from defendants of the profits realized from the lands, on the assumption that a trust relation existed between the parties.

In Equity. On final hearing.

Thurman, Wray & Timmonds and Robinson, Bowling & McCluer, for complainants.

John C. Tarsney, for respondents.

McPHERSON, District Judge. This is an action by a bill in equity to enforce an alleged resultant trust. The complainants are a firm dealing in real estate, residing at Lamar, Barton county, Mo. Respondents are brothers, residing in a small town near Clinton, Iowa. W. C. Comstock is a banker and dealer in real estate. James C. Comstock has been a merchant. H. B. Buckwalter, now deceased, late of Westchester, Pa., owned a body of 1,920 acres of land in Barton county, Mo., the larger part or all improved. George E. Bowling, an attorney at law and real estate agent, of Lamar, Mo., up to the death of Buckwalter, in 1897, and for many years prior thereto, was Buckwalter's agent for renting and caring for the lands, but without authority to sell. Buckwalter left a last will and testament, by the terms of which these lands were devised to a Mr. Reid as executor, and a lady as executrix, with power to sell and convey these lands. The lady had nothing to do with the matters and things hereinafter recited, refusing, when requested, to recognize any of the parties. The business on the part of the estate was conducted by Mr. Reid. His conduct is in no way challenged, and it is sufficient, and likewise proper, once and for all, to say that he is a lawyer of ability, and a gentleman of high character and integrity. After Mr. Reid became the executor he concluded it the better to sell these lands. He went to Barton county, Mo., viewed the lands, and sought information of their value. This was in 1897. He had much talk with Bowling, as well as subsequent correspondence. There is evidence on the question, and much said in argument, and mostly pertinent, as to

the character of the transactions of Bowling, the complainants, and the two defendants, from the first to the end of the matters under consideration; and it is proper to say that the complainants, and Bowling included, and the respondent W. C. Comstock, were all keen, shrewd speculators, and manipulators and promoters, doing things by short turns, and by methods that seem novel. The lands in question were attractive and cheap.

The complainants, in carrying on their real estate business of Lamar, did what they called "immigration" business. They sought to influence people from Iowa, Illinois, and other states to buy lands, and locate in Barton county. But their real purpose was the making of money for themselves on so-called "commissions" or "differences." It seems that they would not sell lands on regular or fixed commission. Their method was to obtain an option from the landowner on the lands at a fixed price net to the owner, they to have all they could get over the price thus fixed. By so doing they were not obligated in any way, but the landowner was tied up. They claim to have had such arrangement as to the Buckwalter estate lands of 1,920 acres. This is one of the disputed questions of the case. That they had no such arrangement directly with Buckwalter or his executor is not disputed; and there is not even a pretense that the lady who was executrix, directly or indirectly, gave any authority to sell the lands at any price, or any terms, to any person. If they did have such arrangement, it was only with Bowling, the rental agent, but who claims to have received from Reid, the executor, the additional authority to sell. This Reid denies.

A man by the name of Reitmeyer, of northeastern Iowa, an insurance agent, promoter, and dealer, by most peculiar and tortuous methods, in most anything, gets into correspondence with complainants on the subject of "immigration" into Barton county. He was to induce men to visit Barton county to look at lands, the expenses of himself and prospective purchasers for the trip to be paid by complainants, on receipts taken according to prescribed forms from certain railroads, for the evident purpose of enabling complainants to be reimbursed from the railway companies in whole or in part. Reitmeyer asked complainants, which request was granted, to have the respondent W. C. Comstock act with him, as a kind of or semi partner, in taking persons to Barton county, and receive a part of the contingent commission to be received by complainants, being the excess received by them over and above the net price fixed by the owner. And W. C. Comstock and Reitmeyer, in this "immigration" business, took one or more persons to Barton county, and a part of the expense was paid by complainants,—something like $70. How much complainants are out, if any sum, the evidence does not show.

Complainants make two claims: First, that they were the agents, duly authorized by the Buckwalter estate, to sell the lands. But I find that they had no such authority. Much is said by counsel on both sides as to the statute of frauds. In my judgment, that question is not entitled to consideration, for the reason it has no application. Bowling says he had the authority from Mr. Reid, the executor, to employ the complainants. This Reid denies, and the correspondence from Bowling absolutely destroys his evidence.

Complainants' other claim is that, if they did not have the authority to sell the lands, they assumed to have the authority, and that, as between them and defendant W. C. Comstock, this was sufficient. The testimony fairly shows the following as the facts: In 1897, and after Mr. Buckwalter's death, Mr. Reid, the executor, came West to look over these lands. Mr. Bowling had been the agent for renting and paying taxes and for nothing else. Reid had Bowling go over the lands with him. Conversations occurred as to the value of these lands and prospective sales in the county generally. Bowling wanted and asked authority to sell, but never received it. Subsequently he asked for such authority by letter. But he never received it. The authority assumed by both Bowling and by complainants was neither definite nor certain in any one particular excepting the price per acre. The assumed authority was to sell to any one, solvent or insolvent; no question of security, other than by inference, of mortgage; and no question of whether the sale was to be for cash, or part cash and part on time; if partly on time, then what time, or what rate of interest. None of these important matters to Mr. Reid were ever assumed. But in thus assuming complainants were to occupy the following position: Reid was to have $20 per acre. Although a principal ordinarily expects only the sum for which he agrees to sell, yet if the agent sells for more it inures to the benefit of the principal. No principle of the liability of an agent, or of the relations between principal and agent, is better understood than this. A great deal has been said and written by counsel in this case, all of which I indorse, as to the relations and duties and obligations of an agent to his principal. But the complainants' position in this case is that in fact they were not the agents; that by assuming the agency they would not sell at the price demanded by the owner, because then they would get no commission, but that they would secretly sell for a greater price, maintain such price as a secret, pay over the $20 per acre to Reid, and pocket the balance! Having no authority in fact to act as agents, but only assuming it, such, as above stated, is necessarily their position. And in carrying out that kind of a scheme, calling Reitmeyer and W. C. Comstock to their aid, then, because it failed, they insist that a court of equity should give them relief as against W. C. Comstock, because he (W. C. Comstock) was not loyal to the scheme,—a scheme which, in my judgment, was against equity, morals, and conscience. Possibly, and it is only possible, that if Reid, as executor, carrying out his trust, subject to the approval of a court of probate, had said that he wanted $20 per acre for the land, and that as a commission he would allow all in excess of $20 per acre, that if complainants had sold the land for what they say it was worth, $30 per acre, complainants could have $19,000 as their commission. Be that as it may, we do not have that case to deal with. Because Reid demanded $20 per acre, complainants, without right, assumed that they could make such a deal, and because one of their agencies played traitor to them they should be given relief as against him. I cannot allow that.

That the Buckwalter estate was wronged, I have no doubt. But I do not believe that this court should by decree in this case, between these parties, give direction as to the spoils. I agree that an agent must be loyal to his principal; that he must use skill and diligence and

zeal for his principal; the information acquired by an agent belongs to his principal; that the use of information acquired by an agent, when an agent, can only be used by the agent, whether during or after the agency, for the benefit of the principal. These things are not only in harmony with good morals, but they are exacted and enforced by the courts. But I am not able to see what application they have to this case. If W. C. Comstock was lacking in good faith towards complainants, the answer is that complainants were not in a position to ask for good faith in the matter of the Buckwalter lands. W. C. Comstock took a contract or option for these lands from Reid, the executor. He assigned this contract to his brother, a defendant herein, James C. Comstock. Whether he did this as a matter of stupidity, or in fraud, or for value and in good faith, I do not deem it material to decide, and do not think it necessary to either review the evidence or follow the arguments of counsel. The fact not in dispute is that James C. Comstock took the place of his brother, W. C. Comstock, by assignment of the executory contract between Reid and W. C. Comstock. This was no better than taking by a quitclaim deed; and such a position is not and cannot be that of an innocent purchaser. May v. Le Claire, 11 Wall. 217, 232, 20 L. Ed. 50; Baker v. Humphrey, 101 U. S. 494, 499, 25 L. Ed. 1065; Dickerson v. Colgrove, 100 U. S. 578, 584, 25 L. Ed. 618. While the appellate courts of a few states hold otherwise, yet the above is supported by the great weight of authority; and if it be a rule of property, and is governed by the laws of Missouri, my attention has not been directed to any case of the state holding to the contrary. Therefore this case should be and is decided as though W. C. Comstock alone is defendant, and as though no assignment of the contract had been made by W. C. to James C. Comstock.

Before receiving a deed from Reid, James C. Comstock knew all or practically all of the claims asserted by complainants. There are a great many things in the evidence in this case which persuade me that it was the united purpose of complainants and Bowling, W. C. Comstock, and Reitmeyer to get the lands held in trust by Reid for the Pennsylvania estate, beat the price down, and make and divide, in secret, an unfair and extortionate commission; and, this being the fact, I know of no reason why this court should aid one of the parties as against another.

But there is another view of the case which prevents a recovery by complainants. W. C. Comstock was at no time the agent of complainants to buy the land from Reid. All that can possibly be claimed is that he was an agent to assist in selling the lands to some unknown third party at a price in excess of $20 per acre, the sum demanded by Reid. Complainants had no rights to ownership nor interest in the lands. All they claimed, and all they assumed,—and that was without merit,—was the contingent right to share in the profits when the land was sold to such party on such terms and at a price as would be approved by Reid; and that, in my judgment, was not the creation of a trust relation between complainants and W. C. Comstock. The parties should all be left where the court finds them.

Complainants' bill in equity will be dismissed, at their costs.

GRUBNAN v. THE ONTARIO.

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

No. 138.

SHIPPING—INJURY TO CARGO FROM LEAKAGE—UNSEAWORTHINESS.

A finding affirmed that damage to cargo by water which leaked from one of the ship's ballast tanks, by reason of the breaking and straining of rivets during heavy weather, was due to excepted perils of the sea, and not to unseaworthiness of the ship at the beginning of the voyage.

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

For opinion below, see 106 Fed. 324.

This cause comes here upon appeal from a decree of the district court, southern district of New York, dismissing the libel. The libel was filed to recover damages by water to 82 bales of wool carried by the steamship Ontario from London to New York. The damage was caused by a leak in a ballast tank upon which, properly dunnaged, the wool was stowed. The precise cause of the leak was the giving way of two rivets about eight inches apart on the top of the tank. Through the holes thus left the water found its way and, being somewhat obstructed by the planking on top of the tank and by the swelling of the boards which covered the limbers, accumulated sufficiently to swash up above the dunnage.

Lawrence Kneeland, for appellant.

J. Parker Kerlin, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The opinion of the district judge sets forth the facts very fully, and exhaustively discusses the various questions which have been argued here. It seems unnecessary to rehearse the entire case. We concur in the conclusion that the vessel was not unseaworthy when she sailed. She encountered heavy weather, pitching and straining violently, and the circumstances indicate that under such pitch and strain these two rivets gave way. Other rivets in the vicinity, which did not give way, were yet so strained that they were found to be weeping, and the edge of the tank at the same place was somewhat distorted. There is no evidence to show that there was any defect in the rivets, such as was indicated in other cases cited in the opinion and in the briefs. We concur in the finding that:

"All the usual and ordinary means of making the ballast tank secure by overhauling and repairing the ship at proper intervals, and by testing the tank by frequent trials, and the ordinary tests, were applied shortly before the ship sailed on this voyage. Competent experts testify that these tests are all that are deemed necessary; and these tests showed that the tank was sound and tight."

The boards covering the limbers, although not water tight, were laid close together to prevent accumulation of obstructing substances in the limbers, which seems, from the evidence, to be proper construction. They were removed just before this voyage, overhauled, and found in proper condition. It is charged that the ceiling of the tank was laid flat without battens, so that any water which might

escape from the tank could not find its way to the wings and limbers without running through and above such ceiling. But the proof as to absence of battens is not persuasive, and the water, after the first heavy weather, when apparently the rivets started, did find its way so quickly to the limbers that the engineers' department at once began using the pumps extra time to keep it down. The trouble was with the limber boards, which swelled, and therefore did not provide sufficient drainage for the flow from two broken and several weeping rivets, but the evidence does not warrant the holding that there was imperfect construction in the limber boards, and certainly shows that they were most carefully overhauled and replaced properly before sailing.

The decree is affirmed, with costs.

PATTERSON v. WADE.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1902.)

No. 727.

1. LIMITATIONS—ACTION TO ENFORCE STATUTORY PENALTY.
   An action to charge directors with liability for a debt of the corporation, under a state statute, because of their having declared dividends when the corporation was insolvent, is one to recover a statutory penalty, which under the statute of Oregon (1 Hill's Ann. Laws Or. p. 136) must be brought within three years after the cause of action accrues.[1]

2. SAME—ACCRUAL OF CAUSE OF ACTION—ACTION TO ENFORCE STATUTORY LIABILITY OF DIRECTORS.
   Under 2 Hill's Ann. Laws Or. § 3231, which provides that directors of a corporation who declare and pay dividends when the corporation is insolvent "shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office," the right of action of a creditor entitled to enforce such provision against the directors accrues on the maturity of his claim against the corporation.

3. SAME—RENEWAL OF CERTIFICATE OF DEPOSIT.
   The issuance by a bank of a certificate of deposit for the amount of a former certificate, which has matured, does not create a new debt, but merely operates to extend the time of payment of the old debt, and a right of action in favor of the holder against directors of the bank, who under the statute have previously become liable for the payment of any debt "then existing or incurred while they remain in office," accrues at the time of the maturity of the certificate existing at the time the penalty was incurred, and not on the maturity of the new certificate.

4. PLEADING—REPLY—DENIAL OF NEW MATTER IN ANSWER.
   An allegation in an answer, in support of a plea of limitation, that the certificate of deposit sued on was issued by the bank in renewal of a prior indebtedness evidenced by a certificate which had matured and on which the exact amount of the new certificate was then due, and not for an indebtedness then created, is not sufficiently traversed to raise an issue by an allegation of the reply that the old certificate was surrendered and received with the understanding and agreement between plaintiff and the bank that it should constitute a new deposit, and such allegation was properly stricken out as immaterial.

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[1] See Limitation of Actions, vol. 33, Cent. Dig. § 162.

5. SAME—MOTION FOR JUDGMENT ON PLEADINGS—INSUFFICIENT DENIALS.
Under the provision of 1 Hill's Ann. Laws Or. § 94, that "every material allegation of new matter in the answer not specifically controverted by the reply shall, for the purpose of the action, be taken as true," where facts were alleged in an answer which supported a plea of limitation, and such allegations were not specifically denied in the reply, defendant was entitled to judgment on the pleadings.

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

Gustav Anderson, for plaintiff in error.

R. & E. B. Williams, for defendant in error.

Before MORROW, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. In this action, commenced March 26, 1898, the plaintiff seeks to recover from the defendant Wade, and other directors of the Portland Savings Bank of Portland, Or., the sum of $9,718.33, alleged by plaintiff to have been deposited by him in that bank on May 10, 1894. The action is based upon a statute of Oregon, which, so far as necessary to be here quoted, is as follows:

"Sec. 3231. If the directors of a corporation declare and pay dividends when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office. * * *" 2 Hill's Ann. Laws Or. p. 1433.

The complaint, in addition to other matters, which need not be referred to, alleges that on March 13, 1893, the defendants, while acting as a board of directors of the Portland Savings Bank of Oregon, declared a dividend of 2 per cent. on its capital stock; that this dividend was paid April 1, 1893; and that the bank was insolvent when this dividend was declared, and also when it was paid. The defendant Wade was the only one of the defendants served with process. In the answer filed by him he put in issue many of the averments of the complaint, and also pleaded, as an affirmative defense, that the action is barred by the statute of limitations, for the reason that the same did not accrue to the plaintiff within three years next prior to its commencement; and in this connection it is alleged in the answer that plaintiff deposited with the Portland Savings Bank, on February 11, 1890, the sum of $10,000, for which the bank issued its certificate of deposit, payable in one year from its date, with interest at the rate of 6 per cent. per annum; that the interest on this certificate was paid, and on March 12, 1891, the plaintiff surrendered the certificate to the bank, taking a new certificate in place of the one surrendered, and for the same amount; that the indebtedness created by the original deposit was thus renewed from year to year; that the fourth certificate issued to plaintiff for that purpose was dated on March 22, 1893, and was for the sum of $10,000, payable February 11, 1894, "with like interest as the other certificates and for the same time"; that on April 19, 1894, $1,000 was paid on the certificate issued March 22, 1893, and on May 10, 1894, this last-named certificate was surrendered by plaintiff, and he received

in lieu thereof the certificate of deposit sued on for $9,718.33, the balance then due upon the deposit alleged to have been made February 11, 1890. The answer then proceeds to allege: "That plaintiff deposited no part of the money mentioned in his complaint subsequent to the time when the first certificate was issued by said bank to plaintiff as aforesaid, and that all of the said certificates issued subsequent to the said first certificate were renewals of the debt and of the said certificate dated February 11, 1890, hereinbefore set out." The plaintiff moved to strike from the answer all of the allegations relating to the deposit made on February 11, 1890, and the subsequent issuance of certificates of deposit therefor. The motion was denied, and thereupon the plaintiff filed a reply to that portion of the answer to which the motion to strike out was directed. In this reply the plaintiff admitted that he deposited $10,000 with the Portland Savings Bank on February 11, 1890, and that certificates of deposit for the amount, and at the times stated in the answer, were received by him, but alleged that each time a certificate was surrendered, and a new one issued in its place, it was agreed between plaintiff and the bank that the transaction was to be deemed a new deposit of the amount named in the surrendered certificate; and with reference to the certificate of deposit issued March 22, 1893, it is alleged in the reply that $1,000 was paid thereon on April 19, 1894, and that on May 10, 1894, the plaintiff, by his agents Wells, Fargo & Co., deposited said certificate with the Portland Savings Bank, "and that said bank then and there received, and said Wells, Fargo & Co. then and there so deposited, said certificate as a new deposit, together with the sum of $718.33, and that said deposits were new deposits, and that pursuant thereto said bank then and there, on May 10, 1894, in conformity with and pursuant to the agreement and understanding by and between said bank and its directors, * * * agreed to pay interest on said deposit from said date, and not from any date prior thereto, and that said bank then and there acknowledged in writing said deposit, and did then and there issue in writing its certificate of deposit therefor, as alleged in plaintiff's complaint." It was also alleged in the reply that plaintiff did not know of the illegal action of the defendants in declaring and paying the dividends mentioned in the complaint until on or about March 25, 1898, and that he could not, by the exercise of ordinary diligence, have acquired such knowledge before that date. The foregoing averments of the reply were, on motion of defendant, stricken out. Thereupon judgment was rendered in favor of defendant on the pleadings. The case was brought here by the plaintiff on a writ of error.

1. The action is one to recover a statutory penalty. Patterson v. Thompson (C. C.) 86 Fed. 85; Bank v. Bliss, 35 N. Y. 412; Gregory v. Bank, 3 Colo. 332, 25 Am. Rep. 760; Wiles v. Suydam, 64 N. Y. 173. An action upon a statute for a penalty or forfeiture must, under the law of Oregon, be brought within three years after the cause of action accrues. 1 Hill's Ann. Laws Or. p. 136. In order, therefore, to pass upon the question which is presented by the ruling of the circuit court, denying plaintiff's motion to strike out that part of the answer to which reference has been made, it becomes necessary—

First, to determine when a cause of action accrues to a creditor under the statute upon which this action is based; and, secondly, whether the facts alleged in the answer show that the present action was not brought within three years after it accrued.

The statute provides that directors of a corporation who declare and pay dividends when the corporation is insolvent "shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office." It will be observed that the statute does not say, in express terms, whether the action it gives shall accrue when the illegal dividends are paid, or only upon the maturity of the creditor's debt, if such debt is not then due; but we think the reasonable construction of its language is that the creditor's cause of action thereunder accrues upon the maturity of his debt. The directors who participate in the payment of an illegal dividend are simply made jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office; that is to say, liable to the same extent as if they had been parties to the contracts by which the debts of the corporation were incurred. They are thus made directly liable for the performance of such contracts of the corporation, and, as the time when performance is to be made is an essential part of the obligation of a contract, the directors cannot, under the statute, be called upon to perform before the time when performance can be required from the corporation. Now, as we have seen, it was alleged in that part of the answer which the court refused to strike out that upon April 1, 1893, the date when the illegal dividends were paid, the Portland Savings Bank was indebted to the plaintiff on account of the deposit made by him February 11, 1890; that such indebtedness was at that time evidenced by a certificate of deposit for the sum of $10,000, dated March 22, 1893, payable on February 11, 1894; and it was further alleged that the certificate sued on was issued to plaintiff upon the surrender of the one of March 22, 1893, and for the balance due upon such certificate. Upon this state of facts, under the construction which we have placed upon the statute, plaintiff's cause of action against the defendant accrued on February 11, 1894, the date when the indebtedness of the Portland Savings Bank to him, existing on April 1, 1893, became due, unless in giving the certificate sued on the bank incurred a new indebtedness to the plaintiff, and that it did not is, we think, clear upon principle and established by decided cases. Iron Co. v. Walker, 76 N. Y. 521; Patterson v. Thompson (C. C.) 86 Fed. 85; Lee v. Hollister (D. C.) 5 Fed. 752. The indebtedness which this certificate represents is none other than the balance due to the plaintiff from the bank on account of the deposit made by him on February 11, 1890, and the certificate when delivered was in legal effect a promise to pay that indebtedness upon the date therein named, and its delivery to plaintiff was not the creation of a new debt. As was said in Iron Co. v. Walker, 76 N. Y. 521:

"The giving up of one promise to pay on taking another from the same party is but a continuation of the promse, and the giving of further time to perform it. As the first did not pay the debt, the other does not redeem the promise of the first, nor itself pay the debt."

It is clear to us that the allegations of the answer before referred to show that all of the certificates of deposit subsequent to the first one issued on February 11, 1890, when the original deposit was made, were but continued evidences of that indebtedness, and in the language of the court in the case of Iron Co. v. Walker, just cited, only "extensions from date to date of the time of payment thereof." It follows from the foregoing views that plaintiff's cause of action against defendant accrued on February 11, 1894. The statute of limitations began to run in favor of defendant on that day, and its operation was not suspended by the action of the plaintiff in accepting from the Portland Savings Bank the certificate of deposit mentioned in the complaint. The time for the payment of the bank's indebtedness to plaintiff was thereby extended until the maturity of that certificate, but this does not affect the right of the defendant here to insist upon the bar of the statute. The general rule, subject to some statutory exceptions not presented by the facts of this case, is that when the statute of limitations is once put in motion nothing interrupts its running, and certainly the plaintiff could not by any agreement made between himself and the bank, after the statute once began to run in favor of defendant, deprive him of the benefit of this general rule. In discussing the effect of the statute of limitations upon actions arising under a statute charging trustees with the debts of the corporation, for failure to make reports as therein required, the court of appeals of the state of New York said, in the case of Rector, etc., of Trinity Church v. Vanderbilt, 98 N. Y. 170:

"The statute operates upon the remedy, and the omission of the creditor to pursue it cannot stop its running. The liability of the trustee was imposed by statute, and the benefit and suit therefor are limited to the creditor as the one aggrieved. In such a case, when the statute of limitations begins to run, nothing subsequent will stop it."

Our conclusion is that the circuit court did not err in denying plaintiff's motion to strike out the averments of the answer showing that the certificate sued on was not issued on account of any indebtedness incurred at its date, but in fact for the balance then due on account of the deposit made by plaintiff February 11, 1890. These facts were properly set out in the answer in support of the defendant's plea of the statute of limitations.

2. The circuit court did not err in granting defendant's motion to strike out that part of plaintiff's reply to which we have already referred. The allegation therein that plaintiff had no knowledge of the facts constituting his cause of action until on or about March 25, 1898, was immaterial. The same also may be said of the further averment that plaintiff on May 10, 1894, deposited with the Portland Savings Bank the certificate of March 22, 1893, "and that said bank then and there received," and said plaintiff "then and there so deposited, said certificate as a new deposit, together with the sum of $718.33, and that said deposits were new deposits, * * * and that said bank then and there acknowledged in writing said deposit, and did then and there issue in writing its certificate of deposit therefor, as alleged in plaintiff's complaint." This cannot be construed as a direct and specific reply to any of the new matter contained in the

answer upon which the defense of the statute of limitations is based. It tendered an immaterial issue as to the fact of an understanding or agreement between plaintiff and the Portland Savings Bank, to the effect that the transaction by which plaintiff surrendered to the bank the certificate of March 22, 1893, and received in exchange therefor the certificate of deposit mentioned in the complaint, was to be deemed a new deposit. But the plaintiff insists that the language just quoted should be construed as an allegation that $718.33 in money was deposited by him with the Portland Savings Bank on May 10, 1894, and that this deposit is included in the amount named in the certificate sued on, and from this it is argued that a new indebtedness in the sum of $718.33 was created by the deposit of that amount upon the day named, and that plaintiff's right to recover the same from defendant is not barred by the statute of limitations, as the cause of action therefor did not accrue until May 10, 1895, the date of the maturity of the certificate referred to. We are not able to agree with plaintiff in his construction of the above averment. It is distinctly alleged in the answer that on May 10, 1894, the balance due on the certificate of March 22, 1893, was $9,718.33, which is the exact amount named in the certificate mentioned in the complaint. The plaintiff did not attempt to deny this allegation in his reply. On the contrary, the same fact clearly appears from the reply itself. The answer further alleged that the certificate sued on was not given for any other indebtedness than the balance due on the original deposit of February 11, 1890, as evidenced by the certificate of March 22, 1893. The averment above quoted cannot be deemed a specific denial of this allegation of the answer, either in whole or in part. The issue tendered by the answer was that the certificate sued on represented only the balance due on the certificate of March 22, 1893, and it is not material that plaintiff, on May 10, 1894, deposited with the bank the sum of $718.33 in money, in addition to the said certificate, unless the amount so deposited is included in the certificate sued on, and in view of the admitted fact that the amount due on the certificate deposited by plaintiff with the Portland Savings Bank, on May 10, 1894, was $9,718.33, and that upon its deposit the bank gave to plaintiff the certificate sued on for that exact sum, we do not think the reply can be construed as distinctly alleging that the latter certificate represents an additional deposit of $718.33, made on the same day. We construe the words "said deposit" in the concluding sentence of the above-quoted averment as referring to plaintiff's deposit of the certificate of March 22, 1893, and to no other deposit. The object of the law, in requiring a reply to new matter contained in the answer, is to narrow the issues, and compel a plaintiff to admit what he cannot conscientiously deny. That portion of plaintiff's reply which was stricken out was evasive, and did not contain a direct and specific denial of the allegations of the answer.

3. The defendant's motion for judgment upon the pleadings was properly granted. Section 94, 1 Hill's Ann. Laws Or., provides:

"Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purpose of the action, be taken as true. * * *"

The facts alleged in the answer of the defendant in support of his plea of the statute of limitations were not specifically controverted by the reply, and, this being so, the defendant was entitled to judgment upon the pleadings, and he would have been so entitled even if no part of the plaintiff's reply had been stricken out.

4. We do not deem it necessary to discuss the other assignments of error in relation to the refusal of the court to strike out that part of the answer setting out an agreement alleged to have been made by plaintiff with the Portland Savings Bank, on April 10, 1894, concerning the payment of the amount which the bank then owed on account of the deposit of February 11, 1890, and the action of the court in striking from the reply allegations in relation to this same agreement, and tending to show fraud and deceit upon the part of the defendants. The judgment does not depend upon the correctness of the rulings of the court in respect to these matters.

The judgment is right, and must be affirmed, because the plaintiff did not in his reply specifically controvert the facts alleged in the answer, showing that his cause of action is barred by the statute of limitations. Judgment affirmed.

NEAL et al. v. UNION MARINE INS. CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 8, 1902.)

No. 132.

1. MARINE INSURANCE—CONSTRUCTION OF POLICY—MASTER'S DRAFT.
An open policy of marine insurance provided for insurance from time to time "on advances and for disbursements secured by master's draft pledging vessel and freight." A certificate was issued thereunder covering advances made by insured on a master's draft for disbursements, which did not itself pledge the vessel or freight, but when negotiated by the insured the managing owner of the vessel gave a writing, which was attached to the draft, making it payable from first freights received at port of destination, and pledging vessel, owners, and freight for its payment. *Held*, that such writing became a part of the draft, the pledge made being within the authority of the managing owner, and brought it within the terms of the policy, notwithstanding the fact that it also pledged the personal credit of the owners.

2. SAME—INSURANCE OF COLLATERAL.
In such case the insured was under no obligation to sue the owners before resorting to the insurance, which covered his collateral pledge of the vessel and freight, where the same was lost through perils of the sea, which was a risk insured against.

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

This cause comes here upon appeal from a decree of the district court, Southern district of New York (95 Fed. 491), in favor of libelants, doing business under the name of Peter Wright & Sons. The libel was filed to recover for the loss of advances alleged to have been made to the bark Sophia upon master's draft, pledging vessel and freight, and insured for the benefit of the libelants by the respondent. The facts sufficiently appear in the opinion.

Albert H. Wray, for appellant.
Henry G. Ward, for appellees.

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

LACOMBE, Circuit Judge. On January 15, 1894, respondent issued its open policy of insurance to the libelants, undertaking to insure them "on advances and for disbursements secured by master's draft pledging vessel and freight. * * * This insurance is to indemnify the assured for any loss through perils of the sea, or prior liens subsequently arising, which may prevent the collection of the said draft in whole or in part. * * *" The open policy was to "cover only such risks as may be reported to, and accepted by, this company."

F. A. D. Hancock was a managing owner of the American bark Sophia. On January 16, 1898, he applied to libelants to negotiate a draft dated Halifax, January 12, 1898, drawn by H. R. Pedersen, master American bark Sophia, on H. R. Pedersen, master American bark Sophia, Tralee, Ireland, at three days' sight, to the order of F. A. D. Hancock, for £390, "value received, and charge the same to account of necessary disbursements at this port of American bark Sophia." Libelants declined Hancock's proposition, stating that this was not such a draft as they would negotiate, but that if he, as managing owner, would give a letter instructing the master to pay the amount of the draft three days after arrival, and would pledge the vessel and freight, so as to bring the paper into the usual course of advance drafts, they would negotiate it. The next day, January 17th, he agreed to do this, and libelants notified their brokers to cover insurance under the open policy. This was done the same day by memorandum for the sum of $1,950, "on advances against captain's draft (cargo white pine deals), valued at sum insured, and shipped on board the bark Sophia at and from Halifax to Tralee." The next day, January 18, 1898, Hancock delivered to libelants the draft indorsed by himself and the letter of instructions, and received the money. The letter reads as follows:

"New York, January 18, 1898.

"Messrs. Peter Wright & Sons, New York—Dear Sirs: Master's draft American bark Sophia: In consideration of your having purchased the draft of Capt. H. R. Pedersen, master of the above-named bark, for the sum of £390, dated Halifax, N. S., January 12, 1898, drawn at three days' sight on Capt. H. R. Pedersen, Tralee, Ireland, in favor of F. A. D. Hancock, for necessary disbursements of the vessel at the port of Halifax, N. S., I hereby advise having instructed Capt. Pedersen to pay this draft out of the first freight money collected at the port of Tralee, and within ten days after arrival of the vessel at said port, and hereby pledge the vessel, owners, and freight in the above sum, in accordance with the custom for settlement of such obligation.

"Yours, truly, F. A. D. Hancock,
"Managing Owner American Bark Sophia."

The bark entered upon her voyage, met heavy weather, and lost her deckload and the freight thereon; put into Bantry Bay, Ireland, water-logged and dismasted, from which place she was towed to Tralee, where she was arrested for the payment of the claim of the Clyde Shipping Company, which towed her from Bantry Bay to Tralee, said claim amounting to £58. She was sold for the sum of £140,

and such proceedings were had in the high court of justice in admiralty that the proceeds of sale of said bark and her said freight were exhausted in the payment of other claims against her.

We concur with the district judge in the conclusion that the letter was, in substance, a part of the draft. Both documents represent but one transaction, are to be read together, and leave no doubt that between the libelants and the owners of the vessel the libelants were entitled to a lien upon vessel and freight for advances made to meet necessary disbursements. The appellant contends that the ship sailed before the draft was cashed, and that the £390 was not used for her necessary disbursements; but there is no evidence to sustain such contention. It is also argued that the policy did not attach because the transaction was not a loan on bottomry, since the credit of the owners was pledged to the payment of the draft. But the policy is not restricted to loans upon bottomry. It covers "advances and for disbursements secured by master's draft pledging vessel and freight." So long as the vessel and freight are pledged the terms of the policy are complied with, whether or not in addition there may be recourse to the owners. Nor is the transaction a mere wager. Libelants loaned money to the owners on their promise to repay. It is altogether probable that they would not have made such loan if the owners had no collateral to offer. They happened to have available collateral in a bark ready to sail and to earn freight, and upon pledging ship and freight the loan was made. To secure themselves against loss the libelants insured this collateral. This is a perfectly legitimate insurance against sea perils of property in which the lender has an insurable interest, for the loss of the vessel may cause him pecuniary loss. And the insured is under no obligation to sue the owners, who may or may not be solvent. The company insured his collateral that is lost, and to the extent of libelants' interest that loss is to be made good. When it is paid the underwriters will be subrogated to the rights of the insured, and may pursue the owners if they see fit to do so.

The contention that the action is barred because of libelants' failure to comply with the sue labor and travel clause is unsound. They did bring suit in Ireland, and followed the proceedings instituted there against the ship, ceasing to further prosecute because they were advised that to do so would be a waste of money, but notifying the insurers that they would take at their expense any other and further proceedings that the underwriters wished.

Decree is affirmed, with interest and costs.

NORFOLK SAND & CEMENT CO. v. OWEN.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 428.

1. MARITIME LIENS—STATUTORY LIENS—LACHES IN ASSERTING.

A lien for repairs given by a state statute, which makes no provision for recording, must be asserted within a reasonable time, dependent on the circumstances of each case, or it will not be enforced by a court of

admiralty as against innocent third persons whose rights have intervened.

2. SAME—ENFORCEMENT AGAINST BONA FIDE PURCHASER.

Libelant made repairs on a steamer in a Virginia port for which he took the owner's note, due in six months, but also claimed a lien on the vessel under the state statute. The vessel remained in the vicinity of such port, and within the reach of process, for more than a year, and was then sold to claimant, who had no notice of the lien, which libelant took no steps to enforce until fourteen or fifteen months after the repairs were made. *Held*, that his delay was unreasonable, and that he was debarred by his laches from the right to enforce the lien against the purchaser, but that a lien might be enforced for other repairs made within six months.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

H. H. Little (Hughes & Little, on the briefs), for appellant.

R. H. Riddleberger, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The libelant, Owen, claims a lien for repairs upon the schooner Tull, whereof Gundy was owner and master, up to November, 1899, when she was sold to the claimant. The first repairs were made in August and September, 1898, at Sharp's wharf, in Essex county, Va., at the request of Gundy, who lived in the same county, about 20 miles distant. The lien is claimed under the statute of the state of Virginia, which provides:

"If any person has any claim against the master or owner of any steamboat or other vessel * * * for materials or supplies furnished or provided or for work done for, in or upon the same, * * * such person shall have a lien upon such steamboat or other vessel, raft or river craft for such supplies or materials furnished, work done," etc. Code, § 2963.

The first contention of the claimant is that under the general maritime law, where supplies are furnished on the order of the owner, there is a presumption that the same are furnished on his credit, and that the circumstances attending the transaction and the taking of a note negative the claim of an intention to look to the vessel for payment. It seems from the testimony that when the schooner was taken to Owen for repair there was some conversation between the parties as to the securing payment therefor, both believing that there was a lien for such repairs; but Owen, being unwilling to rely upon such lien, as boats of that kind were frequently sunk, wished some other security. Inquiry was made by him as to Gundy's pecuniary condition, which disclosed the fact that he had some other property, and a note for the amount of the bill was taken payable in six months, which has not been paid, and has been surrendered. It is clear that a taking of a note under these circumstances would not relinquish the lien, and it is not to be lightly presumed that the libelant relied exclusively upon the personal responsibility of the owner; but the conclusion reached by us makes it unnecessary to determine whether the lien existed, for we are of opinion that under the circumstances, if it did exist, it could not be enforced against a bona fide purchaser.

There is urgent need of federal legislation on this subject; for, inasmuch as under general maritime law there is no lien for supplies or repairs to vessels in home ports, the states have generally undertaken to provide by statute that persons making repairs and furnishing supplies shall have a lien therefor, and the conditions requisite to the establishing of such liens are diverse. In some of the states they are required to be recorded; in others there is no such requirement. In some there are conditions and forms of proceeding not in harmony with the principles and rules of the maritime code, but all such liens in the nature of maritime liens are now by the well-settled decisions of the supreme court required to be enforced in the courts of the United States in admiralty, which thus are compelled to examine and expound the varying and sometimes conflicting lien laws of the different states. It would, therefore, be of great advantage if some uniform law should prescribe that such liens should be recorded in the custom houses, and the existence of secret liens, so abhorrent to the spirit of commercial life, be thus avoided.

The statute of Virginia, cited in support of the lien under consideration, makes no provision for any recording thereof, and there are no circumstances from which it could be inferred that there was lack of diligence in a purchaser in failing to discover it. The work was done in August and September of 1898. The vessel remained in and about the waters of her home port until November, 1899, when she was sold to a bona fide purchaser, who had no notice of the lien claimed, and no means of ascertaining its existence. The libel was filed in January, 1900.

While courts of admiralty are generally governed by the analogies of common law limitations, they are not bound by them, and nowhere is there more general acceptance of the maxim, "Vigilantibus non dormientibus subveniunt leges." A lien which might be enforced after a considerable lapse of time against a vessel in the possession of a claimant, who was the owner at the time it accrued, is considered stale in a much shorter time if the vessel has passed into the possession of another in ignorance of it, and the circumstances rendered it inequitable to enforce it.

While no fixed or arbitrary rule has been established which would be of universal application, the governing principle which has been applied in most of the cases that have been examined, and which seems consonant with natural justice and equity, is that wherever a secret lien is sought to be established upon a vessel which has passed into the possession of a bona fide owner who was ignorant of its existence, and who had no reasonable opportunity to discover it, the court will make rigid scrutiny of the circumstances of the delay, and if there has been reasonable time to enforce the lien, and the vessel has been within reach of process, the party neglecting to avail himself of it will not be allowed to enforce it to the prejudice of an innocent third party. The diligence demanded must accord with the circumstances of each case and existing opportunities, and a court of admiralty will refuse its aid in the enforcement of the lien if, under the same circumstances, a court of equity would do so, a change of circumstances affecting the rights and conditions of the parties being more considered than mere

lapse of time. The Key City, 14 Wall. 660, 20 L. Ed. 896; The Admiral, Fed. Cas. No. 84; The Chusan, Fed. Cas. No. 2,717; Coburn v. Insurance Co. (C. C.) 20 Fed. 644; The J. W. Tucker (D. C.) 20 Fed. 133; The Thomas Sherlock (D. C.) 22 Fed. 253; The Young America (D. C.) 30 Fed. 789; The Robert Gaskin (D. C.) 9 Fed. 62; The Alfred J. Murray (D. C.) 60 Fed. 926; The Lottawanna, 21 Wall. 571, 22 L. Ed. 654; The John Lowe, Fed. Cas. No. 7,356; The Eliza Jane, Fed. Cas. No. 4,363.

In accordance with the principles established by the cases cited, we must conclude that the delay of 15 or 16 months in taking any steps for the enforcement of the lien, the vessel being all that time within reach of process, is an unreasonable delay, and that it would be inequitable to establish it against the vessel, which has passed into the hands of an innocent third party. This disposes of the items set forth in Exhibits A and B of the libel, for work done in August and September, 1898.

As to the work done in July, 1899, set forth in Exhibit C, it seems to be clear that these repairs must have been made in reliance upon the lien upon the vessel, and not upon the credit of the owner, who was already in default in the payment of the note then past due. We are not entirely satisfied that the delay has been so unreasonable as to forfeit the lien, and as to this item the decree of the court below will be affirmed.

The proper order will be to remand the case to the district court to modify its decree in accordance with this opinion, the appellant to have his costs in this court, and the libelant his costs in the court below.

NEWTON v. MANUFACTURERS' RY. CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1902.)

No. 1,023.

1. EMINENT DOMAIN—TITLE ACQUIRED BY CONDEMNATION PROCEEDINGS—LAWS OF OHIO.
   The appropriation of land by a city for park purposes through condemnation proceedings, as provided by Rev. St. Ohio § 2515–28, does not vest the city with the fee, but the estate taken is limited to an easement for the purposes intended, and on the abandonment of such easement the land reverts to the owner from whom it was acquired or his successor in title.[1]

2. SAME—REVERSION—ABANDONMENT OF EASEMENT.
   The condemnation of right of way for a railroad over lands previously condemned by a city for park purposes does not effect an abandonment by the city of its easement so as to work a reversion of the land to the owner of the fee.

3. SAME—RIGHT TO COMPENSATION—OWNER OF NAKED FEE.
   The owner of the fee to lands, an easement in which has been acquired by a city for park purposes through condemnation proceedings on the condemnation by the city of right of way for a railroad across the lands may maintain an action against the railroad company to recover compensation for the additional burden imposed upon his land by the new easement, and such damage, if any, as may result from the new use.

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[1] See Eminent Domain, vol. 18, Cent. Dig. §§ 836, 854.

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

Harvey Scribner and Wilber A. Owen, for plaintiff in error.

King & Tracy and Brown, Geddes & Bodman (Thomas H. Tracy and Clarence Brown, of counsel), for defendant in error.

Before LURTON, DAY and SEVERENS, Circuit Judges.

DAY, Circuit Judge. The circuit court sustained a demurrer to the petition of the plaintiff against the railway company, setting forth, in substance: That on the 16th of July, 1894, the plaintiff was the owner of certain lands in the city of Toledo, known as lots Nos. 1 to 9, inclusive, and Nos. 24 to 32, inclusive, in block 19. Plaintiff avers that while he was the owner of said lands, on the 11th of August, 1892, proceedings were instituted in the probate court of Lucas county, Ohio, by the city of Toledo for the purpose of condemning said property for park purposes, which proceedings were instituted under and by virtue of the authority of the laws of Ohio (Rev. St. § 2515–28); and afterward the said proceedings were removed to the circuit court of the United States for the Northern district of Ohio, Eastern division; and that on the 16th day of July, 1894, judgment was rendered in such proceedings by the circuit court conveying to the city of Toledo an easement for park purposes in said block 19, and assessing damages to the plaintiff by reason of such appropriation in the sum of $3,450. Afterward the city of Toledo used and enjoyed the said property as a public park, and on August 1, 1900, proceedings were instituted in the probate court of Lucas county, Ohio, seeking to condemn for railroad purposes a right of way over and across said block 19, and over and across blocks 18, 20, 21, 22, and 42, said land being a strip 25 feet wide through block 19, and 40 feet wide through blocks 18, 20, 21, 22, and 42. That on October 1, 1900, a resolution was adopted by the common council of the city of Toledo directing the city solicitor to have entered in the said action pending a verdict and judgment in favor of the city of Toledo in the sum of $5,000 and costs. Afterward the Manufacturers' Railway Company, under and by virtue of the authority of the said condemnation proceedings, took possession of the strip 25 feet wide through block 19, and proceeded to lay down its tracks, and ever since that time it has been running its trains daily across said strip. Plaintiff avers that, by the abandonment by the city of Toledo of said strip 25 feet wide in block 19, the easement granted to the said city therein for park purposes has ceased and terminated, and plaintiff is entitled to recover the value of the part of block 19 so appropriated, to wit, the sum of $5,000, for which a judgment is prayed against the said Manufacturers' Railway Company.

The appropriation in the original case in which the land was condemned for park purposes was under section 2515-28, which is as follows:

"Sec. 6. (Purchase of Lands; Appropriation of Land.) After such plan or system has been adopted as provided in the last section preceding, the board shall proceed by purchase, whenever the same can be done on terms satisfactory to the board, to acquire the title to the lands aforesaid, in the name of the city, and whenever the board can not obtain the title to such

lands by purchase as aforesaid, the said board shall report to the common council of said city, a description of the lands purchased by said board, if any, and also an accurate description of the land required or necessary to the plan or system aforesaid, which it has been unable to acquire, by purchase, and the said council may by resolution declare that it is the intent and purpose of the city to appropriate the said lands for the purposes aforesaid, as provided in section 2235 of the Revised Statutes; whereupon it shall be the duty of the city solicitor to institute proceedings in the name of the city to acquire the said land, which proceedings shall be conducted and governed by and in accordance with the provisions of title 12, div. 7, chapter 3, of the Revised Statutes of the state of Ohio (90 L. L. 321; 83 V. 175)."

Section 2232, Rev. St., provides that municipalities may appropriate realty for public parks, limiting the right to appropriate to so much as is necessary for the purposes to which it is to be applied. Section 2244 provides that a corporation may be required to file a full and accurate description of the property to be taken, and the objects proposed, etc. Section 2245, after providing for the manner of procedure in the hearing of the case, provides:

"The inquiry and assessments shall, in other respects, be made by the jury, under such rules and regulations as shall be given by the court; and when a building or other structure is situated partly upon the land sought to be appropriated, and partly upon adjoining land, and such structures can not be divided upon the line between such two tracts of land without manifest injury, the jury in assessing the compensation to any owner of the lands, shall assess the value of the same exclusively of the structure, and make a separate assessment of the value of the structure."

The extent of the interest acquired by an appropriation for park purposes must be determined in this case by a construction of the statutes involved, in view of the decisions of the supreme court of Ohio upon similar statutes, and we find little aid in the numerous authorities cited from other jurisdictions. The question before us is one of statutory construction in Ohio, wherein the decisions of the highest court of that state are of controlling authority. As we understand them, where the statute does not undertake to authorize the appropriation of the fee the estate is limited to an easement for the purposes intended. In McCombs v. Stewart, 40 Ohio St. 647, the case involved title to lands in which the right was appropriated to overflow the same by means of a dam. In speaking of the extent of the estate acquired, the supreme court, speaking by Judge Dickman, said:

"But whether the property taken is paid for in money or in accruing benefits and advantages, it should clearly appear by the terms of the act that it was the legislative intent to take a fee before such an intent can be given to it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied, as in the case at bar, with the taking of an easement."

In Corbin v. Cowan, 12 Ohio St. 629, it was held that the appropriation of lands for the location and construction of a canal did not carry with it the fee of the lands, and that when the canal was abandoned the lands would revert. The statute construed in McComb v. Stewart provides that when a corporation was empowered to appropriate land it might enter upon and take possession of so much as was necessary for the purposes aforesaid. In Voight v. Railroad Co., 58 Ohio St. 123, 50 N. E. 442, the supreme court of Ohio held that an act which

authorized an appropriation of lands for canal purposes, and provided "a complete title to the premises to the extent and for the purposes set forth in and contemplated by this act shall thereby be vested and forever remain in said company and their successors forever," authorized the acquirement of an easement only. The syllabus of that case, which in Ohio receives the sanction of all the judges concurring as the law of the case, contains this statement:

"(5) Lands acquired for its use by a canal company, a private corporation, organized under an act of the general assembly, before the adoption of the present constitution, as the Lancaster Lateral Canal Company, 24 Ohio Laws, p. 71, authorizing it to acquire lands for its use by donation, grant, or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired, on the abandonment of the canal, or his successor in title; the general rule being that, where lands are acquired for public use, an easement only is taken therein, unless the taking of a greater estate, as a fee simple, is expressly authorized by law; and the rule is the same where it afterward disposes of its canal to the state, which, under the act of 1825, takes a fee simple in lands condemned by it to the uses of its canal system."

The case of Malone v. City of Toledo, 28 Ohio St. 643, was one in which the statute expressly authorized the appropriation of a fee, and is not, in our judgment, applicable here.

Applying the principles determined in the Ohio cases to the statute under consideration, we are of opinion that the estate acquired for park purposes by the city was an easement only. In section 2515–28 we find that on failure to obtain the desired lands by purchase the council may declare the intention of the city to appropriate the same "for the purposes aforesaid"; that is, for park purposes. It is argued that the acquisition of land for park purposes implies the necessity of acquiring the fee, as that is essential to the enjoyment of the lands for the intended use. This reasoning is equally applicable to lands appropriated for canal purposes, which must necessarily exclude the owner from any beneficial use of the lands taken, and would seem to require the ownership of the fee as much as an appropriation for park purposes; yet we have seen in the cases cited that the supreme court has held, in the absence of an express statute, that no more than an easement is acquired.

It is further argued that compensation for lands taken under the statute, requiring that the value of lands should be assessed, shows that the same has been paid for once, and therefore it would be unjust to require further payment for the lands which have been fully compensated for. As we understand the decisions of the supreme court of Ohio, above referred to, the estate taken does not so much depend upon the compensation given as upon the authority contained in the statute to acquire the lands. Nor do we feel at liberty to disregard the allegation of the petition that the land was appropriated and conveyed for park purposes only. In view of these allegations, admitted by the demurrer, we cannot assume that the statutory authority to acquire the easement for park purposes was so exercised as to result in the appropriation of the fee, if such title can be acquired without express statutory authority.

The theory of the plaintiff's petition is that, when the appropriation to the use of the railway company of the strip of land 25 feet wide was

made, the easement in the land for park purposes was abandoned, and the land reverted to the original owner of the fee, who has the right to recover the full value thereof. We cannot consent to this theory. Abandonment is a question of intention. Townsend v. Railroad Co., 42 C. C. A. 577, and note (101 Fed. 757); Railroad Co. v. Ruggles, 7 Ohio St. 1. In the leading case of Hatch v. Railroad Co., 18 Ohio St. 92, where lands were purchased by a railroad company from a canal company, which had the easement in the lands, for railroad purposes, the supreme court of Ohio held that such purchase, through the forms of appropriation, was not an abandonment of the easement of the canal company, such as would work a reversion to the original owner of the lands in fee simple. Speaking of this question of abandonment, Judge Brinkerhoff said:

"And the intention to abandon may doubtless be inferred from circumstances, where they are strong enough to warrant such inferences. But here there are no circumstances indicative of an intention to abandon the easement acquired by the original appropriation, either by the canal company or by the state. The canal company, so far from abandoning it, has sold it, and put the price of it into her treasury, and the state has given no indication of her intention to abandon it. She has not proceeded by information in the nature of quo warranto or otherwise to question the franchise of the railroad company to operate its road upon the land formerly used by the canal company, and her policy of permitting the railroad companies to condemn lands to their use remains patent on her statute books."

In that case, as well as in the case of Voight v. Railroad Co., supra, the supreme court held that the change of the use of the appropriated land from that of canal purposes to that of a railroad would not be an abandonment of the easement, and would only entitle the owner to compensation for the additional burden imposed upon his land, and such damage, if any, as may result from the new use. Speaking upon that subject, Judge Brinkerhoff, in the Hatch Case, says:

"The easement in the plaintiff's land, appropriated by the canal company, was regarded, when taken, as a perpetual easement; it was so looked upon by both parties; courts and juries awarded compensation to the plaintiff on this basis; and he cannot now claim with any semblance of justice to be paid over again for the same thing. Whether there may or may not be a case of such an utter contrariety in the uses for which a first appropriation was made and those to which the land is afterward sought to be devoted as necessarily to work an abandonment of the easement, and so a reversion to the owner in fee, we will not assume to say; but such, we think, is not this case."

Applying the doctrine here settled as to abandonment to the facts of the present case, we find no intention on the part of the city to abandon the lands appropriated for park purposes, nor such utter destruction of the estate acquired as would warrant the conclusion of abandonment. The lands were appropriated by the railway company under the authority of the state. Except the one strip referred to, no part of the land originally appropriated was taken. Across this strip the railway company acquired the right of way. This strip was taken, except as to the amount of damages to be paid, by proceedings adverse to the city of Toledo. The property originally appropriated continued to be used for park purposes subject to the use of the strip 25 feet wide for railroad purposes. Certainly there is no intention

of abandonment on the part of the owner under these circumstances, nor do we find in the running of a railway on the narrow strip in the park such abandonment of the appropriation as would work a forfeiture of the estate. In Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420, relied upon by plaintiff in error, the abandonment was clearly made out in the voluntary sale by one railroad company to another of a part of the right of way originally appropriated.

While we do not think the plaintiff can recover the value of the land as upon an abandonment, it follows, however, under the authority of Hatch v. Railroad Co. and Voight v. Railroad Co., supra, that he is entitled to compensation to the extent of the damages he has sustained by reason of the additional burden imposed upon his lands. As was said in Hatch v. Railroad Co., quoted with approval in Voight v. Railroad Co.:

"As the owner of land, subject to a perpetual easement, but appropriated and paid for only for the purposes of canal, he had rights which the railroad company cannot be permitted to ignore, and which, we think, he ought to have instituted proceedings regularly under the statute to condemn and pay for, before it ventured to divert the easement to uses so variant from those originally intended. But this not having been done, and the plaintiff having been restricted to his action for compensation, the rights of the parties are governed by the same principles which would have been applicable in such a proceeding."

It is true the petition seeks a recovery upon the ground of abandonment, but, under the Ohio practice, if the facts stated constitute a cause of action, the demurrer should have been overruled, notwithstanding the petition may contain allegations which would not entitle the plaintiff to a recovery upon another theory. In this case the petition states facts sufficient to entitle the plaintiff to recover for such injuries as he has sustained by reason of the additional burden imposed upon the fee by its appropriation to railroad uses.

The judgment will be reversed, and the cause remanded to the circuit court, with instructions to overrule the demurrer.

BIBBER-WHITE CO. v. WHITE RIVER VAL. ELECTRIC R. CO. et al. (JOSE PARKER & CO., Intervening Creditors).

(Circuit Court of Appeals, Second Circuit. April 22, 1902.)

No. 139.

1. APPEAL—FINAL DECISION—ORDER FIXING PRIORITY OF RECEIVER'S CERTIFICATES.

   An order of a circuit court authorizing a railroad receiver to issue certificates, and providing that they shall be prior in lien to a mortgage indebtedness or to certificates previously issued, is a final decision in such sense as to be appealable.

2. RAILROAD RECEIVERS—AUTHORIZING COMPLETION OF ROAD—POSTPONEMENT OF EXISTING LIENS.

   It is an unwarranted exercise of power by a court of equity to authorize its receiver to issue certificates for the purpose of completing a railroad, and to make the same a first lien on the road without giving the bondholders an opportunity to be heard, where the property is worth no more than the amount of the outstanding mortgage bonds, so that such holders are the equitable owners.

3. SAME.

The power to postpone existing liens to liens created by the court for the purpose of completing an unfinished railroad should not be exercised unless it can be done without ultimate loss to existing lienholders. In any case, it should be exercised with great caution; and where only one-third of a railroad was built at the time of the appointment of a receiver, and its value does not exceed the amount of the liens against it, the court is not warranted in authorizing the receiver to complete the road, and to issue certificates in payment, to be a first lien, over the objections of the lienholders.

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

See 110 Fed. 472, 473, 111 Fed. 36, 1004.

W. B. C. Stickney and Arthur H. Wellman, for appellants.

George D. Mumford, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned of an order of the circuit court of the United States for the district of Vermont entered August 7, 1900, authorizing the receiver of the White River Valley Electric Railroad Company to create a new issue of receiver's certificates to be used in the completion of the railroad of that company, such certificates to be a prior lien over certain certificates previously issued by the receiver pursuant to authority from the court. The facts which led to the making of the order were these: A bill of complaint was filed in February, 1900, by one of the unsecured creditors of the railroad company, asking, among other things, for the appointment of a receiver, with power to operate, repair, and complete the unfinished railroad of the defendant. The bill alleged the insolvency of the defendant; that its railroad was partially completed, and being operated over a portion of its length; that there were outstanding $120,000 bonds of the defendant, of an authorized issue of $250,000, secured by a mortgage deed covering all its property; that the bonds were held by various persons as collateral security for loans to the defendant amounting to some $60,000; that $88,000 of these bonds were held by Jose Parker & Co., as collateral security for $44,000 of notes of the defendant; that the towns through which the said railroad was to run had subscribed subsidies amounting to $55,000, conditioned upon the completion of the railroad by December 30th next ensuing; that the defendant had unsecured indebtedness amounting to $125,000; that it had become impossible for the defendant to borrow money to complete its obligations or continue the work, and some attachments had been made and others threatened; that if its outstanding bonds should be defaulted, and the property should be sold under the mortgage, it would bring a nominal sum only; and that if the outstanding bonds could be recovered, and the road completed so as to save the town subsidies, the property could be saved, and the creditors of the defendant be paid. The defendant answered, admitting the allegations in the bill of complaint, and submitting to the judgment of the court in respect thereto. Thereupon, and upon the 20th day of February, 1900, the court appointed a receiver, with power to maintain and operate the railroad, and authority to complete and equip the same;

and for that purpose, and for the purpose of recovering the outstanding mortgage bonds, to issue receiver's certificates in the sum of $170,000, $70,000 of which were to be applied for the recovery of said bonds, and the balance for the completion of said railroad, said certificates to be a first lien upon all the property of the defendant of every kind. The present appellants, Jose Parker & Co., bankers, and holders of some of the outstanding mortgage bonds, intervened, and became parties to the action. The receiver issued some $60,000 of certificates, and exchanged them with holders of first mortgage bonds of about that amount, including Jose Parker & Co. He then endeavored to make contracts for the completion and equipment of the railroad, but found that no responsible contractor was willing to undertake the work for the certificates in the form and amount authorized. Thereupon the receiver moved the court for a modification of the previous order so as to permit him "to make reasonable and necessary contracts for the completion and equipment of said railroad, and issue receiver's certificates for the same, subject to the order of the court." Upon that application Jose Parker & Co. appeared and consented to such a modification of the order. The receiver represented, in substance, that unless the court authorized new certificates, which would be prior in lien to those already issued, he would not be able to secure the completion of the road. Jose Parker & Co., while consenting to the scope of the application of the receiver, objected to the creation of new certificates which would have priority over those already issued. Upon their representation that they could secure a contractor who would complete the road and receive payment in certificates without priority over the issue previously authorized, the disposition of the motion was suspended from July 20th to August 7th to give them an opportunity to do so. At the latter date, Jose Parker & Co., having failed to accomplish what they had attempted, did not appear in court, and the court made the order the correctness of which is now challenged.

We have entertained some doubt whether the order is in such sense a final decision as to permit a review by this court, except on appeal from the final decree in the cause, but have concluded that it is, upon the authority of In re Farmers' Loan & Trust Co., 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656.

The question of the propriety of the action of the court in authorizing the receiver to complete the road, and authorizing this to be done by an issue of receiver's certificates in the amount of $170,000, which should be a prior lien to the mortgage bonds, is not presented by this appeal. To all this the appellants consented, and it is fairly to be assumed that in doing so they recognized this course to be expedient under the circumstances of the case. They not only accepted the certificates issued pursuant to the first order and surrendered the bonds, but they also consented to a modification of that order which might involve the creation of a larger issue of certificates. Their objections raise the single question whether the court was justified in postponing one class of certificate holders to another,—their liens to the new ones created.

We must assume from the facts in the record that, unless the court had made the order which is complained of, the completion of the

road in time to secure the town subsidies for the fund under administration would have been impracticable, if it would have been practicable to complete the road at all. There would seem to have been only two alternatives,—to abandon the attempt to complete the road, or to create a larger issue of certificates without priority, and endeavor to complete it with the proceeds. The appellants were apparently unwilling to accept the first alternative. Whether the second was feasible was a question on which they differed with the court. There is no evidence in the record which enables us to ascertain whether the court erred in its judgment upon this question. The application by the receiver for a modification of the original order was not based upon a formal petition or supported by any affidavits or documentary evidence, and no affidavits were filed in opposition by the creditors who appeared when the application was made. The hearing and decision seem to have proceeded wholly upon the oral statements of counsel to the court. In the absence of such evidence, we are unable to say that the court erred in deciding the question, or that the admissions of counsel upon the hearing were not sufficient to justify the court's conclusion. The propriety of the order, however, presents another question: Was the court warranted in taking any further action towards completing the railroad which would defeat the priority of the existing liens without the consent of the lienholders? It appears that when the bill was filed and when the receiver was appointed only about 6 miles of the proposed 18 miles of railroad had been built, $130,000 of the unissued mortgage bonds could not be negotiated, and the enterprise had reached a condition of complete financial collapse. The holders of the first mortgage bonds were the only parties having any substantial interest in the property, as it was of no value in excess of their liens to stockholders or unsecured creditors, and apparently not of sufficient value to satisfy their liens. It was a somewhat unusual exercise of the power of a court of chancery under the circumstances to appoint a receiver in a suit to which the trustee of the mortgage bonds was not a party without consulting with the trustee or the bondholders, and we think it was an unwarranted exercise of power to authorize the receiver to undertake the project of completing the road without giving the bondholders an opportunity to be heard. They were the ones of all others who were entitled to a controlling voice in deciding whether there should be an attempt to complete the road, or whether the property should be sold and the proceeds applied towards satisfying their liens. However, it was within the discretion of the court to appoint a receiver without hearing them, and no injustice seems to have resulted to them by the order made at that time authorizing the receiver to complete the road. They were not obliged to accept the certificates in lieu of their bonds, and when they accepted them they acquired a lien as valuable as they had before. But their consent to come in under the terms of that order was not a consent in advance to every further scheme which might be suggested, and when one was proposed which would necessarily impair their liens, and perhaps practically destroy them, they had a right to object, and, having objected, they were entitled to have their liens preserved in the order of their priority, according to the estab-

lished principles of equity. The appointment of a receiver vested in the court no absolute power over the property, and no general authority to displace vested contract liens. "The holder of a mortgage deed upon a railroad has the same right to demand and expect of the court respect for his vested rights and contracted priority as a holder of a mortgage on a farm or lot." Kneeland v. Trust Co., 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379. The appellants were, in effect, equitable mortgagees of the property in the custody of the court, and the priority of their lien was as sacred as though it had been created by the railroad company instead of the court.

The power of a court, which has appointed a receiver in an equity cause and taken possession of a railroad, to subordinate the existing liens upon the property to the expenses of the administration, including those of operating and maintaining it in proper repair, cannot be challenged. But the power to postpone existing liens to liens created by the court for the purpose of completing an unfinished railroad has rarely been exercised, and ought not to be exerted unless it can be done without ultimate loss to the existing lienholders. It is to be exercised with great caution, and, if possible, with the consent or acquiescence of all the parties in interest. Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Kennedy v. Railroad Co., 5 Dill. 519, Fed. Cas. No. 7,707; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. In Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136, the court intimated doubt of the propriety of the exercise of the power to the prejudice of the prior lienholders without their consent; but in Miltenberger v. Railroad Co., 106 U. S. 287, 1 Sup. Ct. 140, 27 L. Ed. 117, the court upheld receiver's certificates, with a prior lien to that of a pre-existing mortgage, created for the purpose of obtaining rolling stock, and for building 6 miles of road and a bridge, part of the main line of a road 92 miles long. The latter is the only reported case which has been called to our attention, in which the exercise of the power has been approved, where it was not invoked at the instance of the prior lienholders, or sanctioned subsequently by their acquiescence, or where their conduct did not create an estoppel. In that case, however, the security of the prior lienholders was augmented instead of impaired by the expenditure permitted. The value of the property was to be enhanced far beyond the cost of the new construction, and $95,000 of the total cost of $125,000 had been donated for the purpose to the receiver by a municipal corporation and another railroad corporation, and it was upon these considerations that the court below made the order which was under review. That decision affords no support to sustain the present order. Here was a road only one-third built. No one could be found willing to complete it upon the terms which had previously been proposed, and, in view of the whole situation as it was presented to the court, the outcome of an attempt to complete it was too uncertain to authorize it to be made without the consent of the appellants. The effect of the order was certain to render their security more precarious, if not to render it worthless, and the chances that the other creditors of the corporation could realize anything by carrying out the scheme were wholly conjectural. Probably in making the order the learned judge

of the court below supposed because the appellants did not appear in court at the time that they did not intend to object to it; but they had already objected to it, and we find nothing in the record to indicate that they intended to waive the objections which they had already made. Under the circumstances, we are of the opinion that the order was an erroneous exercise of judicial discretion.

As the appellants had consented to such a modification of the prior order as would involve the creation of new certificates sufficient in amount to complete the road, the order appealed from should not be vacated, but should be modified by striking out that part making the new certificates prior in lien to those previously issued.

So ordered, and the cause remitted, with instructions to modify the order accordingly.

THE A. P. SKIDMORE.

THE CITY OF LAWRENCE.

(Circuit Court of Appeals, Second Circuit. April 22, 1902.)

No. 122.

COLLISION—STEAMER ANCHORED IN FOG—MISTAKE AS TO LOCATION.

A steamer encountering a dense fog in the night in East river sought the nearest anchorage ground, where she anchored, taking all due precautions against collisions by means of lights and signals. The master was competent, and familiar with the locality, but the outer limit of the grounds was marked only by a buoy at either end, which could not be seen in the fog, and by an error he anchored somewhat outside the limit. *Held*, that under the circumstances the error was excusable, and did not constitute a fault contributing to a collision with the tow of a passing tug, which would not have occurred if the tug had been properly and carefully navigated.

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

Robert D. Benedict, for appellant the Skidmore.

Chas. C. Burlingham, for appellant the City of Lawrence.

James K. Symmers, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. We are satisfied that the evidence warranted the court below in holding the steam tug in fault for the collision which took place between one of her tows and the steamship City of Lawrence, and we agree fully with the findings of fact and law expressed in the opinion of the district judge. We cannot, however, adopt the conclusion of the district judge that the City of Lawrence was also in fault. When the fog which the City of Lawrence encountered while she was proceeding up the East river became so dense that it was unsafe to continue, her master immediately sought the nearest and safest place to come to anchor,—the anchorage ground off Twenty-Third street, which extends along the westward shore to the middle of the river, and begins a little distance above the buoy off Nineteenth street. Supposing she had reached the proper place, she dropped an-

chor, and thereafter until the collision all the duties incumbent upon a vessel at anchor in a fog were observed on board the steamship. Careful watch and bright anchor lights were maintained at her bow and stern; and at intervals of not more than one minute signals, consisting of three strokes of her large bell, were regularly given. The collision took place about 3:40 a. m., after she had been lying at anchor about two hours and a half, the fog not having diminished in the meantime. In fact she was anchored somewhat outside the proper limits, and the question as to her responsibility is whether those in charge of her navigation were negligent in this respect, or whether the error of locality was excusable under the circumstances of the case. Her master was a man of suitable experience and capacity, was familiar with the locality, and used his best endeavors and judgment to place his vessel where she could stay with the least risk to herself, and without responsibility in case of collision with another vessel. The eastward line of the anchorage ground was defined only by buoys at either end, and the buoys could not be discovered in the fog. He was obliged to rely on the indications given by the bells of the Twenty-Third street ferry and upon the soundings taken at the bow of the vessel to ascertain the locality. It is said that the soundings should have suggested doubt whether his vessel was not further to the eastward than the eastward limits of the anchorage ground. They showed something less than seven fathoms of water, but the depth of water within the anchorage ground varies, and at places well within the limits, as well as near where the vessel came to anchor, is more as well as less than seven fathoms. We cannot discover that he omitted any precaution which a vigilant master should have exercised before casting anchor. With so dense a fog, in a locality frequented by so many vessels, it was hazardous for the steamship to proceed at all, and we are not prepared to say that it was not good judgment on the part of her master to bring her to anchor at the earliest practicable moment after he had satisfied himself that he had reached the anchorage ground. It is easy to say, after an accident, that something could have been done to lessen the possibility of one. In this case the question is whether at the time and under the circumstances reasonable prudence was observed. In a case like the present the court should put itself in the position of the master at the time, and, unless it is satisfied that he did not exercise the discretion consistent with sound judgment, should refuse to condemn his mistake as a fault. Especially should the court be slow to hold such an error of judgment a fault contributory to a collision when there need have been no collision if the other and moving vessel had been cautiously and vigilantly navigated.

The decree is reversed, with costs to the owner of the City of Lawrence, and with instructions to the court below to decree for the whole loss, with costs against the steam tug Skidmore.

ESPENSCHIED et al. v. BAUM et al.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 839.

APPEAL—REVIEW—QUESTIONS OF FACT.

Where an equity cause was heard by the chancellor on testimony taken in open court, very clear and palpable error must appear, to justify a reversal on the facts by the appellate court.

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

John M. Holmes and G. A. Koerner, for appellants.
D. M. Browning, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

PER CURIAM. Appellants, in their bill of complaint, charge appellees with abuse of fiduciary relations, and with misconduct in the management of a corporation in which appellants were stockholders. After a full hearing on the merits, at which the principal evidence was heard orally by the chancellor in open court, the bill was dismissed for want of equity. The assignment of errors presents the sole question whether the decree should be reversed on the evidence. A careful consideration of the evidence in the record convinces us that the decree was right. But if the conflicts in the evidence were graver than we find them, a reversal would not be justified, since the court at the trial had the opportunity (which we have not) of judging of the credibility of the witnesses by their appearance and demeanor on the stand. Under such circumstances, a very clear and palpable error in the facts must be shown on appeal.

The decree is affirmed

WILLIAMSON et al. v. AMERICAN BANK et al.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 431.

NATIONAL BANKS—VOLUNTARY LIQUIDATION—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS.

Where a national bank goes into voluntary liquidation, the only authorized procedure for the enforcement of the individual liability of its stockholders is that prescribed by Act June 30, 1876 (19 Stat. 63), by a suit in equity in the nature of a creditors' suit brought on behalf of all creditors in a court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank and all its stockholders, and, in case ancillary proceedings should be necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the court of original jurisdiction, and brought by a receiver or other person appointed by such court.[1]

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[1] See Banks and Banking, vol. 6, Cent. Dig. §§ 932, 933.

Appeal from the Circuit Court of the United States for the District of South Carolina, at Greenville.

On December 11, 1897, pursuant to resolutions and orders of its stockholders, the National Bank of Asheville, a body corporate, organized and established under and by virtue of the statutes of the United States known as the "National Banking Act," by and through its proper officers, executed to W. B. Williamson a general deed of assignment assigning, transferring, and conveying to the said W. B. Williamson all its property, estate, notes, accounts, claims, evidences of debt, and all demands and rights of action whatsoever, due or to become due to said bank, in trust to collect the amounts due and owing upon the same, and to apply the proceeds of the property so assigned to the payment of the expenses of the trust and the debts of the bank, in the manner set forth in the said deed of assignment. This action appears to have been taken owing to the financial embarrassment of the bank, with the intent to effect the voluntary liquidation of the corporation, and close out its business under the provisions of section 5220 of the Revised Statutes of the United States. On October 20, 1900, the said trustee, W. B. Williamson, and the Battery Park Bank, citizens of North Carolina, on behalf of themselves and all other creditors of the National Bank of Asheville, filed their bill in the circuit court of the United States for the district of South Carolina against American Bank, a corporation duly organized and doing business under the laws of South Carolina, and W. L. Gassaway, cashier and trustee for said bank, citizens and inhabitants of the district of South Carolina, alleging, inter alia, that the National Bank of Asheville, when engaged in a general banking business, became indebted to the Battery Park Bank in the sum of $10,000, and that of said indebtedness a balance amounting to upwards of $6,000, and interest thereon, still remains due and unpaid; that the National Bank of Asheville is insolvent, and unable to pay its debts, and that Williamson, the trustee appointed by said bank under its resolution to go into voluntary liquidation, is engaged in administering the assets of the bank pursuant to said resolutions; that the said bank is largely indebted to other persons and corporations, whose names are unknown to the plaintiffs, and that the assets of the bank are exhausted, or so incumbered that they cannot be reached by said creditors, and that the amount of such indebtedness will equal, if not exceed, the capital stock of said bank; that the creditors are entitled to have enforced against the several shareholders of said bank the individual liability provided by the laws of the United States, to the extent of the amount of their stock therein at the par value thereof, and to have the same applied equally and ratably to all debts due and owing by the said bank; that at the time the said National Bank of Asheville became insolvent, and at the time it went into voluntary liquidation, the said American Bank was a stockholder in said National Bank of Asheville, owning 200 shares of the par value of $25 each therein, which shares are standing in the name of said W. L. Gassaway, as trustee for said American Bank; that said American Bank and W. L. Gassaway, as its trustee, are liable to the creditors of said National Bank of Asheville, including said Battery Park Bank, and (as plaintiffs are advised and believe) to said W. B. Williamson, as trustee for the National Bank of Asheville, equally and ratably with all other stockholders of said bank, for all contracts, debts, and engagements of said association, to the full extent of the amount of their stock therein, to wit, in the sum of $5,000. They pray for a decree in favor of said Battery Park Bank for the amount due said bank, and that defendants may be decreed to pay such other creditors as may become parties to the bill such sums as may be found due them, or to pay to said W. B. Williamson said amount as trustee for said creditors, etc. Demurrers were interposed to this bill on behalf of American Bank and W. L. Gassaway, cashier, and on May 23, 1901, after argument thereon, the court sustained said demurrers, and dismissed the bill on the ground that it appeared from the allegations of the bill that the court was without jurisdiction. From the order sustaining the demurrers and dismissing the bill (109 Fed. 36) the plaintiffs prayed an appeal, which was allowed.

M. F. Ansell, for appellants.

H. J. Haynsworth (L. O. Patterson, on the briefs), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and KELLER, District Judge.

KELLER, District Judge, after making the foregoing statement, delivered the opinion of the court.

The demurrers from the decree sustaining which the plaintiffs appealed were interposed upon the following grounds: That the circuit court of the district in which the bank was located or established alone had jurisdiction of a bill by a creditor of a national bank in voluntary liquidation to ascertain and enforce the statutory liability of the shareholders of such bank to the creditors thereof; that in such a suit the other shareholders of the bank are necessary parties, and were not made such; and that there was a misjoinder of parties plaintiff, as there was no interest in common between the trustee, Williamson, and the creditor. The bill under consideration appears to have been drawn with the view of conforming in a general way to the provisions of section 2 of the act of June 30, 1876 (19 Stat. 63), which provides that:

"Whenever any national banking association shall have gone into liquidation under the provisions of section 5220, the individual liability of the shareholder provided by section 5151 may be enforced by any creditor of such association by bill in equity in the nature of a creditors' bill brought by such creditor on behalf of himself and all other creditors of the association, against the shareholders thereof, in any court of equity for the district in which such association may have been located or established."

It departs from the provisions of that act, however, in three important particulars: First, it was not brought within the district pointed out by that act; second, it was not brought against the stockholders generally, but against an individual stockholder and its trustee, in whose name its stock stood; and, third, it joined with the plaintiff creditor, as joint plaintiff, the agent appointed by the stockholders to collect and distribute the assets of the bank under its resolution to go into voluntary liquidation. Prior to the enactment of the act of June 30, 1876, the law relating to national banks and to the enforcement of the statutory liability of their shareholders was contained solely in the Revised Statutes. Section 5151, Rev. St., provided that:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Had it not been for this provision, no personal liability would have rested upon the shareholders of national banks, beyond the ordinary contractual liability for the payment of the par value of the shares subscribed for by them; and, this being true, it is essentially necessary that, when such added liability is alleged to exist and be enforceable, it be ascertained and enforced in the mode pointed out by statute. Section 5220 of the Revised Statutes provides that "any association

may go into liquidation and be closed by a vote of its shareholders owning two-thirds of the stock." Section 5234 provides that when any national banking association has failed to redeem any of its circulating notes on presentation, and the comptroller of the currency has become satisfied of that fact by the means pointed out in sections 5226, 5227, Rev. St., he may forthwith appoint a receiver for such association, who, when appointed, is empowered by said section, under the direction of the comptroller of the currency, to take possession of and collect all assets of the association, etc., and "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." It will be observed that prior to the passage of the act of June 30, 1876, this was the only method pointed out by law for the enforcement of the liability created by section 5151, Rev. St., and it appears to have been available only after default by the association in the matter of redeeming its outstanding notes. If this view be correct, and such association promptly redeemed its circulating notes when presented, no occasion would have arisen under the law, as it then existed, for the appointment of a receiver by the comptroller, and no suitable remedy was provided by statute for the enforcement of this statutory liability on behalf of the general creditors of the association in such a case. The case of Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476, cited by counsel for the appellees, holds that under the then state of the law creditors could not proceed against the stockholders in their own names directly, but must seek their remedy in the mode prescribed by the statute, through the intervention of the comptroller of the currency; and that action on the part of the comptroller touching the personal liability of the stockholders must indispensably precede the institution of any suit by the receiver to enforce the same, and that this fact must be averred in the bill. The reason of this is plain, because the receiver can only enforce this liability when necessary, and the comptroller had then to determine whether or not it was necessary. The case of Kennedy v. Gibson, it is to be remembered, however, was one in which default had been made by the association in redeeming its circulating notes, and a receiver had been appointed by the comptroller of the currency, and it appears that prior to the passage of the act of June 30, 1876, no adequate statutory remedy existed for the enforcement of this liability on behalf of general creditors where no such default had been made. In fact, it appears that prior to the act of June 30, 1876, the stockholders were not in terms made liable to the creditors of the association, but for its debts. See the language of section 5151, Rev. St. However this may be, the congress, seeing some evident need for the relief of the creditors of an association in process of voluntary liquidation, passed the act of June 30, 1876, the second section of which has been heretofore quoted. It may well be that, prior to the passage of the act of June 30, 1876, the courts of equity of the United States would have had jurisdiction to entertain a general creditors' bill in a proper case to enforce the liability of stockholders provided by section 5151, Rev. St., and for which no statutory remedy had been provided, in cases where the bank went into voluntary liquidation, and was found to be without sufficient assets for the dis-

charge of all its debts. While this point has never been expressly decided, the following language from the opinion of the supreme court, by Mr. Justice Matthews, in the case of Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, etc., is significant:

"It thus appears that in the case of an involuntary liquidation under this section [5234, Rev. St.] the business of liquidation, as defined and required by the law, involved the appointment of a receiver, who should, in addition to the collection of the ordinary assets of the bank, also enforce against the stockholders their individual liability, so far as necessary to create a fund sufficient to pay all the debts of the association. It can hardly be supposed that the omission of the statute to provide an express and specific course of proceeding, by way of judicial remedy, in case of voluntary liquidation, left the creditors of such an association in such circumstances without remedy against a deficiency of assets or the results of a fraudulent maladministration. Section 5151 imposes upon the shareholders of every national banking association an individual responsibility for all its contracts, debts, and engagements; and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders. As all the shareholders are bound in that way to all creditors, any proceeding to enforce this liability must be such as, from its nature, would enable the court to ascertain for what the stockholders ought to be made liable, and in what proportion as respects each other."

Again, in the same case, the court, referring to section 2 of the act of June 30, 1876, says:

"This section was in force when the first amended bill was filed in October, 1876. Whether we regard it as merely declaratory of the law as it stood under the original banking act, or as giving a new remedy which could not have been resorted to before, we think it warranted the court below in permitting the complainant to file his first amended bill."

Whatever may have been the proper course of procedure to enforce the liability of stockholders to creditors of a national banking association in process of voluntary liquidation prior to the passage of the act of June 30, 1876, we are clearly of the opinion that since its passage the remedy provided by that act is exclusive in such cases, and must be strictly pursued, and that suit must, therefore, be brought "in any court of equity for the district in which such association may have been located or established," and not elsewhere. See Pollard v. Bailey, 20 Wall. 527, 22 L. Ed. 376; Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825. It is urged by appellants that such a remedy would be ineffectual to give a personal decree against nonresident stockholders, such as the defendants in this case. We will not stop at this time to consider whether or not this is true. It is not necessary in the consideration of this case.

Section 5151, creating this statutory liability, provided that the stockholders "shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association," and it therefore becomes essential in such a suit that the entire status of the affairs of the bank be investigated, and a reference had to determine what proportional part of the shareholders' liability will be necessary to be enforced against them, equally and ratably, to provide for the payment of the creditors. For this purpose the books of the bank are essential, the bank is a necessary party, and what provision could the congress have made more

wise than that the suit shall be brought in the district where the bank was located or established, and where its books and accounts are to be found? It may be true that some ancillary proceeding must be had to enforce the liability of nonresident stockholders by way of collection; but, before this can be enforced at all, its amount must be accurately ascertained and determined, and this, we hold, can only be done in the suit brought as provided by the act of June 30, 1876. Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168. Suppose, for a moment, suits of this nature were permitted to be brought in the various jurisdictions where nonresident stockholders were found. The question of the necessity and extent of the ratable enforcement of the stockholders' liability, the settlement of the accounts, and the extent of the indebtedness of the bank would have to be determined in each case, and might possibly be determined differently in different suits brought in different jurisdictions, and a multiplicity of suits would be occasioned, involving in each the determination of facts which, in a suit properly brought under section 2 of the act of June 30, 1876, could and would be determined once for all. In our view of this case, no suit can be brought by and on behalf of the creditors for the enforcement of this statutory liability save in the district where the bank was located or established, and, if any ancillary proceedings should become necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay the creditors, such proceedings would have to be authorized by the court of original jurisdiction, and brought by a receiver or other official appointed by said court, after a settlement of the accounts of the bank, and a determination of the ratable proportion necessary to be collected; and these facts would have to be averred in any suit brought to enforce the same.

We also think that there was no privity of interest between the plaintiffs, and that there was a misjoinder thereof. The plaintiff Williamson was the agent of the stockholders for the collection and disbursement of the assets of the bank, and for no other purpose, and as such agent occupied rather the position of a defendant than a plaintiff in a suit brought under the provisions of the act of June 30, 1876. Indeed, we think in such a suit brought in the home jurisdiction of the bank he would be a necessary party defendant, as his accounts would have to be settled before a finding could be reached as to the pro rata share of the statutory liability necessary to be enforced against the stockholders. In any event, he should not be joined as plaintiff with the creditor, as no rights were or could be conferred upon him, by virtue of his appointment, to enforce this liability.

We find no error in the decree of the circuit court for the district of South Carolina sustaining the demurrers and dismissing the bill, and the same is accordingly affirmed

PARKER et al. v. MOORE.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 435.

1. CONTRACTS—ACTION FOR BREACH—WHAT LAW GOVERNS.
   A contract, although recognized as valid by the laws of the state where made, will in general not be enforced by the courts of another state, where it is contrary to morals or to the public policy or statutes of such state.
2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.
   A court of the United States will follow the rule laid down by the highest court of the state in determining whether a contract is governed by the laws of the place where it was made and to be performed or by the law of the forum, and also upon the question whether a contract is contrary to the public policy or statutes of the state.
3. TRIAL—DIRECTION OF NONSUIT—QUESTIONS FOR JURY.
   In an action to recover margins advanced by plaintiffs as brokers for defendant on purchases of cotton for future delivery made on defendant's order on the New York Cotton Exchange, where plaintiffs introduced evidence showing that in each case they advised defendant that the purchase was made with the distinct understanding that actual delivery was contemplated, to which he expressed no dissent, it was error to direct a nonsuit, suo motu, based upon the statute of South Carolina, declaring such contracts void unless it was the bona fide intention of both parties at the time the contract was made that the cotton should be actually delivered and received in kind, merely on the self-serving testimony of defendant that it was not his intention to receive the cotton; the question of defendant's actual intention at the time, under such state of evidence, being one for the jury.
4. CONTRACTS—GAMBLING TRANSACTIONS—RIGHT OF BROKER TO RECOVER ADVANCES.
   The statute of South Carolina (Rev. St. § 1859 et seq.), which declares void contracts for the sale and purchase of certain articles, including cotton, for future delivery, unless it is the bona fide intention of both parties at the time that the article shall actually be delivered and received in kind at the time specified, as construed by the supreme court of the state, does not preclude the recovery by a broker of margins advanced for his principal on purchases of cotton for future delivery, on a cotton exchange, although the principal in fact intended not to receive the cotton, but to speculate on the fluctuation in price, where he kept such intention secret, and it was not known to the broker, who made the purchases in good faith, and in the belief that an actual purchase was intended.
5. SAME.
   There is no principle of general law upon which a principal can avoid liability to his agent for advances made in good faith on his request, because the contract on which they were made was rendered illegal by the secret intention of the principal not to perform the same in accordance with its terms.
6. APPEAL—QUESTIONS PRESENTED BY RECORD.
   An assignment of error on the ground that defendant was estopped by his previous conduct from setting up a certain defense in support of which he introduced testimony in the court below cannot be considered by the appellate court, unless based on some objection and exception to the evidence taken in the trial court, and shown by the record.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

For opinion below, see 111 Fed. 470.

¶ 1. See Contracts, vol. 11, Cent. Dig. §§ 455-458.

C. P. Sanders and T. P. Cothran, for plaintiffs in error.
Stanyarne Wilson, for defendant in error.

Before GOFF, Circuit Judge, and BRAWLEY and KELLER, District Judges.

KELLER, District Judge. In October, 1900, the defendant, a farmer of Spartanburg county, S. C., employed the plaintiffs, who were members of the New York Cotton Exchange, to purchase cotton for him for future delivery. The first order given by the defendant, which will serve as an illustration of all others of a similar character, is as follows:

"The Western Union Telegraph Company.

"Received at Cotton Exchange Building, N. Y., Oct. 2, 1900.

"Dated at Spartanburg, S. C., Oct. 2nd.

"To J. H. Parker & Co., N. Y.: Buy me five hundred bales May cotton at nine seventy-eight or lower. W. A. Moore."

On the date of the receipt of the above telegram the plaintiffs sent the following message in answer:

"The Western Union Telegraph Company.

"October 2, 1900.

"To W. A. Moore, Spartanburg, S. C.: Bought five May 78.

"J. H. Parker & Co."

On the same day the plaintiffs sent the following letter to the defendant:

"J. H. Parker & Co., Cotton Exchange.

"New York, Oct. 2, 1900.

"Mr. W. A. Moore—Dear Sir: Under your recent instructions we have this day bought for your account and risk, in conformity with the rules and customs of the N. Y. Cotton Exchange:

"Quantity and Description.	Price.
500 B. C. May.	9.78.

"Please take notice that all orders for the purchase or sale of cotton, coffee, grain, and provisions for future delivery are received and executed with the distinct understanding that actual delivery is contemplated, and the party giving the order so understands and agrees. It is further understood that on all marginal business the right is reserved to close transaction when margins are near exhaustion, without notice.

"Respectfully, J. H. Parker & Co.,

"Per C."

Other purchases and sales were made by the plaintiffs for the defendant, from time to time, in accordance with his instructions, and in each case, upon executing his order, the plaintiffs sent to the defendant a letter similar in character to the one above reproduced.

By October 12, 1900, Parker & Co. had purchased and were carrying for the account of defendant 1,200 bales of cotton, 400 of which were deliverable in January, 300 in March, and 500 in May, 1901. Up to this time the defendant had had on deposit with plaintiffs margins sufficient for the purpose of carrying these contracts in accordance with the rules of the New York Cotton Exchange. At this time the price of cotton declined, and additional margins were demanded, under the rules, by the persons from whom Parker & Co. had bought the cotton, and plaintiffs made various calls upon defendant for these

margins, between October 10 and October 24, 1900. A small amount was sent by defendant, with promise of further remittances, but on October 23, 1900, a final call was made by plaintiffs for over $4,000 in margins, requesting defendant, if he could not send the money, to instruct plaintiffs to close his contract. No reply being received, the plaintiffs, on October 24, 1900, sold the 1,200 bales of cotton at a loss of $4,333.71. In April, 1901, the plaintiffs brought their action in the circuit court of the United States for the district of South Carolina for the recovery of the aforesaid sum advanced by them upon the transaction hereinbefore referred to.

Upon the trial evidence was introduced of the nature of the written contracts, the rules of the New York Cotton Exchange, requiring all contracts for the future delivery of cotton to be made in contemplation of its actual delivery, and, as stated by the learned judge below in his opinion, "the plaintiffs, in a carefully prepared case, proved every step necessary to sustain their demand." By way of defense, the defendant alleged, and was permitted, without objection, to testify, that it was never at any time his intention to actually receive any of the cotton bought by Parker & Co. for him upon his several orders, and that so far as he was concerned the transactions were mere deals in the price of cotton, and were entirely speculative and gambling transactions. In his answer filed to plaintiffs' complaint he had alleged that plaintiffs were participes criminis in such gambling transactions, and that plaintiffs, "beyond question, knew that they were acting for defendant in nothing but gambling transactions, and were profiting from them." No attempt was made upon the trial to prove this allegation in the answer, but, on the contrary, the plaintiffs proved that, so far as they were concerned, the transactions were made under the rules of the New York Cotton Exchange, which contemplate the actual delivery of the cotton, and they proved the notice to the defendant of the terms under which the cotton was bought, by showing the delivery to him, at each transaction, of a notice similar to that embraced in the letter hereinbefore reproduced.

After the introduction of the evidence of the defendant as to his intention to speculate in cotton, and not to buy it, the attention of the court below was called to the statutes of South Carolina (Rev. St. § 1859 et seq.), and to the case of Harvey v. Doty, 54 S. C. 382, 32 S. E. 501, construing those statutes; and thereupon the court, suo motu, entered an order of nonsuit.

Various assignments of error are made by plaintiffs in error, but, in our view of the case, it will not be necessary to consider all of these at large.

The first assignment of error is as follows:

"The testimony shows that the contracts out of which the plaintiffs' claim arose were made in New York, and to be performed in New York. As to their nature, interpretation, and obligation the contracts were governed by the laws of New York, and not by the laws of South Carolina. The testimony shows that the contracts out of which the plaintiffs' claim arose were contracts for the future delivery of cotton made upon the floor of the New York Cotton Exchange; that under said rules actual delivery of the cotton was required; that under the laws of New York such contracts were valid and enforceable. The presiding judge should have so held."

This assignment of error cannot be sustained. The question as to the true meaning and intent of the contracts out of which the plaintiffs' claim arose was a proper subject of inquiry, and cannot be said to have been determinable independently of the effect of the statutes of South Carolina. It is undoubtedly true that ordinarily the validity and effect of a contract are to be determined by the law of the place where it was made, but this rule is subject to the exception that no nation or state is bound to recognize or enforce contracts made elsewhere, which are injurious to its own citizens or subjects. The only general rule that can be laid down is that contracts and liabilities, recognized as valid by the laws of the state or country where made or established, may be enforced in the courts of another state or country where the action is brought, unless contrary to morals, public policy, or the positive law of the latter, in which event they will generally not be enforced. Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; Forepaugh v. Railroad Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; Lumber Co. v. Lang, 28 Or. 246, 42 Pac. 799, 52 Am. St. Rep. 780; Knowlton v. Doherty, 87 Me. 518, 33 Atl. 18, 47 Am. St. Rep. 349; Ex parte Dickinson, 29 S. C. 453, 7 S. E. 593, 1 L. R. A. 685, 13 Am. St. Rep. 749; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Parsons v. Trask, 7 Gray, 473, 66 Am. Dec. 502; Buckner v. Watt, 19 La. 216, 36 Am. Dec. 671; Hinds v. Brazealle, 2 How. 837, 32 Am. Dec. 307.

In a line of decisions embracing Gist v. Telegraph Co., 45 S. C. 370, 23 S. E. 143, 55 Am. St. Rep. 763, Riordan v. Doty, 50 S. C. 547, 27 S. E. 939, and Harvey v. Doty, 54 S. C. 382, 32 S. E. 501, the supreme court of that state has decided that suits brought therein for the enforcement of any right or claim arising out of a contract for the future delivery of cotton or the like must be governed, as to the interpretation of the contract and the morality of the claim, by the laws of South Carolina, even though the contract was made and to be performed in another state; this on the ground, as stated in Gist v. Telegraph Co., that "contracts which are regarded as contra bonos mores in one state cannot be recognized there, although they are regarded as valid in another state where made and to be performed."

The United States courts will follow the rules laid down by the highest court of a state in the matter of determining whether the lex loci contractus or the lex fori shall govern. The federal courts will also follow the highest courts of the state in the construction of its statutes and its constitution, except where they may conflict with the constitution of the United States, or some statute or treaty made under it. Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495; McCluny v. Silliman, 3 Pet. 278, 7 L. Ed. 676; Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703; Webster v. Cooper, 14 How. 504, 14 L. Ed. 510; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; Bank v. Dudley, 2 Pet. 492, 7 L. Ed. 496; Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Jackson v. Chew, 12 Wheat. 153, 6 L. Ed. 583.

For similar reasons the second assignment of error cannot be sustained.

The court, after the introduction of the defendant's evidence, in which he was permitted (without objection made) to testify that he did not intend to actually receive the cotton ordered by him through the plaintiffs, suo motu directed a nonsuit. This, we think, was clearly error. Evidence had already been introduced by the plaintiffs tending to show that the defendant intended to receive the cotton. He had ordered it to be bought for him. He was notified from time to time by plaintiffs, who acted as his agents, that it had been bought in conformity with the rules and customs of the New York Cotton Exchange, and that the orders had been received and executed with the distinct understanding that actual delivery was contemplated, and in no single instance had he demurred to this action of his agents, or repudiated it, but had by silence assented to the purchase upon the conditions stated; and surely it was a question for the jury to say whether the evidence adduced before them as to his intention, evidenced by a course of dealing extending over a considerable period of time, should or should not outweigh a self-serving declaration made by the defendant at the time of trial, that he did not mean to do that which the correspondence introduced in evidence tended to show he had done. The jury, upon a submission of the question to it, might have thought that "actions speak louder than words," and might have found that at the time the cotton was ordered defendant really did mean to buy it subject to actual delivery, notwithstanding his denial on the stand. But, as we conceive the case, the intention of the defendant was not necessarily conclusive as to the right of plaintiffs to recover. The action of the court below was, no doubt, based entirely upon what was conceived to be the effect of the decision in Harvey v. Doty, 54 S. C. 382, 32 S. E. 501. The syllabus in that case is as follows:

"A party in this state, gambling in grain futures in the Chicago Exchange, by an agent, cannot be required, under our statutes against gambling, to repay his agent advances made for his benefit, on the ground that such agent acted with the Chicago trader as a principal, and both had the bona fide intention to deliver the grain at the specified time."

This syllabus undoubtedly looks very much as though the court had decided that, if the intention of the South Carolina principal were to gamble, it made no difference what the intention of his agent was, the contract would still be obnoxious to the laws of the state, and consequently not enforceable there, because contra bonos mores. But there was a very important element which appeared in that case, and was commented on in the opinion of the court, which has no place in the one at bar, and that is the question of knowledge by the agent of the illegal intent of the principal. In its opinion in Harvey v. Doty, the court, in discussing the evidence, says:

"It should be borne in mind that the record discloses that plaintiffs and defendant are directly at variance as to whether plaintiffs knew of defendant's purpose to gamble in grain futures. Plaintiffs say they did not know; the defendant insists that they had full knowledge. Of course this is a question for the jury, and by their general verdict we are obliged to assume that they found in favor of defendant's contention."

This is tantamount to saying that if plaintiffs had not known of defendant's illegal intention, and had themselves honestly acted in his interest, with no intent to violate the statutes of the state, they would have been entitled to recover for advances, notwithstanding the concealed fraudulent intention of their principal. Indeed, we do not see upon what theory a court could hold otherwise. The court in the same case further says:

"It is certain that, no matter how the grain dealers in Chicago may have considered Harvey & Co., the plaintiffs were always obliged to be bound by their agency to Doty."

This is undoubtedly true, and, as a corollary, it is equally true that they could not be bound or affected by a concealed illegal intention on the part of their principal. The court, in Harvey v. Doty, rightly held that the question of knowledge on the part of the agents of the illegal intent of their principal was of the essence of the case, and affected their right to recover advances.

In Roundtree v. Smith, 108 U. S. 276, 2 Sup. Ct. 632, 27 L. Ed. 722, Mr. Justice Miller, delivering the opinion of the court, says:

"It is to be observed that the plaintiffs in this case are not suing on these contracts, but for services performed and money advanced for defendant at his request; and though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it, if proved, they are certainly not in the same position as a party sued for the enforcement of the original agreement."

It seems to us that, to be so connected with the immorality of the contract as to be affected by it, knowledge of the immoral intent of the principal, or an immoral intent on the part of the agent, would be essential, and if the decisions of the courts of South Carolina held otherwise we should hesitate to consider ourselves bound by them in that regard; but, as seen above, they do not so hold.

The supreme court of the United States, in the case of Higgins v. McCrea, 116 U. S. 671 et seq., 6 Sup. Ct. 557, 29 L. Ed. 764, adverted to this principle. In that case, in which a broker's firm in Chicago endeavored to recover for advances made on behalf of a customer, it appeared that the brokers had actually canceled the contracts purchased for their customer during the time when he was protecting the same with margins, and failed to substitute others for them in accordance with the rules of the Chicago Board of Trade. Upon suit for such advances he defended upon this ground, and the further ground that he was speculating only, and filed a counterclaim to recover money which he had paid the brokers in pursuance of the said contracts. In its opinion in the above case the supreme court uses the following language:

"In the present case the plaintiffs alleged and insisted that their transactions with the defendant were carried on with no unlawful purpose. On the other hand, the defendant alleged and insisted that in the same transactions he intended to violate the law. We see no reason why in such a case the plaintiffs might not, if they had not canceled the contracts, recover the money paid by them for the defendant, while at the same time the defendant could not recover the money advanced to the plaintiffs for what he intended to be an unlawful purpose. In Holman v. Johnson, Cowp. 342, it was said by Lord Mansfield that 'the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds, at all times,

very ill in the mouth of the defendant. It is not for his sake that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: "Ex dolo malo non oritur actio." No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causa, or the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the defendant and the plaintiff were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for when both are equally in fault, "potior est conditio defendentis." ' If, therefore, the defendant intended to embark his money in an illegal and criminal venture, we do not see how his case is helped by the fact that the purpose of the plaintiffs was to invest the money so advanced in what they understood to be a lawful and innocent transaction."

Any construction of a contract of agency which would hold it to be good or bad in accordance with the concealed intention of one of the parties to be bound by or to violate a provision of positive law would be subversive of the rights of the innocent party thereto, and not to be tolerated, and such is not the intent of the South Carolina statute.

In the record of the case at bar we do not find any evidence to show that the plaintiffs knew of the intention of the defendant not to receive the cotton bought upon his several orders, but, even if such evidence had appeared, it would have been for the jury to pass upon.

It has been urged in argument that defendant was estopped by his course of acting from denying that he intended to take the cotton, and we are inclined to think that had this question been raised at the proper time and in the proper manner there is a great deal in it. Defendant is a cotton raiser. Suppose before his cotton was matured he had sold 100 bales of it to another, to be delivered at a future date, and when the time for delivery arrived the price of cotton had declined below the contract price. Could it be contended that the purchaser under that contract could free himself from responsibility by declaring that he never intended to receive it? It may be said that such a case is different, in that the seller is the owner of the cotton, and the contract protected under the first clause of section 1859, Rev. St. But in the case supposed the seller is not the owner of any "bales of cotton," but only of an unmatured crop, which may never be gathered, or may prove less than 100 bales when gathered. In such a case, would not the act of the purchaser in buying the cotton estop him, when the price had declined, from denying that he intended to receive it, if he had purchased it according to the usages of the cotton trade?

That assignment of error, however, cannot be taken advantage of for the first time in the appellate court. We do not find in the record that the evidence complained of was objected to, or that any motion was made to strike it out after it was introduced, and it is essential to its consideration by this court that somewhere in the record the objection to the admission of the testimony should appear. And while it appears from the opinion of the learned judge below that the

point was made in argument before him, yet there is no objection or exception in the record upon which to base this assignment of error. However, for the reasons herein assigned, we are of opinion that the judgment of the court below should be reversed and set aside, and a new trial awarded, with costs in this court to the plaintiffs in error.

It is accordingly so ordered. Reversed.

BERLINER GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 412.

On Petition for Rehearing. Dismissed.

For former opinion, see 113 Fed. 750.

PER CURIAM. We have given very careful consideration to the petition of the appellant for rehearing of this case. The conclusion reached by this court was after full conference and grave consideration. We see no reason for any further discussion of the matter. The petition for rehearing is dismissed.

AQUARAMA CO. v. OLD MILL CO. et al.

(Circuit Court of Appeals, Second Circuit. April 8, 1902.)

No. 145.

PATENTS—PRELIMINARY INJUNCTION AGAINST INFRINGEMENT—PLEASURE CANALS.

A showing in support of the validity of the Pickard patent, No. 448,072, for the construction of canals, and to establish acquiescence therein by defendants, *held* insufficient to warrant the granting of a preliminary injunction.

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

Appeal from an order granting an injunction pendente lite forbidding infringement of letters patent No. 448,072, granted to Arthur Pickard March 10, 1891, for the construction of canals, and the operating of a so-called amusement canal under the name of "The Old Mill," or any similar name.

R. B. McMaster, for appellants.

William H. Kenyon, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The complainant company, a New Jersey corporation, was incorporated by George W. Scofield, Merle J. Wightman, and L. W. Thompson for the purpose of operating pleasure railroads, merry-go-rounds, and other amusement devices. The amusement canal, of which complainant alleges it has a monopoly under certain patents, consists of a single continuous canal, having

a fanciful or meandering form, its end being brought around in proximity to its beginning; two passages connecting the end of the canal with the beginning, in one of which the water-propelling wheel is located to produce a continuous current in the canal for the propulsion of boats, and in the other of which lock gates and a lock are located, by means of which boats are returned from the end to the beginning of the canal. The patent declared on was issued March 10, 1891, to Arthur Pickard, numbered 448,072. Its broadest claim is the first: "In a canal, a water-propelling wheel mounted in the canal, and adapted to produce a current for the propulsion of boats, substantially as set forth." The patent has never been adjudicated, and, upon its face, would seem to require more than the presumption arising from its issue to demonstrate patentable invention, except, perhaps, as to the more detailed claims. Three other patents, covering details of construction, are owned by the complainant,—a circumstance which has a bearing on the alleged acquiescence by the public, the taking out of licenses, etc., since it may be that some one or more of the other patents was the inducing cause to acceptance of license. Under these circumstances, it would be necessary to show some special equity as a ground for demanding an injunction in advance of final hearing; and a large part of the moving papers is devoted to an attempt to show that defendants have so conceded the validity of the patent that they should be estopped from now questioning it. No such corporation as the Old Mill Company has yet been formed, but the other defendants (except, possibly, Boshwitz) are associated in the business of constructing a pleasure canal under that name.

The history of prior transactions, as given by Scofield, Wightman, and Edward C. Boyce, a stockholder of the complainant company, is as follows: The Aquarama Company was formed in September, 1900. It acquired from Scofield an equitable interest in the patent in suit at the time of its incorporation, and in November, 1901, the legal title. Since its formation it has granted licenses for the construction of pleasure devices, including amusement canals, in various places. Some time in the spring of 1901 Scofield and Wightman made an agreement with Dangler and the Papes that the five would form a corporation to be known as the Seaside Construction Company, of which either Wightman or Scofield should be elected president, and Gustav Pape elected treasurer, and Frederick Pape manager; that all moneys derived from operating an amusement canal to be built by the Seaside Construction Company at Rocky Point, R. I., should be deposited daily in a bank, checks for withdrawals to be signed by Frederick Pape and another person to be designated by the parties; that profits were to be divided in proportion to the shares; that Scofield and Wightman were to put in $1,000 cash, and also to secure the Seaside Company an exclusive license for Rocky Point under this patent; the others were to put in $3,000 in cash, and the shares were to be divided 100 to Scofield and Wightman (50 each), and 100 to the other three; that the Seaside Company was incorporated May 31, 1901, all except Frederick Pape being named as directors for the first year, and the shares allotted as above;

that Scofield was elected president, and Gustav Pape treasurer; that on June 1, 1901, Scofield and Wightman obtained a license from the Aquarama Company to the five parties and to the Seaside Company, about to be formed, "in consideration of the sum of $2,000," of which $1,500 was actually paid by Scofield and Wightman; that under this license the canal at Rocky Point was built and operated; that Dangler and the Papes carried on the plant, and pocketed the proceeds; that during the entire season of 1901 the Seaside Company, by Pape, sent to Wightman weekly statements showing the gross receipts.

Of course, such a state of affairs would effectually estop the defendants from contesting the validity of the patent. The difficulty with the case, however, is the one usually encountered upon applications for preliminary injunctions, where the proofs before the court consist of ex parte affidavits. All the material statements in the moving affidavits are flatly contradicted in the answering affidavits. It is conceded that the Seaside Construction Company was incorporated by the five persons named, with stock allotted as stated, and that defendants built and operated the canal at Rocky Point. But it is expressly and categorically denied by the defendants that the Seaside Company ever held a meeting, or elected a president or a treasurer, or received any license from the Aquarama Company, or paid for any such license. There are cases where, despite some such conflict of affidavits, the court may yet find sufficient corroboration of the story of the moving party to induce it to issue an injunction. The certificate of incorporation of the Seaside Company tends to support the averments of the complainant, but another somewhat persuasive circumstance seems to us greatly to weaken that support. There is an absence of documentary proof such as one would expect to find marshaled in support of the moving affidavits. The alleged contract between the five persons—a written instrument—is set forth, but it is conceded that it was never signed or executed by anybody. The alleged license, also a written document, is set forth at length, but it is not signed or executed. No receipt for the money alleged to have been paid to the complainant for the license by Scofield and Wightman is produced, nor any written documents tending to show such payment. Of the dozen or more weekly returns of gross receipts at Rocky Point which Wightman says were made to him by Pape, not a single one is produced. Under these circumstances, and in view of the sharp conflict between the affiants, the questions raised should be reserved until their respective statements can be tested by cross-examination, when all doubts which now exist as to the equities will probably be eliminated.

The judge who heard the motion at circuit wrote no opinion, and we infer that his decision was in part induced by a desire to give the parties an opportunity to present the case to this court before the summer recess. It is a somewhat close question, but, upon the whole, we are of the opinion that there should be no injunction in advance of the trial.

The order is reversed.

WESTERN ELECTRIC CO. v. KEYSTONE TEL. CO. et al.

(Circuit Court, E. D. Pennsylvania. May 6, 1902.)

No. 20.

1. PATENTS—PRELIMINARY INJUNCTION AGAINST INFRINGEMENT — EFFECT OF PRIOR DECISION.

   While the decision of one federal court sustaining the validity of a patent after a contest will be accepted by another such court, in interlocutory proceedings, as conclusive upon the issues determined, and the effect of the proofs on which it was based, other issues and added proofs must, of necessity, be considered by the court to which they are submitted in the subsequent case, where the parties are not the same; and a preliminary injunction will not be granted where, giving such effect to a prior decision, the proofs leave the court in doubt either as to the validity of the complainant's patent, or as to its infringement by defendant.

2. SAME—SWITCH BOARDS.

   A preliminary injunction against infringement of the Seely patent, No. 330,067, for an improvement in grouping spring jacks and annunciators for multiple switch boards denied.

In Equity. Suit for infringement of letters patent No. 330,067, issued to John A. Seely November 10, 1885, for telephone switch boards. On application for preliminary injunction.

Frank P. Prichard, George P. Barton, and Edward Rector, for complainant.

Henry M. Paul, Jr., and Joseph C. Fraley, for respondents.

DALLAS, Circuit Judge. "A preliminary injunction should never be awarded where the right is doubtful or the wrong uncertain," and therefore will not be granted in a patent case where the proofs leave the court in doubt either as to the validity of the complainant's patent, or as to its infringement by the defendant. Undoubtedly, this rule is modified by the equally well settled one that a patent which has, after contest, been sustained by a United States court, is exempt from further attack on the same ground, and by the same evidence, upon interlocutory proceedings subsequently had in any other of those courts. But if the parties are not identical, and the question presented or the evidence adduced be substantially and materially different in the two cases, it manifestly results that the conclusion reached in the one cannot be controlling in the other. Blakey v. Manufacturing Co., 37 C. C. A. 27, 95 Fed. 136. The prior adjudication must be regarded as determinative of the issue it decided, and of the effect of the proofs upon which it was based; but other issues and added proofs must, of necessity, be considered by the court to which in any subsequent case they are submitted. Western Electric Co. v. Anthracite Tel. Co. (C. C.) 100 Fed. 301; Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co. (C. C.) 100 Fed. 648; Société v. Allen (C. C.) 84 Fed. 812, affirmed in 33 C. C. A. 282, 90 Fed. 815; Thomson-Houston Electric Co. v. Exeter, H. & A. St. R. Co. (C. C.) 110 Fed. 986.

The propositions which have been stated are fatal to the present motion. The decision of the circuit court of the United States in

Missouri, and of the court of appeals for the Eighth circuit, in Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, cannot be accepted as determining the validity of the patent in question for this court, for two reasons: First, because the construction of the patent upon which it was held to be valid in that case is not the same as that which the complainant invokes in this one; and, second, because relevant and important evidence has been here introduced which was not there exhibited. This additional evidence has had my attentive consideration, but I do not deem it desirable to discuss it at this stage of the cause. It is, of course, possible that upon final hearing the complainant may appear to be entitled to the relief which it seeks, but at present it is enough to say that the proofs now submitted have not convinced me that the interlocutory order which it asks ought to be made. Blakey v. Manufacturing Co., supra.

The complainant's motion for a preliminary injunction is denied.

WESTINGHOUSE ELECTRIC & MFG. CO. v. STANLEY ELECTRIC MFG. CO.

(Circuit Court, D. Massachusetts. May 12, 1902.)

No. 1,461.

1. PATENTS—REISSUES—MISTAKE AUTHORIZING.
   A mistake as to the meaning of a disclaimer limiting the scope of a patent, which is deliberately made to meet a requirement of the patent office, and which does meet such requirement, and thereby avoids an interference, is not a mistake or inadvertence, within the meaning of Rev. St. § 4916, which may be corrected by a reissue with such disclaimer omitted.
2. SAME—REVIEW BY COURTS.
   The courts have power to review the action of the commissioner of patents in granting a reissue on the ground of inadvertence, accident, or mistake, where there is manifest error upon the record.
3. SAME—VALIDITY.
   The Gaulard & Gibbs reissued patent No. 11,836 (original No. 351,589) for a system of electrical distribution is void because not authorized by the statute governing reissues.

In Equity. Suit for infringement of reissued letters patent No. 11,836, issued June 6, 1900, on original No. 351,589, granted to Lucien Gaulard and John D. Gibbs for a system of electrical distribution. On demurrer to bill.

Kerr, Page & Cooper and William K. Richardson, for complainant.
Mitchell, Bartlett & Brownell and M. B. Philipp, for defendant.

COLT, Circuit Judge. This bill is brought on reissued letters patent No. 11,836, dated June 26, 1900, granted to the complainant as assignee of Gaulard & Gibbs. The defendant has demurred to the bill. The question presented by the demurrer is whether, on the face of the bill and annexed papers, the reissue is valid under the statute governing reissues (Rev. St. § 4916).

In the reissue the disclaimer of the original patent is omitted, and another disclaimer inserted. In other respects the specification and

claims of both the original patent and the reissue are identical. The original disclaimer restricted the scope of the patent. The purpose of the reissue was to take away this restriction, and to leave the patent as it would have stood originally if no disclaimer had been made. The disclaimer in the original patent was as follows:

"We do not herein claim the connection of the converters in the line in any other arrangement than we have illustrated in the drawings."

The disclaimer in the reissue is as follows:

"The connection of the converters in the line, except by their high-tension members, which is the arrangement illustrated in the drawings, is not claimed herein."

The first disclaimer, as understood by the patent office and interpreted by the circuit court in the case of Westinghouse Electric Co. v. Sun Electric Co., 35 Fed. 899, limited the patent to the arrangement of converters in series. The second disclaimer imposes no limitation on the arrangement of converters,—whether in series, multiple arc, or otherwise; in other words, it allows the patent to stand for a system of electrical distribution, regardless of the arrangement of the converters.

It appears from the affidavits of the attorneys for the patentees that the alleged mistake consisted in their belief at the time that the first disclaimer meant the same thing as the second disclaimer. Mr. Pope, one of the attorneys, says in his affidavit:

"After stating to him [the examiner] that I had received the letter of September 30th, I asked him to pass the application to issue. In reply he told me that there would have to be an interference with another case or cases involving the distribution of electricity by means of converters arranged in multiple arc. I protested against this, stating that Gaulard & Gibbs had made no such claim; that their invention did not consist in any particular arrangement of converters with reference to each other, but that it did consist in the use of a reducing converter, and that I was quite willing to make any disclaimer or amendment which would more clearly bring that idea out; that the use of a reducing converter, whether singly or in multiple arc, or in a series, or otherwise, was the invention that Gaulard & Gibbs were entitled to have the use of; and that there was no ground for interference between their claims and any claim for a mere relative arrangement of converters. He then said, in substance, that the interference could be avoided only by the insertion of a proper disclaimer, and added, 'But I know you will not be willing to do it.' I replied, in substance, 'What form of disclaimer do you suggest?' He then wrote out a draft of an amendment which he said would meet his views, and submitted it to me. It contained a form of words disclaiming the use of converters in multiple arc. As I was unwilling to disclaim in behalf of my clients a subject-matter which did not constitute their invention, and which they had never sought to claim, and which, moreover, would permit others to use their invention by the simple expedient of employing reducing converters in multiple arc, I refused to accept his suggestion. I then told him, in substance, that I would try to prepare an amendment that I would be willing to make. Then Major Hopkins and I retired, and after consultation we sought to draft an amendment which should distinguish between the invention itself and mere methods of applying it to use. The result was the amendment of October 7, 1886, which was filed on the same afternoon. I don't recollect and don't think that any discussion took place as to its meaning. Our purpose in preparing the amendment was to define the invention as being limited to the connection of converters in the line by means of their high-tension member or converter, which is the arrangement described in the

specification, and the arrangement which is illustrated in all three figures of the drawings of the patent, and thereby differentiate from mere methods of arranging the converters with relation to each other. It never occurred to me that this amendment could be construed to limit the invention to the use of converters in series, and license the public to use converters in multiple."

The affidavit of Mr. Hopkins, the other attorney, merely corroborates Mr. Pope.

In reply to these affidavits, the examiner says:

"From all this it appears that there was but one purpose in the mind of the examiner, and that was to declare an interference precisely as indicated in the official letter of September 30th, unless the necessity therefor was avoided by a disclaimer of the arrangement of converters in multiple arc. * * * There is no indication that he [the examiner] ever waivered in this purpose for a moment, and the form of disclaimer drawn by him was directed to this point. * * * If the disclaimer was intended to have the meaning that is now ascribed to it, it should have been explained to the examiner, so that he might have proceeded to put the case in interference, but no explanation was offered. The proposition that, under a positive requirement for a particular disclaimer, the examiner accepted a disclaimer of something entirely different, having in fact no relation to the requirement, as meeting his views, is beyond credence, and wholly unreasonable. The filing of the disclaimer, 'in view of official suggestion,' after careful and deliberate consultation between these affiants [the attorneys], men of great learning, wide reputation, and long experience in conducting applications for patents, is a sufficient guaranty that there was neither inadvertence, accident, nor mistake, but, instead, the action was carefully considered and deliberately executed. The only mistake, if there was one, was in the expectation that the examiner would accept a disclaimer with a meaning totally unlike his requirement as satisfactory; and this is not a mistake in a statutory sense, that can be corrected by reissue, since it was the result of a deliberate intention."

From these affidavits, it appears that the first disclaimer was made under the following circumstances: The examiner notified the attorneys for the patentees that an interference could be avoided only by a disclaimer of the arrangement of converters in multiple arc. Thereupon the attorneys visited the examiner, and endeavored to convince him that the Gaulard & Gibbs invention did not consist in any particular arrangement of converters with reference to each other, but in the reducing converter. The examiner still insisted that an interference could be avoided only by the insertion of a proper disclaimer. The examiner wrote a form of disclaimer, which the attorneys were unwilling to accept. The attorneys then retired, and, after consultation, drafted the first disclaimer, which was submitted to the examiner without discussion, and accepted by him, and as a result the patent was immediately passed to issue. It will be observed that the attorneys do not say that the first disclaimer was inadvertently substituted in place of the second disclaimer, or that it was filed hurriedly, or that the language was not deliberately chosen; but, on the contrary, it seems that it was drawn with care and deliberation.

We have presented, then, on the face of these papers, this proposition: Is a mistake as to the meaning of a disclaimer which is deliberately made to meet a requirement of the patent office, and which does meet such requirement, and thereby avoids an interference, a mistake inadvertently committed, within the meaning of section 4916?

I am of the opinion that it is not, and therefore that the commissioner exceeded his powers in granting this reissue. Where patentees obtain their patent by making a disclaimer which limits its scope, in obedience to a requirement of the patent office, they should not be permitted subsequently to say that it was filed by mistake; the mistake being that they understood it to mean something different from what the examiner understood it to mean. Such a mistake is not a bona fide one, because by means of it they deceived the patent office, and thereby obtained the issuance of the patent. It would be laying down a dangerous doctrine to hold that, having obtained their patent by an acquiescence in the condition imposed by the patent office, the patentees could then turn around and obtain a reissue with the condition eliminated, on the ground that they did not intend at the time to comply with the demand of the patent office. Under such circumstances, the patentees must be presumed to have intended the legal consequences of their own deliberate act, upon the good faith of which the patent office issued the patent; and any purpose, intent, belief, mental reservation, expectation, or hope that the disclaimer meant something different from what the patent office understood it to mean, and its language imports, cannot be held to be a mistake inadvertently committed, which may be corrected by a reissue. The patentees are estopped from setting up such a mistake on an application for a reissue.

In Leggett v. Avery, Mr. Justice Bradley, speaking for the court, said.

"We consider it extremely doubtful whether reissued letters can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters patent. Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it was such, the applicant should seem to be estopped from setting it up on an application for a reissue." 101 U. S. 256, 259, 260, 25 L. Ed. 865.

The power of this court to review the decision of the commissioner upon the question of inadvertence, accident, or mistake, where there is manifest error upon the record, has always been recognized. Leggett v. Avery, 101 U. S. 256, 259, 25 L. Ed. 865; Mahn v. Harwood, 112 U. S. 354, 359, 6 Sup. Ct. 451, 28 L. Ed. 665; Topliff v. Topliff, 145 U. S. 156, 171, 12 Sup. Ct. 825, 36 L. Ed. 658; Hobbs v. Beach, 180 U. S. 383, 395, 21 Sup. Ct. 409, 45 L. Ed. 586.

Demurrer sustained; bill to be dismissed, with costs.

STANLEY RULE & LEVEL CO. v. OHIO TOOL CO.

(Circuit Court, N. D. New York. May 16, 1902.)

PATENTS—INVENTION—PLANE IRONS.

The Schade patent, No. 473,087, for an improvement in plane irons, designed to render them less liable to crack in hardening and tempering, and to enable them to be worn down farther than in the old style, shows only mechanical skill, and is void for lack of patentable invention.

In Equity. Suit for infringement of letters patent No. 473,087, granted to Edmund Schade April 19, 1892, for a plane iron. On final hearing.

This is an action founded upon letters patent No. 473,087, granted April 19, 1892, to the complainant, as assignee of Edmund Schade, for an improvement in plane irons. The patentee says:

"My invention relates to improvements in plane irons; and the objects of my improvement are to facilitate the manufacture of the plane iron, to improve its quality when made, and to make the plane iron capable of being worn down farther than the old style of iron used in connection with certain planes. * * * By my improvement I adapt the plane iron to be worn down closer than in the ordinary plane iron and to operate in connection with the laterally adjusting lever until the plane iron is completely worn out. By making the circular enlargement at the end of the slot, which is nearest the cutting edge, I am enabled to make the plane irons by pressing them out from sheet steel and to harden and temper them to a point up to or beyond the lower edge of this circular enlargement with less liability of cracking the plane irons at this point, so that fewer irons are lost in hardening and tempering, and they are less liable to become cracked or broken at said point after they are put into use. This is because there are no angular notches at the lower end of the slot from which a crack will start, and because the slot opens into the circular enlargement, so that it is less liable to strain in the expansion and contraction of the metal during the hardening and tempering process. Care is generally taken in hardening the ordinary plane bit not to harden it quite up to the slot; but by my improvement such care is not necessary."

The claim is as follows:

"In a plane, the combination of a plane iron having a longitudinal slot, 4, with the circular enlargement at its lower end, said slot extending up near to the upper end of the bit without any enlargement at said upper end, and a laterally adjusting lever having a projecting part fitted to work in the upper end of said slot, substantially as described, and for the purpose specified."

The defenses are want of patentability, public use for more than two years prior to the date of the application and noninfringement.

Mitchell, Bartlett & Brownell (John P. Bartlett, of counsel), for complainant.

Frederick I. Allen and William A. Megrath, for defendant.

COXE, District Judge (after stating the facts). The art to which this patent belongs is very old. Hand planes were used by the Romans before the Christian era. In its essential features the plane of to-day is what it was 2,000 years ago. Such changes as have taken place were made necessary by progress in other arts and the slow evolution of centuries. No fundamental invention ever has been or ever can be made in the hand plane. The improvements which have taken place have related to matters of detail and in most instances have required only the skill of the calling. The patent in suit describes and claims such an improvement. The gist of the improvement relates to the location of the circular enlargement, through which the holding screw passes, at the lower, instead of the upper, end of the longitudinal slot of the plane iron. Prior to the Schade patent the large screw opening had usually been located at the upper end of the slot of the plane iron. Schade simply reversed the old slot so that the enlargement is at the lower instead of the upper end. In every other respect

the plane iron, the cap iron and the adjusting device are identical with those of prior structures. It is said that this change produces two new results: First. The absence of angular notches in the circular opening lessens the liability to crack and break the plane iron when subjected to the hardening and tempering process. Second. The absence of the large opening at the upper end of the slot enables the friction roller of the adjusting device to engage the sides of the slot to its extreme upper end, and in this way the plane iron can be used until it is completely worn out. Assuming that the absence of angular notches prevents cracking, when the steel is tempered after the slot has been cut, as stated in the specification, there can be no invention in making the end of the slot circular because Markee, Bailey and Baecker all show slots with circular ends and no notches. The location of the enlargement at the lower end of the slot permits the plane iron to be worn down closer than in most of the structures shown in the record, but it would seem that the change is one that did not require anything more than the ingenuity of the skilled mechanic. The idea of saving as much steel as possible was not new with Schade. That such economy is desirable would appear to be obvious, but Baecker, in 1877, expressly recognizes its importance by referring to a bit which "may be sharpened until its length is so diminished that it can no longer be supported in the stock." Various methods of accomplishing this result naturally suggest themselves to the competent workman. Smith, in 1878, describes a plane iron having the usual slot and says, "A circular enlargement is sometimes made of the slot, B, near one or the other end; but this is not claimed here as original." Smith also says that if the circular enlargement is present the arms of his thumbscrew pass through the slot. If the screw is removed in the Smith, or in the Schade, device, there is no necessity for the circular enlargement through which the large screw head passes. Although it is, perhaps, more convenient to have the screw remain in the cap, it is clear that by taking out the screw entirely, when it is desired to separate the cap and bit, a slot might be used which is uniform in width from top to bottom and in which the adjusting device would operate to the extreme upper end of the slot. Again, if the slot be long enough, the enlargement may be made at the upper end with sufficient space below it to allow the adjusting roller to operate until the cutting blade is used up; indeed, several of the slots in both complainant's and defendant's bits appear to be long enough to permit this to be done. Baecker shows a method of producing the desired result by means of a bit having a slot open at its upper end, and Gage shows still another. The Gage patent states, what the court has endeavored to point out, that "other forms of lever connections may be employed with the cutter, or the adjustment may be made by means of lateral screws, or a screw may be employed, extending downward and forward, to operate an eccentric in connection with the cutter. Many devices to effect this lateral adjustment of the cutter plate will occur to those skilled in the art." Bailey and Nicht produced similar results by locating the enlargement in the lower end of a slot in the cap so as to allow the head of the screw to pass through it and rest on its upper surface. Schade shows one way of accomplishing a result

which was accomplished by others in several different ways prior to his patent. Schade's device may be an improvement upon the prior devices, but, if so, it is only in degree. The problem is so simple and may be solved in so many different ways that invention cannot be predicated of its solution in one particular way. The court is unable to resist the conclusion that Schade's achievement was only what might be expected from a clever mechanic, and that no new result, such as is contemplated by the patent law, was attained thereby.

The bill is dismissed.

EBERHARDT v. HARKLESS et al.

(Circuit Court, W. D. Missouri, W. D. May 12, 1902.)

No. 2,472.

1. ATTORNEYS AT LAW — LIABILITY FOR NEGLIGENCE — INAPPROPRIATE ACTION FOR BREACH OF CONTRACT.

A verbal contract, made by agents of a corporation in its behalf, to employ plaintiff either so long as the agents should remain with the company or so long as the company should continue in business, was not one for such a definite term that attorneys employed by plaintiff to enforce his rights thereunder after his discharge were guilty of negligence because they brought an action to recover wages at the contract rate to the time of its commencement, instead of one to recover full damages for its breach.

2. SAME—ACTION FOR DAMAGES.

Plaintiff sued to recover damages alleged to have been sustained through the negligence of defendants as attorneys. The petition alleged that plaintiff had a contract with a corporation for his employment at stated wages during his natural life; that on his discharge he employed defendants to prosecute his claim against the company; that through negligence or gross ignorance of the law they brought an action to recover wages under the contract to that date, and recovered, but that such recovery operated as a bar to any subsequent action, because the damages for breach of the contract were indivisible, and that a second suit brought by defendants failed for that reason. Plaintiff's testimony on the stand failed to support his allegation as to the contract. He stated that certain agents representing the corporation agreed to employ him so long as they should be with the company, and again that they agreed that he should be employed so long as the company was in business. Neither did his evidence sustain the claim that his second suit failed because of the former recovery, but the record showed that it was dismissed because of his failure to comply with an order requiring him to give security for costs, after he had been granted leave to amend his petition. *Held* that, assuming that plaintiff stated his case to defendants in accordance with his testimony, they were not negligent in proceeding as they did, and that plaintiff's evidence as a whole showed no ground of recovery which justified the court in submitting the case to the jury.

At Law. On motion for new trial.

J. A. Smith, for plaintiff.

Scarritt, Griffith & Jones, for defendants.

PHILIPS, District Judge. At the trial of this case to a jury the court directed a verdict for the defendants on the plaintiff's testimony. The only question to be determined on this motion is as to whether that direction was correct, regardless of any reasons assigned by the court in passing upon the demurrer to the evidence.

The theory of the plaintiff's petition is that he had a contract with the Missouri & Kansas Telephone Company, through its agents and representatives, in settlement of a claim for personal injury received by him while in the employ of the company; the substance of which is that, in addition to the sum of $150, paid him on said settlement, for which he gave a receipt in full, there was the further consideration that the company was thereafter to give him employment during his natural life at a compensation of $60 per month, and that he employed the defendants as his attorneys to compel by suit said company to keep said contract, alleging that it had discharged him without cause, and failed and refused to give him employment; that thereafter the defendants, as attorneys at law, brought suit upon such contract in a justice court for the recovery of one month's pay, then due him if the contract had been kept, and that he recovered judgment therein for said period, from which said judgment the defendant company appealed to the circuit court of Jackson county, where the company dismissed its appeal, leaving the judgment of the justice court in force, and which judgment the defendant company afterwards paid off and satisfied; that during the pendency of said appeal the defendants, as his attorneys, brought another suit in the circuit court of Jackson county, Mo., on said contract against said company for the recovery of the monthly payments which had accrued between the time covered by the former suit and the institution of said second suit. To this last action the defendant company appeared and demurred on two stated grounds: First, that the petition did not state facts sufficient to constitute a cause of action; and, second, because of the pendency of another suit between the same parties respecting the same cause of action. This demurrer was sustained, but whether the action of the court was based upon one or the other or upon both of the alleged grounds in the demurrer neither the record nor the evidence in this case discloses. Thereupon the plaintiff took leave to file an amended petition, and, being a nonresident of the state, he was required, by order of the court, to give security for costs. By reason of his failure to give such security, that suit was dismissed by the circuit court. Thereupon the connection of the defendants with the case ceased, and the plaintiff, upon the recommendation of one of the defendants' firm, employed another lawyer in the state of Kansas to institute another suit over there, with which proceeding the defendants had nothing to do.

It is contended by plaintiff that he lost his right of action to recover any further sum from the defendant telephone company for the reason that the contract was indivisible, and that the cause of action thereon could not be split up, and that, when a recovery was had for the one month's pay, it was a bar to any further action; and that this resulted from the negligence and ignorance of the law on the part of the defendants. The petition in this case specially pleads that this principle of law had been announced by the supreme court of the state in the case of Booge v. Railroad Co., 33 Mo. 212, 82 Am. Dec. 160. The facts in that case were that the defendant employed the plaintiff in March, 1858, as a runner or solicitor for freight and passengers from that time until the close of navigation on the Missouri river at

the price of $125 per month, payable monthly; that the plaintiff entered upon such service, and continued therein until the 19th day of June, 1858, when the defendant wrongfully discharged him, and refused to permit him to perform said contract, notwithstanding his willingness and readiness to do so. The petition further alleged that navigation on said river did not close until December, 1858, and alleged that there was due for his wages under said contract for the months of September, October, and November, $375. The evidence disclosed that the plaintiff had hitherto instituted in the same court an action against the defendant on said contract for breach thereof, and obtained judgment therein for the sum of $250, for wages for the period between the 1st of July and the 1st of September, 1858. The court held that the contract was a unit, and that the plaintiff might have recovered in one suit for the whole term of his contract, and that, having elected to sue for the shorter term, it was a bar to the second action. The action in this case is based upon the theory that the plaintiff had a contract with said telephone company to pay him at the rate of $60 per month during his lifetime, or as long as he was able and willing to work. The question to be decided here is, what was the statement made by the plaintiff of his cause of action to the defendants at the time of their employment as counsel, in order to determine whether or not they were culpable of such negligence and ignorance as to place upon them, as attorneys at law, a liability for mismanagement and misdirection of their client's case? In other words, was the case presented by the plaintiff to his attorneys of such character as to leave no reasonable doubt in their minds, as intelligent lawyers, as to whether or not he had a contract that was to run during his life, or for other certain definite period, to bring his case within the rule of the decision above mentioned? A reference to the plaintiff's testimony in this case will show that he had no such contract with said company. After his alleged injury, and in settlement thereof, the following instrument of writing was executed between the parties:

"Kansas City, Mo., Nov. 3rd, 1894.

"Missouri & Kansas Telephone Co., to Charles Eberhardt and Wife, Dr.
"1894. Kansas City, Mo.

"Voucher No. 8.

"In full of all claims by us or either of us, on account of damages or injury to the person of Charles Eberhardt, arising from the accidental falling of a ladder on or about the 19th day of August, 1892, at or near the premises known as the baggage room of the Union Depot Company in the city of Kansas City, Missouri. Said ladder having been borrowed and placed in position by said Eberhardt to enable him to take down some old wire which in his judgment was necessary to be done..... $150 00

"Examined by executive committee, and approved for $100.00.

"Correct. W. W. Smith, Superintendent.

"Examined and found correct. W. H. Ballard, Auditor.

"Approved. A. Burt, General Manager.

"Notice. The person signing this voucher is notified to see that payment is received before or at the time of signing. If this voucher is signed without payment, it is done at the signer's own risk, and the company will not be responsible for any claim for damages thereafter.

"Received of the Missouri & Kansas Telephone Company, subject to the above notice, $150.00 in full of the above account.

"Charles Eberhardt.

"Mrs. Maggie Eberhardt, His Wife.

"Kansas City, Missouri, Nov. 12th, 1894."

Waiving the question raised by defendants' counsel as to whether this was of the character of such a receipt as that its terms could not be varied by showing an additional consideration without a reformation of the instrument, the plaintiff's testimony is that in stating the additional arrangement or consideration to his counsel he talked with the agent of the company about paying his doctor's bill and for medicines, and that the agent told him he could not pay his doctor's bill, or pay out any money, without his signing a release, and that the agent agreed to pay his doctor's bill if he would give them a release; and that he told the agent that, as the company wanted a release, he would have to ask more than his doctor's bill; that he was a cripple, and probably would be so for life; that he had a family to support, and wanted employment; and then the agent or agents said that "as long as they were with the company they would have a place for me. I told them that the way things looked at that time that Mr. Smith [who was the superintendent of the company] wouldn't be with the company much longer, and that as Mr. Burt had just come there, and he didn't know me, and didn't care much about me; and then he [evidently meaning Smith] said, as long as the Missouri & Kansas Telephone Company is in business—doing business—that they would always have work for me to do, and a job that I could do, and that they would put me on inspecting, which was about the best job they had, and that they would put me on as soon as I was able to take it." Further on in his testimony, when speaking of his appeal to the agent of the company for employment, when the agent told him that he had nothing for him to do, he testified as follows: "I told him that I wanted him to do as he had agreed; that I was ready to go to work, and wanted him to keep his part of the contract. I told him that he told me that they would give me work as long as he was with the company." Then, further on, in speaking of his subsequent interview with said Burt, the plaintiff testified that "he said that they would give me work as long as they remained a company and were doing business." Further on he says, "I was to receive sixty dollars a month, inspecting, as long as the company was in business." The charter of said telephone company, in evidence, shows that under the then existing franchise it would expire in 1902, and at the time of this alleged contract would have about 10 or 12 years to run.

From the foregoing extracts from plaintiff's testimony he stated his contract in two different ways. In the first place, he said that Smith and Burt said "that as long as they were with the company they would have a place for me." If that was the contract as he stated it to his counsel, it was not a contract for any definite or fixed period of time, but was a contract continuing only so long as Smith and Burt were with the company. Their assurance, according to this statement, was simply that they would have a place for the plaintiff so long as they were with the company. As they were mere employés of the company, and there is nothing to show that they had a life estate, the presumption would be that they were subject to the incidents of a discharge from the service of the company, or were liable to quit its employment at any time. This is evidenced by plaintiff's own statement "that the way things looked at that time that Mr. Smith wouldn't be

with the company much longer." Such a contract was so dependent and uncertain in its duration that assuredly no lawyer would conclude that a recovery could be had thereon based upon a life tenure in the plaintiff. Then, taking the other horn of the dilemma, based upon his own statement that they would give him employment so long as said company was in business, it was a contract made with the then existing company, whose life depended upon the duration of its then charter. It had no claim to existence except as based upon its charter, which limited its life from its inception, in 1882, to 20 years. The cause of action alleged in the petition is not based upon this theory, but upon the existence of the life of the plaintiff. And at the hearing the plaintiff introduced the tables, recognized by established insurance companies, to show the probabilities of the length of his life, and upon that theory asks for judgment for $20,000. Aside, however, from the legal duration of the telephone company's life, it was liable to go out of business at any time. Its business operations might have proved unsuccessful or undesirable, and its stockholders could have determined at any time to wind up its affairs and go out of business. His contract, therefore, with the company, dependent upon the time it was doing business, was indefinite and uncertain. No court or jury would have been authorized to give him a judgment based upon the theory that the company would continue in business during the residue of its chartered life. Therefore his damages could not be legally measured respecting such future possibility or contingency. And the only safe course for his counsel to have taken in that aspect of the case was to sue for the monthly wages as they accrued. Priest v. Deaver, 22 Mo. App. 276.

Plaintiff's counsel undertook at the hearing to escape from the embarrassment of this situation by offering to show that perhaps in 1899, and after this suit was brought, that said telephone company had, under authority of the statutes of the state respecting business corporations, obtained an extension of its corporate life for a much longer period. The mere fact, however, that it was possible, under the general statutes of the state, for the company at the expiration of its charter to have that charter at some future date extended, could not enlarge the operation of the contract, which the plaintiff's own testimony shows that he had, into a contract for the life of the plaintiff; nor to cover the new life of the company, which did not exist at the time of the contract; and it would be subject to the same incident above indicated of the right and possibility of the company to go out of business at any time at the pleasure of the stockholders. Superadded to all this, the claim set forth in the plaintiff's petition, as the basis of his action, that the second suit brought by the defendants in the circuit court of Jackson county failed on the ground that the demurrer presented therein was sustained on the ground of the pendency of the first suit in the justice court on appeal in the circuit court, where the defendants' attention was called to the ruling of the supreme court in said case of Booge v. Railroad Co., 33 Mo. 212, 82 Am. Dec. 160, and that the defendants, then being advised in the premises, could have saved the defendants' further right of action by dismissing the first suit, is not sustained by the evidence. Neither the record nor

the evidence in the case shows that the state circuit court sustained the demurrer to the second petition filed therein on the second ground mentioned in the demurrer of the pendency of another action. It is incredible to infer that so learned and experienced a judge as Judge Henry, who presided over that court at the time, could have sustained the demurrer on the second ground alleged therein, as the supreme court had held in Arthur v. Rickards, 48 Mo. 298, that a demurrer based on the ground of the pendency of another suit between the same parties for the same cause of action does not lie when such fact does not appear on the face of the petition. And such has ever been the understanding of the profession in the state under the code practice. The only inference permissible, therefore, is that the demurrer was sustained on the first ground,—that the petition was defective in not sufficiently stating facts constituting a cause of action. And this conclusion is confirmed by the fact that leave was granted to the plaintiff to file an amended petition. Neither was there one word of evidence before the court and jury on the hearing of this case that the ruling of the supreme court in said case of Booge v. Railroad Co., or any other like ruling, was discussed or called to the attention of the defendants at that hearing. And the evidence further is that the plaintiff's action in the circuit court was dismissed for the reason that he refused or failed to give security for costs, as required by the court. Who can say what the ruling of the circuit court, had that case proceeded to trial on its merits, would have been respecting the right of the plaintiff to maintain his second action? How can this court assume, or a jury be permitted to ascertain, that the circuit court would have directed a verdict for the defendant, or that under the court's instructions to the jury a verdict might not have been returned in favor of the plaintiff? How could the court, by its instructions, have authorized the jury to find in advance that from a verdict for plaintiff in said cause the defendant would have appealed; and if it had so appealed, what the decision of the supreme court would have been upon the mooted question of the divisibility of the contract? It does seem to me that a verdict for the plaintiff under such state of the case, based upon a contract running for the life of the plaintiff, would have been speculative and conjectural, which no court should permit. Neither is it too much to say that under the statement of what the plaintiff's contract with the agents of the telephone company was, as expressed by him on the witness stand, his attorneys were well justified in the conclusion reached by them on the law of the case that it was conservative to sue for the wages already earned, and from time to time as they accrued. At all events, the questions of law and practice arising on the state of facts as declared by the plaintiff on the witness stand were so debatable that it seems to me it would be an unreasonable and harsh rule for a court to say that an attorney should be liable to his clients for making a mistake respecting his remedy under such circumstances. It extends the rule establishing the liability of attorneys for negligence and ignorance beyond precedent and sound reason.

The motion for new trial is overruled.

LIEBIG'S EXTRACT OF MEAT CO., Limited, v. WALKER et al.

(Circuit Court, S. D. New York. April 4, 1902.)

1. UNFAIR COMPETITION—IMITATION OF NAME AND DRESS.
Complainant, Liebig's Extract of Meat Company, Limited, manufactured and sold in the market extract of meat, put up in two-ounce jars, having a wrapper and a neck label, and capped with a metallic capsule. The label had printed thereon the name of the goods, "Liebig's Extract of Meat," its own name as maker, and a fac simile signature of "J. v. Liebig," in blue script, running diagonally across the printed matter. Defendant entered the market with an extract of meat put up in jars of the same size and shape, having a neck label and wrapper of substantially the same material and appearance, printed in the same colors. They contained the name of the goods, "Liebig's Extract of Beef," and the names "Liebig Fluid Beef Company" and "Liebig Beef Company," both shown by the evidence to be fictitious. Diagonally across the wrapper was the fac simile signature "J. T. Walker," in blue script, closely imitating in appearance the signature on complainant's wrappers; and other portions of the reading matter were also similar. *Held*, that the dress of defendant's goods was evidently intended to deceive the public into buying such goods as those of complainant, and constituted unfair competition, which entitled complainant to an injunction restraining defendant from using the name "Liebig's Fluid Beef Company," or simulating the name or labels of complainant in any manner which would deceive purchasers of ordinary intelligence, using ordinary care.[1]

2. TRADE-MARKS—COMMON-LAW RIGHTS—LIEBIG'S EXTRACT OF MEAT.
Liebig's Extract of Meat Company, Limited, of London, has no common-law trade-mark in the name "Liebig," as prefixed to the words "Extract of Meat," similar rights in the use of the name having been previously granted by Baron Liebig to others; and such name has become a generic designation of the article, when prepared by the Liebig process, which may be used by any manufacturer or vender.

3. SAME—UNFAIR COMPETITION—GROUNDS FOR RELIEF.
The Liebig process of making extract of meat not being a trade secret, but free to be employed by all, a court of equity cannot enjoin a manufacturer or dealer from designating his product as "Liebig's," at suit of a rival dealer, on the ground that it is not in fact made by such process, and the designation is therefore fraudulent; that being a question which can only arise between seller and purchaser.

4. SAME—EFFECT OF REGISTRATION—NAME WHICH HAD BECOME PUBLICI JURIS.
The registration of the name "Liebig's Extract of Meat" as a trade-mark in the United States by a foreign manufacturer could confer no exclusive right where the article was previously known and sold in this country under such name as a generic designation, and where, moreover, such manufacturer had no trade-mark rights in the name in its own country.

In Equity. Suit for infringement of trade-mark and for unfair competition. On final hearing.

James L. Steuart (Steuart & Steuart, of counsel), for complainant.
Hubert A. Banning, for defendant J. T. Walker.

HAZEL, District Judge. This suit, in its original form, was commenced against J. T. Walker, trading under the name and style of J. T. Walker & Co., the H. M. Anthony Company, a corporation, Henry

[1] Unfair competition in trade, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v Harper & Bros., 30 C. C. A. 376.

M. Anthony, and Charles F. Sullivan. Subsequently, pursuant to stipulation between counsel for complainant and counsel for all defendants except J. T. Walker, an order was made by Judge Coxe permitting a discontinuance as to the stipulating defendants. At the hearing a motion was made to amend the bill of complaint by striking out the defendants against whom the suit was discontinued, and charging the defendant Walker with the acts complained of. The defendants are residents of the state of New York, and in the original bill were charged with intent to injure the complainant by fraudulently diverting and securing to themselves the profits and emoluments connected with the sale of complainant's product, known and designated as "Liebig's Extract of Meat." It is further alleged in the bill that the manufacture and sale of this article by the defendants were carried out pursuant to a conspiracy with Libby, McNeill & Libby, an Illinois corporation, not a party to this suit, to defraud the complainant. It was insisted on the argument that a discontinuance as to some of the defendants required a dismissal of the bill against all defendants on the ground that the interests of the defendants are inseparable. I am quite well satisfied that a decree can be made without affecting the rights of any absent parties. The defendants against whom the suit was discontinued are not indispensable; hence their absence is not fatal. The bill cannot be considered in any sense as a new bill, and the amendment is therefore allowed.

The gist of the amended bill charges that the defendant Walker has sold and continues to sell extract of meat manufactured by Libby, McNeill & Libby, contained in similar jars, labeled and inscribed in substantial resemblance to jars, wrappers, and labels used by complainant in the sale of its extract of meat. Complainant's wrapper has printed thereon the name of the goods, "Liebig's Extract of Meat," name of maker, "Liebig's Extract of Meat Co., Limited," and a fac simile trade-mark signature of "J. v. Liebig," in blue, running diagonally across the printed matter on the wrapper. The jar contains two ounces of meat extract, and is corked and capped with metal capsule, on which appear the words "Liebig's Extract of Meat Co., Limited, London." It has printed upon a narrow label wrapped around the upper part of the jar the words, "Examined and Approved by the Director of the Scientific Department and Control. Dr. M. von Pettenkofer and Dr. Carl von Voit Delegate." The printed matter upon the neck label is in black on white paper, and upon the wrapper in red and black. It has printed thereon, in addition to the words already stated, the words, "Extractum carnis Liebig." The defendant's jar is of the same size and shape as that of complainant. The neck label and wrapper is of substantially the same material and appearance. Upon the neck label are printed in black letters the words, "Examined and Approved by the Director of the Scientific Department of the Liebig Fluid Beef Company"; and upon the wrapper are printed the words, in red and black letters, "Liebig's Extract of Beef, Depots, New York, Chicago, Prepared by Liebig Beef Co. (Extractum carnis Liebig)." And diagonally across the printed matter on the wrapper appears the script signature in blue, "J. T. Walker," in close imitation of "J. v. Liebig." The jars, neck label, wrapper,

and the printed matter thereon, used by both parties, quite closely conform. Taking these facts into consideration, together with the similarity of the products of both parties, unfair competition is charged by the complainant. The proofs satisfactorily show that "Liebig's Fluid Beef Company" was and is a fictitious concern. The wrappers used by the defendant having printed thereon "Liebig's Fluid Beef Company," either with or without the signature of "J. T. Walker" across the face of the printed matter, are clearly imitations of the complainant's wrapper. The signature of the defendant impressed upon the wrapper in blue, whenever used, is imitative of the blue fac simile script signature used by the complainant. The defendant, therefore, must be enjoined from using on his goods a wrapper and neck label having printed thereon the words "Liebig's Fluid Beef Company," as shown by the proofs, and which in color and general appearance clearly simulate that of the complainant, and are calculated to deceive the public. The defendant, by using a neck label and wrapper containing words from which it may be inferred that its product is that of complainant's make, manifests its indubitable purpose to deceive the public and palm off the defendant's extract as that manufactured by complainant. A similar suit to the one at bar, brought by complainant against Libby, McNeill & Libby and others, of Chicago, Ill., was tried in the Seventh circuit. The complainant there maintained, as here, that the defendant, by the use of the word "Liebig" as applied to the use of his product, infringed complainant's common-law trade-mark right in the nomenclature of Liebig, as prefixed to the words "Extract of Meat." Liebig's Extract of Meat Co. v. Libby, McNeill & Libby (C. C.) 103 Fed. 87. This claim was determined adversely to complainant. In the Chicago case, complainant's right or title to the word "Liebig" was directly involved. A common-law trade-mark right to the name of "Liebig" was insisted on. Judge Seaman, in an exhaustive and well-considered opinion, found that there was no evidence showing devolution of title from the Royal Pharmacy, from which complainant claims title in the use of the name "Liebig" in connection with "Extract of Meat"; that the grant of such right by Baron Liebig to the complainant, April 12, 1866, was clearly insufficient to establish such right, in view of prior agreements and use of the name and formula in the manufacture of extract of meat by the Royal Pharmacy. Reference is made by Judge Seaman to English and Continental decisions on the right of complainant to maintain an exclusive trade-mark right in the designation. He held that the designation and its equivalent were common property; that it has many years since become the commercial name of the article, and therefore the defendant in that case had a right to its use. He held the defendant, however, guilty of unfair competition, and enjoined it from simulation of the label and name of complainant. By order subsequently entered, the court directed that "the defendant, Libby, McNeill & Libby, be perpetually restrained and enjoined from using the word 'Liebig' in association with the word 'Company,' in any form or combination of words, to indicate the maker, distributer, or vender of its extract of meat, and from using such words associated together in any manner whatsoever which

could lead purchasers of its extract of meat to believe that it emanated from complainant, and was the complainant's extract of meat, which is always associated with the complainant's corporate title of 'Liebig's Extract of Meat Company, Limited.'" The use of the external wrapper marked "Liebig Fluid Beef Company," either with or without the signature diagonally across the face of the printed matter thereon in fac simile of the script signature, which would be a colorable imitation of the blue fac simile script signature of the complainant company, was also enjoined, as well as the use of the wrapper for the sale of extract of meat, which would be a colorable imitation of complainant's. Judge Seaman followed the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, affirming the rule there stated, and held that, as the manufacture of beef extract in accordance with the Liebig formula is equally open to the defendants under that name, they may so designate the meat extract manufactured by them. His opinion then quotes the following from the Singer Mfg. Co. Case, supra:

"Subject, however, to the condition that the name must be so used as not to deprive others of their rights, or to deceive the public, and therefore that the name must be accompanied with such indication that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact."

The defendant, therefore, in the sale of his extract of meat, is required to offer his product in such a manner as not to lead an intending purchaser of ordinary intelligence, using ordinary care, into the mistaken belief that he was purchasing an article manufactured by another.

Defendant stoutly maintains that the determination of the court in Liebig's Extract of Meat Co. v. Libby, McNeill & Libby, supra, is res adjudicata on all questions involved in this suit. I do not think so. The defendant here was not a defendant in the Illinois case, and the goods as they were offered to the public were of different appearance. The wrapper has printed upon it the words "Liebig Beef Company," and "Liebig Fluid Beef Company," and has printed in blue diagonally across it a script signature in close imitation of the fac simile signature of "J. v. Liebig." This fac simile signature did not appear upon defendant's wrappers in the Chicago case. Moreover, Judge Seaman held that the evidence in that case showing Libby, McNeill & Libby's connection with the Walker signature in imitation of the signature of "J. v. Liebig" was insufficient to overcome the testimony on the part of the defendants by which their participation in the use of such a wrapper was denied, and especially as Walker and other witnesses gave testimony that Walker's production in New York of "Liebig's Extract of Meat" was independent of defendant Libby, McNeill & Libby. In view of these facts, the Libby Case cannot be held to be res adjudicata. White v. Chase, 128 Mass. 158. I concur in the opinion of Judge Seaman that the word "Liebig," prefixed to "Extract of Meat," or in connection with the sale of meat, has long since ceased to signify the origin of its manufacture, and has become a generic description of the article sold by complainant under that designation. The language employed by

Judge Wallace in his dissenting opinion in Rahtjen's American Composition Co. v. Holzapfel's Composition Co., 41 C. C. A. 334, 101 Fed. 263, aptly applies. He says:

"So long as Rahtjen and his associates and successors in business enjoyed a monopoly of the manufacture of the article, the name not only identified the characteristics of the article, but also denoted the source of manufacture; but when the monopoly ceased, and the article passed into the domain of public property, the name which had been its generic designation also passed. Their monopoly has ceased to exist in this country, as well as abroad, and the property in the name can no more survive here than it can abroad."

This view has been sustained by the supreme court decision in this case in review, and which will be considered later.

The question whether complainant has ever had an exclusive right to the designation "Liebig's Extract of Meat" has also received unusual consideration in the courts of England. Meat Co. v. Hanbury, 17 Law T. (N. S.) 298; Same v. Anderson, 55 Law T. (N. S.) 206; same in house of lords decision in 1885. I deem it, therefore, entirely unnecessary to again review the facts upon which are based those decisions holding adversely to complainant's claim of the exclusive right to the use of the name "Liebig" in connection with the manufacture and sale of extract of meat. Complainant insists, however, that, as the defendant has given no proof of the truthfulness of the assertion printed upon his label that his goods are manufactured according to the formula of Baron Liebig, complainant is injured, and that this court, in the absence of such proof, should enjoin an apparent deception upon the public; that the United States trade-mark rights of the complainant are independent of trade-mark rights obtained in other countries, and, although the words "Liebig's Extract of Meat" may be generic, still the sale of such meat extract by defendant deceived the public, and is a fraud upon the complainant, if a secondary meaning of these words be shown in the United States. To supplement the first proposition advanced, complainant argues that its proof establishes that its extract of meat is manufactured according to the formula of Baron Liebig, and that, in the absence of proof on the part of the defendant that he employs the process of Baron Liebig, this court, in the exercise of its equitable power, should enjoin the use of the words "Liebig's Extract of Beef" on defendant's labels. A sufficient answer to this contention is that Baron von Liebig never regarded his formula as a trade secret. The record is replete with proof that the process of manufacturing extract of meat according to his formula was made public many years since. The public is presumed to be acquainted with the process. As it is no longer a secret process, a purchaser of "Liebig's Extract of Meat," using ordinary care in selection of the article purchased, cannot be fraudulently induced to accept a different product. Obviously, if a purchaser, believing that jars purchased by him contain "Liebig's Extract of Meat," should discover that such jars contain some other commodity, and that a fraud has been practiced upon him, he has his remedy for damages at law. It would, however, be extending the power of a court of equity beyond its proper sphere to hold that a rival dealer in a commodity may successfully apply to that court to

enjoin and restrain the manufacture and sale of a product or article that any one may manufacture and sell, even though a sale of the article is fraudulent. The case of City of Carlsbad v. Kutnow, 18 C. C. A. 24, 71 Fed. 168, cited by counsel, is distinguishable from the case at bar. There the city of Carlsbad gave a contract for a term of 15 years, by which it conveyed the sole and exclusive right to sell the products of Carlsbad Springs, including salts in crystallized and powder form. The complainant gave by contract to Eisner & Mendelson Company the sole and exclusive right to sell said product in the United States. The court held that as the city of Carlsbad had not used the name upon any but generic salts derived from the spring waters, and there being no evidence that it authorized or acquiesced in such use by any other person, it was infringement to sell articles of salts in no way derived from the Carlsbad waters under the name of "Improved Effervescent Carlsbad Powder." In the case at bar the primary question, as we have seen, is decided against the complainant. No sole and exclusive right to the formula is found. In Hiram Walker & Sons v. Mikolas (C. C.) 79 Fed. 955, it was admitted that the whisky bottled and sold by defendants as "Canadian Rye Whisky" is not made in Canada. The statement on the labels that the whisky was distilled and bottled by H. S. Ramsey & Sons, of London, Ontario, was admittedly untrue, and no such firm was in existence. In Buckland v. Rice, 40 Ohio St. 526, it was shown by the complainant that "Trommer's Extract of Malt" was not made by Trommer's formula, but by a formula of one Gessner. In none of these cases had the article sold become common property.

The trade-mark of complainant was registered in England, October 25, 1876, and in the United States, June 30, 1885. The contention that a secondary meaning of the words "Liebig's Extract of Meat" arises in the United States because of independent right conferred by the trade-mark is untenable. The supreme court of the United States, in Holzapfel's Composition Co. v. Rahtjen's American Composition Co. (decided Oct. 21, 1901) 22 Sup. Ct. 6, is decisive of this contention. In that case the trade-mark "Rahtjen's Composition, Holzapfel's Manufacture," was registered after the defendant company had commenced the manufacture of paint, and had sent the same to the United States under that description, and as early as in 1884. The court said:

"The United States registered trade-mark could not, therefore, interfere with the prior, but not exclusive, right of the defendant to the use of these words."

The doctrine of the Rahtjen Case would seem to apply to the case at bar, where the generic appellation was known in this country long prior to registration of the trade-mark. In the Rahtjen Case the supreme court further said:

"In the manufacture and sale of the article, of course, no deceit would be tolerated; and the article described as 'Rahtjen's Composition' would, when manufactured by defendant, have to be plainly described as its manufacture."

It follows, therefore, from the foregoing, that the defendant Walker has the right to designate his product by the name "Liebig's Ex-

tract of Beef," for such it must be assumed to be. But in doing so he must use clear and unmistakable words which will identify his own product as such, and not that of "Liebig's Extract of Meat Company, Limited, London." The language of Judge Seaman in the Chicago case, declarative of complainant's right to injunction, aptly applies:

"The complainants are entitled to a decree for the protection of their good will, enjoining the defendants from such simulation of the label and name of the complainants. The injunction will apply to each of the forms of outer wrapper above indicated, but will not extend to jars or pots in use, nor to the neck labels, inner labels, or certificate, as neither of these is deemed objectionable, within the rule and to the extent demanded for such protection."

The record, which is a voluminous one, clearly shows that the objective purpose of the complainant was to establish an exclusive right to the words "Liebig's Extract of Meat." The defendant is a dealer in meat extracts, and purchases his commodity from Libby, McNeill & Libby, who were involved in the Chicago suit, and by whom an accounting was directed by the court. The damages which the complainant claims to have sustained are due to the use of the generic name of the meat extract, as well as to unfair competition. As much difficulty would be experienced in proving any damages,—indeed, it is doubtful whether any damages could be recovered,—no accounting is directed. Little v. Kellam (C. C.) 100 Fed. 353; Hires Co. v. Consumers' Co., 41 C. C. A. 71, 100 Fed. 813. By far the greatest amount of money has been expended in taking proof on the main question involved. The charge of unfair competition is merely supplementary. Considerable testimony was taken both abroad and in the United States. English and Continental decisions, writings and lectures by Baron von Liebig and others, are printed in the record. No reason exists why Walker should contribute to the payment of a record which appears not to have been necessary to substantiate a violation of a United States registered trade-mark, or an act of unfair competition. The complainant is awarded costs, but, in computing the same, only such costs and disbursements are allowed, to be taxed by the clerk, as relate to unfair competition by defendant Walker. A decree in accordance with the foregoing opinion may be entered.

NORDLINGER v. UNITED STATES.

(Circuit Court, S. D. New York. May 9, 1902.)

1. CUSTOMS DUTIES—CONSTRUCTION OF STATUTES—COMMERCIAL DESIGNATION.
The commercial designation of an article, when clearly established, and shown to have been definite, uniform, and general, will control, in the construction of a tariff statute.[1]

2. SAME—EVIDENCE OF COMMERCIAL DESIGNATION.
While commercial designation for the purpose of tariff classification is that known and used by importers and large dealers, and not that of the retail trade, a retail dealer is not for that reason incompetent to testify upon the subject, but the weight to be given to the testimony of any witness depends upon his intelligence and knowledge of the

[1] See Customs Duties, vol. 15, Cent. Dig. § 14.

subject, and a retail dealer may, from the magnitude of his business and purchases, be better qualified to testify than some importers.

8. SAME—CLASSIFICATION—LEGHORN CITRON.

Leghorn citron, which has always been imported in substantially the same form and condition, has been commercially designated and classified by importers and wholesale dealers since prior to the tariff act of 1883 as a dried fruit, and is properly classified under paragraph 704 of that act (22 Stat. 519), placing in the free list "fruits, green, ripe, or dried, not specially enumerated or provided for in this act," and not under paragraph 302 (page 504) as a "comfit, sweetmeat or fruit preserved in sugar."

Appeal from a decision of the board of general appraisers affirming the action of the collector in assessing duty on certain imported merchandise.

Albert Comstock, for importer.

D. Frank Lloyd, Asst. U. S. Atty., for the United States.

COXE, District Judge. The merchandise involved is known as "Leghorn citron" and was imported in 1890 while the tariff act of 1883 (22 Stat. 488) was in force. The collector assessed duty under one of the paragraphs of "Schedule G—Provisions," which is as follows:

"Comfits, sweetmeats, or fruits preserved in sugar, spirits, sirup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem." 22 Stat. 504.

The importer insists that it should have been admitted free of duty as a "dried fruit," under a paragraph of the free list of the same act, which is in the following words:

"Fruits, green, ripe, or dried, not specially enumerated or provided for in this act." 22 Stat. 519.

Although the paragraphs in the act of 1883 are not numbered counsel agree that the paragraphs in question are, respectively, 302 and 704. The question, then, is—should the citron in controversy have been classified under paragraph 302 as fruit preserved in sugar or under paragraph 704 as a dried fruit? Or to state the issue still more concisely, has the importer proved by a preponderance of testimony that the imported citron was dried fruit?

Conceding the general proposition that Leghorn citron as imported in 1890 was preserved fruit, the importer contends that it was known commercially as "dried fruit" at and prior to March 3, 1883, the date of the passage of the act. Almost the entire proof has been taken in this court so that the question is an original one to be determined by a fair preponderance of testimony. As the board did not have the question before them upon the present record, or, in fact, upon any testimony, sufficient to establish a trade meaning, the usual rules relating to appeals from the decision of the board on questions of fact have no application here. There can be no doubt that the commercial designation of an article, when clearly established, is to be considered in preference to its ordinary designation, and fixes its status for tariff purposes. Such designation is the result of established usage in commerce and trade and must be "definite,

uniform and general, and not partial, local or personal." Arthur v. Lahey, 96 U. S. 112, 24 L. Ed. 766; Maddock v. Magone, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482; Patton v. U. S., 159 U. S. 500, 506, 16 Sup. Ct. 89, 40 L. Ed. 233; Robertson v. Salomon, 130 U. S. 412, 9 Sup. Ct. 559, 32 L. Ed. 995; Toplitz v. Hedden, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961.

Commercial designation, for purposes of tariff classification, can only be established by proof showing how the article in question is known in the language of trade and commerce. Where do the importers and large dealers place it? How do they classify it? By what name is it bought and sold by them? It is manifest that the language of the retail trade is insufficient to establish commercial designation, but the court is unable to accede to the proposition, so often argued in these cases, that a retail dealer is incompetent to testify upon the subject at all. The court does not so understand the law. The weight to be given to the testimony of a witness depends upon his knowledge of the subject in hand and a retail dealer who does business upon a gigantic scale, bringing him daily in touch with importers and jobbers, is certainly better qualified to throw light upon a commercial question than a wholesale dealer or importer who conducts a petty and insignificant business. In other words, it is the intelligence and knowledge of a witness which determines the weight to be given to his testimony and not his vocation. On the other hand, it is entirely clear that an importer or wholesale dealer will, in the nature of things, be much more likely than the retailer to possess the knowledge which enables him to speak ex cathedra upon a question of commercial designation. The evidence bearing upon this question was read at the argument and the more important parts have since been re-examined with the result that the court is of the opinion that the preponderance of testimony is with the importer.

Comparing the group of witnesses called by the importer with those called by the government it is thought that the former by reason of their large business transactions and extensive knowledge were better qualified than the latter to speak upon questions relating to the trade and commerce of the country. It is true that many of the importer's witnesses are directly interested in the result of this litigation, but on the other hand their testimony is strongly corroborated by a large number of publications addressed to the wholesale trade in different sections of the country from which it appears that Leghorn citron has uniformly and for many years been classed as a dried fruit. These publications were issued since the date of the act, but were made competent by the undisputed testimony that the classification began years prior to the act and has continued unchanged to the present day. The finding that citron is, and was at the date of the act of 1883, known commercially as a dried fruit is in conformity with the decision of this court in Nordlinger v. U. S., 69 Fed. 92, and, although a large volume of additional testimony has been taken, precisely the same issue is presented. But it is argued that even though the court should find that citron was known commercially as a "dried fruit" it is more specifically provided for as a "fruit preserved in sugar or sirup." In other words, it is contended that paragraph

302 provides a duty upon a dried fruit if that dried fruit is preserved in sugar. The question thus presented is an interesting one and much may be said upon both sides, but it is thought that the argument of the district attorney, although able and ingenious, fails to give sufficient significance to the commercial designation, which, for the sake of argument, must be assumed as established, and proceeds upon the theory that Leghorn citron is in fact a dried fruit and is also in fact a fruit preserved in sugar and that as between the two descriptions the latter, namely, "preserved in sugar" is the more specific. The trade name when ascertained fixes the character of citron for tariff purposes. Being known to commerce as a dried fruit it would seem that congress must have intended to include it under that term notwithstanding that it was also a preserved fruit in fact, but not so known commercially. Although preserved fruit, Leghorn citron was known to the wholesale trade as dried fruit and was bought and sold under that name. Can the fact that sugar was used in the preserving process take it out of the commercial category? It is thought not. Take for illustration a typical dried fruit, raisins for instance; it certainly would not alter the tariff classification of raisins to show that sugar was used in the drying or preserving process. Indeed, the proof shows that well known members of the dried fruit group are subjected to a preserving process in which sugar, spirits and sirup are employed. There never has been any doubt as to the citron imported. It came from the Mediterranean and was known as Leghorn citron because this was the largest point of export. It always was imported in substantially the same condition. It never came to this country with the original sirup of preservation still remaining. It never came in bottles or casks in liquid of any kind. Neither was it imported after being subjected to the heat of the sun as the sole drying process. Although the precise method by which Leghorn citron was prepared was not known in this country until recent years the process was always the same and so was the product. Trade and commerce had to deal with one variety only and it was this article, always the same in origin, method of preparation and appearance, that the wholesale merchants and importers of the country chose to designate as a dried fruit and which they necessarily excluded from the category of preserved fruits. All this is made clear by the testimony offered by the importer. The testimony of Mr. Gordon may be taken as illustrating the distinctions suggested He says:

"My firm is Gordon & Dilworth. My business is dried fruits, general preserved fruits, jellies, jams, and table delicacies generally. At and prior to 1883 I personally dealt in the Leghorn citron in controversy in this case; both buying it and selling it. I always bought and recognized it as dried fruit. I have bought Leghorn citron in the wholesale markets of this country for at least fifteen years prior to 1883. The word 'sweetmeat' is a general term and includes preserved fruits, jellies, jams, glacéd fruits, any compound preparation of fruits, and would be limited in its application to those things preserved with sugar; while the term preserved fruits had, certainly by 1883 and for many years prior to that, to the trade and consuming public, narrowed itself down, that when mentioned without any other explanation always meant fruits preserved in sugar, or sugar sirup, and the original sirup remained with the fruit without separation. Ever since the foundation

of the house of Gordon & Dilworth, just fifty years ago this year, they have put up preserved citron, and preserved citron has been manufactured universally through the country both by business houses and by private families and always has meant what I have indicated preserved fruits to mean, namely, the fruit put up with the original sugar or sirup of preservation without separation. It was intended for immediate consumption, for eating. The main use of Leghorn citron is for mincing and using in the manufacture of plum puddings, mincemeats, cakes, and other composite culinary concoctions. It is also purchased by confectioners who use it in composition in making candies. It is also cut into small pieces, put through special processes, and then sold in its prepared state as a part of the general stock of a candy merchant. It undergoes a preparation, generally steeping in sirup and glacé, or something of that kind. Every dealer has a different way of doing things. My house manufactured an extensive line of these products for consumption of the class I have described. The preserved citron in bottles and sirup and the mincemeat and plum pudding containing citron, those are largely made by our house which is the oldest house in the country."

Another witness, Mr. Dudley, who was called for the government, testified as follows:

"Q. What are the principal articles known in the trade as dried fruits? A. Prunes, raisins, currants, prunelles, citron. Q. And citron? A. Yes, sir. Q. Well, you have named citron for what reason as a dried fruit? A. Because I think it is generally understood in trade as a dried fruit. Q. How is it regarded commercially? A. Commercially it is a dried fruit."

Mr. Hoffman, another government witness, while not personally in accord with the commercial designation, testified as follows:

"Q. Was citron commercially known as a dried fruit at and prior to the year 1883? A. Yes. Q. It was known as a dried fruit? A. It was known then as well as now as a dried fruit, if you take it that way. Q. Was it known commercially as a dried fruit? A. No more then than it is now. Q. It is known now as a dried fruit commercially? A. Yes, it is; you couldn't put it under any other heading."

To quote further from the voluminous record would unnecessarily prolong this opinion; sufficient already appears to make it clear how Leghorn citron was regarded in trade and commerce. The weight of evidence is to the effect that it was recognized as a dried fruit and that paragraph 302 was considered as having reference to a distinct group of fruits in no way liable, in the nomenclature of commerce, to be confused with the other well-known group covered by paragraph 704. If the importer's contention be correct that citron was known commercially as a dried fruit then it is as much within the provisions of paragraph 704 as if it were mentioned there eo nomine. Let it be assumed, in order to test the correctness of the government's contention, that this was the fact, that paragraph 704, instead of being couched in general terms, mentions the dried fruits by name, as "dried figs, dates, citron," etc. We then would have "dried citron" opposed to "fruits preserved in sugar" and there can be no question that the former is the more specific description of Leghorn citron, especially when it appears that this was the only kind of citron imported and the lawmakers could have had no other kind in mind. It will be noted that several members of the dried fruit group are specially provided for in Schedule G, namely, figs, raisins, dates and prunes. In Cadwalader v. Zeh, 151 U. S. 171, 14 Sup. Ct. 288, 38

L. Ed. 115, the court, at page 178, 151 U. S., and page 291, 14 Sup. Ct., 38 L. Ed. 115, says:

"If the whole testimony in the case enabled the jury to determine whether the articles in question were commercially known as toys, their commercial designation by those carrying on the business of dealing in them was a safer test, and more in accord with the apparent intent of congress, and with the rule of construction judicially established in similar cases, than to leave the question, whether 'toys' or 'earthenware' was the fitter name for these articles, to be decided by the opinion of jurors based upon their personal knowledge or experience."

In Robertson v. Salomon, supra, the court says:

"The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. But if the commercial designation, fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation."

In the Tea Case, 9 Wheat. 430, 6 L. Ed. 128, it appeared that although there existed a simple and distinct tea known as "Bohea," the name, in a commercial sense, had been used to designate a compound made up in China of various kinds of the lowest priced black teas. It was held that if the tea in question was bought and sold under the name "Bohea" its place was fixed thereby for tariff classification. Applying the law to the facts here it is thought that the preponderance of testimony is to the effect that the citron in controversy was known commercially as a dried fruit and that paragraph 704 more aptly describes citron in the crude condition in which it was brought to this country than paragraph 302, which relates to fruits advanced from the crude state by a comparatively elaborate and expensive method of preservation. The case presents one of the most puzzling controversies arising in tariff law which the court has had to consider for many years. The protean character of the article in question growing out of the fact that sea water, boiling water, sugar and heat are all employed in drying and preparing it for market, the disagreement upon the question of commercial designation and the conflicting results in prior litigations, all combine to surround the issue with embarrassments and perplexities. Nevertheless the court, after somewhat extended examination and reflection, is convinced that the contention of the importer is correct.

The decision of the board, in so far as it relates to citron, is reversed and in all other respects it is affirmed.

HALE v. TYLER et al. (three cases).

(Circuit Court, D. Massachusetts. May 6, 1902.)

Nos. 1,555–1,557.

1. FEDERAL COURTS—EQUITY JURISDICTION—EFFECT OF STATE STATUTES.
The inherent jurisdiction in equity of courts of the United States cannot be narrowed by state laws conferring jurisdiction of certain matters upon a particular state court, even though such jurisdiction is made exclusive so far as the state courts are concerned.[1]

[1] See Courts, vol. 13, Cent. Dig. §§ 795, 902.

2. SAME—CREDITORS' SUIT TO REACH LANDS OF DECEDENT — POSSESSION OF PROBATE COURT.

Where the requisite diversity of citizenship exists, a federal court of equity has jurisdiction of a suit brought by a creditor of a decedent, on behalf of all creditors who may come in, to set aside a conveyance of real estate made by the deceased in his lifetime, and alleged to have been fraudulent, notwithstanding the pendency of probate proceedings on his estate in a state court, where such court has granted no license to sell such real estate, nor otherwise taken possession of it; and such jurisdiction is not affected by the fact that, under the statutes of the state, a state court of equity would not have jurisdiction.

In Equity. On motion to dismiss for want of jurisdiction. See 104 Fed. 757.

M. H. Boutelle and E. W. Freeman, for complainant.
H. W. Chaplin, for defendants.

No. 1,556.

LOWELL, District Judge. This is a bill in equity brought by the receiver of a Minnesota corporation. It sets out that one Norton, a stockholder in the corporation, had, under the laws of Minnesota, become indebted to the plaintiff as such receiver; that Norton, in fraud of creditors, conveyed real estate in Massachusetts to the defendants, one of whom is now his administratrix. The bill prays that the conveyances may be set aside for the benefit of all creditors who may come in. The defendants have filed a motion to dismiss for want of jurisdiction, on the ground that the matter is within the exclusive cognizance of the probate court of Massachusetts.

As was said by Judge Colt, in this court, in Jordan v. Taylor, 98 Fed. 643, 645, "the determination of the question of jurisdiction in this class of cases, as shown by the authorities, is not always free from difficulty." The following principles are clearly established: (1) This case is within the jurisdiction of the English court of chancery, as that jurisdiction existed at the time of the American Revolution. This case is not similar to proceedings to probate a will or to appoint an administrator, which are wholly outside the ordinary jurisdiction of a court of equity. (2) "The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses." Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260. It follows, therefore, that this court has jurisdiction in this case, unless its inherent jurisdiction in equity is here particularly limited. (3) The enlargement of the jurisdiction of the state court of probate does not narrow the inherent jurisdiction of a federal court of equity. This has been held in many cases. "The jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." Hyde v. Stone, 20 How. 175, 15 L. Ed. 874. "If legal remedies are sometimes modified to suit the changes in the laws of the state, and the practice of their courts, it is not so with equitable." Payne v. Hook, above cited, at page 430, 7 Wall., 19 L. Ed. 260. That an enlargement of the jurisdic-

tion of a state court may enlarge the jurisdiction of the federal courts seems to be decided in Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524, and is fully stated in Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006. Whether this additional jurisdiction thus conferred by state statute is equitable or legal, or neither, has not been determined. If it is deemed equitable, then the dictum in Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260, that the equity jurisdiction of the federal courts "is uniform throughout the different states of the Union," may require modification. However this may be, it is settled that the equity jurisdiction which is inherent in the federal courts cannot be narrowed, even if it may be added to, by a state statute. It follows, therefore, that the jurisdiction of this court is unaffected by the jurisdiction conferred upon the Massachusetts court of probate, even if that jurisdiction is, by the state statute, made exclusive, so far as the state courts are concerned.

The inherent jurisdiction in equity of a federal court is restrained of its exercise under some conditions. "The only qualification of the application of this principle is that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state." Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 348, 30 L. Ed. 532. "Where property is in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process issued out of another court." Jordan v. Taylor, 98 Fed. 645. Upon this ground was decided Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536, and not upon any limitation of the inherent jurisdiction of a federal court of equity. "The powers of courts of equity are not in issue in the present suit, nor is there any question presented about restraining or limiting them." 21 Wall. 284, 22 L. Ed. 536. That this limitation upon the exercise of equity jurisdiction by the federal courts depends upon possession of the res, and not upon inherent want of jurisdiction, appears further from Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400. There the federal court had taken possession of the res before the death of its owner. The supreme court held that the federal court should retain control, although the exclusive possession of the probate court would otherwise have been undoubted. Even where the probate court has first taken possession of the res, jurisdiction over the controversy still inheres in the federal court, and may even be exercised by the latter, provided the control of the res by the former remains undisturbed.

This court has to determine, therefore, if the estate alleged to have been conveyed in fraud of creditors by the defendant's intestate is in the possession of the Massachusetts court of probate. The defendant relies upon Pub. St. Mass. c. 134, § 15:

"If an executor or administrator is licensed to sell lands fraudulently conveyed by the deceased or fraudulently held by another person for him, or lands to which the deceased had a right of entry or of action or of which he had a right to a conveyance, he may first obtain possession of such lands by entry or by action, and may sell the same at any time within one year after so obtaining possession. He may make a formal entry upon the premises and bring the action on his own seizin acquired by such entry, demanding the land as executor or administrator."

That the land in question is not in the possession of the probate court, so as to exclude the jurisdiction of this court from all suits concerning it, is plain. Plainly, this court would have jurisdiction of an otherwise proper suit to recover its possession, brought on the ground that Norton never had title to it. The land is not here supposed by the defendant to be in the possession of the probate court, but only that incorporeal right which exists to subject the land to the payment of Norton's debt, as having been conveyed by him in fraud of his creditors. This right the probate court can confer upon the administratrix. The same or a similar right is conferred by the general principles of equity upon Norton's creditors. The former must proceed in strict accordance with statute. The latter may resort generally to a court of equity, until they are deprived of that resort (a) by statute, as they may be deprived by statute of their resort to the state courts of equity in this case; or (b) by the fact that the probate court, by its exclusive possession of this incorporeal right, has excluded from its control all other courts, even though those courts are otherwise of competent jurisdiction.

The possession of an incorporeal right is a metaphysical abstraction. Yet I cannot think that the probate court has taken exclusive possession of the incorporeal right here in question merely by granting letters of administration, without inventory, or license to sell, or even representation of insolvency. In Ball v. Tompkins, 41 Fed. 486, the circuit court for the Western district of Michigan proposed to itself the question now before this court:

"What is the nature and character of the possession of the state or federal court which excludes the exercise of authority over the subject or thing by the other?"

The reply was as follows:

"That the possession contemplated as sufficient to make it exclusive is that which the court, by process, or some equivalent mode, has, either for the direct purpose of proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. This thing may be corporeal or incorporeal,—a substance or a mere thing. But a controversy, a question, an inquiry, is not such a thing. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds, from the beginning to the judgment, without the court's having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession." 41 Fed. 490.

The property there in question was real estate devised to executors in trust to pay the rents and profits to the beneficiaries. The court held that this real estate was not in the possession of the court of probate:

"It could license its sale, if that should become necessary; and, if not, it could release it from that liability which the law, and not any process of the court, put it under, and order its division among those entitled, upon proper proceedings. If the property should be sold under a license, and the sale confirmed, the executor's and devisees' title would be defeated, but only from that time." 41 Fed. 491, 492.

So in Comstock v. Herron, 5 C. C. A. 266, 55 Fed. 803, the bill was brought to compel the payment of annuities by trustees and executors, and the court said:

"This is no actual possession of the fund by the probate court. That court has simply certain powers of adjudication which may effect it." 5 C. C. A. 275, 55 Fed. 812.

The plaintiff's case is here stronger than it was in Ball v. Tompkins. The Massachusetts court of probate has taken no possession or control of the real estate which the plaintiff seeks to reach. It is true that the estate of the deceased—even his real estate—is ordinarily deemed to be in the control of the probate court. Yonley v. Lavender. But the property here in question is not Norton's real estate, in the ordinary sense of those words. It is in the hands of Norton's grantees, who hold it by a title good as against Norton. True, Norton's administratrix may petition for leave to sell it, and may then bring an action for it. Walker v. Fuller, 147 Mass. 489, 18 N. E. 400. She cannot even maintain an action to recover possession of it, except after obtaining license to sell. Hannum v. Day, 105 Mass. 33. Under these circumstances, the res is not in such possession of the probate court as to exclude the jurisdiction of the circuit court if the latter has jurisdiction in other respects. Had the Massachusetts court of probate undertaken to license the sale of the real estate in controversy, the question presented by this motion would be different. Thus in Ball v. Tompkins, at page 492, the court said:

"Undoubtedly, the state court may license the sale of this property, if it finds it expedient to do so, in the situation of affairs. If it does so, this court would, of course, respect its action. If, on the contrary, that court does not find itself compelled to grant the license, this court may order a sale, and marshal and distribute the proceeds, or it may take such action as the equities require, and it finds expedient."

In the case at bar it is not necessary to determine if a license to sell, granted by the probate court after the filing of this bill, would oust the jurisdiction of this court over the real estate. In that respect the situation in Ball v. Tompkins was not precisely what it is in this case. The quotation just made manifests the clear opinion of the learned judge that, until a license is granted, this court has jurisdiction to deal with the property.

The precise question here presented was decided in favor of the plaintiff in Hagan v. Walker, 14 How. 29, 14 L. Ed. 312, unless the fact that there the state courts of equity had jurisdiction prevented the res from falling into the possession of the probate court. The distinction thus contended for by the defendants is this: The inherent equity jurisdiction of the federal courts, indeed, remains always the same, whatever may be the comparative jurisdiction of the state courts of equity and of probate. But the exclusive possession of the res by the court of probate is given by, and dependent upon, the state statutes. Where these statutes permit the interference of the state courts of equity, this fact establishes that the possession of the probate court is not exclusive, and so a federal court of equity may deal with the res. The jurisdiction of a federal court of equity may thus be indirectly, though not directly, limited by a state statute extending the jurisdiction of the probate court. This is the theory of the defendants, but the jurisdiction of the Alabama courts of equity over property conveyed by an intestate in fraud of creditors was not alluded to in the

opinion in Hagan v. Walker. Throughout the opinion the jurisdiction of the federal court of equity to subject the property to the payment of the intestate's debts was treated as inherent, and not dependent upon any peculiarity of local law. That the administrator, representing the creditors, might be able to make good his claim to the property, was stated, but this fact was not deemed to give the court of probate such possession of the res as to exclude federal jurisdiction.

On another ground some federal courts of equity have asserted jurisdiction over a case like this. In Dodd v. Ghiselin (C. C.) 27 Fed. 405, it was held by Judge (now Mr. Justice) Brewer that a federal court of equity would not interfere with an administrator obeying the state law. But if fraud appeared, the same learned judge held that the administrator could be proceeded against in any court of equity. Dodd v. Ghiselin is founded upon Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260. Of Payne v. Hook, Mr. Justice Davis said in Yonley v. Lavender, 21 Wall. 276, 283, 22 L. Ed. 536,—the case most strongly relied on here by the defendant:

"The bill charged gross misconduct on the part of the administrator, and one of its main objects was to obtain relief against these fraudulent proceedings. This relief was granted, and the administrator compelled faithfully to carry out the trust reposed in him."

In Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547, and in Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630, decrees of a probate court made in the exercise of its jurisdiction were relieved from on the ground of fraud. If relief may be given after a decree, it may, perhaps, also be given beforehand, as was decided in Dodd v. Ghiselin. A like distinction between fraud and ordinary administration was made in Railroad v. Gomila, 132 U. S. 478, 485, 10 Sup. Ct. 155, 33 L. Ed. 400; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Van Bokkelen v. Cook, Fed. Cas. No. 16,831; McDermott v. Copeland (C. C.) 9 Fed. 536; Rich v. Bray (C. C.) 37 Fed. 273, 2 L. R. A. 225; Walker v. Brown, 11 C. C. A. 135, 140, 63 Fed. 204, 209 (commenting on Pratt v. Northam, 5 Mason, 95, Fed. Cas. No. 11,376) and at page 141, 11 C. C. A., and page 210, 63 Fed. (commenting on Payne v. Hook); Mineral Co. v. Vaughan (C. C.) 88 Fed. 566, 570; Bank v. Fitzgerald (C. C.) 94 Fed. 16. See Johnson v. Ford (C. C.) 109 Fed. 501. Precisely how far a federal court of equity, upon charges of fraud, will interfere in the administration of an estate in the probate court, the cases just cited do not determine. That any appropriate decree may be made which binds only the administrator personally, is pretty clear. In Byers v. McAuley, 149 U. S. 608, 617, 13 Sup. Ct. 906, 37 L. Ed. 867, it is intimated that even in case of fraud the res within the possession of the probate court will not be taken from its control. The decision in the case at bar is therefore rested upon the reasons first stated, and not upon any supposed jurisdiction of a federal court of equity to supersede the probate court in its administration of the effects of an intestate, even in case of fraud.

It was urged that, if this court takes jurisdiction of this bill, it will be unable to deal with the claims of creditors resident in Massachusetts against the real estate in question, and so injustice will be

done them; but the result does not follow. In Byers v. McAuley, 149 U. S. 608, 619, 13 Sup. Ct. 906, 37 L. Ed. 867, it was intimated that, if the circuit court undertakes to distribute the proceeds of the real estate here in question, it may deal with creditors resident in Massachusetts, as well as with those living outside the state.

Motion to dismiss denied.

No. 1,557.

LOWELL, District Judge. So far as the motion to dismiss is concerned, the bill in this case may be taken to be like that in No. 1,556, except that the real estate here in question is situated in Maine. Plainly, the probate court of Massachusetts has taken no exclusive jurisdiction of the right to subject to the payment of Norton's debts real estate in Maine conveyed by Norton in fraud of his creditors. That this court in other respects has jurisdiction for that purpose seems settled by Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181, and has not been denied by the defendants.

The motion is therefore denied.

No. 1,555.

LOWELL, District Judge. This bill sets out the receivership; the liability of Norton as stockholder; his death, and the appointment of Mrs. Tyler as administratrix, with the usual bond; the recovery of judgment by the receiver against the administratrix; the possession by the administratrix of the estate of Norton; the failure to file inventory or otherwise to proceed with the administration; further, that the defendant administratrix fraudulently represented the estate to be of less than its real value, and otherwise acted with intent to conceal the estate from the creditors, and that she has fraudulently appropriated the estate to her own use to the injury of the creditors. The bill finally alleges that the condition of the estate is known only to the administratrix. It prays for discovery of assets and an accounting, that the administratrix be directed to pay the debts, and that the liability on her bond be enforced.

As I understand the argument of the learned counsel for the defendant, he admits that, if the motion to dismiss for want of jurisdiction be denied either in No. 1,556 or in No. 1,557, then the motion to dismiss No. 1,555 should also be denied. As the motions to dismiss in Nos. 1,556 and 1,557 have been denied, further discussion of the motion in No. 1,555 seems unnecessary. Precisely what is the relief to which the plaintiff is entitled need not now be decided. That his allegations show him entitled to some relief is plain. He does not complain of the mere error of the defendant,—a mere mistake of law or fact in administering the estate,—but of the defendant's fraud, willful misappropriation of the assets, and devastation of the estate. He thus brings himself within the reasoning of the decision in Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260, and in Byers v. McAuley, 149 U. S. 608, 618, 13 Sup. Ct. 906, 37 L. Ed. 867. See Kennedy v. Creswell, 101 U. S. 641, 645, 25 L. Ed. 1075; Green's Adm'x v. Creighton, 23 How. 90, 107, 16 L. Ed. 419.

WESTHEIDER v. WABASH R. CO. (two cases).

(Circuit Court, S. D. Illinois. May 17, 1902.)

FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF CONSOLIDATED CORPORATION.

A corporation organized under the laws of a state for the purpose of taking over railroad property owned by a number of other corporations of different states, in accordance with an agreement between them for consolidation, under which they conveyed their properties to the new company, and then went out of existence, is a citizen of the state where it was created by individual corporators, for the purposes of the jurisdiction of a federal court.[1]

On Motions to Remand to State Court.

T. F. Drew and W. C. Johns, for plaintiffs.
Hugh Crea and C. N. Travous, for defendant.

HUMPHREY, District Judge. In 1887 the Wabash, St. Louis & Pacific Railroad, extending through or into states of Ohio, Michigan, Indiana, Illinois, and Missouri, was sold under foreclosure to a purchasing committee. This committee then conveyed to five separate corporations, organized one in each of said states, the property lying in the state in which such respective organization was made. The separate corporations so organized were: In Ohio, the Toledo Western Railroad Company; in Michigan, the Detroit & State Line Wabash Railroad Company; in Indiana, the Wabash Eastern Railway Company of Indiana; in Illinois, the Wabash Eastern Railway Company of Illinois; in Missouri, the Wabash Western Railway Company. In July, 1889, the above-named five corporations entered into an agreement for the consolidation of the five different properties by conveyance to a new company to be thereafter created. The agreement recites the method by which the property of each corporation shall be transferred to the new corporation in exchange for the securities of said new corporation by the consent of the directors and stockholders of each of said old corporations, and that thereafter "the five named corporations shall forever cease and determine." The agreement of consolidation was recorded in the office of the secretary of state of Illinois, and a certified copy thereof was recorded in the office of the county recorder in each county through which the Illinois line runs. On August 1, 1889, a new corporation was created under the laws of the state of Ohio, and under the name of the Wabash Railroad Company. In pursuance of the agreement of consolidation, all the property of the five railways was conveyed to, and became the property of, the Wabash Railroad Company, the defendant herein, and the five corporations above mentioned went out of existence.

Henry Westheider, Jr., by his next friend, and Henry Westheider, Sr., brought suits against the Wabash Railroad Company in the circuit court of Macon county, Ill. The defendant removed the cases to this court; the petition for removal averring that at the time of the commencement of said suits the defendant was, and still is, a corporation created and organized by and under the laws of the state of Ohio, and

[1] See Courts, vol. 13, Cent. Dig. § 860.

was at the commencement of said suits, and still is, a citizen of the state of Ohio. The plaintiffs entered their motions to remand, relying upon the contention that the defendant is a corporation formed by the consolidation of the said five railway companies, and that the filing of the articles of consolidation in the office of the secretary of state of Illinois made the defendant a citizen of Illinois for jurisdictional purposes, and that, as the plaintiffs are citizens of the state of Illinois, the federal court has no jurisdiction.

The issue thus clearly made depends upon the effect to be given to the railroad consolidation act of Illinois, under which the agreement in question was made. The law upon the subject of consolidations, and their effect upon the question of citizenship of corporations, did not precede, but has followed and endeavored to keep pace with, the varying methods of consolidation; hence some of the earlier decisions overlook distinguishing elements regarded by the later decisions as controlling. A corporation, as such, has no citizenship. It is only by imputing to the corporation the citizenship of its individual corporators that it is regarded as a citizen. It is equally well settled that one corporation cannot give citizenship to another, and therefore the citizenship of constituent companies cannot be looked to to determine the citizenship of a newly created company into which the properties of constituent companies have been merged. The courts have recognized at least three distinct forms of railroad consolidations: (1) An agreement of consolidation between two companies, and the continuance in existence of both corporations; (2) the merger of one corporation into another, and the continuance in existence of one of the two, and the extinction of the other; (3) the creation of the consolidated corporation as a new corporation, and the extinction at the same time of the constituent companies as separate entities. It is clear that the cases at bar belong to the third class, and in such case the citizenship of the new corporation must be determined solely from a consideration of the question, under the laws of what state was the new corporation first created from individual corporators? It may be given corporate existence in other states by a variety of ways for a variety of purposes, but its citizenship is given by the state creating it, and follows the citizenship of its original corporators. 1 Fost. Fed. Prac. (3d Ed.) p. 67; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 563, 19 Sup. Ct. 817, 43 L. Ed. 1081, and cases there cited. I have examined a large number of other cases cited by counsel. They are cases falling under one of the first two forms of consolidation above described, and are not applicable here. The case of Walters v. Railroad Co. (C. C.) 104 Fed. 377, is entirely consistent with this view. It is not disputed that the defendant company was created out of natural persons under the laws of Ohio, and it is not contended that the defendant was ever created out of natural persons under the laws of Illinois. Citizenship in Illinois cannot be imputed to the defendant through individual corporators. Whatever existence it has in Illinois it gets solely by virtue of the agreement of consolidation above recited. That agreement was made under the Illinois act of 1883, which permits a corporation of Illinois to consolidate its property, franchises, and stock with those of other states upon such

terms as may be agreed upon between the directors and approved by the stockholders. There is no requirement that the consolidated corporation shall have citizenship in Illinois, and the agreement in question is made in compliance with the act.

The motions to remand are denied.

PLATT v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. May 14, 1902.)

RECEIVERS—POWER TO BIND ESTATE.

Receivers for a railroad company cannot legally obligate themselves, as such, to pay a liability incurred by the corporation prior to their appointment.

On Exceptions to Master's Report.

C. B. Taylor and J. B. Reilly, for exceptions.

Samuel Dickson, for receivers.

DALLAS, Circuit Judge. The exceptions of Margaret O'Connor and of Alfred Sully, respectively, to the eighty-seventh report of the master, sur petition of the receivers for their discharge, have been argued and considered. They cannot be sustained. The judgment in the court of common pleas of Schuylkill county, upon which the claim of Margaret O'Connor is based, is for a liability of the Philadelphia & Reading Railroad Company which arose and matured prior to the original appointment of receivers; and it was not legally possible for them, or their successors, as such, to contract or incur any obligation to discharge it. I am also clearly of opinion that the position taken by Mr. Sully was rendered untenable by the terms of the foreclosure decree of May 1, 1896, and the proceedings subsequently had in pursuance of that decree or in conformity therewith.

Accordingly the exceptions of both the above-named exceptants are dismissed, the report of the master is confirmed, and the decree recommended by and annexed to that report will be entered as the decree of this court.

SCHOENEMANN v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. May 15, 1902.)

No. 42.

CUSTOMS DUTIES—CLASSIFICATION—SHELLS.

Shells which have been treated with chloride of lime to cleanse them from any animal or vegetable matter adhering to them, by which their value has been increased from 5 to 10 per cent., have been "advanced in value from their natural state," and are not entitled to free entry under paragraph 635 of the free list in the tariff act of 1897, but, by virtue of the similitude provision of section 7, they are dutiable under paragraph 450, which covers manufactures of shells, and also "shells engraved, cut, ornamented or otherwise manufactured."

Appeal by Importer from Decision of Board of General Appraisers.

Frank P. Prichard, for plaintiff.

Wm. M. Stewart, Jr., and James B. Holland, for defendant.

J. B. McPHERSON, District Judge. In September, 1897, the appellant imported certain shells, which he asserted to be either exempt from duty, or liable to only 10 per cent. ad valorem, as non-enumerated manufactured articles. The shells were appraised, however, at 35 per cent. ad valorem, under section 1, par. 450, Act July 24, 1897, which imposes that rate upon "shells engraved, cut, ornamented or otherwise manufactured." The board of general appraisers approved this classification, and the importer has appealed to this court.

The shells are claimed to be exempt from duty because they are said to be embraced by paragraph 635 of section 2, which puts upon the free list "shells not sawed, cut, polished, or otherwise manufactured, or advanced in value from the natural state." It appears from the evidence that these shells have been subjected to treatment by chloride of lime, the purpose being to clean them thoroughly from such animal and vegetable matter as may adhere to the inside or outside of the shell. Nothing else has been done to them, but it is shown by the testimony of the importer himself that by this process their value has been increased from 5 to 10 per cent. It is argued on his behalf that the "natural state" of the shell is its state after this cleansing process has been applied, but I am unable to take this view. I think the "natural state" of the shell is the state in which it is ordinarily found when it is taken from the water or picked up on the shore, or perhaps after the body of the animal has been removed. Cleaning is a process that advances it by one stage toward being fit for subsequent use, and, while I agree that to clean it is not a process of manufacture, it is to be observed that paragraph 635 not only uses the words, "otherwise manufactured," but adds disjunctively the phrase, "or advanced in value from the natural state." In my opinion, this disjunctive conjunction distinguishes the case in hand from several decisions that were cited in behalf of the importer.

The second position of the appellant is that, if the shells are not entitled to admission free of duty, they should only pay 10 per cent. under section 6, which imposes that rate upon "all raw or unmanufactured articles not enumerated or provided for." I think, however, that the rate of 35 per cent. was properly imposed under section 7. This is the so-called "similitude section," and provides "that each and every imported article not enumerated in this act, which is similar either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars above mentioned." Paragraph 450 imposes a rate of 35 per cent. upon manufactures of shell, and also upon "shells engraved, cut, ornamented, or otherwise manufactured." While it is true that the shells in controversy have merely been cleaned, and therefore do not come within the language just quoted, nevertheless they come so nearly within it that section 7 carries them the remainder of the way. They are certainly similar in material, in quality, and in texture to shells engraved, cut, ornamented, or otherwise manufactured, and they are also similar in some of the uses to which they may be applied, for it ap-

pears in evidence that the shells in controversy are sometimes used as ornaments without being subjected to any further process.

The decision of the board of appraisers is affirmed.

JOHNSTON et al. v. MOWATT.

(District Court, E. D. Pennsylvania. May 15, 1902.)

SEAMEN—IMPRISONMENT—LIABILITY OF MASTER FOR DAMAGES.

Libelants were seamen on board an American bark of which respondent was master, and while in Havana, during their term of service, refused to work longer. Respondent reported the matter to the captain of the port, who was a military officer of the United States, and requested permission to discharge the men. This was refused, and the captain of the port had the men taken on shore and imprisoned. On their return to the vessel one of them was placed in irons by the mate. Respondent was absent, and it did not appear that the act was done by his orders. Shortly after his return such libelant was released. *Held* that, conceding the imprisonment in both instances to have been unlawful, there was no ground for holding respondent personally liable therefor.

In Admiralty. Suit by seamen to recover damages for illegal imprisonment.

Jos. Hill Brinton, for libelants.

Howard M. Long and Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. On July 30, 1901, the libelants shipped at the port of Philadelphia as seamen on the American bark Matanzas, of which the respondent was master, for a voyage to Havana and elsewhere, returning to a port of discharge in the United States within six calendar months. The ship arrived at Havana on September 15th, and after she had come to anchor the respondent went ashore. During his absence the libelants, with others of the crew, refused to work, Johnston declaring that he wanted to be in a safer ship, while Gronland said that he was sick and not fit to work. Upon the respondent's return to the ship the refusal of the men was reported to him, and the next morning he called them aft, and demanded to know their reasons for declining to work. The reasons already stated were repeated to the respondent, and he thereupon reported the matter to the captain of the port. Havana was then under military law, and an officer in the United States army was captain of the port. The respondent asked permission to discharge the men, but both the captain and the collector of the port refused to allow him to do so, on the ground that they did not want any more vagrants in the city. The captain of the port said, further, that he would himself take charge of the matter, and shortly afterwards he sent some of the harbor police to the ship, who, upon the continued refusal of the men to work, took six of them ashore and put them into prison. At the same time he directed the respondent to notify him when the ship was about to sail, in order that he might return the men on board. While in prison, Gronland was examined by a physician, and pronounced to be in as good physical condition as when he signed the

articles. After two or three days Gronland consented to return to work, but Johnston continued to refuse until September 20th, when he was brought back to the ship and put in irons by the mate in the respondent's absence. When the respondent returned to the ship the libelants demanded to see the American consul, and the respondent sent at once for that official, whose representative came to the ship and had an interview with the libelants. They declared the ship to be unseaworthy, and demanded that a survey be had. This was granted without delay, and the surveyors pronounced the ship to be in seaworthy condition. Thereupon the libelants returned to work, and continued at duty until their arrival at the port of Philadelphia, where they were discharged. This suit is brought for the imprisonment at Havana, for which the libelants declare the respondent to be liable.

Section 19 of the act of December 21, 1898 (2 Supp. Rev. St. 903), was under consideration in The South Portland (D. C.) 111 Fed. 767, and it was there decided by Judge Hanford that since the passage of this statute there is no authority for the imprisonment of a seaman for refusing further to perform his contract, so long as the vessel is lying in port, and that such imprisonment at the instance of the master, whether through judicial process or otherwise, is a violation of personal rights which renders the vessel liable for damages. Assuming this to be correct, the question still remains whether the present respondent is liable, and upon this point the testimony satisfies me that neither the imprisonment on shore nor the punishment on board the ship was inflicted by the direction or at the request of the master. The captain of the port took the matter into his own hands by virtue of his military authority, and, while undoubtedly the respondent did not prevent the imprisonment, he had no control over the harbor police, and could not have interfered with their action. He wished to discharge the men, but, as he was not permitted to do so, nothing was left for him except to allow the captain of the port to remove the men from the ship. It nowhere appears that the action of the mate in putting Johnston in irons for a few hours upon his return to the vessel was ordered by the captain, or that he was present when it was done. I see no ground, therefore, upon which the respondent can be held liable, and therefore direct the libel to be dismissed, but without costs.

In re OLD DOMINION S. S. CO.

(District Court, E. D. North Carolina. May 7, 1902.)

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—LOSS OF CARGO BY FIRE.

In a proceeding by a shipowner in a district court for limitation of liability, the question whether a fire by which cargo was destroyed was caused by the design or neglect of such shipowner, so as to deprive it of the exemption from liability given by Rev. St. § 4282, if not previously adjudicated, will be determined by the court, and will not be left open to be determined by a jury in an action brought by the cargo owner for the purpose.[1]

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[1] Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.

2. SAME.

Under Rev. St. § 4282, which provides that no owner of any vessel shall be liable for loss or damage caused to goods shipped by reason of fire on board the vessel "unless such fire is caused by the design or neglect of such owner," the fact of such design or neglect must be affirmatively shown by a cargo owner to charge the shipowner with liability for a loss by fire.

3. SAME—FINDING BY STATE COURT—CONSTRUCTION AND EFFECT.

A special finding by the jury, in an action in a state court by a cargo owner to charge a steamship company with liability for loss of goods by fire, that the goods were destroyed through the negligence of the defendant, will be given effect as conclusively establishing defendant's negligence and liability in proceedings subsequently instituted by it for limitation of liability in a court of admiralty; but where under the laws of the state a corporation is chargeable with the negligence of its servants, so that the finding may have been based on the acts or omissions of the master or crew, it does not establish the fact that the loss occurred with "the privity or knowledge of the owner," so as to deprive the company of the benefit of Rev. St. § 4283, giving it a right to limitation of liability for any loss occurring without its privity or knowledge, which must be that of its managing officers.

In Admiralty. Proceeding for limitation of liability.

Wm. H. White and Donnell Gilliam, for petitioner.
Thos. J. Jarvis and Jas. H. Pou, for respondents.

PURNELL, District Judge. On September 21, 1899, the old Dominion Steamship Company filed in the district court a petition and libel to limit its liability under the act of 1851 and acts amendatory thereof (section 4282 et seq., Rev. St.). Stipulations were filed, a trustee was appointed to whom the lighter or flat was transferred, appraisers appointed, and other proceedings had in accordance with the statute and practice. The freight paid in advance has been refunded, and the unpaid freight has not been collected. All proceedings are regular; whereupon a monition and injunction issued as provided in admiralty rule 54. Answers were duly filed by the Thames & Mersey Marine Insurance Company, Limited, and the British Foreign & Marine Insurance Company, Limited. Subsequently the following agreed statement of facts was filed:

"First. That the petitioner, the Old Dominion Steamship Company, is a corporation chartered and existing under the laws of the state of Delaware, and is thereby authorized to engage in interstate and intrastate commerce; that at the time hereinafter mentioned the petitioner was engaged in operating lines of steamships, as common carriers of freight and passengers, from Tarboro to Washington, N. C., and points on Tar river, in said state, and that the steamer R. L. Myers was performing this service from Washington to Tarboro, and from Washington another steamer performed the service to Belle Port or Belle Haven, in said state; that at Belle Port or Belle Haven said steamers connected with the Norfolk & Southern Railroad, and their freight and passengers transported thereby to the city of Norfolk, in the state of Virginia, and from Norfolk the said petitioner operated lines of steamboats to New York, Boston, and other Eastern cities; that formerly the said petitioner operated a line of steamers from the said town of Washington to the city of Norfolk, but this line had been abandoned, and the arrangement above mentioned substituted therefor, at the time of the loss in question.

"Second. That Tar river is a navigable stream from Washington to Tarboro; that at Washington it takes the name of Pamlico river, which empties into Pamlico sound, which latter body of water is connected with the Atlantic

Ocean by Ocracoke and Hatteras Inlets. The tides ebb and flow in Pamlico sound and river, but do not ebb and flow in Tar river above Greenville.

"Third. That the steamer R. L. Myers of the petitioner plies regularly between Washington and Greenville, a distance of twenty-five miles, at all seasons of the year, but for several months of each year during the late summer and part of the fall the water of the river is too low to enable said steamer Myers to operate above Greenville; that when this is the case the company uses a lighter draft steamer above Greenville, and when the water is too low for this lighter draft steamer, which it is for several months of each year, the company uses a flat or lighter hereinafter described with which to take the cargo from steamer at Greenville to points above and from points above Greenville to the steamer at Greenville; that during the entire period that the petitioner has been operating its steamer on said river it has been customary for the petitioner to use the flat or lighter in use at the time of the loss in question for the purpose of transporting freight from points on the river above Greenville to the steamer Myers at Greenville whenever and during the time the water of the river would not admit of navigation by said steamer; that the use of said flats for such purpose was well known to the shippers of the cotton in question, and also that said cotton was so to be transferred in this particular instance, but such was not known to the consignees of said cotton or to the insurance companies.

"Fourth. That the flatboat or lighter in use at the time of the loss complained of was about 80 feet long, 18 feet wide, 4 feet deep, with a flat deck on which the cargo was loaded; that at one end there was a part set off for a cabin for the crew, and the covering of this cabin was somewhat higher than the flat deck of the other part; that both ends of the flat were square, and it was propelled by men by means of poles, and was guided by means of a large oar which could be adjusted at either end of the flat; that this flat had no special name, but was known and called the 'Old Dominion Flat,' and was not registered.

"Fifth. That the cotton in question was loaded upon said flat at Falkland and Center Bluff, two points on said river above Greenville, on the 10th of November, 1897, and was destroyed by fire the same day, while being transported to Greenville for delivery to the steamer Myers.

"Sixth. That the Thames & Mersey Insurance Company is a corporation duly licensed and empowered to do a general insurance business, and that 29 bales of the cotton upon the flat was insured in said company, and that the said cotton was entirely destroyed, and was of the value set forth in the answer of said company herein; that the British Foreign & Marine Insurance Company is a corporation duly licensed and empowered to do a general marine insurance business, and that the 113 bales of cotton upon said flat was insured by and in said company; that said cotton was entirely destroyed by said fire, and was of the value set forth in the answer of said company herein.

"Seventh. That the testimony taken on the trial of the suit of the Thames & Mersey Insurance Company against the Old Dominion Steamship Company, tried at April term, 1899, of Pitt superior court, as set out in the printed copy now on file in the supreme court, together with this statement of facts, shall be taken as the evidence upon which the two causes pending in this court shall be heard. Either party shall have the right to file herewith a printed copy of the above-mentioned evidence as now on file in the supreme court of the state."

The value of the cotton referred to in section 6 of the facts agreed, set out in the answer of the Thames & Mersey Insurance Company, is $706.59, and in the answer of the British Foreign & Marine Insurance Company $2,022.45, the insurance on which the said companies have severally paid, and been substituted by assignment to the rights of the shipper and owners thereof.

The testimony referred to in the seventh section of the agreed facts shows the defendant in the state court, libelant here, introduced all

the testimony as to the origin of the fire, and this does not account therefor; there is no evidence tending to show design or neglect, privity, or knowledge of the owners of the vessel. The facts as gathered from the record do not show how the fire originated. When the lighter had proceeded about three miles on the voyage down the river an explosion, or a noise resembling an explosion, was heard as coming from under the cotton four or five bales forward of the cabin. Immediately the cotton was in flames. There was no fire on or about the lighter. The lighter was not equipped with any fire apparatus. There was nothing of the kind aboard, except two buckets from which the crew drank water. No equipment would have been effective in extinguishing the fire after it was discovered. Much of the cotton was thrown overboard, but this continued to burn. Efforts to extinguish the fire failed when the lighter was scuttled and sunk. The lighter was manned by a crew of seven in the employment of libelant, which crew was sufficient and competent for the service in which they were engaged.

At the time the libel was filed the Thames & Mersey Company had obtained judgment against the libelant in the state superior court of Pitt county, N. C., for $706.59 and costs, in which suit, among other issues, the jury (under the instructions of the court) answered the issue "Was said cotton destroyed by the negligence of the defendant company," "Yes," and judgment was rendered accordingly for the amount claimed. From this judgment libelant has perfected an appeal to the state supreme court. The insurance company now pleads "said findings, and the judgment thereon against the libelant, further saying said fire did not occur through the fault or negligence of its officers, agents, or employés."

At the time the libel herein was filed and the injunction issued the British Foreign & Marine Insurance Company had instituted suit in the state superior court of Pitt county, N. C., against the libelant by issuing a summons for the relief demanded in the complaint, but no complaint had been filed or other proceeding had.

The bill of lading issued by the libelant to the shipper of the cotton destroyed or lost, as hereinbefore stated, does not specify any particular vessel or route by which the same is to be transported, but contains the following conditions: "(1) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof by causes beyond its control, or by floods, or by fire," etc. "(2) No carrier is bound to carry said property by any particular train or vessel," etc.

The maritime law of the United States limiting the liability of shipowners is contained in sections 4282–4289 of the Revised Statutes of the United States and acts amendatory thereof. The policy and purposes of these statutes are discussed and explained in the decisions of the supreme court in able and exhaustive opinions filed in Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 588–9, 3 Sup. Ct. 379, 27 L. Ed. 1038; Transportation Co. v. Wright, 13 Wall. 104, 121, 20 L. Ed. 585; Constable v. Steamship Co. (1894) 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; and many other decisions un-

necessary to quote. The policy of the law is too well settled to require further comment, and settled by the highest authority.

The two claims represented in the case at bar may be easily distinguished, and are governed by different provisions of the law. Section 4282, Rev. St., is as follows: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." This section clearly applies to and governs the claim of the British Foreign & Marine Insurance Company.

The argument that this suit should be left open until the same can be tried in the circuit court and the question of negligence passed on by a jury is without force. The jurisdiction of this court in such causes is ample and complete,—it is absolute. The authorities cited in respondent's brief to sustain the position taken, "that since the passage of the amendatory acts—the Harter act and others—the disposition of the courts has been reversed, and instead of extending by implication it has been their policy to define those acts strictly, and interpret them in favor of the owners of the goods rather than in favor of the owner of the ship," do not seem to sustain this contention In The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed 130 (cited as Flint v. Christall), the question was whether the owner of a stranded vessel, seaworthy at the time of the commencement of the voyage, was entitled to general average contribution for sacrifices made and suffered by him subsequent to the stranding in efforts to save freight and cargo, and has no application to the case arising under the section above quoted. The case of Calderon v. Steamship Co., 170 U. S. 272, 8 Sup. Ct. 588, 42 L. Ed. 1033, was based on the finding that the "negligence of the company was clearly proven," and the bill of lading attempted to limit the liability of the carrier to packages of goods not exceeding in value $100, and such bill of lading was prohibited by the Harter act, and had been held to be invalid in numerous decisions. In The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, the unseaworthiness of the vessel was found to exist, and the claim to exemption from liability was from "faults or errors in navigation or in the management of the vessel." The other decisions cited in the brief are all by courts inferior to the supreme court, and cannot govern the application of principles laid down by that court. They do not attempt to do so, and are as far from application in this case as those above cited. This is a case of fire, and the bill of lading, a quotation from which is hereinbefore cited, simply claims exemptions allowed under the statute.

The claim of the Thames & Mersey Marine Insurance Company, Limited, is governed by a different section of the statute and a different principle of marine law. Had libelant filed its petition before taking its chances in the state court, the two claims would have been governed by the same law; but it did not see proper to do this, but submitted its cause to that jurisdiction. It must abide the conse-

quences, and the judgment in the state court must be treated in this court with due deference, governed by the comity between courts.

The rule of negligence is essentially different in the two jurisdictions. The rule in the state court it is unnecessary to discuss. It follows the acts of the legislature and the decisions of the state supreme court, neither of which governs in a court of admiralty, especially when they, either or both, conflict with the provisions of an act of congress or decisions of the courts of the United States. In this court those rules control which are in accordance with the maritime law which libelant has invoked. It has the privilege of invoking the marine law at any time before a judgment is actually paid (The Benefactor, 103 U. S. 239, 26 L. Ed. 351; Ben. Adm. § 658; Hughes, Adm. pp. 228, 229); but if it neglects to do so this court will determine the cause as it finds it when its jurisdiction is invoked.

The claim of the Thames & Mersey Marine Insurance Company must therefore be taken to be established by judgment. Hence this claim would be governed by section 4283, Rev. St., as amended, which is as follows:

"The liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

This section of the Revised Statutes was amended by the act of June, 1886, and made applicable to canalboats, barges, and lighters, and such amendment is constitutional. Ex parte Garnett, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631. In the state court—and it is presumed the judge instructed the jury according to the state law—a corporation is liable for the negligence of its servants, but under the act of congress the privity or knowledge necessary to deprive it of the limitation therein provided for must be that of its managing officers. Craig v. Insurance Co., 141 U. S. 638, 646, 12 Sup. Ct. 97, 35 L. Ed. 886; The Republic, 9 C. C. A. 386, 61 Fed. 109. The owner is not deprived of the benefit of the statute by reason of the privity or knowledge of the master. Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111. An examination of the record filed as evidence in this cause by consent does not disclose any finding that the loss, damage, etc., was "incurred with the privity or knowledge of such owner or owners." To deprive petitioner, who has complied with the requirements of the statute, of the limitation of liability therein provided, there must be an affirmative finding to this effect. It is therefore held that as to the claim of the British Foreign & Marine Insurance Company the petitioning libelant is exempt from liability under section 4282 of the Revised Statutes; that as to the claim of the Thames & Mersey Marine Insurance Company the liability of petitioning libelant is limited to the value of the lighter or flat on which the cargo of cotton was loaded when the fire occurred.

A decree will be entered accordingly.

INTERNATIONAL CONTRACTING CO. v. WALSH et al.

(District Court, E. D. New York. May 12, 1902.)

1. SHIPPING—HIRING OF SCOWS—LIABILITY OF HIRER FOR INJURY.
An injury to scows, resulting from their going adrift by reason of the parting of their lines while being towed in from the dumping grounds, in the absence of proof of negligent handling of the tow, or that the sea was in such condition as to render it negligence in the hirer to attempt their navigation, was presumably due to their not being equipped by the owner with suitable lines; and to charge the hirer with liability therefor the burden rests upon the owner to show clearly that the risk of injury from such cause was assumed by the hirer.

2. SAME.
A hirer of scows which went adrift by reason of the insufficiency of the lines with which they were equipped by the owner, if negligent in failing to make an effort to recover the vessels, or to promptly notify the owner of their loss is liable for damages approximately resulting from such negligence or delay; but the contract cannot be considered as remaining in force thereafter, so as to render him liable for further hire.

In Admiralty. Suit to recover for hire of scows and damages for their injury.

Albert A. Wray, for libelant.
James J. Macklin, for respondent.

THOMAS, District Judge. This action was brought against Augustin Walsh; but, it appearing that the cause of action, if any, was against Edward S. Walsh, he was brought in. The libelant seeks to recover a balance alleged to be unpaid upon the hiring of two scows, and for injury received by them while under such hire. The libelant claims that it was stipulated in the contract of hiring that upon the completion of the service, the scows should be returned to the libelant in their condition at the time of hiring. The respondent Edward S. Walsh admits that he was the party who hired the scows, but states that such stipulation was not a part of the contract. After several days of use, the scows, in tow with others, went to sea, were dumped at the mud buoy, and were returning in a choppy sea when the lines securing them parted, whereupon they went adrift and were later recovered in an injured condition by the libelant. There was a caretaker on each scow, and presumptively the lines were part of the outfit of the scows. The captain of the tugboat states, that "we wasn't pulling but very little on them at the time they parted." It is inferable that the owner of the scows knew that they were to be used for the purpose of going to sea and meeting expectable conditions of navigation. If the weather that prevailed at the time of the accident was not violent, if it was only such as should have been withstood by proper lines, then, in absence of neglectful handling of the tow, it would be a justifiable inference that his property was damaged from his failure to equip his scows with suitable towing lines. Even if the covenant claimed by the libelant were made, it should not be construed to include accidents happening on account of defects that existed in the equipment of the scows. Surely against such defects the respondent

could not covenant; but, if the lines were in good condition, as the evidence shows, why did they part? If they were equal to the strain of ordinary seas, they should have held. The scows were the last in the tow, and, if in such situation good lines parted, the weather must have been perilous, and, in the absence of preponderating evidence, it is improbable that the respondent increased his legal liability, so as to guaranty that he would return the scows in good condition, whatever perils of the sea might injure them. It is reasonable that a bailee might guaranty against his own or another's wrongful injury to vessels, or their improper use under unfavorable conditions of weather; but it is more difficult to conclude that he assured their safe return against the acts of God and the enemies of the republic. But such is the libelant's contention. There is no evidence of imprudent exposure to the elements, and with the presumption against, and the burden of proof upon, the libelant, it is concluded that the contract did not contain the covenant for which the libelant contends.

The remaining question relates to the duty of the respondent with reference to the boats after they had gone adrift. Was he justified upon the parting of the lines in abandoning the boats, and leaving the bailor to seek and find them, and recover them at his own cost, or should the bailee have used some diligence? This question was not the subject of contention in the form stated, but it was rather contended on the part of the libelant that the hiring still continued. Such contention should not be maintained. But, had it appeared that the bailee was guilty of some breach of duty in reporting the loss, whereby the owner was deprived of an opportunity of recovering his property, the respondent would be liable for any damages approximately resulting from such delay. The evidence does not satisfactorily disclose negligence on the part of the respondent in the regard mentioned. Therefore it is concluded that the libel must be dismissed, with costs.

THOMAS v. ATLANTIC TRANSPORT CO., Limited, et al.

THE MINNEHAHA.

(District Court, E. D. New York. April 19, 1902.)

COLLISION—STEAMSHIP AND TUG—PREMATURE FASTENING OF LINE.

The Minnehaha, a large steamship 600 feet long, while slowly making her way under her own steam to her berth in North river, and when some piers below it, was approached by a tug, which had been employed to assist her in docking. The tug came close alongside, and called for a line, which was passed out and made fast on the tug by two deck hands. The tug then went ahead somewhat faster than the ship, but in a parallel direction, drawing out the line until she was even with, or ahead of, the stem of the ship, when the line was made fast on the ship, and the tug, by the force of the wind and tide, swung in front of the ship, and was struck and sunk, the two deck hands being drowned. *Held*, that the tug, by steaming alongside instead of keeping off, placed herself in a more dangerous position, and that upon evidence, a preponderance of which showed that the line was made fast on the ship on the signal of one of the deck hands on the tug, the ship could not be held in fault.

In Admiralty. Suits for injury of a tug in collision and for the death of one of her crew.

Hyland & Zabriskie, for libelant Esther E. Thomas.

James J. Macklin and Wilcox & Green, for respondents Millard et al.

Convers & Kirlin, for respondent Atlantic Transport Co.

THOMAS, District Judge. On the 18th day of September, 1900, the steamship Minnehaha, claimed to be the third largest vessel coming into the harbor of New York, was bound for and several piers below her berth, Pier 39, foot of Houston street, North river. The wind was strong from the northwest, and the tide ebb. While the Minnehaha was thus under her own steam, approaching her pier, three tugs came alongside, two taking their positions off her starboard side or quarter without in any way making fast, and the tug America coming to the port side, and calling for a line when her starboard side was some six feet from the steamer. These tugs had been employed to assist in docking the steamship. There was at this juncture no occasion for the America receiving a line, as it was her duty to assist the steamship in docking at Pier 39, by taking a line, and thereupon standing off from the steamship's course, and holding the steamer's head up against the tide as she swung into her berth. Hence the America's arrival was premature. Nevertheless, the steamship acquiesced, and passed a line from the second chock, which was some 80 feet aft of the bow of the vessel. The America was about 60 feet long. The Minnehaha was about 600 feet in length, with a beam of 65 feet, and without cargo. The distance from the level of the water to her main deck at the stern was about 40 feet, and from the water to the bridge about 70 feet, the bridge being situated about 200 feet aft of the stem head. The America carried a crew of five men, the captain, who was alone in the pilot house, the engineer and fireman, who were in the engine room, the deck hand and cook, who were on the stern of the vessel receiving and handling the line which they made fast to the tug's bitts, which bitts, 40 feet aft of the pilot house and 12 or 15 feet from the stern, were concealed from the view of the tug's master. The freeboard of the America was 5 or 6 feet, and the top of her smokestack showed just above the steamship's deck, which had an open rail. After the line had been received from the steamship by the tug, the latter went ahead, carrying out the line with her, and making somewhat more headway than the steamer, which was going very slowly, when in some manner the tug went in front of the stem of the steamship, was struck by the latter, was driven under water, the deck hand and cook were drowned, and the other members of the crew thrown into the water and rescued. One of the libels is filed for the death of the cook, and the other libel for injury to the tug.

There are several allegations of fault against the steamship, but one only is reserved for discussion, viz., that the line was made fast on the steamship before sufficient had run out, and without orders from the tug, so that the tug was violently stopped in her forward progress, and thrown in front of the stem of the steamship. There is a sharp diversity in the contentions respecting the distance the tug had gone forward before the line was made fast, as it undoubtedly

was. The libelants claim that the tug had not cleared the stem of the steamship, while the claimant urges that her stern had cleared the stem of the steamship by some distance, and that the tug had been steaming ahead for some minutes before the accident occurred. One conclusion is easily reached, that the accident to the America was caused by the fact that, instead of keeping off from the steamship, she steamed alongside of her, and that the making fast of the line abruptly checked her speed, whereupon the northwesterly wind and ebb tide threw her in front of the larger vessel. The fault of being in too close proximity to the steamship was that of the tug. She was not wanted there, she could perform no duty at the time, and, if it was not negligent for her to be in that position, yet there was danger in it, and that danger, so far as it arose from her position, she herself assumed. But, nevertheless, she had a right to assume that the line would not be made fast on the steamship until orders were given to that effect by the tug. When the line was passed over from the steamship to the tug, the boatswain called out to the men on the deck to "sing out when they had enough line." The captain of the tug states that he did not hear this, but as he was in the pilot house, and to the windward, it is not strange that he did not hear it. But whether anything of the kind was said is unimportant, for it is expectable that such would be the procedure. The captain of the tug was facing away from the stern of his vessel. He was in no position to hear or see what the men on the stern of the tug said or did, and as both such men were lost the evidence is entirely in the hands of those upon the steamship. The evidence of the steamship is that, after the line had run out for such a distance as to allow the tug to precede the steamship, one of the men on the stern of the tug called out "to make fast," holding up his hand at the same time, and that thereupon the line was made fast. If such was the fact, it is impossible to find the steamship in fault; but this evidence, in detail, will be later considered.

The libelants urge that there were certain facts and circumstances from which it is inferred that there was no such direction given by either of the men on the stern of the tug, and that in any case, if such order had been given, the steamship company should have disregarded it, unless it came from the captain of the tug, and evidence is offered that it is the custom of the port for the master or his mate to give such orders, and that they do not suitably come from deck hands. But there was no mate, the captain was in no position to give the order, and the evidence on the part of the steamship is that orders of that nature are not limited to the officers of a tug. So that the case narrows itself down to this, was the direction given?

The disposition of the line and the men on the steamship may now be explained. The hawser, an 8-inch rope, with a total length of 120 fathoms, was coiled close to the rail just abaft the bitts, which was 8 or 10 feet aft of the chock. After certain of the hawser had been run out, stated by respondent's witnesses to be 30 or 40 fathoms, one of the men on the tug signaled with his hands, and sang out to make fast, and this was immediately done. Thereafter the three seamen remained at the bitts, but received no order from the tug. After

the line was made fast on the steamer, the two men on the stern of the tug left their position at her bitts, and one of them was seen going forward on the starboard side. The boatswain at the time she was made fast stood some distance forward, and in immediate charge of the men who were handling the hawser, and Crichton, the chief officer, was at the stem. Nilsen, one of the three at the hawser, states that one of the men standing aft on the deck sang out, "Make fast;" that he (Nilsen) could not see the man without going to the rail of the steamship, which he did not do, but he distinctly heard him. He was uncertain whether there were two or three men aft on the tug. Wilson, the boatswain, states that there were two men on the after-deck of the tug, and that they made the hawser fast on the tug by putting the eye over the bitts. He gave this evidence:

"Q. And by whose direction was it made fast? A. By their singing out from the tugboat, and raising of a hand to make fast. I repeated the order. The men were already doing so. They evidently took it from the tug. Q. What were the words of the man on the tugboat that you heard? A. 'Make fast,' holding up his hand at the same time. Q. Do you know this tugboat from previous experience? A. Yes. Q. Do you know the men? A. I don't know the men personally. Q. Can you state whether that was the usual signal? A. Yes; the holding up of one or two hands to make fast or hold on. Q. What did you say when you heard these words, did you say? A. 'Make fast.' Q. You sung out, 'Make fast'? A. I sung out, 'Make fast.' Q. The men had already begun? A. Had already begun to make fast. Q. Was it made fast then? A. It was made fast. Q. Whereabouts was the tug with reference to your vessel at that time? A. She was ahead of the stem, a little off to port."

Crichton, the chief officer, testified as follows:

"Q. How far was the stern of the tugboat ahead of a line straight across from your stem? A. Somewheres about 80 feet, I think. Q. What occurred then? A. They held up their hands, and sung out, 'Make fast.' Q. Who did that? A. One of the two hands on the lower deck. Q. The same men who had taken the line? A. The same men who had taken the line. Q. And made it fast? A. And made it fast. Q. Was that order obeyed on your boat? A. Yes, sir; made it fast at once. Q. Did you see the line made tight yourself? A. I saw the line was fast because the tug went ahead immediately. By the Court: Q. Where was the man who made that signal? A. Abaft the house on the tug, standing abaft the house on the main deck."

It is claimed that this evidence is impaired by the subsequent statement of the witness, which was as follows:

"Q. You say you saw the man lift his hand on the lower deck, or the two men? A. One man. Q. That was when the boat was how far ahead of you? A. About 60 feet from the stem. Q. What did he say, if you heard him say anything, besides holding up his hand? A. I can't remember. Q. Did he say anything at all? A. He shouted something,—'Make fast,' or 'Hold on,' or something of that kind. Q. You couldn't tell what he said? A. I couldn't tell what he said. Q. Do you suppose a man 75 feet abaft of you could tell what he said? A. He might. Q. Further away from the America than you were? A. He might have heard. I wasn't paying attention to the word,—I was looking for the motion. Q. Did he put up two hands, one, or what? A. Two hands. Q. What was he doing there at that time,—anything more than standing there? A. No; just standing there. Q. You knew he was the deck hand from the position he occupied? A. Yes, sir; one of the men."

There are some discrepancies in this evidence, but they are not of a substantial nature, or other than might be expected from three

honest witnesses who had taken different parts in a transaction, and were severally trying to give their recollections of it, and their narrative must be accepted. Indeed, if the issue must be determined whether the stern of the tug was some distance in advance of the stem of the vessel, the evidence on the part of the ship, in the number of witnesses, is greater than that of the tug, and it was not apparent that the witnesses for the steamship, in their manner of testifying and clearness of narration, were inferior to those of the tug. The disaster, resulting in the loss of life of two men, brings before the court litigants whose unfortunate condition requires a careful consideration and estimate of the evidence, but it seems clear that the libelants have not sustained the burden which rests upon them of showing that the accident arose from the culpable negligence of the ship. On the other hand, it appears, aside from any presumption of freedom from negligence, that the ship did not contribute to the accident, but did as directed by the men upon the tug.

The libels herein are dismissed.

THE ATLAS.

THE LEONARD J. BUSBY.

(District Court, E. D. New York. April 19, 1902.)

1. COLLISION—BREAKING OF BARGES FROM PIER—EVIDENCE CONSIDERED.
   Conflicting testimony considered, and the parting of a line by which a barge was made fast to a pier *held* to have been due to the strain caused by the tying up of five other barges on the outside, where they were negligently allowed to lie during a high wind, all being sustained by the first, and not to the cutting of the line by a steam tug.

2. SAME—NEGLIGENCE—MOORING.
   A barge was negligent in remaining tied up on the outside of five others, the inner one only being fast to the pier, during a stormy day, with the wind blowing at a high velocity from the side, and is liable for a collision caused by her swinging around on the parting of the line by which the stern of the inner boat was held to the pier.

In Admiralty. Suit for collision.

James J. Macklin, for libelant.
Avery F. Cushman, for claimant of the Atlas.
Albert A. Wray, for claimant of the Busby.

THOMAS, District Judge. On January 19, 1901, six large barges, several of them covered, and all laden, lay across the end of the North Central pier in the Atlantic Basin. The barge Altoona was next to the pier, and the barge farthest out was the Atlas. The Altoona sustained all the vessels, as she alone had lines to the pier. She had out several lines, but one 4-inch line ran from the cleat on her extreme stern to the string piece of the side of the dock, some 50 feet from the end, although there was an iron spile and an upright put at that place on the dock for the purpose of making fast, which was not used. The wind was from the northwest, and while it was blowing at between 50 and 60 miles an hour, the line just named parted at the string piece,

and the vessels all swung around, so that the Atlas came in collision with the canal boat Mullen, which was lying at East Central pier, outside and across the bows of three other boats. It will be observed that the opening in the basin gave full opportunity for the wind to affect the vessels, and the accident that happened was precisely what the condition of the boats and the weather would cause. In other words, adequate cause for the parting of the line was present, and, in view of such conditions, the negligence of the Atlas, and even some of the boats lying inside of her, is sufficiently apparent. But the captain of the Altoona ascribes the accident to a different cause. At a time shortly before the parting of the rope, the steam tug Busby had come into the basin, for the purpose of mooring therein the barge Behre, and upon her arrival she put the barge on the north side of the North Central pier, and some 40 or 50 feet away from the end of the pier. The captain of the Altoona states as follows:

"Q. She [the Busby] came in and landed a boat there. Then what? A. He worked up towards my line,—a new four-inch line I had out, I put there the night before to secure me well for the night. He worked on the line for to get his stern off. By doing so he cut my line, and, when that line parted, the other two lines I had out from the stern parted as well from the strain of all the rest of the boats."

Van Pelt, who was on the vessel Ridgeway Park, alongside which the Behre was landed, testified that, after the landing of the barge by the Busby, "she went ahead on a brand new line, and when she went ahead she shoved that line to the dock and her stem iron cut the line. Q. Did you see what boat this line ran to from the dock? A. I think from the first boat, but I couldn't say exactly." On the other hand, it appears from the evidence of the Busby that, although she was headed across the slip, yet that her stem was at all times several feet away from the line and did not touch it. To this the master of the barge Behre, the captain of the Busby, the deckhand Matthews, Wilson, the night captain of the Busby, who was in the pilot house, but not on duty, and Nugent, the engineer of the Busby, who said that he saw the accident, all testify.

This case has been held for some time after having received the first consideration, for the purpose of determining the credibility of these witnesses. Upon the trial the court was impressed with the straightforwardness of the captain of the Altoona, and there is considerable hesitation in determining that he was in error in his statement that the Busby cut the line; but the evidence of the witnesses for the Busby was not impaired by any conduct during the examination, or inconsistency in statement, and the court does not feel justified in concluding that the several witnesses for the Busby were outweighed in the quality of their evidence by the two witnesses testifying in opposition. Therefore the Busby cannot be held for the accident. Although the wind was very much more severe at the time of the accident than it had been theretofore, yet the day had been tempestuous, and the manner in which the Atlas was tied up to the Altoona was calculated to produce this accident; and it is concluded that the Atlas was at fault in lying in the position in which she did.

Decree must therefore proceed against the Atlas alone.

In re HULL et al.

(District Court, D. Vermont. May 17, 1902.)

1. BANKRUPTCY—VALIDITY OF CHATTEL MORTGAGE.
The rule of the supreme court of the United States that a chattel mortgage of goods, giving the mortgagor the right to sell and to replace the goods sold with others which should come under the mortgage, is fraudulent and void as to other creditors as a matter of general law, is to be followed in bankruptcy proceedings, regardless of the decisions of the courts of the state on the question.

2. SAME—PROPERTY PASSING TO TRUSTEE.
The provision of Bankr. Act 1898, § 70 (5), which vests in the trustee title to property of the bankrupt "which prior to the filing of the petition he could by any means have transferred," covers personal property which, although mortgaged, the bankrupt was authorized by the terms of the mortgage to sell.

3. SAME—PREFERENCES—MORTGAGE.
A chattel mortgage given within four months prior to the bankruptcy of the mortgagor, to secure the purchase price of goods then bought, and including such goods and also other goods previously owned by the mortgagor, is void as an illegal preference, under the bankruptcy act, as to the goods previously owned, but is valid as respects the new goods which were acquired as a part of the same transaction.[1]

In Bankruptcy. On claim of mortgagee to proceeds of mortgaged goods.

Clarke C. Fitts, for claimant.
John E. Gale, for trustee.

WHEELER, District Judge. The claimant, Frisbee, sold a small stock of goods to the bankrupts, and long within the four months prior to the petition took a mortgage back of those and other goods and some exemptions, leaving power to sell and replace goods to be included in the mortgage. The whole have been sold, and the goods that came from the claimant brought $178.59; those formerly of the bankrupts, $92.78; and the exemptions, $25; and he claims the proceeds of the whole.

The validity and effect of chattel mortgages with such power of sale by the mortgagors as to other creditors have long been the subject of much discussion and divergence of judicial opinion in England and this country. 5 Am. & Eng. Enc. Law (2d Ed.) 992. The United States supreme court has decided that such mortgages are fraudulent as a matter of general law, and void as to other creditors in bankruptcy proceedings. Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758. The supreme court of Vermont has held that they are good and valid as against other creditors in state insolvency proceedings. Peabody v. Landon, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903. This is a question of general law under the bankrupt act, rather than a rule of property under the state law, and the decision of the supreme court of the United States, which has final disposition of it, is, of course, to be followed here. Besides this, the present Bankr. Act § 70 (5),

[1] See Bankruptcy, vol. 6, Cent. Dig. §§ 259, 260.

vests in the trustee property of the bankrupt "which prior to the filing of the petition he could by any means have transferred." This property, that did not come from the claimant, was so left by the mortgage that it might be transferred by the bankrupts.

The act saves liens in good faith for a present consideration from its operation; but this does not make good, nor add to the force of, mortgages that would not be valid as to any property at common law. In Peabody v. Landon it was said that possession by the mortgagee under the mortgage would, as to after-acquired goods, make the lien good as of the date of the mortgage, which in that case was prior to the limit of the state insolvent law, although the delivery was within it. But that is not in question here. This mortgage created a new debt, and a delivery of prior property to secure it would be a prohibited preference. Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758. Upon these principles, the mortgage, and the proceedings under it, appear to be void in law as to prior property, not exempt, as against creditors represented by the trustee.

As to the goods that came from the claimant, the sale and mortgage were parts of one transaction, by which he put in as much as he would take out if he should have the benefit of them or their proceeds; and to that extent it would not affect, and could not be fraudulent as to, other creditors. The record of the mortgage would probably save his rights as a conditional vendor. V. S. § 2290.

As to the exemptions, neither any of the other creditors nor the trustee representing creditors has any right or interest here. They are to be merely set out, subject to review here, to the bankrupts by the trustee, and liable to the rights of others, as they may be determined elsewhere.

The result is that the claimant is entitled to the $178.59 avails of his former goods; the trustee is entitled to the $92.78 avails of the former goods of the bankrupts for the benefit of the estate; and the trustee is left to set out the avails of the exemptions to the bankrupts, without prejudice to the rights of the claimants.

$178.59 decreed to claimant; $92.78 decreed to trustee; $25 left to be set out as avails of exemptions, without prejudice.

In re OTTO.

(District Court, D. New Jersey. May 22, 1902.)

BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

Where a bankrupt omitted from his schedules money standing to his credit in bank, and on his examination at first denied that he had a bank account, and subsequently testified that it had been closed, and then claimed that the money belonged to his wife under a written trust agreement, which he failed to produce when requested, a finding was justified that he knowingly and fraudulently concealed the money from his trustee, and was debarred from the right to a discharge.[1]

In Bankruptcy. On application for discharge.

Paul N. Turner and John S. Foster, for bankrupt.

Hatch & Wickes, for intervening creditor.

KIRKPATRICK, District Judge. Application has been made in this case for the discharge of the bankrupt. The matter going to the referee, testimony has been taken, and the referee finds from it that the bankrupt has knowingly and fraudulently concealed, while a bankrupt, from his trustee, and failed to mention in the schedule attached to his petition in bankruptcy, certain moneys deposited and standing to his credit on the books of the Market and Fulton National Bank in the city of New York. I have carefully considered the testimony, and concur in the conclusion reached by the referee. I am satisfied from the evidence that the account in the Market and Fulton Bank was one in which was kept the general funds of the Otto family, which funds were used for the purpose of maintaining it; that the bankrupt deposited in the account the proceeds of his own labor as well as any income of which his wife was the recipient, and so mingled them as to render them indistinguishable. The account stood in the name of the bankrupt, and no other person was entitled to draw upon it. It was under his sole control, and he was the owner of it. There was a balance to the credit of the bankrupt in the account at the time of the adjudication, and this amount should have been included in the schedules. I am of the opinion that the omission of the amount from the schedules was made knowingly and fraudulently. In his examination the bankrupt denied that he had any bank account, either for himself or as attorney or trustee for his wife. When he did admit the existence of the account in question, he sought to belittle it, swore that it had been closed, that it belonged to his wife under a trust agreement, showing what purported to be a copy thereof. This paper was without date or witnesses. He was asked to produce the original, but after ample opportunity neglected or refused so to do. It does not appear that this agreement was shown to any one, and the advice of Mr. Turner that because of it the money in the Market and Fulton Bank belonged to his wife was conditioned upon the fact that the agreement had been made bona fide. The evidence fails to satisfy me that such an agreement was ever made, and it was incumbent on the bankrupt to show that the money standing in his name

[1] See Bankruptcy, vol. 6, Cent. Dig. § 735.

at the time of filing the schedules, and not included therein, was the property of another, and not his own.

In the whole case I concur in the finding of the referee, and the discharge of the bankrupt is therefore refused.

JABINE et al. v. OATES et al.

(Circuit Court, W. D. Kentucky. May 24, 1902.)

APPEAL BOND—VALIDITY—APPEAL TAKEN IN ACTION AT LAW.

An appeal will not lie from a judgment of a federal court awarding a writ of mandamus, which is at law; and where such an appeal was prayed for, and inadvertently allowed, a bond given thereon was a nullity, and did not operate as a supersedeas, nor was it based upon any consideration which could bind the parties thereto, either as a statutory or a common-law obligation.[1]

At Law. On demurrer to answer.

D. M. Rodman, for plaintiffs.

Wm. H. Yost and Willis L. Reeves, for defendants.

EVANS, District Judge. Several years ago the two plaintiffs each brought an action at law against the county of Muhlenberg to recover the amounts due on certain interest coupons attached to bonds issued by that county. Judgments having been rendered for the amounts claimed, the plaintiffs, in ancillary proceedings which were consolidated, procured the issuance of a writ of mandamus requiring the county court of Muhlenberg county to levy a tax sufficient to pay the sums due. In the course of this consolidated proceeding the judgment was rendered which is described in the bond presently to follow. From this last judgment an appeal was prayed and granted to the circuit court of appeals, and Muhlenberg county executed an appeal bond in the following words:

"Whereas, the appellants, Muhlenberg county and the Muhlenberg county court, have taken an appeal from a judgment of the United States circuit court for the Sixth circuit, and district of Kentucky, Owensboro division, rendered at its January term, 1897, against them, in which judgment the county judge of said county was ordered and directed to forfeit the office of and remove the present sheriff of Muhlenberg county from his office, and further, after such removal, to appoint a collector to collect the tax heretofore levied in the above cases by the county court, and to appoint as such collector any citizen or resident of the state of Kentucky, whether he is a resident of the appellant county or not; whereas, the above-named appellants have prosecuted an appeal to the United States circuit court of appeals for the Sixth circuit to reverse the judgment above described: Now, we, Muhlenberg county as principal, and P. S. Phillips [and others, naming them] as sureties, covenant to and with the appellees, John N. Jabine and Eva Murray, in the above-named consolidated cases, that the appellants will pay to the appellees all costs and damages that may be adjudged against the appellants on the appeal, and that they will satisfy and perform the judgment in case it shall be affirmed, by removing the said sheriff, and by appointing the collector as required in said judgment: Now, therefore, the consideration of this obligation is such that if the above-named appellants shall prosecute their said appeal to effect, and answer all damages and costs if they shall

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[1] See Mandamus, vol. 33, Cent. Dig. § 428.

fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue. Sealed with our seals and dated this 17th day of March, A. D. 1897."

Certain of the defendants signed the bond, and they are sued thereon in this action for a sum in damages equivalent to the full amount of the judgments at law, though what stipulation in the bond would support that claim in its entirety is not at all clear. To the petition of the plaintiffs the defendants have answered, pointing out that the judgment attempted to be superseded by the bond above set forth was rendered in a proceeding at law, and that no appeal could be granted therefrom, and insisting that the appeal itself and the bond given for its prosecution were alike void. The answer also claims that the appeal was in fact abandoned, and was never taken to nor decided by the circuit court of appeals, and, further, that a writ of error was sued out, and, upon the case being heard thereon by the circuit court of appeals, the judgment described in the bond was affirmed. It is averred in the answer that no other bond was given except the one above set forth, and that it had reference altogether to the appeal, and none to the writ of error. The plaintiffs have demurred to the answer, and, assuming that the averments of the answer are true, it seems to the court that the legal effect of the showing made is that the appeal bond sued on, as well as the appeal itself, were misconceived and ineffectual, and could not and did not of themselves operate to supersede the judgment at law described in the bond, and, furthermore, that they did not and could not bring the case before the circuit court of appeals, nor give it jurisdiction to review the judgment. In Saltmarsh v. Tuthill, 12 How. 389, 13 L. Ed. 1034, it was said by Chief Justice Taney, in delivering the opinion of the court, "The judgment in this case being in a common-law proceeding, it was not removed to this court by the appeal, and consequently the appeal bond did not operate as a supersedeas." The difference between an appeal, which can be taken only in equity and admiralty causes, and a writ of error, which alone must be taken to review judgments in actions at law, is so well marked and so clearly defined in the federal practice that it need not be enlarged upon. Muhlenberg Co. v. Dyer, 13 C. C. A. 64, 65 Fed. 634. The fact that the word "appeal" is applicable to all forms of action in our state practice is not, and cannot be, material in the federal practice, which, as to the manner of reviewing the judgments of inferior federal courts, is regulated entirely by federal laws. In this instance an appeal appears to have been prayed and inadvertently granted by the court rendering the judgment, and a bond thereupon appears to have been executed, which some of the parties supposed would operate as a supersedeas of the judgment at law. This erroneous supposition, however, cannot change the legal aspects of the case, nor make a supersedeas out of what the law makes an idle and vain thing. There cannot be an appeal from a judgment in an action at law in the federal practice, and, if there cannot be an appeal from such a judgment, then a bond to prosecute to effect an appeal in such a case cannot have any validity; nor can such a bond be based upon any consideration which would make it binding upon the parties thereto. Such a bond is in-

effectual to operate as a supersedeas, and did not and could not so operate in this case as to have prevented the taking of any steps nor the issuance of any process or writ available to the plaintiffs after the rendition of the judgment. That there is no consideration to uphold such a bond under such circumstances may be a very essential point of view from which to look at the case, and especially as it seems to be fair to infer from the answer that the appeal bond in this instance was given before the writ of error was allowed or issued, and was in no sense a consideration or condition upon which that writ was allowed. Indeed, the bond to prosecute with effect the inapplicable and impossible remedy of an appeal seems to have no legal bearing upon the remedy actually, and possibly upon fuller advice, afterwards pursued, of having the judgment reviewed by a writ of error, which was the appropriate proceeding. It is averred in the answer that the appeal was actually abandoned and was never prosecuted. If this be so, the case might possibly be stronger, though, as that remedy did not lie at all, it probably could not be abandoned. An appeal was never available. It was never a legal possibility. It could not be pursued. But a writ of error—the appropriate remedy—was pursued, though without any bond having been given to operate as a supersedeas under the statutes of the United States. That a mandamus is not an equitable proceeding, but is only a writ for the enforcement of judgments at law,—in short, that it is only a proceeding ancillary to the action at law,—is so clear that no authority need be cited, except that of Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743. The case of Babbitt v. Finn, 101 U. S. 7, 25 L. Ed. 820, cited by counsel for plaintiffs, is manifestly not applicable to any question involved here. In that case, under the bankruptcy law, there were two writs of error sued out. One carried the case from the district court to the circuit court. A bond which operated as a supersedeas was given when the first writ of error was allowed. The circuit court affirmed the judgment, and another writ of error, which carried the case to the supreme court of the United States, was sued out. A second bond was then given for the prosecution of that writ of error. There was no appeal in either case, and all that the supreme court decided was that the sureties on the first bond were liable thereon upon the final affirmance by the supreme court of the judgment at law rendered by the district court. It is true that sometimes judges, in their opinions, speak rather loosely of appeals, using that word in its more general and generic sense; but the authorities, when we view the actual decisions of the courts, leave no doubt, as it appears to me, upon the only question involved in the demurrer.

It is insisted for the plaintiffs that the bond sued upon is at least good as a common-law obligation, and will therefore support the action. Even if this might, in some general sense, be true, and even if what has been said is not maintainable, still the answer shows that the bond was so given as not to be founded upon any consideration sufficient at common law to support it as a binding obligation, inasmuch as it is apparent, if the answer be true, that no good to the obligors, in the way of staying the judgment, and no loss or prejudice to

the obligees in the same way, could, as a matter of law, be possible by reason of its stipulations. But the claim that the bond might be operative at least as a statutory bond is probably sufficiently answered by what was said by Mr. Chief Justice Waite, in delivering the opinion of the court, in Sage v. Railroad Co., 93 U. S. 417, 23 L. Ed. 933, as follows: "A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with." The bond sued on was based entirely upon an illusory, and in that case impossible, thing, called an "appeal," which was a nullity, and consequently could support no stipulation whatever. Indeed, the bond at once became a mere waif in the case, and could not have prevented any action the plaintiffs might have chosen to take, and the then learned judge of this court would doubtless have promptly so held if his attention had been called to it. If, when the writ of error was sued out, a proper bond had been thereupon given, based upon that writ, and if it had been sued upon, a different case would be presented,—especially if the plaintiffs' petition had shown that the writ of error was lodged in the clerk's office in time to operate, under the statute, as a supersedeas. Kitchen v. Randolph, 93 U. S. 87, 23 L. Ed. 810; Foster v. Kansas, 112 U. S. 204, 5 Sup. Ct. 897, 28 L. Ed. 629. One, possibly, of the plaintiffs, and certainly all of the defendants, are citizens of Kentucky; and if the bond sued on is, as plaintiffs contend, a mere common-law obligation, and not a statutory bond, then the question of jurisdiction may depend on the diverse citizenship of the parties, and be a most important one for consideration.

Some stress is laid upon the fact that the attorney who executed the bond under a power had been authorized thereby to sign the names of the sureties to a supersedeas bond, but whatever power he may have had is quite immaterial, as we are to consider only what bond was in fact executed. Its express stipulations must now be looked to, and the question of what they might have been under the power of attorney cannot concern us.

The answer of the defendants presents a good defense, and the demurrer thereto must be, and is, overruled.

MEARS et al. v. LOCKHART et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,652.

VENDOR AND PURCHASER—TITLE OF BONA FIDE PURCHASER—UNRECORDED CONTRACT.

A bona fide purchaser of land for full value from the holder of the legal title cannot be affected by an agreement made by his grantor to hold the land in trust for another of which he had no actual notice, and which was not recorded until after his purchase.

Appeal from the Circuit Court of the United States for the District of North Dakota.

E. Ashley Mears, for appellants.

John E. Greene (Ira B. Mills, W. C. Resser, and E. B. Mills, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was a bill filed by J. B. Lockhart (upon whose death Frances E. Lockhart and Angline Kearney Lockhart, an infant, were substituted as appellees) against E. Ashley Mears and Clarence T. Mears, the appellants, to determine the adverse claims of the appellants and quiet the appellees' title to certain real estate situated in North Dakota. The proceeding was authorized by the Code of that state. The defendants answered, and filed a cross bill. A good deal of testimony was taken. The court below found against the appellants on several grounds, and entered a decree in conformity to the prayer of the bill.

The property in question had once belonged to the National Bank of North Dakota at Fargo. The bank failed, and thereafter proceedings were had which resulted in investing John A. Percival with the legal title to the real estate in controversy and certain personal assets of the bank. To perfect Percival's title to the real estate the appellant E. Ashley Mears, as president of the bank, executed and delivered to Percival on the 17th day of August, 1896, deeds of conveyance for the same, and on the same day Mears and Percival entered into a contract, the material parts of which are as follows:

"This contract entered into the seventeenth day of August, 1896, by and between E. Ashley Mears, president of the National Bank of North Dakota, at Fargo, North Dakota, on behalf of himself and other officers of said bank, and John A. Percival, witnesseth that whereas, the officers of the National Bank of North Dakota are anxious to have it reorganized for the benefit of its stockholders, and the stockholders' agent heretofore appointed has transferred its assets to John A. Percival under an order of the judge of the United States court for the district of North Dakota; and whereas, it being necessary to perfect its title that the officers of said bank should execute in its behalf to said Percival a deed for all the real estate so transferred; and whereas, the said Percival is willing to turn over to any new corporation formed in the interests of any or all of the stockholders of said national bank all the real and personal property which he purchased from said stockholders' agent, J. A. Hanway: Now, therefore, the officers of said bank have this day executed deeds to the following described real estate to John A. Percival, to wit: * * * It is here further agreed that on payment to said Percival by the officers of said bank of the sum of

twenty-six thousand dollars at or prior to the time he makes payment to said Hanway or other person for purchase price he shall convey said property in fee simple, free of all liens or incumbrances except those existing at this time to said officers, or, should any mortgage be placed thereon, such amount shall be deducted from the said sum of twenty-six thousand dollars. It is hereby further agreed that said payment may be made in installments, and that said officers shall be at liberty to take, and said Percival shall convey, any portion of the aforesaid property on payment to said Percival of the amount of this contract. It is agreed that Percival is to take the bank stock at $4,600 to apply on this contract."

This contract is the basis of the appellants' claim to the property. The circuit court found that this "agreement was wholly terminated and annulled by the mutual agreement of the parties." Though there is evidence in the record to support this conclusion, we do not rest our judgment on that ground.

The lower court also found that Lockhart was a bona fide purchaser in good faith for a valuable and sufficient consideration, without notice, either constructive, express, or implied, of any claim, either legal or equitable, of the appellants or either of them, or any other person, to the premises in controversy. In this finding we fully agree. According to the great weight of the evidence, Lockhart was a bona fide purchaser in the fullest and strictest sense. He agreed to pay and did pay $19,000 for the property. This was its full value. The contract between Mears and Percival which we have quoted was not acknowledged or recorded, and he had no notice of its existence, and no notice of any fact to put him on inquiry. Fourteen days after Lockhart made his purchase and had paid, or become irrevocably bound to pay, the purchase money, and the deeds from Percival to him had been duly acknowledged, the contract between Mears and Percival with an imperfect acknowledgment was recorded. This action did not and could not affect the rights of Lockhart previously acquired.

No useful purpose would be subserved by reciting in detail the evidence to support the finding of the lower court and of this court on this question of fact. The science of jurisprudence is not advanced by the discussion of mere questions of fact. It is enough to say that the evidence upon this issue is to our minds conclusive. Conceding, therefore, that the agreement between Mears and Percival established a trust relation between them, Lockhart was not affected thereby, because he had no notice, either constructive or actual, of the existence of any such trust relation.

The decree of the circuit court is affirmed.

BOARD OF COM'RS OF KEARNY COUNTY, KAN., v. VANDRISS.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1902.)

No. 1,648.

1. MUNICIPAL BONDS—ESTOPPEL BY RECITALS—BONA FIDE PURCHASERS.
Where municipal bonds were sold in the open market for full value to purchasers who had no knowledge of any facts impairing their validity, the municipality is estopped to deny the truth of recitals therein stating the act authorizing their issuance, and certifying that "all acts,

conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law"; and the bonds cannot be defeated unless they themselves, or the act under which they were issued, or both, when read together, disclosed that they were issued without authority or not in conformity with law.[1]

2. STATUTES—SPECIAL LAWS—VALIDITY.
Under Const. Kan. art. 2, § 17, prohibiting the enactment of a special law when a general law can be made applicable, as construed by the supreme court of the state, it is the province of the legislature and not of the courts to determine when a special law is necessary.

3. MUNICIPAL BONDS—CONFORMITY TO STATUTE—TIME OF PAYMENT.
Under a legislative act authorizing and directing a township to issue bonds, and providing that they should be payable 20 years from date, and, at the option of the township, might be called in and paid at any time after 10 years, such bonds are not invalid because by their terms they were made payable in 20 years from the 1st of January preceding the date of their issuance, in March; the township reserving the right therein to pay them at any time after 10 years; the provision relating to time of payment being merely directory, except as imposing a limitation beyond which the bonds should not be made to run.

4. SAME—MODE OF EXECUTION.
Under an act authorizing and directing a township board, which, under the law, consisted of the township trustee, clerk, and treasurer, to issue bonds, it is not essential to the validity of such bonds that they should be signed by all the members of the board; and they were properly executed by being signed by the trustee and attested by the clerk, with the seal of the township.

5. SAME—EFFECT OF RECITALS.
Bona fide purchasers of township bonds containing recitals that all acts precedent to and in the issuing of such bonds had been done as required by law, and bearing the certificate of the state auditor that they were "regularly and legally issued," and registered in his office, have the right to rely on the presumption that they were executed in pursuance of appropriate formal action of the township board.

6. SAME—TAKING EFFECT OF ACT.
An act authorizing a township to issue bonds, and providing that it should take effect "from and after its publication," was in effect during the whole day of such publication, so as to render valid bonds issued thereunder and bearing that date, in the absence of proof of the hour when the publication was made and when the bonds were signed.

7. SAME — DISSOLUTION OF TOWNSHIP ISSUING — LIABILITY OF MUNICIPAL SUCCESSOR.
Kearny county, Kan., is the municipal successor of the old township of Lakin, in Finney county, and liable for the obligations of such township, under the decision of the supreme court of the state, which is conclusive on the county in a federal court.

8. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—HOW DETERMINED.
A federal court has jurisdiction of an action to recover on coupons from municipal bonds aggregating in amount over $2,000, exclusive of interest, where the claim is made in good faith, although a plea of limitations is sustained as to some of the coupons sued on, which reduces the amount of recovery below that sum.[2]

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

[2] See Courts, vol. 13, Cent. Dig. § 890.
Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Shoe Co. v. Roper, 36 C. C. A. 459.

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

This action was brought by L. Vandriss, the defendant in error, against the board of county commissioners of Kearny County, Kan., the plaintiff in error, on 280 coupons that had been detached from municipal bonds. Said bonds, together with the certificate of the county clerk and state auditor, were in the following form:

"No. ——— $250.00.

"United States of America.

"Funding Bond.

"Township of Lakin, Finney County, State of Kansas.

"Know all men by these presents that the township of Lakin, county of Finney, in the state of Kansas, for value received, promises to pay to the holder of the indebtedness funded by the issue of this bond, or bearer, the sum of two hundred and fifty dollars, at the fiscal agency of the state of Kansas, in the city of New York, on the first day of January, A. D. 1907, with interest at the rate of six per cent. per annum, payable at the fiscal agency of the state of Kansas, in the city of New York, semiannually, on the first days of January and July in each year, on presentation and surrender of the interest coupons hereto attached as they become due. After ten years from date the said township expressly reserves the right, upon service of notice at said fiscal agency at any time when coupons are due, to pay off this bond at such time thereafter, not less than one year, as may be named in said notice. This bond is one of twenty bonds of like tenor and date, issued for the purpose of funding certain indebtedness of said township of Lakin, under the provisions of an act of the legislature of the state of Kansas entitled 'An act to authorize the township board of Lakin, Finney county, Kansas, to issue bonds of said township to fund its outstanding floating indebtedness.' Approved March 5th, 1887. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law.

"In testimony whereof, the township, by its trustee and township clerk, have hereunto set their hands. Done at Lakin this 12th day of March, 1887.

"[Seal.] A. B. Roylan,
"Township Trustee.

"Attest: F. C. Kennedy,
"Township Clerk.

"State of Kansas, Finney County—ss.: This bond was duly registered in my office according to law this 14th day of March, A. D. 1887.

"A. H. Burlis,
"County Clerk.

"I, T. McCarthy, auditor of the state of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered in my office according to law this 15th day of March, 1887.

"Witness my official seal.

"[Seal.] T. McCarthy,
"Auditor State of Kansas."

Section 1 of the act of March 5, 1887, which is referred to in the bonds as the authority under which they were issued, is as follows:

"An act to authorize the township board of Lakin, Finney county, Kansas, to issue bonds of said township to fund its outstanding floating indebtedness.

"Section 1. That the township board of Lakin, Finney county, Kansas, be and said board is hereby authorized and directed to issue the bonds of said township, in amount not exceeding five thousand ($5,000) dollars, for the purpose of funding the floating debt of said township. Said bonds shall be known and designated as Lakin township funding bonds, shall be issued in denomination of two hundred and fifty ($250) dollars each, shall be made payable at the fiscal agency of the state of Kansas, in New York City, and

shall bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and shall have interest coupons attached therefor. The principal shall be payable twenty (20) years from date, and at the option of the township at any time after ten (10) years said township may call and pay any one or more of said bonds." Laws Kan. 1887, c. 65.

The action was brought by the plaintiff below against Kearny county because Kearny county had become, as it was claimed, by reason of certain local legislation, the legal successor of the township of Lakin, Finney county.

Milton Brown and S. S. Ashbaugh, for plaintiff in error.

T. F. Garver (J. B. Larimer, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The testimony below showed, without contradiction, that the entire issue of bonds in suit, amounting to $5,000, was sold in the open market for cash, at a small premium above their par value, in the month of March, 1887, shortly after they were executed, and that the purchaser had no knowledge of any facts or circumstances impairing their validity, save such as was disclosed by the bonds themselves, when read in connection with the act under which they had been issued. The original purchaser of the bonds, and all subsequent holders thereof, who succeeded to his rights, must be regarded, therefore, as bona fide holders, unless the bonds themselves, or the act under which they were issued, or both, when read together, disclosed that they were issued without authority or not in conformity with law, and were for that reason invalid. E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 26 C. C. A. 91, 80 Fed. 692, 700; Id., 173 U. S. 255, 274, 19 Sup. Ct. 390, 43 L. Ed. 689; Rathbone v. Board, 27 C. C. A. 477, 83 Fed. 125; Commissioners v. Clark, 94 U. S. 278, 286, 24 L. Ed. 59. If they were bona fide holders, the recital in the bonds is obviously of such a nature as will cure any irregularity in the exercise of the power to issue them which was conferred on the municipality by the act of March 5, 1887. The recital also estops the municipality from pleading that its officers acted fraudulently in issuing the bonds or in disposing of the proceeds. These defenses are eliminated by the recital, upon the assumption that the securities were sold to an innocent purchaser for value.

Counsel for the plaintiff in error urge in their brief that the act referred to above, authorizing Lakin township to issue the securities, was invalid, under section 17, art. 2, of the constitution of the state of Kansas, which prohibits the enactment of a special law like the one under consideration when a general law can be made applicable. But this contention is without merit, since the doctrine is firmly established in the state of Kansas that it is the province of the legislature, and not the province of the courts, to judge of the necessity for special legislation. The subject was considered by this court in Rathbone v. Board, 27 C. C. A. 477, 83 Fed. 125, and in Travellers' Ins. Co. v. Oswego Tp., 7 C. C. A. 639, 59 Fed. 58, and the Kansas decisions on the subject are there collected,—particularly in the case first above cited. We deem the local decisions construing the constitutional pro-

vision in question as binding upon this court, and nothing further need be said on that subject.

The next proposition which is urged, in behalf of the county, to defeat the payment of the bonds, is that they were not issued in conformity with the statute from which the authority to issue them was derived, because they were made payable on January 1, 1907, and were issued, as the certificate of the state auditor indicates, subsequent to March 15, 1887, so that they matured in somewhat less than 20 years. It will be observed, however, that by the terms of the statute the township had the option to call in and pay any one or more of the bonds after the lapse of 10 years, and as we construe the act, in the light of this provision, its effect was to fix a time, to wit, 20 years, beyond which the bonds could not run, while it gave the municipality the privilege of paying them at any time after the expiration of 10 years. As the township had the power to call in and pay the bonds after the lapse of 10 years, we perceive no reason why it might not, in the first instance, make them payable on January 1, 1907, instead of March 15th of that year. By making them payable at that time, instead of 2½ months later, it complied substantially with the provisions of the statute. Moreover, since the provision relative to the time of payment was directory in its character, and did not go to the essence of the power to issue, the failure to comply therewith strictly did not render the bonds void, as has several times been decided. Rock Creek Tp. v. Strong, 96 U. S. 271, 277, 24 L. Ed. 815; City of South St. Paul v. Lamprecht Bros. Co., 31 C. C. A. 585, 590, 88 Fed. 449; Dows v. Town of Elmwood (C. C.) 34 Fed. 114, 117. The proposition, therefore, that the bonds were void because they ran for a period which was a little less than 20 years, is, in our judgment, untenable.

Another claim is that the bonds are void on their face, even in the hands of a bona fide purchaser, because they are not signed by the township treasurer, who, as it seems, under the laws of Kansas, was a member of what is termed the "township board." With reference to this proposition, we observe that the act under which the bonds in suit were issued did not direct how they should be signed,—whether by one or all of the members constituting the township board. It not only authorized the board to issue the bonds, but directed that they should issue them; intending, as it would seem, to leave the board no discretion in the matter. Now, as bonds and contracts, when executed by private corporations, are usually signed by their chief executive officers, and attested by the corporate seal, if there is a seal, and as bonds and contracts thus signed are always regarded as having been executed by the proper persons, we perceive no reason why a township board or any other quasi municipal corporation may not execute bonds, which it has been authorized and directed to issue, in the same manner, unless there is a statute requiring them to be executed in a different form. In the case of Blair v. Cumming Co., 111 U. S. 363, 368, 4 Sup. Ct. 449, 28 L. Ed. 457, a law of the state of Nebraska authorized the county commissioners of a county to issue special bonds for and in behalf of precincts of the county; and bonds were issued, which were signed simply by the chairman of the board, and attested by the clerk, with the seal of the county attached. It was

held that the bonds were properly executed, although they were not signed by all the persons composing the board of county commissioners. See, also, Curtis v. Butler Co., 24 How. 435, 16 L. Ed. 745. By the laws of Kansas a township board consists of a township trustee, a township clerk, and a treasurer, the former of whom, as it seems, is the chief executive officer of the township; and inasmuch as the bonds in controversy were signed by the township trustee, and attested by the clerk with his seal, it follows, from the authority last cited, that they were properly executed, and that the signature of the remaining member of the board was unnecessary to render them valid obligations of the township.

Counsel for the county suggest, however, that it does not appear affirmatively that the township board, as a board, ever resolved to issue the bonds, or ever authorized the township trustee and the township clerk to sign them, and that no recovery ought to have been allowed, for that reason, although they were signed by the proper persons. This suggestion, we think, is without merit, in view of the fact that the bonds are in the hands of an innocent purchaser for value, who bought them on the strength of the recital that "all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law," and who also bought them on the faith of the auditor's certificate, which was appended to each bond, to the effect that they had been "regularly and legally issued." Because of this recital and the certificate of the auditor, an intending purchaser had the right to assume that the bond had been executed in pursuance of appropriate formal action which had been lawfully taken by the township board.

The special act of March 5, 1887, under which the bonds were executed, by its concluding section, declared that it should take effect from and after its publication in the Kearny County Advocate. It is said (although we have been unable to verify the statement by the record) that the act was not published until March 12, 1887, which is the day the bonds bear date; and for this reason it is insisted that they are invalid, because, as counsel urge, they ought not to have been issued until after March 12, 1887. This contention appears to be based on the theory that the act was not operative until March 13, 1887,—the day succeeding its publication. But it is a general rule that, where a computation is to be made from an act done, the day on which it is done is to be included; and, in accordance with that rule, it has been held on several occasions that a legislative act, when nothing is said to the contrary, takes effect on the day of its passage or approval, and is to be regarded as in effect during the whole of that day, except in those cases where the law takes notice of fractions of a day, and gives effect to an act from the hour it was actually passed or approved, as it always will do when it becomes necessary to decide upon conflicting interests and accomplish the ends of justice. Louisville Tp. v. Portsmouth Sav. Bank, 104 U. S. 469, 474, 26 L. Ed. 775; Arnold v. U. S., 9 Cranch, 104, 3 L. Ed. 671; Lapeyre v. U. S., 17 Wall. 191, 21 L. Ed. 606; In re Richardson, 2 Story, 571, Fed. Cas. No. 11,777; Coal Co. v. Barber, 47 Kan. 29, 27 Pac. 114. Applying

this doctrine to the case in hand, the act in question was either in force during the whole of March 12, 1887, the day when it was published and was to take effect, or it would be permissible to show the hour of the day when the publication was made, as well as the hour on which the bonds were signed; and, in the absence of any proof on that point, the presumption would be that they were not signed until the act was published, since the law never presumes that an act was done wrongfully when it may have been done lawfully. In either event, therefore, so far as the present record discloses, the bonds were valid obligations of the township, although they did bear date March 12, 1887. Moreover, the record shows that the bonds were not registered by the county clerk until March 14, 1887, nor certified by the state auditor until March 15, 1887, nor sold by the township until some days later, so that, in any event, they were not fully executed, and did not become valid obligations of the township by delivery, until some time after the act of March 5, 1887, had become a law.

Two other questions were suggested by counsel for the plaintiff in error on the argument, which will be noticed briefly. The first is that Kearny county is not the municipal successor of the township of Lakin, in Finney county, which issued the bonds. The second is that the trial court had no jurisdiction, because the amount of the coupons, on which a recovery was eventually allowed, was less than $2,000. As respects the first of these questions, the county is concluded by the decision of the supreme court of Kansas in Vandriss v. Hill, 58 Kan. 611, 50 Pac. 872, where it was expressly determined, in a manner that is binding on this court, that after the congressional townships which formerly composed Lakin township, of Finney county, became attached to Kearny county, and the latter county was organized, Lakin township, eo nomine, ceased to exist, and Kearny county became its municipal successor, and liable for all of the obligations of the township,—including, of course, the bonds now in controversy.

Respecting the other question, it is only necessary to say that the sum originally sued for exceeded $2,000, exclusive of interest and costs; and the fact that a recovery was not allowed on some of the coupons, because the statute of limitations was successfully pleaded as a defense thereto, does not defeat a jurisdiction which was once lawfully acquired. In cases of this kind it is the sum actually claimed in good faith by the plaintiff when he files his declaration or complaint which determines the jurisdiction of the court, and the fact that the plaintiff may not succeed in recovering all that he asks will not affect the jurisdiction of the court. Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 504, 13 Sup. Ct. 416, 37 L. Ed. 255; Washington Co. v. Williams, 49 C. C. A. 621, 111 Fed. 801, 811.

Finding no error in the judgment below, it is hereby affirmed.

THE PILOT BOY.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 424.

1. COLLISION—STEAMER AND SAILING VESSEL—BURDEN OF PROOF.
In case of a collision between a steamer and a schooner, the steamer is presumptively in fault, it being her duty, under the rules, to keep out of the way; and the burden rests upon her, in order to avoid liability, to show that she took the proper precautions, and that they would have proved effective if the schooner had not changed her course.[1]

2. SAME—LOOKOUT.
It is the duty of a steamer to have a trustworthy lookout, properly stationed, other than the officer of the deck or the helmsman; and the absence of such lookout in case of collision is prima facie evidence that the collision was caused by the steamer's fault, and casts upon her the burden of showing that the presence of the lookout could not have avoided the collision.

3. SAME—EVIDENCE CONSIDERED.
A collision occurred in the night between a steamer and schooner, which met in the narrow channel of the Stono river, along the coast of South Carolina. The steamer had no lookout, except the pilot, who was acting as helmsman, and was a competent and experienced navigator in those waters. He saw the lights of the schooner when a mile or more distant, and from that time kept close watch of her. According to his testimony, which was corroborated, without conflict, by a number of other persons on the steamer, some of whom were disinterested, when he approached nearer he gave a signal of one whistle, slowed down, and took the starboard side of the channel; the schooner then showing her red light. The signal was afterward repeated. On coming near the schooner, her red light disappeared, on which he at once reversed. Shortly after, the schooner's green light was shown, and the collision followed almost immediately. This testimony was not effectively contradicted by the witnesses for the schooner. *Held* that, upon such facts, the steamer was not chargeable with fault, but that the collision must be attributed to a change of course by the schooner.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston.

J. P. K. Bryan (Trenholm, Rhett, Miller & Whaley and M. Rutledge Rivers, on the brief), for appellants.

Julian Mitchell, Jr. (Mitchell & Smith, on the brief), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and KELLER, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the District Court of the United States for the Eastern district of South Carolina, sitting in admiralty. It is a case of collision in a part of the continuous water way of inland navigation along the Atlantic seaboard,—a highway much used by vessels of limited draught. The schooner Beulah Benton, of 36 tons register, 57 feet on her keel, 19 feet beam, and drawing 4 feet when loaded, with full complement of tackle, apparel, and furniture, left Edisto Island on the night of January 15, 1901, on a voyage to Charleston, S. C. Her regular

[1] See Collision, vol. 10, Cent. Dig. §§ 54, 257.

master was sick, and she was in charge of the mate, as master, with a crew of three men, besides himself. Her cargo consisted of 66½ bales of sea-island cotton, of which 34 bales were on deck. She had proceeded on her voyage, and had entered Stono river, above the mouth of Rantowles creek. She had the wind abeam, blowing fresh. Her course was about N. N. E. She had up mainsail, topsail, foresail, and jib, on the port side, and was proceeding about five miles an hour. About the hour of 4:40 of the morning of January 17th, she sighted the light of the steamer Pilot Boy, which was on her voyage from Charleston to Beaufort, S. C., approaching her in the same river. In a short time afterward the schooner and steamer came into collision, the steamer striking the schooner at an angle of about 45° on her starboard side, between her masts, and cutting her nearly in two. The schooner filled with water, and her cargo was seriously damaged. The deck cargo was taken off at Hart's wharf, on the Stono river,—a place not far from the spot where the collision occurred. The schooner was towed to Charleston, the cargo in her hold unloaded, and the schooner repaired. The Pilot Boy is a side-wheel steamer, about ——— long, which for several years has run regular trips through these waters, by night as well as day, between Charleston and Beaufort. The accident occurred in that part of the Stono river which flows between John's Island and the mainland; having on the easterly side the broad and level marshes of John's Island, and on the westerly side similar marshes attached to the mainland. The exact spot of the collision was somewhere southward of the mouth of Rantowles creek. The witnesses differ as to its location. The schooner and the cargo were owned by different persons. The libel in this case was filed by both the owner of the schooner and the owner of the cargo, seeking damages from the Pilot Boy. Claim and answer were filed. Testimony was taken in the presence of the court. After argument, the libel was dismissed; the court holding the steamer without fault causing the collision. Exceptions were taken, appeal was allowed, and the cause is here on the assignments of error.

The testimony in this case offers no exception to the confusion and conflict which so frequently characterise the litigation over collisions in courts of admiralty. The salient facts, therefore, must be carefully noted. The principles of law governing cases of this character must be kept in mind and applied to these facts, as far as they can be, as disclosed in the testimony.

This is a collision between a steamer and a sailing vessel, occurring in a narrow channel in the nighttime. Under articles 20 and 21 of the sailing rules, when a steamer and a sailing vessel are approaching each other in such a direction as to involve risk of collision, the steamer must keep out of the way of the sailing vessel, carefully watching her movements, and the sailing vessel must keep her course. The reasons for this rule are given in New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co., 22 How. 461, 16 L. Ed. 397. And the rule is enforced in very many decided cases. The Colorado, 91 U. S. 692, 23 L. Ed. 379. If the steamer fails to keep out of the way of the sailing vessel, she is responsible for the collision, unless the sailing vessel is in fault. The Sea Gull, 23 Wall. 165, 23 L. Ed. 90. When a steamer is

approaching a sailing vessel, the steamer is required to exercise all necessary precautions to avoid risk of collision. If this be not done, prima facie she is chargeable. Steamship Co. v. Rumball, 21 How. 372, 16 L. Ed. 144. When a steamer has notice that a schooner is before her and near her track, she is bound to take efficient measures to avoid the schooner. New York & V. S. S. Co. v. Calderwood, 19 How. 241, 15 L. Ed. 612. If she adopts such measures, and they would have been effective if the schooner had not changed her course, the steamer is not chargeable for the consequences. The Potomac, 8 Wall. 590, 19 L. Ed. 511; The S. C. Tryon, 105 U. S. 267, 26 L. Ed. 1026.

In the case at bar the schooner and steamer were approaching each other in a narrow channel. The lights of each were seen by the other. The collision having occurred, the burden is on the steamer to show that she took the proper precautions, and that these would have proved effective if the schooner had not changed her course. The Java, Fed. Cas. No. 7,233.

There is another rule of law governing cases of collision: It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout, besides the helmsman, and, in case of collision, the absence of such lookout is prima facie evidence that the collision was caused by the fault of the steamer. The Genesee Chief, 12 How. 443, 13 L. Ed. 1058. When acting as the officer of the deck, and having charge of the navigation, the master of a steamer is not a proper lookout. The Ottawa, 3 Wall. 269, 18 L. Ed. 165. Proper lookouts are persons other than officers of the deck or the helmsman, and they should be stationed on the forward part of the vessel. Id. Elevated positions on a steamer, such as the hurricane deck, are not as favorable situations for the lookout as those on the forward deck near the stem. In the case at bar the lookout was the helmsman on the hurricane deck. But the absence of a lookout is not conclusive of fault. It may appear that the collision could not have been guarded against by a lookout. The Farragut, 10 Wall. 334, 19 L. Ed. 946; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Victory, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519. Nevertheless the burden of proof in this regard also is on the steamer.

We must then look first to the testimony offered in behalf of the Pilot Boy, to see whether she adopted the proper precautions to avoid the schooner, and whether the absence of a proper lookout caused or contributed to the disaster. There are only two witnesses on the Pilot Boy who can speak, of personal knowledge, as to all the facts occurring just before the collision. These are Hamilton, the helmsman, and Townsend, an ordinary hand, who helped Hamilton at the wheel. Hamilton was the pilot and lookout. Other witnesses testify as to certain facts and circumstances attending the collision. These two alone can speak as to what occurred from the time the schooner was first sighted and the time when the collision became imminent. In order to understand the testimony, it is necessary to obtain some idea of the locus in quo. The Stono river, as it increases its distance from the ocean, becomes quite narrow. Its course about

the place of the collision is from the southwest toward the northeast. The points of the compass are stated approximately. It has several bends in its channel. On each side of the stream are wide flats covered with salt-water marsh. On the easterly side of the stream is the marsh of John's Island. Not far from the place of collision on this John's Island shore is a wharf or landing known as "Hart's Landing," sometimes called "Belvidere." On the west side of the stream are the marsh flats of the mainland. A creek of some size, known as "Rantowles Creek," flows from the direction of the mainland down toward the Stono, approaching close to it, then turns off northwardly, and, after another bend, enters into the Stono, almost in a due easterly direction. The collision occurred in the Stono above the mouth of Rantowles creek. Hamilton is a licensed pilot. Although he is illiterate, witnesses of the highest character—seafaring men—testify, of their own knowledge, that he is a competent and efficient pilot and steamboat man. He has been accustomed for 23 years to carry steamers through these narrow waters, and has been in charge of the Pilot Boy and her predecessor of the same name on their regular repeated trips through them for about 16 years. In his testimony he betrays some characteristic vanity,—a disposition to talk learnedly of his duties. But on the whole his evidence favorably impressed the court below, as it does this court. His account of the transaction is this: He first saw the schooner when he was in Stono river, about a mile below Rantowles creek. The schooner first showed her green light. A few minutes after the green light disappeared, and she showed a red light. Townsend, who was with him in the pilot house, says that Hamilton called his attention to the schooner; that at first he saw no light on her, but soon saw the red light. To this extent he corroborates Hamilton. It is well to say here that the witnesses were examined apart, none but the witness on the stand being present in court. Hamilton goes on and says that, when he reached the place at which Rantowles creek empties into the Stono, he gave one blast of his whistle. He did this, he says, to let the schooner know that he was coming, and slowed down on one bell. Townsend says that Hamilton said, when he did this, "I will slow down, because those fellows seem not to have much idea of what they are doing," and he gave one bell. At the same time, Hamilton ported his wheel. When he turned from the mouth of Rantowles creek, he again blew another blast. He did this, he says, to let the schooner know that he was going to starboard. He is corroborated as to these two blasts, and as to his slowing down, by Harris, Ferguson, and Phillips, all reputable witnesses; the first being a steamboat man and a passenger; the others being connected with the Pilot Boy. Hamilton further says that all this time he was observing the schooner off his port bow, showing a red light. In this he is corroborated by three witnesses, passengers on the Pilot Boy and not connected with her. One of these (Wineman) heard the first whistle and the one bell. Then he heard the second whistle. When he heard this second whistle he went to the port gangway of the Pilot Boy, where they put out the freight, and, looking out, he saw a red light coming down on the port side of the steamer. Benjamin Hart, Jr., also a passenger on the Pilot

Boy, heard the two whistles. At the second whistle he looked out of the forward gangway of the steamer, on the left-hand side, looking toward John's Island, and saw a red light. Cross, a colored preacher; also a passenger, who was in the cabin, heard both whistles. At the second, thinking that they had gotten to a landing, he rose and went on the left side of the steamer, abaft the wheel house. There is a small sort of deck just abaft the wheel house. Standing on that, he looked out, and saw a boat ahead showing a red light. Hamilton goes on and says that, seeing the red light of the schooner, he thought it was all right, as he was on a starboard helm, but in four or five minutes the red light suddenly disappeared, and a green light appeared. He gave the signal at once (three bells and a jingle) to stop and reverse; and then came the collision,—whether before the steamer got sternway on her, or not, he does not say. In this disappearing of the red light, and the showing of the green light, four or five minutes after the second whistle, he is confirmed by Wineman, Hart, and Cross. Mr. Harris heard the two blasts and the slow down and the three bells and jingle. He sprang out of his berth, leaned his body out of the window, and saw over the port bow of the steamer the glare of a red light, shut out by a green light, and then, very soon after, the collision. Bonneau, the engineer at his post, heard and obeyed the one bell, after the first blast heard the second blast, and some minutes afterward heard and obeyed the three bells and jingle. Kramer, a passenger (a man of excellent character), heard the blasts, the bell, and afterward the bells and the jingle, and then the collision. If this testimony be true,—and the trial judge, who saw the witnesses and heard their testimony, and was well acquainted with the character of most of them, believed it to be true,—it establishes these facts: That although Hamilton was helmsman, and on the hurricane deck, whilst he was not the proper lookout, yet he saw the approaching schooner promptly, observed her closely, and is corroborated by the evidence of others in the correctness of his observation. So the collision could not have occurred because the approaching vessel and her movements were not seen and watched, in other words, for want of a lookout. Another fact is shown by this testimony: Hamilton observed the precaution required when an approaching vessel is observed. He slowed down at once, and proceeded slowly and cautiously under one bell, still watching the schooner; for, just as soon as he saw the red light disappear, he stopped and reversed. He says that when he did so he put his wheel to starboard. By doing this, when the steamer got under way back, her bow would have been thrown to starboard; and, as he supposed the schooner was approaching him on his port side, she would probably have passed the bow of the steamer. Hamilton swears that he kept on the starboard side of the river, as he should have done under the rule of the road (article 21). It is clear that the collision did not occur from any negligence or default on the part of the steamer. So long as the Pilot Boy saw only the red light of the schooner, those on board of her could feel sure that there could be no collision. Just at the instant that this cause for security ceased by the disappearance of the red and the showing of the green light, every precaution which could have been taken to avoid a collision was adopt-

ed. This change in the lights of the schooner indicated that she had changed her course.

So far only the testimony of the Pilot Boy has been considered. The crew of the schooner say that they were proceeding with a fair wind against tide, on the port side of the stream, running along and close to the edge of the marsh, about 20 feet; that they kept that course until the collision without change. They saw the lights of the Pilot Boy when they were a little south of Hart's landing, and heard the first whistle after they had passed the landing. They saw her red light when the Pilot Boy was about the mouth of Rantowles creek, and then she showed both lights, coming down on the schooner. Their theory is that the Pilot Boy was on the side of the stream on her port side, and that she changed direction and came across the stream to the side the schooner was, and collided with her. This directly contradicts the testimony of the witnesses for the Pilot Boy,—especially Capt. Williams, who runs on this river in his boat, and who says that it is impossible to follow the shore line on the west side of the Stono, in the reach in which this collision happened, without getting aground. But be this as it may, the trial judge heard all these witnesses, weighed their credibility, and decided against the libelant. Examining carefully, as has been done, all the evidence in the case, we cannot see any error in this,—certainly none of such a character as would compel a reversal of his conclusion.

It is ordered that the decree of the district court be affirmed.

BANK OF COMMERCE et al. v. CENTRAL COAL & COKE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,567.

1. RAILROADS—FORECLOSURE OF MORTGAGE—PRIORITY AS BETWEEN RECEIVER'S CERTIFICATES.

   It is the duty of the court to pay indebtedness which it has authorized its receiver to contract in the administration of railroad property, before any indebtedness of the company, from the proceeds of the property, and receiver's certificates representing such indebtedness are entitled to priority of payment over those issued by order of the court for preferential debts of the company.

2. SAME—CONSTRUCTION OF DECREE.

   A provision of a decree foreclosing a railroad mortgage, and directing a sale of the property, that the fund arising therefrom, after payment of costs, etc., shall be applied "(3) to the payment of all interventions or other claims heretofore or hereafter to be allowed * * * as superior to the lien of the bonds, * * * or, if the fund realized be not sufficient to pay the same, then to the payment of the same pro rata," does not apply to receiver's certificates issued by direction of the court in payment of indebtedness it has itself contracted in the operation of the property, but should be construed as referring only to claims against the railroad company; and it does not put it out of the power of the court to thereafter deal with the question of the priority of such certificates under a general provision of the decree passing the cause "for further orders."

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

John M. Taylor (P. C. Dooley, Morris M. Cohn, and J. G. Taylor, on the brief), for appellants.

W. C. Perry (Samuel H. West, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Farmers' Loan & Trust Company filed a bill against the Stuttgart & Arkansas River Railway Company to foreclose a mortgage on the company's road. A receiver was appointed to operate the road pending the foreclosure proceedings. The order appointing the receiver authorized him to pay certain debts of the railroad company incurred for labor, materials, and supplies prior to the appointment of the receiver. Subsequently the court authorized the receiver to issue certificates for such indebtedness, which were declared to constitute a lien on the road paramount and superior to the lien of the mortgage in suit. The certificates issued under this order are known as "Class B." The court made an order authorizing and directing the receiver to borrow money to pay the taxes on the road, and to construct a Y, and make needed repairs on the engines and cars on the road; and for the debts incurred in complying with this order he was authorized to issue certificates which were declared to constitute a lien on the road superior and paramount to that of the mortgage in suit. The certificates issued by the receiver for expenses incurred by him under this order of the court are known as "Class A." It will be observed that the indebtedness for which the receiver's certificates in class A were issued was contracted by the receiver in compliance with an order of the court. This indebtedness was incurred by the court while it had the possession and custody of the road, and was operating it, through its receiver. Properly speaking, the certificates issued by the receiver for this indebtedness are the obligations of the court issued for debts incurred by the court itself in the operation of the road and the administration of the trust. The certificates embraced in class B were issued for the debts incurred by the railroad company prior to the appointment of the receiver, but which were declared to be paramount and superior in right of payment to the mortgage debt. The lower court held that the certificates in class A should be paid in preference to the certificates in class B. The opinion of the circuit court is reported in Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co. (C. C.) 106 Fed. 565. The appellants contend that all the certificates stand on the same footing, and should be paid pro rata.

When the debts of the railroad company were contracted, the credit was given to the railroad company. The creditors extended the credit to the company with the full knowledge of all the risks incident to extending credit to a railroad company, among which may be mentioned the insolvency of the company, the appointment of a receiver therefor, and the right and authority of the court appointing the receiver to incur debts in the operation of the road which would have the preference right of payment over any and every class of indebtedness of the railroad company. On the other hand, when the debts of the receiver were contracted in pursuance of the order of the court the credit

was given to the court. The railroad company was not liable for such indebtedness. The creditors knew they must look to the court alone for payment, but they also knew that it was the duty of the court contracting this indebtedness to discharge the same if the property or its proceeds in its custody and possession was adequate to that purpose. Debts contracted by the railroad company on its credit, although they belong to the class called "preferential," do not rank on the same high plane with debts contracted by the court on its credit; and, where the property or fund in the custody and control of the court is not adequate to pay both classes, preference will be given to the debts contracted by the court. The obligations of the railroad company to pay its debts is not affected by the receivership and foreclosure. It retains its corporate existence, and its creditors may still pursue it, and in some cases its officers and stockholders. But it is not so with the debts contracted by the court. They are not debts of the railroad company, and the company is not liable for them. The court alone is liable for its debts. That obligation imposes on the court the duty to apply the property or its proceeds in its custody and control to the payment of the debts contracted by it in and about the management of the property. Judicial repudiation of obligations is not to be sanctioned under any conditions. One of the chief duties of courts of justice is to compel delinquent debtors to pay their debts. It could do this with poor grace indeed if it neglected to pay its own debts when it had the means to do so. It is true that the errors and mistakes of courts, though they may ruin a citizen, are placed in the category of injuries produced by the law, and for which the law furnishes no redress. But here the court has committed no error or mistake, and has it in its power to protect its contracts and its credit, and do justice to the citizens who trusted it. While a court cannot be adjudged a bankrupt, and no proceedings can be taken against it to enforce payment of its obligations, these very facts make it all the more important that it should scrupulously observe its obligations to the citizen. A court that would fail to do this would speedily and justly forfeit the respect and confidence of the public. We conclude, therefore, that the lower court was right in ordering the payment of the receiver's certificates issued for the court's debts in preference to those issued for the company's debts, though those debts were declared to be preferential. Dow v. Railroad Co. (C. C.) 20 Fed. 260; Mercantile Trust Co. v. Farmers' Loan & Trust Co., 26 C. C. A. 383, 81 Fed. 254; Miltenberger v. Railroad Co., 106 U. S. 311, 1 Sup. Ct. 140, 27 L. Ed. 117; Butler v. Cockrill, 20 C. C. A. 122, 73 Fed. 945, 953; Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 168.

But it is said, while the court might originally have given this preference, it was foreclosed from doing so by the terms of the final decree of foreclosure, which, it is claimed, put all the receiver's certificates on an equality. We do not so construe the decree. The clauses of the decree on which this contention rests read as follows:

"It is also ordered, adjudged, and decreed that the lien of said mortgage is prior to any other lien in favor of any party to this cause, except so far as this court has heretofore ordered certain intervening claims paid by S. W. Fordyce, the receiver herein, and has, by certain decrees and orders of

this court heretofore entered herein, declared such claims, and judgments entered thereon, to be paramount and superior to the lien of the mortgage described in the bill of complaint herein, as shown by the records of this court in this case, reference thereto will more fully appear; and except, also, to the interventions of S. R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, the Arkansas Supply Company, A. C. Barstow, executor and trustee, three separate interventions for $5,000, cash advanced; $2,108.96, taxes paid; and on account of Illinois Steel Company, four notes, each for $1,650.96. *The question as to the priority of the lien of each of the claims or interventions above described being passed for further consideration and decree of this court.* It is further ordered and decreed that the fund to arise from said sale shall be applied as follows: (1) To the payment of all proper expenses attendant upon said sale, including the expenses, outlays, and compensation of the master commissioner to make said sale, as such expense, outlays, and compensation may be hereafter fixed and allowed. (2) To the payment of the costs of this suit, and the compensation of the plaintiff herein for its services, charges, and expenses in the execution of its trust under said mortgage so made to it as aforesaid, including its own compensation and commissions, and its disbursements for solicitor's and counsel fees in the execution of said trust, as such charges, expenses, and compensation may be hereafter fixed and allowed by this court. To the payment of all interventions or other claims heretofore or hereafter to be allowed by this court in this case as superior to the lien of the bonds mentioned in mortgage foreclosed hereby; if the fund realized be not sufficient to pay the same, then to the payment of same pro rata."

We think the clause of the decree which we have italicized was intended to reserve the question of priority between the several classes of debts contracted by the railroad company having preference over the mortgage debt. If the clause of the decree we have italicized included the debts contracted by the receiver under the order of the court, then the question of priority between these debts and the other debts mentioned in the decree was expressly reserved for further consideration; and, if such debts were not included in this clause of the decree, then they were unaffected by it, and it remained for the court to order and direct their payment according to the principle we have indicated should apply to such debts.

Touching the "(3)" clause of the decree, we think it refers to the debts of the railroad company which had been or might thereafter be allowed and given a preference over the mortgage debt,—in other words, to the class of debts contracted by the railroad company which are commonly called "preferential." It was obvious to the court and to the parties when this decree was rendered that the property or its proceeds would not be adequate to pay the costs of foreclosure, the debts of the receiver contracted by order of the court, and the debts of the railroad company which had been or might be adjudged to be preferential, and this fact accounts for this clause of the decree. The term "interventions," in this clause of the decree, was not appropriate to describe the receiver's certificates embraced in class A. When the court makes an order authorizing its receiver to incur a debt, and issue a receiver's certificate for the same, and the receiver, in compliance with such order, contracts the debt and issues his certificate therefor, no petition of intervention and no further order are necessary to establish that debt or its preferential character. That was done by the order of the court authorizing and directing the receiver to contract the debt and issue the certificate. A debt thus

contracted is an audited claim from its inception. It then becomes the duty of the court to make suitable provision for the payment of such debt, which is, in effect, as we have seen, a debt of the court.

But a further answer to the contention of the appellants that the decree of foreclosure put it out of the power of the court to subsequently deal with the question of the order of payment of the receiver's certificates is found in the last clause of the decree, which gives to the parties the right to "apply to the court for further orders and directions at the foot of this decree, and this cause is passed for further orders." We think the retention of the cause "for further orders" authorized the court to make any further appropriate order on the subject of the receiver's certificates.

The circuit court held that the certificates in class A fell within the provisions of section "(2)" of the decree, and should be paid as part of the costs and expenses of the receivership under this clause. We do not find it necessary to discuss or decide that question.

The decree of the circuit court is affirmed.

PHELPS v. CHURCH OF OUR LADY, HELP OF CHRISTIANS.

(Circuit Court of Appeals, Third Circuit. May 22, 1902.)

No. 5.

1. MINERALS—EXCEPTION IN DEED—MARBLE.
   Under the law of New York as settled by its court of appeals, marble in place is a "mineral," and the title thereto does not pass by a conveyance of the land which excepts and reserves to the grantor all mines and minerals which may be found therein.

2. ASSUMPSIT—IMPLIED CONTRACT—DEFENSES.
   In a jurisdiction where the rule prevails that a defendant in trover may defeat recovery by showing the ownership and right of possession of the property sued for in a third person, the same defense is available where the plaintiff elects to waive the tort and sue in assumpsit to recover the value of the property.

3. SAME—TO RECOVER VALUE OF PROPERTY CONVERTED—TITLE OR POSSESSION TO SUPPORT.
   Under the law of New York a lease of land for a term of years, with the right to dig, quarry, and use "all or any marble, stone, or other valuable material substance" found therein, but which excepts and reserves "mines and minerals as specified in original conveyance," where the deed under which the lessor holds title expressly excepted and reserved therefrom all mines and minerals found in the land, conveys to the lessee no title to marble in place in the land, and will not support an action of assumpsit by the lessee to recover the value of marble quarried and removed from the land by another at a time when plaintiff was not in possession.

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

Robert H. McCarter, for plaintiff in error.
David H. McClure, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The case presented to us upon the former writ of error was that of an action brought by the receiver of a company which had the right of property in the marble contained in a tract of land in the state of New York to recover the value of marble quarried from the land by a mere trespasser, who acted for and delivered the marble to the defendant. This statement is fully borne out by the opinion of the court. 40 C. C. A. 72, 99 Fed. 683. Speaking of the indenture made November 25, 1892, between Mrs. Mary Brady, the party of the first part, and James W. Carpenter, Jr., and James A. Phelps, the parties of the second part, the court said: "According to all the authorities, this deed operated to convey an estate in the land for the specified term of fifty years, and its legal effect was to pass to the parties of the second part and their assigns a right of property in the stone and other valuable substances contained in the land." The Metropolitan Marble Company, whose receiver is prosecuting this action, claims under the above-recited deed by virtue of a sublease from the assignee of the term. Of Sullivan, who quarried the marble, the court, in its former opinion, said: "Sullivan appears in the light of a mere trespasser, who had been in the temporary unlawful occupancy of the premises;" and the court added: "The case, as presented by this record, is not one of conflicting titles to the land. It will be observed that at the time the court gave peremptory instructions against the plaintiff the defendant had not put in any evidence whatever." We have no reason to doubt the soundness of the principles laid down by this court on the former occasion, or the correctness of the judgment pronounced by us upon the facts then presented.

At the second trial of the case a different state of facts was developed. In the first place, it was made to appear (for reasons about to be stated) that the receiver's company, the Metropolitan Marble Company, had no right of property in the marble contained in the land. And, secondly, it was shown that, after the Metropolitan Marble Company had suspended work at the marble quarry, Mrs. Mary Brady and her three daughters executed a written lease of the quarry to the Reverend John P. Callaghan, the rector of the Church of Our Lady, Help of Christians, and that the entry of Sullivan upon the land was made and the marble was quarried and taken away under and in pursuance of this lease to Father Callaghan. The title of Mrs. Mary Brady to the tract of land in question originally came from John La Farge, who, together with his wife, by deed dated February 15, 1852, conveyed the land to one Margaret Lewis. That deed contained the following exception and reservation: "Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns, forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away." Succeeding deeds in Mrs. Brady's chain of title contained a similar exception and reservation clause. Furthermore, the above-mentioned indenture of November 25, 1892, whereby Mrs. Brady demised and leased the tract of land to James W. Carpenter, Jr., and James A. Phelps for a term of 50 years, contained the clause following: "Ex-

cepting and reserving mines and minerals as specified in original conveyance." And, finally, the sublease of June 25, 1895, by the assignee of the term, the Oswegatchie Quarry Company, to the Metropolitan Marble Company (the plaintiff company), contained the same exception and reservation, namely, "Excepting and reserving mines and minerals as specified in original conveyance." Since our judgment upon the former writ of error, the supreme court of New York, in the case of Brady v. Brady, 31 Misc. Rep. 411, 65 N. Y. Supp. 621, has held that the ownership of the marble in the tract of land conveyed by the above-mentioned deed of John La Farge remained in him by virtue of the exception and reservation of "mines and minerals" contained in his deed. In so holding the supreme court followed the interpretation which the court of appeals of the state of New York gave to the word "minerals" in a grant or reservation in its opinion in the case of Armstrong v. Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683. The land here in question is in the state of New York, and the instruments before us are to be construed in accordance with the law of that state as expounded by its courts. Under the decision in the two above-cited New York cases it is clear that neither Mrs. Brady, nor her lessees, Carpenter and Phelps, nor the Metropolitan Marble Company, the sublessee, took any title to the marble in this land, but that the right of property therein remained in John La Farge. It should be noted that no such point was made, discussed, or considered when the case was here before. Now, not only does the present record disclose that the Metropolitan Marble Company had no ownership of the marble in place, but the proofs establish these further facts, namely: That the marble sued for was not quarried by the plaintiff or his company, and was never in the possession of either, and that during the whole time occupied in the mining and removal of it the Metropolitan Marble Company was out of possession of the quarry, and Father Callaghan was in the actual possession thereof under his lease from Mrs. Brady and her daughters. Instead of bringing trover, the plaintiff, waiving the supposed tort, sued in assumpsit for the value of the marble which was so mined and afterwards was used by the defendant in the erection of its church building at East Orange, in the state of New Jersey. Upon the indisputable facts now appearing, can the plaintiff recover in this action? It may, we think, be affirmed with great confidence that by the law of the forum, in such circumstances as exist here, a defendant in trover could defeat the action by showing the right of property in the chattels sued for to be out of the plaintiff, and in a third person. Glenn v. Garrison, 17 N. J. Law, 1. This is the general rule, and it is supported by sound reason; for, if the action could not be defeated by showing that the title to the articles was at the commencement of the suit in a third person, the defendant might be compelled to pay for the same property again to such third person, he being a stranger to the first suit. Ekstrom v. Hall, 90 Me. 186, 192, 38 Atl. 106. This rule undoubtedly applies to a case such as this, where the plaintiff elects to sue in assumpsit for the value of the articles converted. Now, it is true, as shown by Northam v. Bowden, 11 Exch. 70, and

other cases cited by counsel for the plaintiff in error, that possession of property may give sufficient title to maintain an action for its conversion against a mere wrongdoer. But in the present case the plaintiff shows no possessory title. The mined marble which is the subject of this suit never was in the possession of the plaintiff or his company. Moreover, when this marble was mined and taken away, the plaintiff's company was not in possession of the land from which it was quarried. It was mined and removed by one who was in the actual, open, exclusive, and peaceable possession of the quarry, claiming it by color of title at least. The marble, after it was mined, was no more the property of the plaintiff or his company than it was when in situ.

Whether or not Mrs. Brady is precluded from denying the right of her lessees, Carpenter and Phelps, and those claiming under them, to quarry marble from the land embraced in her lease, is a question not material here. This is not an action to recover damages for the disturbance of a supposed mining right. The action is upon the common counts in assumpsit, and proceeds upon an implied promise by the defendant to pay the value of the marble it used. A right of property in the receiver's company, or at least a possessory title, is the very basis of the action.

We cannot see upon what principle the defendant is estopped from availing itself of the defense that the plaintiff's company had no ownership whatsoever in the marble, the value of which is sued for. This lack of ownership, be it observed, appears not alone by the showing of the defendant, but is a fact inherent in the plaintiff's case, and demonstrated by his own proofs.

The learned judge below, without ignoring the fact that the ownership of the marble in the land remained in John La Farge under the exception and reservation in his deed, and without detracting from the importance of the fact, put his binding instruction in favor of the defendant rather upon the ground that the title to real estate was involved in the suit. But whether or not, by the two leases executed by Mrs. Brady,—the first to Carpenter and Phelps, and the second to the Reverend John P. Callaghan,—the title to land was drawn in controversy in such a sense as to deprive the court of jurisdiction to try the case, is a question upon which it is not necessary for us to pass. While we are of opinion that the direction given to the jury to find a verdict for the defendant was right upon the whole evidence, we prefer to put our determination distinctly upon the ground that neither the Metropolitan Marble Company nor its receiver had any right of property in or title to the marble sued for, either while it was in place or after it was quarried.

The judgment of the circuit court is affirmed.

DOWAGIAC MFG. CO. v. SUPERIOR DRILL CO.

P. P. MAST & CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

Nos. 989, 1,041.

1. PATENTS—SCOPE—INCIDENTAL ADVANTAGES OF INVENTION.
A patentee is entitled to all the uses and advantages of his invention, whether he knew of them or not.

2. SAME—PATENTABLE INVENTION—PROOF OF COMMERCIAL SUCCESS.
The fact that a patented device went at once into extensive public use, and has continued therein, does not of itself conclusively establish either novelty or utility; but if, upon technical grounds, the matter is doubtful, it is persuasive evidence of those qualities, unless it appears that such commercial success was due to other causes.

3. SAME—VALIDITY.
It is no objection to the validity of a patent for an improvement in a physical structure that its utility depends on the use of the structure in a particular manner, when such mode of use is described in the specification in terms intelligible to those skilled in the art.

4. SAME—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
If a new combination of old elements is such that it produces a new mode of operation, and a beneficial result, there may be a patentable invention.

5. SAME—INFRINGEMENT—CHANGING FORM OF PARTS IN COMBINATION.
One does not escape liability for infringement by changing the form or dimensions of the parts of a patented combination, where such change does not break up or essentially vary the principle or mode of operation pervading the original invention.

6. SAME—GRAIN DRILLS.
The Packham patent, No. 557,868, for an improvement in disc grain drills, consisting of a shield extending below the end of the seed conduit, and in front of the same, adjacent to the lower and rear portion of the disc, on its convex side, so as to stand within the angle of the furrow, and having its front and lower edges bent inwardly and brought close to the disc,—its purpose being to keep the furrow clear of obstructions from the land side until the seed has been dropped therein, and also to act as a guide for the seed,—was not anticipated, shows patentable invention, and is valid. Claims 1, 2, 3, and 6 also *held* infringed by the device used by one of the defendants, and claims 1, 2, and 3 by that used by the other defendant, which was that of the Mast patent, No. 615,727.

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

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

The following are the opinions in the courts below:

Superior Drill Co. v. Dowagiac Manufacturing Co. et al.

WANTY, District Judge. Suit is brought on the first claim of patent No. 347,982, issued to W. B. Arnett, on August 24, 1886, which reads as follows: "A spout on conductor for a seeding machine having its lower end flattened laterally and formed with a delivery orifice elongated in the direction of the line of travel, whereby the spout is enabled to deliver the seed centrally in a narrow furrow." And on the fifth claim of patent No. 527,621, issued to F. R. Packham, on October 16, 1894, which reads as follows: "In a furrow opener, a support having a laterally projecting trunnion and a vertically arranged conduit, a lubricating chamber formed in the top

of said support and having a laterally extending passage leading therefrom and ending on the periphery of said trunnion, substantially as specified." And on the first, second, third, and sixth claims of patent No. 557,868, issued to F. R. Packham, April 7, 1896, which reads as follows: "(1) A furrow opener consisting essentially of a frame or support having a conduit therein, a disk journaled on a suitable trunnion on said frame or support which is located in front of the conduit, said frame or support being provided with an extended portion which projects below the lower end of the conduit and in front of the same, said extension being formed at the front to conform to the shape of the side of the disk adjacent to which it is adapted to lie, substantially as specified. (2) The combination with the frame having a conduit therein, and a furrow opening disk journaled at an angle on the frame of a guide shield extending below the end of the conduit and in front of the same, said shield being located within the angle of the furrow opening disk so as to stand wholly within the furrow, substantially as specified. (3) The combination with the supporting frame having a conduit therein, and a disk journaled on said frame at an angle to the line of draft, as described, of a downwardly projecting shield in front of and below the conduit, said shield being curved at the front so as to lie adjacent to the disk and being placed wholly within the path of said disk so as to extend within the furrow formed thereby, substantially as specified. * * * (6) The combination with the frame having a supporting trunnion, and an angularly arranged furrow opening disk thereon, a downwardly projecting shield in the rear of and below said trunnion, said shield being located between the said disk and a line extending through the cutting edge thereof parallel to the line of draft, a lug or projection on said frame, and a scraper connected to said lug so as to bear on the inside of said disk, substantially as specified." And on the fourth claim of patent No. 578,941, issued to F. R. Packham on March 16, 1897, which reads as follows: "(4) The combination with a furrow opening disk and its support of the drag-bars connected to said support, one of said drag-bars being extended forwardly and upwardly in a line behind said disk, and the other drag-bar being extended forwardly and laterally, as well as upwardly, at a different vertical as well as lateral angle to the other bar, both of said bars having a common line of attachment, substantially as specified." These claims all relate to the construction of what is known as the single disk drill for seeding. Grain drills have been a fruitful subject for patents for a great many years, as shown by the 27 patents introduced in evidence by the defendants to show the prior state of the art; and during later years the disk drill has received considerable attention.

The claim sued upon for the infringement of the Arnett patent, No. 347,982, above quoted, is not for a spout in combination with a disk, but for one to be used in a seeding machine, having its lower end flattened laterally and formed with a delivery orifice elongated in the direction of the line of travel, whereby the spout is enabled to deliver the seed centrally in a narrow furrow. An examination of the specifications shows that Arnett claimed this spout applicable, not only to a disk drill, but to other machines as well. Mr. Packham testifies that grain spouts or conduits with flattened or elongated discharge ends, according to his recollection, were used in connection with hoe and shoe drills six or seven years before the date of the Arnett patent; and we find them in the Wagoner patent, No. 60,096, issued November 27, 1868, and in the prior Arnett patent, No. 312,791, dated November 24, 1885. In this Arnett patent the spout is shown in connection with a disk furrow opener as in the patent sued on. I find this claim to have been anticipated.

The fifth claim of the Packham patent, No. 527,621, refers to the lubricating parts of the device. It had been common for a great many years to provide means for lubricating a journal, and in the prior art relating to grain drills this device is found in the patents issued to La Dow and Bramer, in 1880, and there was no invention in the adoption of it by Packham.

The fourth claim of the Packham patent, No. 578,941, is for the combination with a furrow opening disk and its support of the drag-bars connected to said support, one of said drag-bars being extended forwardly and up-

wardly in a line behind said disk, and the other drag-bar being extended forwardly and laterally, as well as upwardly, at a different vertical as well as lateral angle to the other bar, both of said bars having a common line of attachment. The use of the double drag-bar extending forwardly to a common line of attachment is shown in the Wagoner patent of 1866, the Shepard patent of 1869, the Arnett patent of 1885, the McClelland patent of 1888, and the Packham patents of 1894 and 1896, and was, therefore, old in 1897, when Packham took out this patent. The Wagoner and McClelland patents show double drag-bars extending forwardly at a different vertical angle to bring their forward ends to a common line of attachment, as claimed by Packham in this fourth claim of his patent of 1897.

The main patent relied upon in this suit is the one, No. 557,868, issued in 1896, and it is claimed that the first, second, third, and sixth claims, above quoted, of this patent, solved the problem in grain drills which made successful what had before proved a failure. It is claimed that this solution consisted in a combination and arrangement of parts whereby all act harmoniously, and for the first time made it possible to plant a predetermined amount of grain regularly and evenly at a specified depth, by scattering the seed centrally in a furrow wholly made by the revolving disk. After a review of the prior state of the art, including the 1894 Packham patent, No. 527,621, every feature which enters into the 1896 patent is found, except the guard, extension, guide, or shield, by which names the device to prevent the land side of the furrow from caving in until the grain has been deposited is called in the claims above quoted. This shield, wherever mentioned in the claims, read in the light of the specifications, lies wholly within the path of the disk and forms no part of the furrow opening device. The complainant's expert testified that all of the parts thus brought together were old, except the extension or shield. There are a number of patents in the record which show the use of shields of various kinds to protect the grain from obstructions falling into the furrow until after the seed has been deposited. It is claimed by the defendants that the adding of this shield, which had formerly been used for the same purpose, did not require the exercise of the inventive faculty. The co-operation accomplished by this protecting device, which is located below and in front of the conduit and wholly within the furrow, and is shaped in front so as to conform to the side of the disk, had never before been accomplished. By this construction the disk opens, and the shield prevents the obstructing of the furrow until the grain is deposited, and it tends to deflect the grain against the revolving disk and scatter it in the furrow. The spout ends where the shield or guard begins; but, with the revolving disk and shield, the grain finds its way to the bottom of the furrow scattered in the center more thoroughly than it could be if it was conducted there by the spout, instead of falling against the disk and shield. Although the spout, disk, and shield in different form are found in the prior art, there was no such combination as is effected by this patent; and, although the elements are old, the beneficial result accomplished by this combination has great utility, which is shown by the general adoption of it by manufacturers of seeding machinery, including the defendant company. The defendant company has adopted this shield for the exact purpose set out in the claims of the patent, makes the same combination, and secures the result which has made this single disk drill a commercial success. I find the first, second, third, and sixth claims of patent No. 557,868 valid and infringed.

There is no proof found in the record supporting the allegation in the bill that defendants C. E. Lyle, W. F. Lyle, and N. F. Choate are joint infringers with the defendant company, and the bill will be dismissed as to them, and a decree entered against the defendants the Dowagiac Manufacturing Company and W. F. Hoyt in the usual form.

Superior Drill Co. v. P. P. Mast & Co. et al.

CLARK, District Judge. In respect to the Arnett patent, No. 359,832, issued in 1887, I need only say that according to the weight of the evidence it was never a success in actual use, constituted nothing more than a patent on paper, never reduced to actual practice, and lacking in the element of

utility. The bill, therefore, so far as based upon this patent, cannot be sustained. I do not think any case for relief against those sued as individuals is sufficiently made out, and the bill is not sustained in this regard. With reference to claim 8, patent No. 578,941, and the claims of patent No. 601,477, here involved, it seems sufficient to say that, looking to the prior state of the art, including the Packham patent of 1896, No. 557,868, if there is anything in these devices by way of improvement which can be regarded as new, it is the particular support and conduit formed integrally, rigidly and strictly limited to the particular construction; and, so limited, there is no infringement. This leaves remaining the really troublesome part of this lawsuit, involving as it does the two questions principally discussed of whether or not, in view of the existing state of the art, there is anything patentable in the Packham invention on which letters were issued April 7, 1896; and, second, how far, in view of the late case of Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, this court is required to independently consider and decide the very questions already passed on by another court of co-ordinate jurisdiction.

In regard to the first question, it is certainly a serious issue whether the shield, as the same is now adjusted with reference to the conduit and disk in the plaintiff's device, does not appear by actual inspection of the models to perform the function of opening, in part, at least, the furrow, just as it undoubtedly did as used in prior devices under the name of guard, etc. It is true this is claimed not to be any part of its function in the present device; but does this militate against the fact that, although it is an unclaimed function not specified, it is nevertheless a part of the actual use made of it in the combination? On the other hand, although it was not a function, specified or claimed in prior devices, of the guard or shield to hold open the furrow and protect the grain while passing down from the conduit into the furrow, was it nevertheless not plainly a function which it in fact did perform, and does not this appear by actual inspection to have been the case? The distinct claim now made for the combination is that the shield is so adjusted to the conduit that it stands within the line of the furrow, but operates independently of the furrow opening function in older devices, and that its distinct use is to hold open the furrow, and, in combination with the conduit, to protect the grain while falling from the conduit. I am not prepared to say that there is such new and independent testimony introduced in the present case, or that the issues are sufficiently varied from those involved in the case before Judge Wanty, as to require otherwise than that I should accept his judgment as correct to the extent that he actually ruled the same questions which are now involved. It seems to conduce to a more orderly and better administration of the law to accept the deliberately expressed judgment of a court of co-ordinate jurisdiction, unless it very fully and very clearly appears that the case is so different in the evidence as to imperatively require a different result. Although the question has been to me one of no ordinary difficulty, I have decided, as stated, that I should accept Judge Wanty's opinion so far as it goes, because I do not believe that there is now anything new in the case which requires a different ruling, and I think it highly probable that, if it turns out that Judge Wanty's views are not approved by the circuit court of appeals, it will be because that court differs in opinion with him upon the case actually presented to him on the former hearing, and quite independently of anything that has been offered by way of new or additional evidence on the present hearing. I take this course the more readily because the case disposed of by Judge Wanty is now pending in the circuit court of appeals, and I am quite certain and am advised that any ruling now made will go up for review, and the cases can be heard at the same time, and every issue made in both cases disposed of by one judgment of the court, and this is desirable as bringing about the earliest possible termination of the litigation in regard to these patents. I consequently sustain the patent, and grant relief to the extent that Judge Wanty did, and dismiss the bill in all other respects. This result does not seem to require that the costs should be adjudicated otherwise than in the usual way of following the result of a suit.

Thomas A. Banning, for appellant Dowagiac Mfg. Co.
H. A. Toulmin, for appellant P. P. Mast & Co.
Paul A. Staley and Border Bowman, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. These causes were heard together, for the reason that both involve the validity and scope of the patent on which both the cases are founded, as they now stand on appeal. The question of infringement is presented upon facts slightly different in the two cases, but the facts are so nearly identical that both cases may conveniently be disposed of in one opinion. Thus needless repetition will be avoided. There was a cross appeal in the second of the cases above entitled, by the Superior Drill Company, which was complainant in the court below, taken upon the grounds that the circuit court erred in decreeing that certain other of the complainant's patents, which were alleged by the bill to have been infringed, were invalid, and also in dismissing the bill as to other persons who were joined as defendants. This cross appeal was dismissed at the hearing, for the reason that, this being an appeal from an interlocutory decree for an injunction, it was premature, upon the authority of Hohorst v. Packet Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443, and Western Electric Co. v. Williams-Abbott Electric Co., 48 C. C. A. 159, 108 Fed. 952.

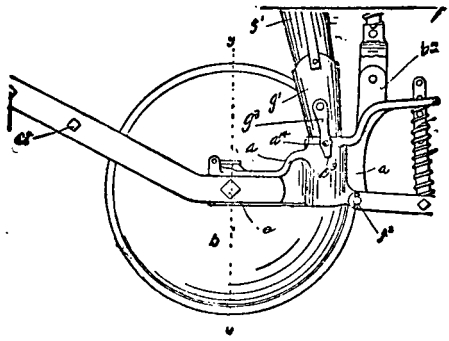
The bills in both cases were filed by the Superior Drill Company against the appellants, respectively, for the purpose of restraining the alleged infringement of several patents relating to seed drills belonging to the Superior Drill Company, and for profits and damages. In the circuit court (Judge Wanty presiding in the first case, and Judge Clark in the second) all those patents were held void, except one. This was No. 557,868, issued April 7, 1896, to F. R. Packham, which was held valid and infringed in respect to the first, second, third, and sixth claims thereof. A perpetual injunction was awarded, and a reference to the master ordered, to ascertain and report profits and damages. The defendants in both cases have appealed. The cross appeal of the drill company having been dismissed, the controversy in this court relates only to the questions of the validity and the infringement of the Packham patent, above mentioned.

This patent relates to the construction of furrow openers, in the class of grain drills known as "disc drills," and was granted for an improvement in such furrow openers. Specifically, it consists in locating a shield or guard at a particular place in the organization of the furrow opener, and in a particular relation to the other parts of the furrow opener; the purpose being to produce certain results, which will be presently explained. The general composition of grain drills and their mode of operation being well known, it will be necessary to particularly describe only those parts of a drill which are immediately involved in the operations of opening the furrow, dropping and scattering the seed in the furrow, and covering the seed with the soil. As might be expected from the universal use of these implements, which have become so indispensable in the production of grain crops,

a great many inventions and a long list of patents had already developed and spread the knowledge of the art of their construction, and their use, at the time of Packham's invention. In one of the leading forms of these the furrow was opened by a device in the shape of a very narrow double-moldboard plow, which, penetrating the ground at an acute angle, opened and slightly raised the soil on either side, whereupon the seed was dropped through a tube behind and within the wings of the opener, while the soil was thus lifted, and immediately upon the passing forward of the opener out of the way the soil dropped back upon the seed. In another the furrow was made by a wedge-shaped device, called a "shoe," and somewhat in the form of a sharp V, both in its horizontal and its vertical shape, the point dividing the soil, which was pressed sidewise by the wings; and the lower edge of the shoe being also an angle, and the wings flaring outward, the earth was, in consequence, pressed downward while it was being pressed sidewise, thus leaving the furrow in a V shape. The seed was dropped in the furrow immediately behind the shoe, and, the sides of the furrow being impacted, it was necessary to employ a covering device, as a short chain carrying rings dragging behind the shoe, or blades which were set so as to scrape the earth back into the drill, or a press wheel which would crush down upon the seed the upper part of the sides of the furrow. In another, instead of a shoe, the same work was done by using a roller in the form of two concave discs, having their concave sides facing each other, and their edges united in one; the result being that, as the roller moved on its journal, it formed and left the V-shaped furrow of the shoe drill. Some covering apparatus was necessary, as in the case of the shoe drill, and for the same reason.

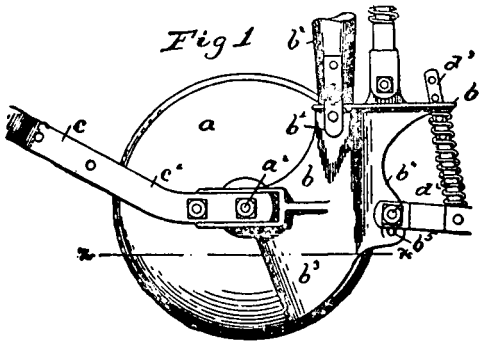
In recent years the disc harrow has come into general use. As usually constructed, the operative part consists of concave discs, located at equal distances upon a shaft having bearings. In use, these discs, and, of course, the shafts, were set at an angle to the line of draft, and when the harrow was drawn forward the revolving discs would cut into the ground, and scrape upon their concave sides, and partly turn, the soil lying in their wake, leaving ridges larger or smaller, depending somewhat upon the angle at which the discs were set. Thereupon invention began, of means and methods to utilize this form of harrow for the purposes of a seeding drill, and a considerable number of patents were taken out upon such inventions. The general object sought to be obtained was to devise some subsidiary apparatus, which, co-operating with the discs of the harrow, would open a furrow, drop the seed evenly upon the bottom thereof, and then properly cover it. Several of these inventions seem blind enough, but others made some approach toward the definite purpose. These latter we shall more particularly consider when we come to take up the question of the anticipation of the Packham patent. For our immediate purpose we will, however, state the characteristics of a previous patented invention of Packham, upon the construction of which the one in suit was designed to be an improvement. The former patent referred to was No. 527,621, issued October 16, 1894, and was for a seeding machine. The following figure, which includes only those parts of Fig. 1 of the drawings regarded as necessary for the illustration, which, with

a few words of explanation, will enable one to see what the improvement of the later patent was:



In this figure, c^4 is the drawbar; g' is the seed tube coming down from the hopper, and terminating a little below a horizontal line drawn through the center of the disc; f^2 shows where the drawbar of the pressing wheel is attached; and b is the disc journaled at e, the convex side only of the disc being shown. In operation the forward edge of the disc is set to the left of the line of draft, making an angle therewith. The rearward edge of the disc will be to the right of the line of draft, so that when the machine is moved forward the disc will dig a furrow beginning where the forward edge of the disc meets the surface of the ground, growing deeper to the line passed over by the bottom of the disc, and then thinning out to the line where the rear edge of the disc rises out of the ground. During this operation the earth is scraped and lifted sidewise on the concave side of the disc, and, where the disc leaves it, stands in a ridge having a face toward the furrow, more or less perpendicular, according to the angle at which the disc runs to the line of draft. In the illustration shown, the seed drops from the bottom of the conduit into the furrow made by the disc at or about the place where the rear edge of the disc begins to rise out of the earth. When the ground is clean and well pulverized, and the machine moves steadily, the seed would fall through the intervening space between the lower end of the conduit and the furrow in a suitable way. But if clods or stubble or other trash were in the way, the clods might roll into the furrow, as the disc passes by, or the stubble or trash might not be cut off or might extend into the furrow space, or the oscillating motion of the drill might tend to cast some of the seed upon the land side of the furrow; so it seemed a desideratum that a construction should be devised whereby the furrow should be kept clear of obstructions, and the seed be prevented from spilling upon the land outside the furrow while it was being sown and covered. The purpose of the Packham invention, now in question, was to supply this requirement. It consisted in adding a shield to the former construction, extending from the conduit, and on the land side thereof, down into the furrow, and having its forward edge bent a little inwardly, and conformed to the convex surface of the disc, so as to pre-

vent any obstruction from coming into the furrow, or in the way of the falling seed. The shield was attached to the frame above in a constantly fixed relation to the disc, and so located along the rear and bottom segment of the disc, but at a little distance therefrom, as to follow in the wake of the disc, and just within the furrow made thereby when the machine was in operation; the lower edge of the shield being also bent inwardly to conform to the convexity of the disc, and consequently to the land side of the furrow. The following figures, 1 and 4, taken from the drawings, show the convex side of the disc, and the form and location of the shield, and, when contrasted with the foregoing figure of Packham's former construction, show the main characteristics of the invention covered by the later patent:



a is the disc, and b^8 the shield. Their relation to each other and the parts with which they are combined will be clearly seen. It is claimed, as the result of this invention, that the parts are so located and organized as to effect substantially the following operation: While the disc is making the furrow the shield keeps the furrow clear of all obstructions liable to come into it from the front or land side, and while the disc holds the earth up and out of the furrow the seed falls down upon the bottom of the furrow between the disc and the shield; much of it striking against the shield and disc, and being distributed somewhat thereby. Then the disc lets go the earth, which drops back upon the seed. Not all of the earth lifted drops back upon the seed, but most of it. In some conditions of the soil a following wheel is used, which presses a little more of the soil into the furrow, and compacts the whole. Thus it is said the seed is all cleanly sowed upon the bottom of the furrow, and evenly covered with the earth pulverized by the disc.

It is true that the purpose of deflecting the seed, which is dropped against the inside of the shield, is not mentioned in the specification; but in describing its form it is stated that it extends downwardly, "following substantially the line of the furrow-opening disc," and in the drawings (see Fig. 4, above) it is shown to conform to the convex face of the disc, curving inwardly at the bottom. It is seen that the obvious consequence of this is that the seed falling upon the inside of the shield would be deflected against the lower portion of the disc, and in

use this is found to be the result. And in Goshen Sweeper Co. v. Bissell Carpet Sweeper Co., 19 C. C. A. 13, 72 Fed. 67, it was held by this court that a patentee is entitled to all the advantages of his invention, whether he knew of such advantages or not, and that proposition has been confirmed by our more recent decisions. Frederick R. Stearns & Co. v. Russell, 29 C. C. A. 121, 85 Fed. 218, and Palmer Pneumatic Tire Co. v. Lozier, 33 C. C. A. 255, 268, 90 Fed. 732. And see the learned opinion of Judge Sanborn in National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 709, 45 C. C. A. 544.

From an attentive consideration of the record, and a study of the patent in the light of what is generally known of the art, we think these claims for the invention are substantially well founded; and the invention seems to us to have considerable merit, if, indeed, it was not, as the defendants contend, anticipated by former inventions. The claims of the patent which are said to be infringed in case No. 989 are, 1, 2, 3, and 6; and in No. 1041, claims 1, 2, and 3. These claims read as follows:

"(1) A furrow opener consisting essentially of a frame or support having a conduit therein; a disc journaled on a suitable trunnion on said frame or support, which is located in front of the conduit; same frame or support being provided with an extended portion which projects below the lower end of the conduit, and in front of the same; said extension being formed at the front to conform to the shape of the side of the disc adjacent to which it is adapted to lie,—substantially as specified.

"(2) The combination with the frame having a conduit therein, and a furrow-opener disc journaled at an angle on the frame, of a guide or shield extending below the end of the conduit, and in front of the same,—said shield being located within the angle of the furrow-opening disc, so as to stand wholly within the furrow,—substantially as specified.

"(3) The combination with the supporting frame having a conduit therein, and a disc journaled on said frame at an angle to the line of draft, as described, of a downwardly projecting shield in front of and below the conduit,—said shield being curved at the front so as to lie adjacent to the disc, and being placed wholly within the path of said disc, so as to extend within the furrow formed thereby,—substantially as specified."

"(6) The combination with the frame having a supporting trunnion, and an angularly arranged furrow-opening disc thereon, a downwardly projecting shield in the rear of and below said trunnion,—said shield being located between the said disc and a line extending through the cutting edge thereof parallel to the line of draft, a lug or projection on said frame, and a scraper connected to said lug so as to bear on the inside of said disc,—substantially as specified."

It is contended for the appellants that, having regard to the then existing state of the art, Packham's improvement was only the result of the application of mechanical skill to the knowledge already acquired and disclosed to the public. And if, in truth, this invention was but a step in the normal progress in the skill of the workman, or the result of the observation of a need, and the provision of a remedy by the exercise of the ordinary skill of those conversant with the subject, it was not entitled to a patent, and the defense would be made out. Reference to authority is not needed to support this proposition, which is elementary.

But the fact remains that for many years those in the front rank of the intelligent and ingenious inventors in this department of art

had been devoting themselves to its improvement, and many inventions had been deemed worthy of patents which made some approach toward the result which the present invention reached, but none of them was able to devise an organization so completely adapted to the requirements as this. Such is the strong impression made upon our minds by the testimony exhibited by these records. The public seems to have been of that opinion, and the appellants, by adopting the substance of the invention, as we think they did, bore testimony to its superior utility. The testimony, taken as a whole, is convincing that the invention went immediately into, and has continued in, extensive public use. As has been often said, this fact does not of itself conclusively establish either novelty or utility; but if, upon technical grounds, the matter is doubtful, it is persuasive evidence of those qualities, unless it appears that such commercial success was due to other causes, which is not shown here. Gandy v. Belting Co., 143 U. S. 587, 594, 595, 12 Sup. Ct. 598, 36 L. Ed. 272; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286.

One of the objections made to the validity of the patent by counsel in the first of these cases (and, if available, it is equally so in the other) is that the invention described in the specifications is rather of the method of use of the physical structure than of the structure itself. This contention is founded upon evidence which tends to establish (and we think it is the fact) that the structure must be operated in a certain way in order to accomplish its purpose; that is to say, the effectiveness of its use is dependent upon its proper manipulation. But that is true of all machinery. It addresses itself to the skill of the operator, and it is expected that he will exercise common skill in adapting it to the conditions in which it is intended to operate.

The evidence referred to is that of a witness (Miller, an expert called by the complainant) who, on cross-examination, was unable to state the precise angle at which the discs should be set to work properly. Undoubtedly, the operator might have to exercise his judgment in order to ascertain the proper adjustment for making the narrow furrow which the indications seem to require. It was held in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, that a specification in letters patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates. And a similar observation was made in the Telephone Cases, 126 U. S. 1, 536, 8 Sup. Ct. 778, 31 L. Ed. 863.

We are unable to find any tenable ground for the objection.

Another objection to the validity of the patent is that the claims thereof are for mere aggregations of parts, which have no co-operation in use. This objection, if tenable, would be applicable to most, if not all, the inventions which have been patented for constructing disc-harrow drills. It is true that this is not a conclusive answer to the objection, but it would convict the patent office of a long line of error. A strong presumption must arise from the fact that, although such inventions have repeatedly been under consideration, patents have been issued thereon without notice of so fundamental an objection. And the inference is that reason for such an objection was not found to exist. But at all events it is plain that, with respect to

this patent, the objection is not well founded. The parts do efficiently co-operate to produce the useful result. The disc, which is the factor distinguishing this class of drills from those in previous use, cuts, scrapes, and lifts away, and then drops back, the earth. Meantime the shield is keeping the furrow and the space for the falling seed clear, keeping the seed from falling out sidewise on the land, where it will not be covered, and aiding in distributing the seed. The conduit during these operations is carrying down the seed from the hopper, and the frame is supporting the other parts, and holding them in proper relation to each other. Beyond doubt, such facts bring the case within the description of a patentable combination given in Reckendorfer v. Faber, 92 U. S., at page 357, 23 L. Ed. 719. And see Deere & Co. v. Rock Island Plow Co., 28 C. C. A. 308, 84 Fed. 171, for a case much in point.

The proceedings in the patent office on Packham's application for the patent in question were put in evidence, and it is claimed that they have the effect to restrict his claims. From the contents of the file wrapper, it appears that upon the filing of the application the first three claims were objected to, upon references which seem to import that it was understood that the shield had something to do with opening the furrow. Thereupon the first claim was withdrawn, and a new one substituted; the formation of the shield being explained by letter, the applicant saying therein:

"By this arrangement the shield has absolutely nothing to do with opening the furrow, while in the reference devices this is usually the chief function of the shield."

Thereupon the office made the further objection that the first three claims lacked patentable novelty, upon references. To this Packham responded by letter as follows:

"It will be understood that the shield forms no part of the furrow opener; nor is it, in fact, a part of the conduit. The conduit ends where the shield commences, and, as the shield stands within the angle of the furrow-opening disc, the soil remains in the condition left by the rotation of the disc while the seed is dropped from a point above the furrow, thus ensuring the most efficient planting."

And he amended the claims here involved to the form shown in the patent. Upon this explanation and amendment the patent was issued. The effect of the applicant's renunciations was to make it free from doubt as to whether his shield should assist in making the furrow, and whether it should form a part of the conduit. It is not now claimed that it performs either of those functions. If it were so claimed, the proceedings would constitute an estoppel. Thomas v. Rocker Spring Co., 23 C. C. A. 211, 77 Fed. 420. On the contrary, what is now claimed is in full accord with the applicant's disclaimer.

A word of explanation with regard to claim 1 seems proper in this connection. It will be observed that, unlike the other claims, it does not limit the location of the shield to one "standing wholly within the furrow." But in the specification the applicant describes it as standing within the furrow in ordinary circumstances. In his letter to the patent office last above quoted, he states the shield "stands within the angle of the furrow-opening disc." Now, what-

ever doubt there might have been as to whether the claim was limited in the construction of its language by the specification, it was removed by the limitation which he put upon it by his explanation, the consequence of which was the allowance of his patent; and the claim must be read as limited in this respect in the same way as are the other claims.

The further objection is made (and this is the principal reliance of the defendants) that Packham's invention was anticipated by previous inventions of himself and others, or at least so near an approach had been made by such previous inventions that it required only mechanical skill to develop the art in the direction and to the extent shown by his organization. And many patents (not less than 50) are shown for the purpose of illustrating the progress which had been made at the date of his invention. The general characteristics of these kinds of drills, such as hoe drills, shoe drills, and roller drills, and their manner of making a furrow and dropping and covering the seed, have already been described. But a considerable number of the previous patents relate to disc drills. It would require too much space to exhibit them all in detail. We shall, however, refer to such of them, and such of the older art, as seem specially relied upon by counsel, or seem to us most pertinent, and dismiss the others with the remark that we have examined them, and find nothing which comes near to an anticipation of the invention which forms the basis of the suit. Several patents showed and described single-disc furrow openers,—among them, the patent to Bramer in 1886, the patent to McSherry in 1886, and the patent to Packham in 1894, already referred to. Several patents also showed the discs set on a shaft carried at an angle to the line of draft. Among these were a patent to Arnett in February, 1885, and another to the same inventor in December, 1885, and still another was that to Packham in 1894. All these patents, and, for that matter, seed drills generally, showed a vertical conduit or seed spout. Coming now to those which have a part serving as a shield or guard, the first to which our attention is directed, in case No. 989, is a patent to Stinde in 1873. This proves to be a flat disc coulter, running straight ahead of a V-shaped furrow opener having wings, and a seed tube discharging behind and within the rear portion of the wings. The expanding wings carry the earth up and outward while the seed is being dropped, and then let the earth fall upon it. It was substantially the hoe drill with a rolling coulter running ahead of the point of the hoe. It is a very remote reference, and useful only as an illustration of a former construction of grain drills. The Ives patent, of 1875, was for a former construction, partaking of the forms of both the hoe and shoe drill. It contained nothing more pertinent than the ordinary form of such drills, and need not be further considered. The Springer patent, of 1878, was for a form of the hoe drill. The Arnett patent, of February, 1885, was for a disc drill, in which two discs were set in each frame. Opposite to each disc was a flat plate, or "fluke," as it was termed, inclining at the bottom toward the rear part of the disc. The seed dropped upon the fluke, and slid down into the furrow. There was nothing in this

construction serving as a shield or guard to keep obstructions out of the furrow. The McClelland patent, of 1888, showed a flat disc or rolling coulter opposite to which was a plate set at an angle to it, the forward edge of which plate was brought close to the disc. By the conjoint action of the disc and the plate the earth was pressed back, and the seed was dropped in the furrow thus made. How the seed was covered is not shown, the invention apparently not extending to that part of a drill.

In the records of both these cases is shown a patent to Fuller & Lee, issued in 1892, which is much relied on by the defendants; and, as it seems to us to make the nearest approach to the patent in suit, we shall set it out with more particularity. It was for a grain drill of the disc furrow-opening type, in which the discs are set in segments, each segment carrying two discs; the discs in the segments being set at opposite angles from the line of draft, after the manner of a disc harrow, to resist the tendency of the discs to slew away from or toward the line of draft (according to their set) from the resistance of the earth on the concave side. These segments of discs were impelled forward by push bars loosely attached at their rear end to a crossbar running across the machine, and at their front end to the parts on which the discs were set. Above the segment bar, and connected therewith by a hinge, was a vertical rod, surrounded by a spring. The upper end of this rod was capable of a limited movement up and down through an arm extending over the segment bar from a crossbar behind; thus affording means for the rise of each segment or either end of each segment, if any of the discs should meet obstructions, such as clods, roots, or stones, or should be passing over uneven ground. The seed spouts were brought down from the hopper behind, and were carried down to the rear part of the back or convex side of the discs, and over the furrows made by the latter. The lower end of the spouts flared open toward the discs so as to deflect the falling seed against the discs, or in another form and for the same purpose a spoon-like guide plate was attached to the lower end of the spout on the opposite side from the disc, and it was suggested that this might be so constructed as to operate as a scraper to remove the soil sticking to the disc. But this "guide plate," as it was called, was intended and formed for the purpose of deflecting the seed into the furrow, and (if as suggested) for scraping the dirt from the disc. There is no suggestion of so constructing it as that it would keep the furrow clear, and it is evident that it was not designed for such a purpose, and need not be so constructed as to effect it. Moreover, the relation of the guide plate to the disc was not constant, for while the spouts which carried the guide plate seem to have a fixed position, the discs did not. In operation, all in one segment might rise or be depressed, thus changing their relation to the seed spouts vertically, or one end of the segment might rise, or the other be depressed (situations more likely to happen); the discs and their furrows would vary from the line of draft and of the seed spouts, and their lower surfaces would approach or recede from the guide plate, as the case might be. If the surface of the ground were smooth and even, and there were

no obstructions, the conditions just mentioned might not occur to any appreciable extent; but if the ground were uneven, or contained anything which would disturb the uniformity of the furrow opening, it is easy to see that the seed might be sometimes dropping in the wrong place, and would not be properly covered. From the foregoing statements it clearly follows that the Fuller & Lee patent was not an anticipation of the invention of the patent in suit.

Another patent shown by the defendants in both records is one issued to Henry in 1893 for a disc grain seeder and harrow combined. Like that of Fuller & Lee, it was composed of segments or gangs of discs. Provision was also made for the rise and fall of the discs in the segments. At the end of the seed tubes was formed a moldboard. This moldboard, following the disc, but slightly to one side of it, completed the furrow partly made by the disc, and, as the seed dropped inside the rear part of the moldboard, returned the earth upon the seed, and "fenders" following after formed the earth into ridges. By building these parts to suit the double purpose, the ground was cultivated throughout the space passed over, as it was drilled. The points of resemblance between that invention and the one covered by the Packham patent are too scanty to support a comparison. The patent to Webster in 1893 is also exhibited in both records as an anticipation. This patent was for an attachment to grain drills showing a pair of discs set at opposite angles to the line of draft on a single drawbar divided into four members, two of which carried the boxes in which each disc was journaled. The seed spout descended between the front part of the disc and the corresponding member of the drawbar, and was attached to the latter in front of the axle of the disc, and then turned backward so as to deliver the seed in the furrow behind the disc. A cutter was secured to the front side of the lower end of the seed spout to assist the disc in opening the drills. There is no suggestion that this cutter is to act as a shield to prevent rubbish from falling into the furrow, or to aid in deflecting the seed into the furrow, nor does either its form or location indicate any aptitude for such purposes; it being simply a flat blade, whose single function was that of assisting in opening the furrow. The shield of the Packham invention is entirely wanting, and there is nothing which performs any of its functions; all that is shown being employed in doing that which in the Packham invention is performed by the disc. In the record of case No. 1,041 certain other patents are shown, which are in that case relied upon as anticipations. We will notice specially the most important of them. A patent to Haworth was issued in 1864 for a corn planter, which, being in a closely related art, is, of course, relevant. In this patent the parts involved in opening the furrow and dropping and covering the seed were these: A flat rolling coulter revolving in the line of draft, and snug beside it a moldboard curving outward. The front edge of the moldboard was set close to the coulter, so as to scrape it, and also to keep rubbish from coming into the furrow. The moldboards were attached to the lower ends of the seed spouts, which delivered the seed in the furrow behind the moldboard. To what extent the earth dropped back from the moldboard upon the seed does not appear, but the broad wheels carrying the machine follow in

the wake of the furrow, and doubtless aided in covering the seed and compacting the earth about it. In a later patent to the same patentee the faces of the wheels are grooved, apparently to crowd the earth from the sides to the center of the furrow, as well as to compact it. These Haworth patents did not employ the concave discs of the later art, though there is some oral testimony that in the manufacture the flat discs sometimes turned at an angle to the line of draft, and sometimes they were turned over to an angle with a perpendicular line. This may have been so, though, if it were necessary to decide how the fact was, we should hesitate to depend upon the memory of witnesses running back over so many years, seeing that the patent does not exhibit any such peculiarity, and no further patent was taken out to represent the improvement, if it was such. The mechanical operation of the moldboard of the Haworth seeder is not the same as that of the concave disc of the Packham patent; nor does the shield of the latter perform any part in the opening of the furrow, as does the rolling coulter of the Haworth patent; nor is there any provision for deflecting the seed against the disc, and thereby securing a more even distribution of the seed in the space line within which it is to fall. The most that can be said is that the Haworth patent accomplishes in a general way the kind of result of that of the Packham patent, but it does it by different mechanical means, and less perfectly.

There is testimony tending to prove that there was in use about the year 1892 an attachment upon the outer side of the lower end of the seed tube of Hapgood's disc drill, consisting of a steel shield or knife. This shield was provided for the purpose of keeping the tube from clogging, and was not intended for or adapted to the purposes of the Packham shield. It did not keep the furrow clear, nor did it deflect the seed, which were the principal advantages of the Packham patent. Then there was the McSherry seeding machine, patented in 1886, which shows a disc for opening the furrow; and a seed spout coming down behind the disc, the opening being directly in line with the bearing point of the disc upon the ground. The seed spout was flattened somewhat laterally, and might "be curved or made convex on one face to conform to the convex face of the disc." There was no shield at all, unless the flattened seed tube be called such, and it is idle to claim that it was an equivalent. This fulfills the task of comparing the previous development of the art with Packham's invention, and we see nothing which supports the defense that it was anticipated. The result is that the patent must be held valid. It was not a primary invention, but we think it brought the organization of disc furrow-opening and seed dropping and covering devices to a much higher degree of perfection than had previously been attained. This was done by locating in the right place and in the right manner a shield or guard constructed in the right form to accomplish a better and more useful result. The invention constituted a distinct and valuable improvement, and was patentable for what the claims here involved fairly import; and the patentee and his assigns are entitled to claim as equivalent all such combinations of the same or similar parts organized in a similar manner, and operating to perform a like mechanical result.

It is true, as contended, that the mere bringing together of old elements found in older machines of the same or a kindred art to perform the same functions and to effect the same mechanical result does not constitute patentable invention. We have several times recognized and applied this rule, some of our most recent cases being Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co., 41 C. C. A. 351, 101 Fed. 282; Overweight Counterbalance El. Co. v. Vogt Mach. Co., 43 C. C. A. 80, 102 Fed. 957; Burnham v. Manufacturing Co., 49 C. C. A. 163, 110 Fed. 765.

But the converse of that proposition is equally true,—that, if a new organization of old elements is such that it produces a new mode of operation and a beneficial result, there may be a patentable invention. The decisions to this effect are very numerous. A long list of them is shown in 1 Rob. Pat. § 155, note 4.

The case of Star Brass Works v. General Electric Co., 49 C. C. A. 409, 111 Fed. 398, recently decided by this court, is a very pertinent illustration of a patentable invention shown by the peculiar location of one of the elements of a combination of old elements. It was an invention relating to the construction of the head of a trolley employed in operating cars by electrical power, and consisted in so locating the brush which takes off the current from the circuit as to diminish the friction between the hub of the wheel and the brush to a greater extent than had previously been done, and also, by putting the brush inside the frame, protecting it from injuries to which it had theretofore been exposed.

We have next to consider the question of infringement. For this purpose it will be convenient to show in the first place the figures illustrating the construction of the furrow-opening and seed sowing and covering devices used by the defendant the Dowagiac Manufacturing Company, for all these devices are more or less involved in the use of Packham's invention:

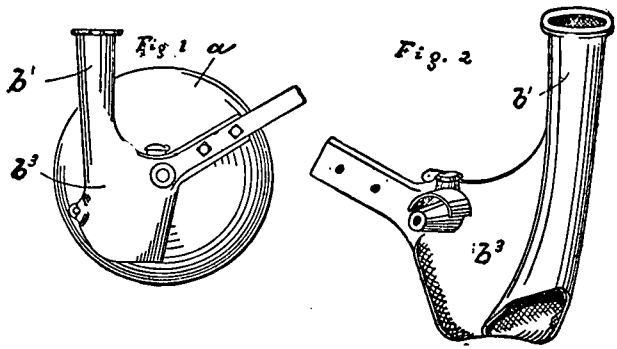
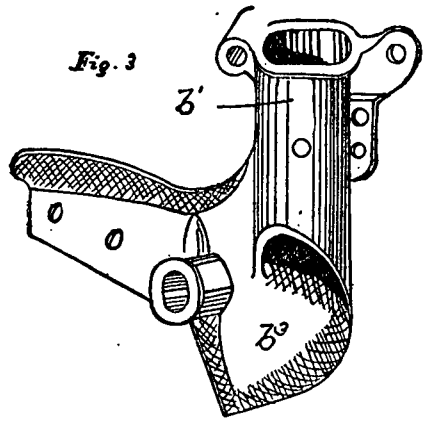
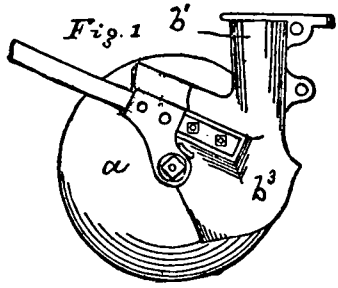


Fig. 1 shows the land side of this defendant's opener, and by compairing it with Packham's, which is shown on a previous page of this opinion, it will be seen that they are practically identical. Fig. 2 shows the reverse side of the defendant's shield and tube facing the disc. Contrasted with this, we here show, in Fig. 3, the reverse side of Packham's shield and tube:

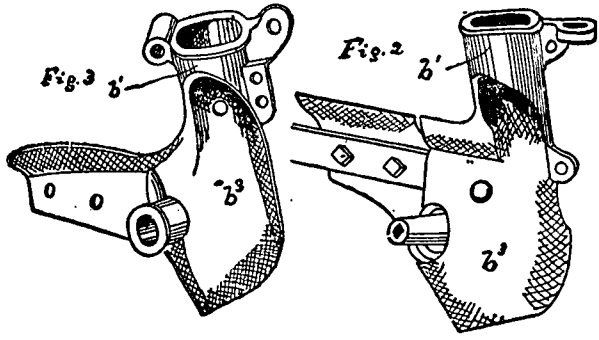


The only difference is that the seed tube in the defendant's structure is carried down on the shield lower than in Packham's, but it has, though in a diminished degree, the same provision, by cutting away one side of the tube, for deflecting the seed against the disc. But Packham does not specify the precise extent to which the tube shall be carried down, and the principle or mode of operation is the same in the one as in the other. Apparently, the defendant's purpose was to create a safe difference; but to do this something more was required than simply changing the length of one of the elements of the combinations, no essential difference in the function to be performed by that element being created thereby, and the essential characteristic of the invention remaining unaltered. The Packham invention is not obscured by the change, which does not affect its distinguishing feature or the leading purpose thereof,—that of keeping the furrow clear,—though it modifies to some extent the manner of effecting the distribution of the same in the furrow. The case in this respect is much like that of Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, in which the defendant had introduced an additional spring to aid in the function of the torsional spring of the invention. To the same effect are Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 139, and the other cases cited below as applicable to both of the cases before us.

In the case of P. P. Mast & Co., that defendant is building under a patent (No. 615,727) issued December 13, 1898, to P. P. Mast, as assignor to the defendants. The land side of the furrow opener is shown in Fig. 1 as follows:



Contrasted with Packham's structure, shown on a previous page of this opinion, it is seen there is no difference, except that the shield is not carried down quite so low as in the latter. It is carried down as far as to the earth on the land side when in operation, but not into the furrow. The reverse side is shown in Fig. 2, which compared with the reverse side of Packham's structure, shown in Fig. 3, shows that it is identical with the latter, except in the respect that the shield is shortened as just stated:



But Packham did not limit precisely the depth to which his shield should extend. Doubtless it must extend far enough to accomplish the intended purpose.

The specifications and claims of this patent show, as we think, a consciousness of being on dubious ground. After stating that his invention relates directly to a combined furrow-opening and seed-delivering device, the patentee goes on to acknowledge the state of the art as follows:

"I am quite well aware that numerous and varied constructions and arrangements have been devised and disclosed in many letters patent heretofore granted, and that among these have been shown and described furrow-opening and seed-delivering devices employing discs set so as to rotate in a plane at an angle to the line of draft, and employing seed-delivering devices set behind and within the angle of the discs, so as to deliver the grain in the furrow; the lower part of such delivering devices being in some cases wing-like, and substantially in contact with the disc along one edge of such wing, and acting to keep the sod out of the furrow, and thereby assisting to render the furrow in good condition for the grain, and the wing also in-

cidentally protecting the grain from outside influences during its descent into the furrow,"

—And specifically mentions several such patents, but omits the Packham patent, issued about two years before, and which was doubtless the most notable and perfect of all such structures. He calls the shield and the lower end of his seed spout a "winged tube," and says he has provided "a novel manner of securing the tube with its wing in the desired relation with respect to the disc." It was a novel manner as compared with the patents he acknowledged, but not so with respect to Packham's. Further on he says:

"I will now refer to the seed-delivering attachment, which I mount on the drag bar, and carry by said bar, as before indicated. This device consists of a tube, S, preferably of cast iron, and of a plate portion, T, formed with a recess (indicated by the line U) to receive the bar, and with a wing-like portion, V, which co-operates with the disc in delivering the seed into the furrow, and which, in those cases in which the disc runs deep enough in the soil to make a furrow which would tend to cave in, also guards against such accident or incident similarly, so far as this is concerned, to the wing-like plates or parts of the seed-delivering devices acknowledged in the prior art. Bolts, W, or other means, I employ to secure the bar in the seat, U; and the plate, T, and the extension, V, being thus secured to the outside, they are brought in the proper relation to the convex side of the disc, so that the forward edge of the wing-like extension, V, will hug close to the disc, while the rear portion of the same will stand off from the disc, as required in this class of devices, as also indicated by the art as I have acknowledged it above, but in which art my peculiar structural arrangement was absent, and in accordance with which structural arrangement I find my device to be successful in use and economical in manufacture. * * * The tube, with its plate-like part and extension, I arrange and provide to receive and deliver the grain into the furrow; and while this function is not new, as the prior art shows, still my way of making this tube with its plate and extension, and attaching it to the inside of the bar, is new, and a valuable and useful mode of construction."

Here he calls what in Packham's patent is called a "shield" a "wing-like portion," but he attributes to it precisely the functions of Packham's shield, namely, co-operating with the disc in delivering the seed into the furrows, and guarding against the falling in of the soil on the land side, or other similar "incidents," and suggests no other function whatever. Now, the shortening of the shield is only a colorable variation of form, for, according to the specification, it must be brought down far enough to perform the function of keeping obstructions out of the furrow. Moreover, describing and claiming the shield as new amounts to a confession of the patentability of the Packham invention.

It is a rule of law applicable to the structures of both the defendants that one does not escape liability for infringement by changing the form or dimensions of the parts of a patented combination, where such change does not break up or essentially vary the principle or mode of operation pervading the original invention. Cochrane v. Deener, 94 U. S. 787-789, 24 L. Ed. 139; Morey v. Lockwood, 8 Wall. 230, 19 L. Ed. 339; Elizabeth v. Pavement Co., 97 U. S. 126, 137, 24 L. Ed. 1000; Loom Co. v. Higgins, 105 U. S. 585, 26 L. Ed. 1177; Penfield v. Chambers, 92 Fed. 630, 34 C. C. A. 579; Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 36 C. C. A. 375; King Ax Co. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423; McSherry

Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 721, 41 C. C. A. 627; Taylor v. Spindle Co., 75 Fed. 301, 22 C. C. A. 203; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544.

In Bundy Mfg. Co. v. Detroit Time Register Co. it was held by this court that where the defendant had used a key of a form adapted to perform its function in a time register by pushing it, instead of one performing a like function by turning it (the mode of operation being substantially the same), he was liable for infringement. In King Ax Co. v. Hubbard the defendant had nearly obliterated an opening, which in the patent was one of the parts provided for a plunger in an ax-forming machine, and had changed the other parts so that they, to some extent, participated in relieving the consequences of diminishing the opening; but, the mode of operation remaining substantially the same, we held that the defendant had not escaped infringement. Again, in McSherry Mfg. Co. v. Dowagiac Mfg. Co., the patent in suit was one which related to means for regulating the pressure upon the shoes and their followers in a grain drill. This was done by two horizontal and parallel springs pivotally attached at their forward end to the two drawbars of the shoe, the free end of the springs being depressed or raised by mechanism attached to that end. In the patent the pivoting at the forward end was effected by uniting that end of the springs in the form of a loop, and imbedding them between the two faces of flat castings adapted to receive them, which, when bolted together, clamped fixedly the loop forming that end of the springs. Then there were lugs on each side of the casting, which had eyes, through which were bolts pivoting them to the drawbars of the shoe. The defendant did not use the clamp, but, instead, formed eyes upon the forward ends of each of the springs, and pivotally attached to the drawbars by a bolt running through a spring and a drawbar. Inasmuch as the springs and the clamp of the patent were made integral by rigidly fixing them together, we held that, recognizing the invention as a distinct advance in the art, the pivoting of the forward ends of the springs directly upon the drawbars was substantially the equivalent of uniting the ends of the springs with a clamp, and then pivoting the clamp upon the drawbars. Judge Lurton, who wrote the opinion, justified this conclusion by applying to the case the essential rules indicated by the former decisions of the court,—of first determining the quality and bounds of the invention, and then restraining trespass within its limits. And it was shown how the limits are expanded or contracted by the character of the invention.

In that case the change made was by taking out the clamp and extending the drawbars, while in the Dowagiac Mfg. Co. Case, before us, there is a prolongation of the seed tube.

From what we have said, it is apparent that we are convinced that the invention of the patent in suit is one entitled to recognition as one amply filling the claims in controversy, and that the defendants infringe them.

The decree of the circuit court in each case will be affirmed.

TILGHMAN v. PAXSON CO.

SAME v. FOUNDRY CO.

(Circuit Court, E. D. Pennsylvania. May 15, 1902.)

Nos. 2, 3.

ABATEMENT—DEATH OF PLAINTIFF—TIME FOR REVIVAL.

Where there has been no undue delay on the part of a plaintiff in the prosecution of a suit during his lifetime, upon suggestion of abatement by his death, his counsel will be allowed a reasonable time to take proceedings for a revival.

On Motions by Defendants to Dismiss.

Hector T. Fenton, for complainant.
Francis T. Chambers, for respondents.

DALLAS, Circuit Judge. A writing, filed on behalf of the plaintiff in each of these cases, "suggests the abatement of the suit by reason of the death of the plaintiff, Benjamin C. Tilghman, on the 3d day of July, 1901." This was exactly one month after the filing of the replication, and therefore to the time of the death of Benjamin C. Tilghman there had been no objectionable delay. The learned counsel for the defendants insists that the death of Benjamin C. Tilghman did not really abate the suit, but I do not think that the question thus proposed should be considered upon the present motion. I assume the suggestion to have been made in good faith, and, as plaintiff's counsel states that it is his purpose to proceed in pursuance thereof, it seems to be right that he should still be accorded a reasonable time in which to do so. But the defendants should not be subjected to any unnecessary further delay, and will have leave to renew their present motion if the proceedings contemplated shall not be taken within 20 days.

The defendants' motions to dismiss are denied.

In re TUNE.

(District Court, N. D. Alabama, N. D.)

1. EXEMPTIONS—EFFECT OF WAIVER IN NOTE.

Under the laws of Alabama, a waiver of exemptions in a promissory note does not amount to a lien or pledge of any of the debtor's exempt property, or confer any estate or interest in it. The waiver may bring an estoppel into play, but only after judgment and execution on the debt.

2. BANKRUPTCY—PROTECTION OF BANKRUPT'S RIGHT TO DISCHARGE.

The court of bankruptcy should see to it, pending a discharge, that remedies for the collection of debts from which the discharge might absolve the debtor shall not be perfected so as to condemn exempt property in satisfaction of debts, from which the discharge is intended to free it.

3. SAME—ATTACHMENT LIENS.

Subdivision "c" is destroyed by subdivision "f" of section 67 of the bankrupt law, and the latter is the only law regarding liens of attachment obtained against the insolvent within four months of the adjudication.

4. SAME—EXEMPT PROPERTY.
Whatever benefit results from the annulment of attachment liens extends to exempt property as well as to that which is not exempt. It is the policy of the law to allow the bankrupt, as well as creditors, to benefit by the changed status.

5. SAME—EFFECT OF ADJUDICATION.
An attachment in a suit to collect a simple contract debt can create a lien only when perfected by a valid judgment of condemnation. It is a lien "obtained through legal proceedings," and, when the insolvent debtor is adjudicated a bankrupt, the bankrupt law annuls it, subject to the provisions of section 67f.

6. SAME—ATTACHED PROPERTY—LOSS OF JURISDICTION BY STATE COURT.
When the only right of possession by a state court of attached property is based on an attachment lien, which is annulled by the adjudication in bankruptcy, the state court loses all jurisdiction of the rem, which is transferred into the exclusive jurisdiction of the court of bankruptcy. There is no longer any right of possession in the officer of the state court, who then holds as bailee for the person rightfully entitled to possession, and becomes a trespasser if he fails to deliver on proper demand.

7. SAME—PLEADING ADJUDICATION IN BAR.
If, after suit brought in such case, and before judgment, the adjudication is timely and properly pleaded, the only remaining jurisdiction in the attaching court is to stay suit, and await the determination as to the discharge. If discharge is granted and pleaded, the only jurisdiction is to dismiss or render judgment for the defendant. If the discharge is not granted, or granted and not pleaded, the court can render judgment in personam; since the res was transferred by the adjudication to the exclusive jurisdiction of the court of bankruptcy, and its jurisdiction over the rem is in no wise affected by the discharge or refusal to discharge.

8. SAME—JURISDICTION OF BANKRUPTCY COURT—ADVERSE CLAIMS TO PROPERTY.
The various decisions of the supreme court examined and reviewed. The result *held* to be that a court of bankruptcy may inquire in a summary way as to an adverse claim, made by a stranger, to the property, which belongs to the bankrupt. If it appears that the claim is manifestly without foundation, it may order the property turned over to the trustee, and punish refusal as a contempt, without compelling the trustee to resort to a plenary suit to recover the property.

9. SAME.
The summary jurisdiction is ousted if determination of the validity of the adverse claims involves the decision of matters in pais and the weighing of conflicting evidence and finding of facts, which, when presented, leave room for fair doubt as to the invalidity of the claim, since such a claim is not merely colorable. Delivery must then be compelled by suit in plenary proceedings in a proper court.

10. SAME—PARTIES AND PROCEDURE—INJUNCTION.
If, after attachment, and before judgment, the insolvent is adjudicated a bankrupt within four months, etc., and properly pleads the discharge, but the state court refuses to regard it, and nevertheless renders judgment of condemnation, and directs a sale of the property, the receiver or trustee is entitled to an injunction and mandatory order to its officer to surrender possession; but there should first be a rule to show cause on petition, to which the parties affected should be made defendants, and an opportunity given them to be heard, before injunction issues; though, if the exigency is pressing, a temporary restraining order may be made until the matter can be heard.

11. FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—TRANSFER OF JURISDICTION BY OPERATION OF LAW.
In cases of concurrent jurisdiction the court first obtaining possession of the property administers it; but where that court loses jurisdiction, and it is transferred by operation of valid laws to a court of the United

States, which has exclusive jurisdiction of the subject-matter, the question becomes one of obedience to the paramount authority of the constitution, and comity can have no influence in determining the right.[1]

12. BANKRUPTCY—POWERS OF COURT—ENFORCING RIGHT TO PROPERTY.

Where an attachment issued from a justice court and levied on defendant's property is annulled by operation of the bankruptcy law, and the defendant duly pleads the adjudication, but the justice disregards it, and gives judgment of condemnation, and orders a sale of the property, which, by operation of law, has passed into the exclusive jurisdiction of the court of bankruptcy, such court is not required by considerations of comity to ask the justice to make a proper order on the constable to surrender, before making its own order directing the marshal to seize the property.

(Syllabus by the Court.)

In Bankruptcy. On review of questions certified by referee.

James Harlan and S. M. Sloan, each of whom were holders of notes waiving exemptions, commenced suits against Tune by attachment on February 15, 1902, to collect their debts, suits being returnable on the 22d day of February, 1902. Tune filed a voluntary petition on the 17th day of February, 1902, and the next day was duly adjudicated a bankrupt. In his schedule Harlan and Sloan were listed as creditors. Tune, in his petition, claimed the raft of logs and some household and kitchen furniture, in all worth about $400, as exempt. On the same day the bankrupt petitioned for the appointment of a receiver to take possession of the logs, averring "that the logs were rafted, and ready to be shipped, and liable to be stolen or taken away and greatly depreciated in value; that, in order to conserve the property, it was necessary that a receiver be appointed to hold the property until a trustee was appointed." A receiver was appointed and qualified immediately. The petition further shows that on the day set for hearing the bankrupt appeared before the justice, and when the cases were called for trial, before judgment was rendered, properly pleaded adjudication, a duly certified copy of which was made a part of the plea. The justice declined to allow the plea, but stated he would delay a few days to inform himself further. On the next day, as the petition avers, the justice rendered judgment, and ordered the raft of logs to be sold for the satisfaction of the judgment. It appears from the record that, although the justice refused to hold up judgment of condemnation, the judgment contained a stay of execution for 30 days. The petition avers the receiver demanded the property from the constable, but the latter, being indemnified by the plaintiffs, refused the demand, and insisted on selling the logs, and the justice ordered him to retain possession and sell the same for the satisfaction of the judgment. With or without reference to the adjudication, passed three days after the suit was commenced, the evidence abundantly shows that Tune was insolvent at the time of the levy, and for many months prior thereto. The petition prayed, in substance, an injunction against the creditors and the justice from taking further proceedings, and that all of them be enjoined from interfering with the receiver, and that the creditors and constable be required to deliver the raft of logs to the receiver, and that he be put in possession by proper process. This petition was sworn to, but the persons mentioned in it were not made parties, and it does not appear to have been served upon them, or that they had any notice of it other than was conveyed by the order afterwards made by the referee, Murphy. On the 26th day of February, 1902, the referee made an order in substance enjoining the constable, justice, and creditors "from taking possession of or retaining under their control any property the bankrupt owned on the 18th day of February, 1902, and particularly the raft of logs, and ordered them without delay to deliver possession to the receiver." It contained a sweeping injunction

[1] Conflicting jurisdiction of federal and state courts, see notes to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356, and Plow Works v. Finks, 26 C. C. A. 49.

against the creditors, forbidding the prosecution of the attachment suit in the justice court or having any process thereon issued against the bankrupt or any of his property, and from making any sale of the property, or removing the same, or from receiving any money, the proceeds of the sale of the property of the bankrupt; and the justice was ordered to vacate the judgment made by him, and all orders made since the 18th of February, 1902. It was further ordered that the marshal put the receiver in possession of the property. On the 19th day of March, 1902, Harlan and Sloan proved their claims against the bankrupt. On the same day, without making any answer to the petition, they appeared, and without any protest as to the jurisdiction moved to dissolve the order, and to have the raft of logs returned to the constable, on the ground that the attachment was a lien upon the raft at and before the filing of the bankrupt's petition, and the right to enforce the attachment was properly triable before the state court, and there was no ground for the appointment of a receiver. In support of this motion Harlan and Sloan proved that for more than 10 years past Tune had never owned as much as $500 worth of property,—that the attachment suits were brought because Tune was about to move the raft of logs out of the state; that at the time of the attachment bankruptcy proceedings had not been instituted; that, so far as creditors knew or believed, Tune had not contemplated bankruptcy at the time the attachment was sued out and levied. It does not appear, except inferentially, from the testimony taken on the hearing, that the raft of logs was finally delivered to the receiver under the order; but it appears that it was, from other parts of the record, and the prayer of the creditors to have it returned to the constable. On the hearing, the referee refused to vacate or modify the order, and the creditors excepted.

Kirk, Carmichael & Rather, for creditors.
S. S. Pleasants, for trustee.

JONES, District Judge (after stating the facts). In Re Moore (D. C.) 112 Fed. 290, it was held that the waiver of exemption authorized by the laws of this state could not of itself confer any title, interest, or equity in the property of the debtor, and did not constitute a lien or pledge in any sense. That case differs from this, in that there the exempt property was claimed before a judgment or attachment. In view of the argument of counsel and the effect claimed for the levy on the exempt property in this case, some further discussion of the case seems proper.

The whole office and effect of a waiver of exemptions is to build up an estoppel which is quickened into being only by a judgment on the debt and the issue of execution in the statutory mode. An estoppel to claim property does not give the person in whose favor the estoppel runs a lien on that property. The judgment and execution alone give the waiver any operation; and the combined effect of the debt, waiver, judgment, and execution, so far as they give any virtue to the waiver, is merely to bring the estoppel into play. If any lien arises in this case it is because of a levy, if that levy can be lawfully followed by a judgment of condemnation. Any legal obstacle interposed between the levy and the right of judgment, so as to defeat condemnation, keeps the waiver in the background, and renders it wholly without influence. No lien in a suit on a simple contract debt can ripen from a levy of an attachment, unless that levy can be followed by a judgment of condemnation. Liens thus obtained are "obtained through legal proceedings," and are the mere creatures of proceedings in court. The preservation of the levy under the at-

tachment is essential to the right of the creditors to subject the property in this case. The question then arises, was the attachment lien dissolved by the adjudication? It is urged that a court of bankruptcy cannot concern itself with liens upon exempt property, or their enforcement. It cannot be denied that it ought to view with concern an attempt to create a lien upon exempt property pending discharge. It is its duty to see that legal remedies for collection of debts, from which discharge may absolve, shall not be allowed to create liens upon property set apart to the bankrupt, so as to nullify the policy of the law, by subjecting the exempt property to debts from which the discharge intended to free it. It is insisted that, as the raft of logs was exempt property, the provisions of the bankrupt act annulling attachments and liens cannot affect the levy in this case, as those provisions were made for the benefit of creditors who cannot share in the exempt property, and no disposition the debtor may make or suffer to be made can amount to a preference. All enlightened governments endeavor to guard against the distressing consequences resulting from the inexorable collection of debt, the enforcement of which shapes in so many ways the condition and destiny of the debtor, by granting liberal exemptions, and providing for periodic discharge from debt. To accomplish these results, the bankrupt law not only relieves the debtor from all debts, with a few exceptions, but to all intents and purposes makes the bankrupt a creditor with a lien, so to speak, and prefers him to creditors to the extent of his exemptions in distributing his assets. This cardinal purpose dominates the whole law. When the statute deals with the dissolution and annulment of attachments, judgments, etc., it is careful to specify the exception, and the only exception, in which the bankrupt's exempt property shall not be affected by the changed legal status imparted to the rest of his estate by the dissolution of attachments and liens; and that is the case of conveyances made to hinder, delay, and defraud creditors. The subdivision in which this is provided is preceded by one relating to the same general subject, in which no such exception is made; and it is followed by another section, which is peremptory and sweeping in its language, that "all liens shall be deemed null and void, and the property affected shall be wholly discharged and released and shall pass to the trustees as a part of the estate of the bankrupt." If the statute did not intend to except exempt property from the effect of its policy in declaring all liens void, save in the particular instance mentioned, why use such sweeping and peremptory language as necessarily to include all the bankrupt's property in all other sections specifying what shall pass to the trustee? This studied difference in the language of the different subdivisions of the same section, which deals with liens and the effect of their dissolution or annulment, cannot be ignored in ascertaining the legislative intent. It is significant of a purpose not to exclude exempt property, save in the one specified instance, from the benefit of the annulment of liens, and to pass it to the trustee for the benefit of the bankrupt. The main reason for the four-months provision was to prevent the race by creditors to seize the estate of the insolvent when it is found that he is in failing circumstances, and

to prevent the preferences which would follow if liens and attachments were allowed during that period. This purpose would be wholly defeated if liens could be created upon the exempt property. Some creditors would unquestionably be preferred. Some would receive satisfaction in whole, some in part, and some nothing. All this, in the face of the policy of the statute to preserve the exempt property, and to require all creditors who had not acquired liens older than four months, or which are protected, to share equally in the bankrupt's estate.

If subdivision "c" is not destroyed by subdivision "f," it can have no effect in this case, since the debtor resisted the lien, and the creditors did not know he was in contemplation of bankruptcy. Without entering into any extended discussion on the subject, it seems to me that subdivision "f" destroys subdivision "c." If subdivision "f" had been enacted in a subsequent independent statute, there would be little doubt that it was intended as a revision of the entire field of "liens obtained through legal proceedings," and would necessarily amount to a repeal of the prior law on the subject, though there were no express words of repeal. In view of the known history of the enactment of the bankrupt law, and the fact that subdivision "f" is the latest utterance in point of time on the subject of liens obtained by operation of law, I feel compelled to hold that subdivision "f" of section 67 controls this case. Under that section the lien of the attachment "is null and void," and the "property affected" is wholly "discharged and released therefrom," and passes to the trustee "as a part of the estate of the bankrupt." This construction is in harmony with the purpose of other provisions of the bankrupt law to have the whole estate, including the exempt property, pass to the trustee to be administered in the bankrupt court. For certain purposes the court takes possession of the exempt property, and the right of possession passes to the trustee for that purpose. The court is given express power to determine the exemption and to set apart the property to the bankrupt. Although the title to the exempt property does not pass to the trustee, yet, as the purpose of the bankrupt law is to protect it, and to save it to the bankrupt, to the detriment of creditors, the language of the act in section 67, subd. "f," where it speaks of the property affected by the levy passing to the trustee, must be construed to mean that it passes to the trustee for whom it may concern, to be administered in the order that the language and policy of the bankrupt law command. It commands the trustee to set apart some of the property to the bankrupt, whose title is not intended to be affected by its passing into the possession of the trustee, and to devote the rest to the payment of debts. It best comports with the language and policy of the bankrupt law to hold that it annuls "all liens," with the exception stated therein, which are acquired against an insolvent's property by legal proceedings within four months of the filing, and that it intended to destroy such lien upon exempt property as well as upon the other property of the bankrupt.

The questions before me are certified at the instance of Harlan and Sloan, creditors. They proved their claims before the hearing

of the motion to dissolve the injunction, and rely upon facts proved on the hearing to sustain their exceptions. Clearly, Harlan and Sloan were parties to the bankrupt proceedings, and cannot, in any event, complain that the court could not exercise summary jurisdiction over them. Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. They should have been served with notice of the petition, and had an opportunity to be heard, before the mandatory injunction issued. If, as appears from the petition, there was an exigency, it could have been met by a temporary restraining order, and then injunction could go as the case might require. The exceptions before me relate solely to the propriety of the order itself, and not the manner of its making. These creditors had no claim whatever to the raft of logs, or title or right of possession, save such as might be founded upon the levy of the attachment in their suit against Tune three days before the adjudication. Tune was all the time insolvent. The adjudication "annulled" the levy, and dissolved any lien which otherwise might have been acquired thereunder, and made it the duty of the creditors to refrain from pushing their suits to judgment and insisting that the justice render judgment of condemnation. The adjudication was properly pleaded before the justice before any order of condemnation. These creditors have no right to complain of the appointment of a receiver or of the order to the marshal to put him in possession; for they had no adverse claim to the property in the sense of law, not even a respectable pretense to title or right of possession. So far as they are concerned, the order was right, and they could not complain of it, even if they had not submitted themselves to the jurisdiction of the court. What is the power of the court to deal summarily with strangers?

The decisions, both of the courts of appeal and of the district courts, on this question, are conflicting; and it would unnecessarily incumber this opinion to attempt to review them. The question must be decided in the light of the decisions of the supreme court of the United States; particularly the cases of Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Bardes v. Hawarden Bank, 178 U. S. 525, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183; Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182; and Mueller v. Nugent, 22 Sup. Ct. 269, 46 L. Ed. —— (decided Jan. 20, 1902). It was a matter of doubt among the legal profession whether the decision in Bernheimer's Case did not turn at last upon the fact that Bernheimer submitted himself to the jurisdiction. The supreme court of the United States in Nugent's Case decided that Nugent, the agent of the bankrupt, who had meddled with the property without right before the adjudication, could be subjected to the summary jurisdiction, though he protested against it. Nugent's Case also sheds light upon other questions which had heretofore been in doubt. The district court committed Nugent for contempt for not paying over money which belonged to the bankrupt. The circuit court of appeals (44 C. C. A. 620, 105 Fed. 586) reversed the judgment of the district court. The court of appeals regarded Nugent as a stranger, so far as the jurisdiction of the district court was concerned. It held that,

"even if he were regarded as the agent of the bankrupt, recourse must be had to ordinary legal remedies, and in a proper court." It held, on the authority of the Hawarden Case, that the district court was without jurisdiction to imprison Nugent for disobedience of its orders. The supreme court reversed the decision of the circuit court of appeals, and affirmed that of the district court. The supreme court said "the respondent denied jurisdiction on the ground that he did not receive the money, or any part of it, after the petition in bankruptcy was filed," though "he afterwards sought to amend his response to the rule by asserting that whatever money belonging to the bankrupt came into his hands was not received as agent of, but was held adversely to, the bankrupt." The opinion further says that the "real question involved was whether the order was a lawful order. It was to be determined as a mere question of law on the facts found that the money belonged to the bankrupt's estate, and was then in Nugent's possession as the bankrupt's agent, he asserting no adverse claim."

In another part of the opinion, referring to this, the court said:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition."

In another place the court asks:

"Does the mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in a circuit court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the assets of a bankrupt to be collected and to determine controversies relating thereto would be seriously impaired, and in many respects rendered practically inefficient. The bankruptcy court would be helpless, indeed, if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law. It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and, in effect, an attachment and injunction (Bank v. Sherman, 101 U. S. 407, 25 L. Ed. 866), and on adjudication title to the bankrupt's property became vested in the trustee (section 70, subd. 'c'), with actual or constructive possession, and placed in the custody of the bankrupt court."

In Sherman's Case, quoted approvingly above, the supreme court said:

"The bankrupt became, as it were, for many purposes, civiliter mortuus. * * * Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. * * * Otherwise the efficacy of the act depended not upon its own language and meaning, but was only what others outside of the proceedings might choose to permit it to be."

Certainly, the supreme court of the United States, in its last decision on the subject, did not deem that decision to conflict with the case of Bardes v. Hawarden Bank and the other cases noted, which deny to the court of bankruptcy jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the insti-

tution of proceedings in bankruptcy. It unquestionably intended that those decisions should stand. But Nugent's Case inevitably withdraws from the influence of Bardes' Case summary, as distinguished from plenary, proceedings against a third person, who without right, or fair appearance of right, retains property of the bankrupt in defiance of the orders of the district court, though he is not a party to the suit, and does not submit to the jurisdiction. It also results irresistibly that it qualifies or departs from any expression to the contrary which may be found in Morgan v. Thornhill, 11 Wall. 65, 20 L. Ed. 60; Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; and Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403,—which are all made the subject of review in Bardes' Case, which in turn was under review in Nugent's Case.

In Bardes' Case, 178 U. S. 534, 20 Sup. Ct. 1004, 44 L. Ed. 1175, Mr. Justice Curtis is quoted as saying of two former cases that they are "an illustration of the rule that any opinion given here or elsewhere cannot be relied on as binding authority unless the case calls for its expression." So the Case of Bardes and those following it are not to be construed as holding in any wise that the mere assertion of an adverse claim would oust the summary jurisdiction of a court of bankruptcy to ascertain (to use the language in Nugent's Case) "whether any basis for such actually existed at the time of the filing of the petition," or the further holding in Nugent's Case that the court "would be bound to enter upon that inquiry." It is apparent from reading the opinion in Nugent's Case that the only adverse claim which could oust the summary jurisdiction was a claim which was not merely colorable. To use its language again, there must be an "actual basis" for the claim. This is only the application of the familiar principle regarding equity jurisdiction in cases where it is essential to injunctive relief to have a superior legal title or right to the defendant. A bare claim, a bare denial of the plaintiff's right, no matter how positive, will not dissolve the injunction: but the defendant must go further and show facts in support of the denial, which at least give color of right in him, and make the contested matter of right between him and the complainant one of some fair doubt. There must be reasonable room for controversy.

Now, then, when the trustee of the bankrupt claims property to which another sets up title, and asks the assistance of the court of bankruptcy, the court, to use the language of Nugent's Case, "is bound to enter upon that inquiry." If, as the supreme court says, "it is bound to enter upon that inquiry," and "in doing so undoubtedly acted within its jurisdiction," is not the court, if it finds the claim merely colorable, bound to direct the surrender of the property to the trustee? Clearly, the court is "bound to enter upon the inquiry," and, if the facts in the particular case show that the detention is without color of right, then it is bound to take and administer the property. It is safe to say that a claim like that here is without color of right when upon the undisputed facts, as matter of law repeatedly construed by the highest court in the United States, the claim is baseless. Subdivision "f," § 67, of the bankruptcy law, declares that "all levies, judgments, attachments or other liens obtained by legal pro-

ceedings against a person who is insolvent, at any time within four months prior to the filing of the petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustees as a part of the estate of the bankrupt." This provision applies alike to voluntary and involuntary petitions. Of the constitutionality of this statute there can be no doubt, for it is passed in pursuance of a grant in the constitution, which authorizes congress to confer upon the courts of the United States exclusive jurisdiction of matters in bankruptcy. If this section is constitutional, there would seem to be no doubt that the state court, in which such an attachment was begun, lost all right to the custody of the property; for by operation of the supreme law the custody was devested out of that court, and invested in the trustee. The cable which kept the property in the grasp of the jurisdiction of the state court parted when the law annulled the levy. The levy could no longer affect the property. The adjudication vacated it. Subdivision "f" quashed it, and the property "affected" by it was "wholly released and discharged" from its power. How is it possible in such a case for a court to have jurisdiction and rightful possession over the rem, when against the only proceeding which could confer a right to possession the law itself pronounces an inexorable sentence of nullity, and at the same time stripped the court of jurisdiction to make any further order? The jurisdiction of the court of bankruptcy to enforce the possession that the law gives it, and to take the property from the other court, which, in the contingency named, has no jurisdiction over or right to possession of the rem, seems plain. If this court has the jurisdiction, and application is properly made to it, it cannot refuse to exercise it. Why, then, should it not take the property on which the attachment is had into its own custody?

In weighing the effect of the adjudication upon the attaching court's possession by reason of annullment of levy, we must not confound title and right of possession. The legal title is often in one man and the right of possession in another. It is true the bankrupt's title passes to the trustee "as of the date of the adjudication," but where forbidden liens, which the law annuls, are concerned, the adjudication determines the right of possession, not only "as of the date of the adjudication," but within four months prior to the filing of the petition. In the eye of the law no right of possession can result from the void levy; and the possession, as well as the right of possession, thus acquired, are, by force of the statute and adjudication, put either in the bankrupt or trustee; for the attaching creditor can take nothing by his void levy. If the possession and right of possession at the time of the void levy remain by force of the statute in the bankrupt, the trustee, who takes subject only to valid liens, has a right of possession which relates back to the void levy, since he succeeds to the rights of the bankrupt. So, the void levy, the only process by which the attaching court can claim possession, is converted by the adjudication into a levy upon the possession of the trustee, which, as against forbidden liens, was prohibited by law the very moment the lien

was thus attempted to be created. Concede the possession acquired by the annulled levy to have been rightful up to the time of the adjudication, yet after that the right of possession based upon the levy was absolutely destroyed, and became void ab initio. It is to be noted that the language of the statute is not merely that the lien shall be "null and void," and the property shall be "wholly released," but that they "shall be deemed" null and void, and the property "shall be deemed" wholly discharged. This expression is twice used. Deemed by whom? Certainly, by all courts. Why? Unquestionably to compel those intrusted with the administration of the law to treat the annulled liens as though they had never existed, and the property as though it had never been taken in possession. The purpose is plain that the court of bankruptcy must act upon the matter as though the attaching court had never made a levy, and the property had never come in its possession, or passed out of the control of the bankrupt. Such a levy cannot retain or nourish any right of possession in the attaching court after the adjudication, and it is the only claim on which a remaining right of possession in the state court is rested. It is void ab initio. As long as the levy was made within four months of the filing of the petition, the date when the bankrupt's title passed to the trustee is immaterial to any issue here presented.

It is said that comity prevents one court from interfering with property in the possession of another court. This is a wise and salutary rule repeatedly enforced by the supreme court of the United States, and respected by all lovers of law and order. No one bows to the rule more profoundly than the writer of this opinion. But the question is not one of comity or concurrent jurisdiction. It is a question of the supremacy of the constitution and laws of the United States, to which state and federal courts alike must bow. It is no new thing in our jurisprudence for a state court, which had concurrent jurisdiction of the subject-matter with the federal court, and first obtained jurisdiction, to lose that jurisdiction, and have that jurisdiction by operation of "the supreme law of the land" vested exclusively in a federal court, which enforces the transfer of the res into its own custody. Our removal laws are familiar instances of this loss of jurisdiction by one court after that court has acquired such jurisdiction, and the gain of its jurisdiction by another court. The sections of the act cited inevitably give the district courts of the United States the exclusive jurisdiction to administer the estate of an insolvent, as against liens and attachments acquired against insolvents by legal proceedings, at any time within four months prior to the filing of the petition, with exceptions named not here material, if he be adjudged bankrupt; for, in the language of the statute, "the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same," and "shall pass" to the trustee as a part of the estate of the bankrupt. As to suits to obtain liens upon an insolvent's property, brought before adjudication, but within four months of the filing, the only jurisdiction which can remain in the attaching court is to hold on to the suit; and if discharge is not granted, or granted and not pleaded, to render a judgment in personam. Its jurisdiction over the rem is taken away by the adjudica-

tion. The failure to obtain a discharge cannot revest the state court with jurisdiction of the rem, which remains in the court of bankruptcy to administer, unaffected by the denial of a discharge to the bankrupt.

When the attaching court, after the adjudication is formally brought to its notice by a party to the record by timely plea, ruthlessly disregards it, and proceeds, in violation of the law of the land, to enter judgment of condemnation, what comity does it extend to the court of bankruptcy? There is no reason to suspect that it would pay any attention to a request to surrender possession, and no reason in such a case why the request should precede the order. On the happening of the contingencies mentioned in subdivision "f," the jurisdiction of the state court is taken from it as completely as when there has been a removal from state to federal courts by a party "entitled to removal." In such a case it has many times been held that the jurisdiction of the state court "absolutely ceased, and that of the circuit court of the United States immediately attached"; that the state court was "without further jurisdiction"; its rightful jurisdiction comes to an end. Crehore v. Railway Co., 131 U. S. 243, 9 Sup. Ct. 692, 33 L. Ed. 144. The jurisdiction of the state court over the attached property in this case, whatever it might have been, has ceased and determined. The levy is void. The court's orders with reference to the possession of the property are void. The original levy being void, the court, having no further jurisdiction, cannot make any further order except to stay the suit. It cannot protect the officer or party acting or claiming under such orders if made. He becomes a trespasser as to the property without a shadow of legal claim to the property or to its possession whenever he refuses to deliver on demand of the rightful owner, the trustee, or the receiver. It seems, therefore, to follow conclusively from the principles stated that the court of bankruptcy in the cases of attachments mentioned in subdivision "f," not only has the jurisdiction, but is under duty, to take the property from the possession of one who, though originally holding for the state court, has, by reason of its loss of jurisdiction over the rem, become a mere bailee for the true owner, whenever, on proper demand, such bailee refuses to surrender possession. It is entirely illogical to contend in such a case that the court of bankruptcy interferes, in any legal sense, with the possession of the state court.

The collection and distribution of the assets of the bankrupt estate in a sense involves the administration of a trust. The court to which the administration is confided has the inherent power, apart from the special jurisdiction conferred by the bankrupt law, if need be, on its own motion, to punish mere intermeddlers by summary process. It can make no difference that the jurisdiction is invoked by the trustee, the receiver, or the bankrupt himself, so long as the person against whom the power of the court is invoked is a mere intermeddler, or one who claims to hold or take possession under a claim which in law is purely colorable. Such proceedings are not "suits" in the ordinary meaning of the term, nor in the sense in which the word is used in subdivision "b" of section 23. They come, rather,

under subdivision 15 of section 2, which empowers the court "to 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." Each case of this kind, of course, must depend upon its own facts. If it be clear that the property belonged to the bankrupt, that it was attached in proceedings against an insolvent within four months of the filing of the petition, and that the only claim of the person in actual possession of the property is derived from these proceedings, the case is clearly within the principles enunciated in Nugent's Case. On the other hand, if, in the particular case, there is any fair room for doubt as to the fact of insolvency when the evidence is presented,—and that is the only issue which can arise, since the intent with which the attachment is levied is entirely immaterial,—the claim is not "merely colorable," and the summary jurisdiction cannot be further pursued. In Re Seebold, 45 C. C. A. 117, 105 Fed. 910, the circuit court of appeals in this circuit held, where an action was begun in a state court, prosecuted to judgment, and execution issued, and the property subjected to the pledge by judgment, seized, and advertised for sale before the institution of proceedings in voluntary bankruptcy, the state court having possession of the property and the jurisdiction of the parties, the court of bankruptcy had no authority to stay the proceedings. Most clearly that decision was right. The action asked at the hands of the court of bankruptcy in that case was an attempt to annul a lien preserved by the bankrupt law, a lien of which the supreme court of the United States had said in another case, "The lessor's lien on the goods of the tenant on the premises is one of the strongest and most favored under the law of Louisiana." In Re Kenney, 45 C. C. A. 113, 105 Fed. 897, the circuit court of appeals of the Second circuit held that where, within four months before the filing of the petition in bankruptcy against an insolvent judgment debtor, execution had been issued and levied upon his personal property, and a sale made, the proceeds of such sale remaining in the sheriff's hands at the time of the adjudication did not belong to the judgment creditor, but to the estate of the bankrupt, and the court of bankruptcy has power and jurisdiction to order the sheriff to pay over such proceeds to the trustee when appointed. In Re Seebold, supra, there are many general expressions contrary to the conclusion I have reached, but they were not necessary to the decision of the case. This case and that differ in vital respects. One concerns a lien which the bankrupt law preserves, and the other a lien which it destroys. In the one there was a judgment ascertaining the debt and decreeing satisfaction out of a pledge before the petition was filed. In this case there was no pledge, and the adjudication annuls the lien begun by levy of an attachment, and it cannot now be followed by judgment of condemnation of the rem in the state court. How far our court of appeals would feel bound by the general expressions in that case it is not for me to determine; nor can I foresee whether the general expressions used in that case on the facts of this case would not be modified by the principles declared in Nugent's Case. If In re Seebold were "on all fours" with this case, my sense of subordination and

of the respect due a higher tribunal would make me accept the general views there declared as conclusive, though other courts of like high grade might have decided otherwise. When, however, the supreme court has made later utterances on the subject, and the facts of this case differ so materially from the facts of Seebold's Case, there can be no impropriety in following my own judgment.

The aptness of the remark quoted from Nugent's Case that the bankruptcy court "would be helpless, indeed, if the bare refusal to turn over could conclusively operate to drive trustees to an action to recover," etc., is strikingly illustrated by the facts of this case. Tune was adjudicated a bankrupt three days after the levy. He promptly appeared and pleaded the adjudication before the judgment of condemnation. The justice, after a little delay, proceeded to render judgment of condemnation notwithstanding the adjudication, and the constable, indemnified by creditors who were unwilling to stay judgment in their suit, in obedience to the bankrupt law, was about to sell the property. It was exempt under the laws of the state until a valid condemnation was had. The attachment—the court's only title to possession—had been annulled, and the supreme law required that the property be delivered to the trustee. But for the interposition of this court, the raft of logs, which was practically the only disposable property of the bankrupt, would have been sold, and the owner driven to a lawsuit with the plaintiff, or a suit on the constable's bond,—neither of which might have been fruitful,—to get the proceeds of a sale of the exempt property, which it was the duty of the bankrupt court to set apart to him, and which could have been determined there with little cost and delay. If such proceedings cannot be prevented by the court of bankruptcy, it would soon become a mere auditor of the debts of the bankrupt, and go through the formal ceremony of discharging him, while other courts would administer and distribute the property and determine the rights of the creditors therein.

The creditors can take nothing from their exception to the order of the referee, which is in all things confirmed.

THE TJOMO.

(District Court, S. D. Alabama. April 12, 1902.)

1. SHIPPING—LOSS OF CARGO—IMPLIED WARRANTY OF FITNESS OF SHIP.
   The warranty that a ship is fit at the beginning of a voyage to safely carry the cargo received by her, which is implied where the bill of lading is silent, cannot be implied if the parties have contracted otherwise; and in such case the burden of proof is not upon the carrier, but upon the shipper, who must show the carrier's negligence to entitle him to recover for loss or damage to cargo.

2. SAME—STIPULATIONS IN BILL OF LADING.
   Stipulations in a bill of lading for cattle to be carried by ship, exempting the carrier from liability for accident to the cattle, or any mortality, "from whatever cause arising," and that the shippers accepted the fittings and fastenings as satisfactory, do not relieve the carrier, under the provisions of the Harter act, from the duty of exercising due diligence to properly equip and outfit the vessel, and to make her seaworthy, and capable of performing her intended voyage, nor lessen or avoid the

obligation to properly stow the cattle; but the burden rests upon the shipper to affirmatively prove negligence in such respects to charge the carrier with liability for cattle which were killed or washed overboard during a storm of such violence that it might well have caused the loss if the vessel were seaworthy, and properly fitted and loaded.

8. SAME—CARRIAGE OF LIVE STOCK—LIABILITY FOR LOSS.

A steamship had been in the cattle-carrying business for several months, during which time she had made 14 or 15 trips between gulf ports and Havana, on many of which she had carried cattle for libelant. On the voyage in question the ship encountered a storm of great violence, described by some of the officers of experience as the worst they had ever seen, during which the deck fittings were broken, and some of the cattle were lost. Libelant claimed that the fittings were not sufficiently strong, and that the cattle were overcrowded, but his testimony showed that he was familiar with the fittings, and had accepted bills of lading stipulating that they were satisfactory; that he was on the ship when she was being loaded, and made no complaint as to the manner of loading to the person having charge of the same, but after leaving the vessel sent another car load on board. The evidence also showed that the fittings were such as were customarily used for the purpose at that port, and were the same used on the previous voyages, which were made with safety, and also that the loading was the same as on former voyages. *Held*, that the evidence did not establish the unseaworthiness of the ship, or negligence in the stowage of the cattle, and that the loss must be attributed to excepted perils of the sea.

In Admiralty. Suit in rem to recover damages for loss of cattle in shipment.

McIntosh & Rich, for libelant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The libelant brings this suit to recover damages for breach of contract on the part of the vessel to deliver a cargo of cattle shipped by him to Havana, Cuba. The ship sailed August 11, 1901, and while on her voyage, on the night of the 12th–13th of August, encountered a terrific storm in the Gulf of Mexico, in which many of the cattle were lost by being carried overboard or killed or injured by the breaking down of the superstructure of the cattle fittings upon the deck, which was in great part broken away and also carried overboard. The bill of lading contains the following provisions:

"It is expressly stipulated that live stock shall be at the risk of the owner, shipper, or consignee thereof, and the steamship is in no way responsible for any accident or any mortality which may occur during the voyage, * * * from whatever cause arising. It is also mutually agreed that steamer reserves the right to load the live stock either under or on deck of steamer, shippers accepting fittings, fastenings, and ventilation as satisfactory. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all exemptions from liability contained in, an act of congress of the United States approved on the 13th day of February 1893 [known as the "Harter Act"]."

"In every contract for the carriage of goods there is an implied engagement on the part of the carrier to furnish safe and suitable means of transportation, and in the case of a carrier by ship to supply a ship which is not only seaworthy, but is also reasonably fit to carry the cargo stipulated for in the bill of lading. It is also elementary law that a carrier by vessel cannot escape liability for the loss or injury

of goods during transportation through dangers of navigation caused by its own previous default, notwithstanding an exception in the bill of lading from liability from sea perils." The Exe, 6 C. C. A. 410, 57 Fed. 399.

In The Prussia, 35 C. C. A. 625, 93 Fed. 837, the court said:

"It is the duty of the carrier by water, when he offers a vessel for freight, to see that she is in suitable condition to transport her cargo in safety; and he impliedly warrants that this duty has been fulfilled. * * * But it is competent for the parties by express contract to modify the obligations which would otherwise devolve upon the carrier, including even that of providing a seaworthy vessel, and short of any modifications which will exempt him from the consequences of his own misconduct or negligence, or those for whom he is responsible, such contracts, though strictly construed against the carrier, are given full effect."

In Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 441, 9 Sup. Ct. 472, 32 L. Ed. 788, it is said that:

"Special contracts between the carrier and the customer, the terms of which are reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, * * * or for perishable articles, or live animals when injured without default or negligence of the carrier."

The warranty that a ship is fit at the beginning of a voyage to safely carry the cargo received by her, which is decided to be implied where the bill of lading is silent, cannot be implied if the parties have chosen to contract otherwise. The burden of proof in such case is not upon the carrier, but upon the shipper, and there must be sufficient evidence of the carrier's negligence before the shipper can recover. The Southwark (D. C.) 104 Fed. 103.

The proctors for libelant do not, as I understand it, question these principles of law, but their contention is that, through the negligence of the owner of the steamship, or of those for whom he is responsible, the ship was unseaworthy, and improperly equipped, in that the fittings of the pens or compartments provided for the cattle were insufficient and insecure, both in construction and material; and that the cattle were improperly and negligently stowed on the ship by being too much crowded in the pens, and that the loss complained of was attributable to these causes. The claimant takes issue on this contention, and alleges that the loss was attributable solely to the perils of the sea. The evidence on the part of the claimant shows the encountering by the ship of a terrific storm of wind and heavy seas, characterized by the master of the ship as "a very heavy hurricane," with wind from 90 to 100 miles an hour. The first mate, who had been going to sea 10½ years, speaks of it as "the most terrible storm" he ever saw. The second mate has been going to sea 10 years, and says he "never saw such a big storm before." This evidence shows a specific and adequate cause for the loss of the cattle, consistent with the seaworthiness of the ship, and warrants the conclusion that this was the immediate cause of the loss. This, then, puts the burden on libelant to show that the result would have been prevented by the exercise of due care and diligence in the construction of the fittings of the vessel and in the proper stowage of the cattle. My opinion is that, notwithstanding the stipulations in the bill of lading, the owner of the ship

should have exercised due diligence to properly equip and outfit the vessel, and to make her seaworthy, and capable of performing her intended voyage, and the obligations of the master, agents, or servants to properly stow the cattle were not thereby lessened or avoided. Harter Act, Feb. 13, 1893. The Manitoba (D. C.) 104 Fed. 145. Where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, where it appears that the loss has been caused by the dangers of navigation, it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill upon the part of the carrier. Christie v. The Craigton (D. C.) 41 Fed. 62; The Warren Adams, 20 C. C. A. 486, 74 Fed. 413. If the steamship Tjomo was not unseaworthy at the commencement of the voyage either by reason of insufficient and defective fittings and fastenings or of negligent or improper stowage of the ship, then the libelant cannot recover. "The requirement of 'seaworthiness' intends that the ship shall be in a fit state as to repair, equipment, crew, and in all other respects, to encounter the ordinary perils of the contemplated voyage. Seaworthiness does not require perfection, but only reasonable fitness." The Aggi (D. C.) 93 Fed. 490; The Rover (D. C.) 33 Fed. 515; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; Dupont De Nemours v. Vance, 19 How. 162, 15 L. Ed. 584. "If the ship was at the commencement of the voyage in such a state as to be reasonably capable of performing it, she was seaworthy." The Titania (D. C.) 19 Fed. 101. "The question of seaworthiness is to be determined with reference to the customs and usages of the port from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters." Id.

The preponderance of evidence clearly shows the seaworthiness of this vessel in respect to her fittings and fastenings. It shows that they were in accordance with the custom and usage of this port with vessels engaged in the same trade prior to the storm in which the loss here complained of occurred; that this particular vessel had been regularly running in the trade for four or five months prior to that time; that her fittings were substantially like those of the other vessels in the same line; that libelant had been a regular shipper of cattle with the line of steamships to which the Tjomo belonged for about two and a half years, and had shipped on the Tjomo nearly ever since she had been in the trade, and that he was familiar with her fittings for cattle. The libelant described the character of the fittings, and stated that some of the planks out of which they were constructed were split at the ends, and that the nails would not catch well, and that some part of the structures was weak. He, however, stated that his observation of this condition of things was several weeks—perhaps one or two months—before the trip on which the loss complained of occurred. There was some other evidence on the part of libelant as to the character and condition of the fittings of this steamship, but it related to them subsequent to the storm. There was also expert testimony for both libelant and claimant on the question of the sufficiency of fittings of the character of those shown to have been constructed on the

Tjomo, the preponderance of which was that they were fit and sufficient for the ordinary dangers of navigation in the voyages in which she was engaged. The fact that this ship had been for several months subjected to conditions calculated to test her seaworthiness in respect to her fittings without any evidences of defect in them, and thereafter an adequate cause for their destruction was present, is sufficient evidence that the ship was seaworthy at the beginning of the voyage. The Aggi, supra, and authorities therein cited. It appears that she had made 14 or 15 trips in this trade, and had met with no accident or mishap. And the fact that libelant, who had made frequent shipments of cattle by this steamship, and was at every shipment on or about the ship when she was being loaded, and was familiar with her fittings and fastenings, accepted bills of lading with a stipulation therein that the fittings and fastenings were satisfactory, I think clearly demonstrates that such fittings and fastenings were proper and sufficient to encounter the ordinary perils of the sea. But it is said that libelant did not receive the bills of lading until after the ship had sailed. It was his right to have had them before the ship sailed, and he could have demanded them if desired. Moreover, he had been a frequent shipper of cattle on this vessel, and it may reasonably be presumed that the previous bills of lading accepted by him contained a like stipulation as to the fittings, etc. My opinion is that libelant has not only failed to show negligence on the part of the ship in providing fit and sufficient fittings and fastenings for the cargo, but that the evidence shows she was entirely seaworthy in this respect.

Was there a want of proper skill and care in stowing the cattle? "It is well settled that in determining what is proper stowage the customs and usages of the place of shipment are to be considered, and, if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty or negligence can be imputed to the ship, and in case of damage under great stress of weather the injuries will be ascribed to perils of the seas." The Titania (D. C.) 19 Fed. 107. Libelant testified that he saw all of his cattle after they had been put aboard the ship, except one car load of 24, which had not been loaded at the time he was aboard; that they were loaded later. He said his cattle were too crowded, and that he told the first mate of the ship, who was present, that they were crowded, but that the first mate was not superintending or supervising the loading of the cattle; that a stevedore was, and that he made no complaint to the stevedore, or to the master of the ship; that he does not know how many cattle he had aboard without seeing the bill of lading. He further testified that there were 85 grown cows in two pens,—43 and 42,—and he thought there were 60 or 65 calves divided in the two pens, and that there were from 70 to 80 cows and calves in each of the pens. It does not appear that he counted the cattle. He says he had shipped a great many cattle by this ship and others in the same line, and that the usual load was from 18 to 25 in a pen. W. J. Denton testified on behalf of libelant that he is now in the cattle business with libelant; that he observed the loading of the steamship Tjomo in last August, when libelant's cattle were shipped; that he told libelant his cattle were crowded too many in a pen; did not know how many;

was not then with libelant. He further says that the usual number put in a pen is 20 or 25, and he has known as many as 30, where they were not very large. Frank A. Ross testified on behalf of claimant that he, as stevedore, loaded the steamship Tjomo on the trip in question; that he does not recollect exactly how many cattle were put in a pen at that time; the ship had a full cargo, but was not overloaded, and the cattle were not overcrowded; that it was usual to put from 20 to 30 in a pen,—not more; the superstructure where these cattle were stowed was divided into four pens, and the cattle were loaded as was customary. But Scott testified for claimant that he was foreman of cattle fittings, and was so employed in August last on the steamship Tjomo; that she usually put about 25 head of cattle in a pen; that she could carry as many as 30 if packed, and, if there were small calves among them, could carry 35; that he did not think there were as many as 40 on the trip referred to; that the ship had no greater load on her than he had seen on her at other times, or on other vessels of the line. He did not count the cattle, and did not know how many were in the pens. From observation he did not think there were more than was customary. The master of the steamship testified that the manner of loading and stowing the cattle on the voyage in question was not different from the customary manner in the former shipments by libelant; that the largest number of cattle they put in a pen is about 35; cannot say definitely how many were put in a pen on this voyage; paid no particular attention to how many were in a pen so long as he did not see too many. In this state of the evidence it is difficult to determine whether the cattle were or were not stowed in a proper mode,—whether or not there were too many in a pen; but there is one circumstance shown in this connection which I consider of much weight, and that is the fact that libelant saw his cattle were badly crowded, as he says, and yet subsequently had put aboard and shipped 24 additional head of cattle. The burden being on the libelant to show negligence in the stowing of the ship, he has failed to satisfy me by the evidence that the ship was not, as regards the stowing, reasonably fit to encounter the ordinary perils that might be expected on her voyage; and, even if she was not reasonably fit to encounter such ordinary perils, the evidence fails to satisfy me that the loss was occasioned by that unfitness.

My judgment is that the libelant is not entitled to recover, and that the libel must be dismissed.

In re THOMPSON.

(District Court, S. D. Georgia, W. D. May 14, 1902.)

BANKRUPTCY—HOMESTEAD EXEMPTION—GEORGIA STATUTE.

Under the provision of Code Ga. § 2820, which declares that "a debtor guilty of willful 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 lose the benefit of such exemption, a bankrupt cannot be denied the right to his homestead exemption because he once con-

veyed the land claimed to his wife in a vain attempt to evade a debt, where it was reconveyed prior to the bankruptcy proceedings and was scheduled by him as his property.

In Bankruptcy. Review of referee's decision allowing homestead exemption.

John I. Hall, for bankrupt.
Merrel P. Callaway, for objecting creditor.

SPEER, District Judge (orally). This is the case of an old man who, in 1896, made a deed to land to his wife. Doubtless, he made it in the effort to save his home. He was surety on the bond of a guardian. Suit was pending against him and he made this conveyance. Judgment was obtained. The wife claimed the property. Claim proceedings under the Georgia law were submitted to the jury, and the jury very properly held the property subject to the judgment. In the meantime the bankrupt law was enacted, and after a time, but before the proceeding in bankruptcy, the wife reconveyed this land to her husband. He then filed his petition in bankruptcy and placed this property in his schedule. He did not conceal it from his creditors. If he committed a fraud in the first instance, it seems that fraud was redressed, so far as the parties could redress it, by her reconveyance and his acceptance of that reconveyance. Now is he entitled to a homestead exemption in the land thus reconveyed to him, and now in the hands of the trustee?

It appears to me that we must test this question by the Georgia statute, and on looking to this we find in section 2830 of the Code this language:

"A debtor guilty of willful 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."

This provision relates, I think, to fraud committed at the time the debtor seeks the exemption. There was no such fraud here. The homestead, therefore, would not be denied under the Georgia law by a Georgia court, and I do not think we have the right to deny it. I do not think the bankrupt court has jurisdiction to inquire into the initial fraud in 1896. We are only concerned with fraud respecting the application for exemption in the bankrupt court, just as the Georgia court of appropriate jurisdiction would be concerned with fraud at the time the applicant seeks the exemption. To hold otherwise would be to deny the place of repentance to the debtor who in the past had attempted to wrong his creditors. In the cases which have been cited, the title had been put out of the applicant for homestead by his own act, and, the title being out of him, the court held that he could not take homestead therein, because in parting with his property he has parted with his opportunity. In Minor v. Wilson (C. C.) 58 Fed. 616, this language is used:

"A valid homestead could not be set apart to Minor himself nor to his family out of the lands in controversy, because the conveyances of Minor to

his wife, and afterwards from Minor and his wife to Hardee, show that at the time the homestead was set apart the title of the property was not in Minor, the husband."

An order will be taken confirming the referee's judgment and allowing the exemption.

RECEIVER OF CENTRAL R. & BANKING CO. OF GEORGIA (ANDERSON, Intervener) v. MACON, D. & S. R. CO.

(Circuit Court, S. D. Georgia, W. D. June 6, 1902.)

1. EQUITY—GROUNDS FOR RELIEF—SUFFICIENCY OF PETITION OF INTERVENTION.
The receiver of a railroad filed a bill in equity to enjoin the tearing up by another railroad company of a spur track connecting a brickyard with the main line of his road, alleging that his company had been in lawful and peaceable possession and use of such track for more than 10 years. The owner of the brickyard intervened for the protection of his right to the continued use of the spur track under a contract with the receiver's company. His petition showed that the deed by which he acquired the property described the same as a brickyard, and that the spur track which was upon the land of his grantor then existed and was essential to the use of the property conveyed for brickyard purposes. *Held*, that his petition was not demurrable because it also showed that his grantor in the deed reserved the right to sell the right of way subsequently purchased by defendant, and which crossed the spur track, such reservation being consistent with the continued maintenance and use of such track, and that when read in connection with the bill it stated grounds for equitable relief.

2. SAME.
An intervention pro inter esse suo must be construed as pleading in connection with the averments of the original bill.

In Equity. On demurrer to petition of intervention of F. W. Anderson.

Alexander Proudfit, for intervener, W. F. Anderson.
Olin J. Wimberly and John I. Hall, for complainant.
John M. Stubbs, Alexander Akerman, and Minter Wimberly, for defendant.

SPEER, District Judge (orally). This question, notwithstanding the extraordinary heat with which it has been argued by counsel, does not seem to possess any very great difficulty. In the equity cause of Rowena M. Clark against Central Railroad & Banking Company of Georgia a receiver was appointed about the year 1892. While operating the properties of the defendant company the receiver complained in an equitable proceeding, dependent upon the main litigation, that the Macon, Dublin & Savannah Railroad Company had torn up its spur track leading to Anderson's brickyard, and was thus interfering with the operation of the properties with which the receiver was intrusted. The Macon, Dublin & Savannah Railroad Company was required to restore the track which it had torn up, and at the request of both parties an order was granted preserving the status quo until the final determination of the controversy. There has been much delay in this, but it is not chargeable to the court. There were

many applications for continuance on the one side and the other.

Now that the question is finally up for determination, W. F. Anderson, the owner of the brickyard and alleged licensee of the Central Railroad, has filed an intervention to protect his right, under a contract with the Central Railroad, to use the spur track constructed by that railroad for the purpose of reaching his brickyard. His intervention sets forth a number of material averments, and the intervention itself must be construed in connection with the original proceeding in which he intervenes. That proceeding alleges that the Central Railroad & Banking Company was in the peaceable and lawful possession of the spur track, and had been in possession 10 years prior to the time the original proceeding was filed. It is distinctly alleged that it was in possession and use of this spur track at the time the Macon, Dublin & Savannah Railroad Company bought their right of way from Marshall J. Hatcher, under whom Anderson also holds; that the Macon, Dublin & Savannah Railroad Company bought from Hatcher subject to any right the Central might have had by virtue of that possession; and, because of the apparent and easily discernible character of the spur track crossing the right of way which the Macon, Dublin & Savannah bought from Hatcher, on which they subsequently constructed their own road that the latter road bought with knowledge of the rights of the Central. These averments are very material. If it be true that the Macon, Dublin & Savannah bought their right of way with notice of this possession, use, and occupancy on the part of the Central, they took with notice of the equity of the Central to insist upon whatever rights it may have under that possession, and any rights the Central may have are the rights of its licensee, Mr. Anderson.

It is said, however, that Anderson had no title to this right of way when he bought the brickyard from Hatcher. This he did in the year 1886. The existence of this spur track, according to the averments of the original petition, dates from 1882; and if it is true, as alleged in the original petition of the Central Railroad, that when Anderson bought the brickyard the spur track ran from the Central Railroad into the brickyard for the purposes of that industry, Anderson has the right to insist that he be heard as to his privilege to enjoy the use and possession of that spur track for all the purposes of his business. The conveyance of such a property as a brickyard with a railway spur track connecting it with a main line or any other right of way by which the purchaser must have the opportunity of access and egress gives to him the right to insist upon the enjoyment of anything that he may be entitled to with regard to his right of way. If it amounts to an easement, he has the right to insist upon his easement. If it is merely possession, and his right to easement has not matured, he has the privilege to defend his possession. If there is no title in him to his right of way, that must appear from the evidence introduced upon an issue made with regard to title.

Whatever may be the final conclusion of the court as to the rights of Anderson, it would not be proper to dismiss his intervention, depending upon the equities of the Central Railroad, upon this demurrer, for that would enable the Macon, Dublin & Savannah Railroad

to take advantage of its own wrong. If the averments of the original petition are true, it entered upon the property and tore up the spur track, vi et armis, and such conduct does not meet with the favorable consideration of a court of equity.

Respondent in its demurrer relies with apparent confidence upon a clause of the deed of M. J. Hatcher to Anderson in which Hatcher reserves the right to sell the right of way now occupied by the Macon, Dublin & Savannah for railroad purposes; but that does not necessarily exclude the right for which Anderson contends, namely, that he bought with a railway crossing over that right of way in order to connect with the main line of the Central. It is true that while conveying the fee in the entire premises to Anderson for the purposes of the brickyard that Hatcher may have incorporated a limitation in the conveyance by which he reserved the right to sell for railway purposes this particular right of way, which was an old track of the Central Railroad. Under a familiar rule, however, a deed must be construed most strongly against the grantor, and since Hatcher sold Anderson this property described as a brickyard for the purposes of such an enterprise, with a spur track already in existence crossing that old right of way, which he stipulated that he might sell for railroad purposes, this limitation in the conveyance will, we think, be construed so as to preserve his right to sell the strip reserved, and at the same time to preserve Anderson's right to the use of the spur track crossing it, and connecting him with the main line of the Central. In other words, since he sold Anderson a brickyard, and since it is plain that a spur track crossing the right of way which he reserved was necessary to the operation of that brickyard, before he or those holding under him would have the right to tear up that spur track they must be able to point out plain and explicit terms in the deed authorizing this denial to Anderson of a facility existing at the time he bought. Since it is obvious that Hatcher's reservation of the right to sell the old right of way of the Central, which traverses a portion of the land sold by him to Anderson for the purposes of a brickyard, is not at all inconsistent with the right of Anderson to enjoy the use of the spur track crossing that right of way, the court must overrule the demurrer based upon the limitation in Hatcher's conveyance, and must determine the rights of the parties upon the evidence, to be taken as usual in equity.

OHIO RIVER R. CO. et al. v. FISHER.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 411.

1. VENDOR AND PURCHASER—PROTECTION OF BONA FIDE PURCHASERS—REVERSAL OF DECREE ON BILL OF REVIEW

A testator left all his property to trustees for certain purposes, among which was the payment to his son's wife, in case she should become a widow, without children, of an annuity sufficient to afford her a comfortable support during her widowhood. The son contested the will, and a decree was entered setting it aside and directing the trustees to convey the property to the son as heir at law, which they did. Thereafter the son sold all the property, his wife joining in the deeds for the purpose of relinquishing her right of dower. After his death a bill of review was filed by certain of the defendants in the suit, in which the decree was reversed, and the will was held valid. Thereafter the son's widow filed a petition to charge the lands sold with the payment of her annuity under the will. *Held* that, as between her and the purchasers of such lands, who bought in good faith and for full value in reliance on the decree, the equity of the latter was superior, and their rights were not affected by the proceedings on the bill of review.

2. RES JUDICATA—MATTERS CONCLUDED.

A decree rendered on demurrer is conclusive only on the issues joined by the pleadings; and where a decree so rendered adjudged the validity of a will, which was the matter in issue, but the court in its opinion held that the will was inoperative as to certain bequests which had been revoked by a codicil, and that such bequests became intestate property, subject to a legacy previously charged by the will upon the whole estate, such decree cannot be pleaded as an adjudication of the rights of such legatee.

3. WILLS—LANDS CHARGED WITH LEGACY—EFFECT OF CONDEMNATION.

Where land was regularly condemned for railroad purposes at a time when the legal title was in the executors and trustees of a testator, who were made parties, and to whom the compensation was paid, such land was released from liability for a legacy which was made by the testator a charge upon his estate generally

4. APPEAL—FINALITY OF DECREE.

A decree fixing the amount of an annuity to which a legatee was entitled under a will, adjudging it to be a charge upon the lands of the testator, and appointing a receiver to collect the same from such lands, is not final and conclusive of the rights of the annuitant, where, during the same term, it was suspended as to certain purchasers of the lands and afterward a reference was made and a further hearing had, and an appeal from the decree subsequently entered brings up the entire case for review.[1]

Cross Appeals from the Circuit Court of the United States for the District of West Virginia, at Parkersburg.

H. P. Camden, for Ohio River R. Co. and Lewis Pfalzgraf.

V. B. Archer, for Maria P. Fisher.

Before GOFF and SIMONTON, Circuit Judges, and KELLER, District Judge.

[1] Quality of judgments for purpose of review, see notes to Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 482; Emigration Co. v. Gallegos, 32 C. C. A. 475.

SIMONTON, Circuit Judge. This case comes up on an appeal from the decree of the circuit court of the United States for the district of West Virginia.

Henry J. Fisher, a prominent lawyer in West Virginia, departed this life in 1883, seised and possessed of considerable real and personal estate. He left a widow and but one child, a son, Henry J. Fisher, Jr. By his last will and testament he devised and bequeathed the whole of his estate, real and personal, to Charles E. Hogg and L. F. Campbell, as trustees in trust to dole out to his son a bare subsistence. He then directs that the accumulations of his estate be safely invested, and, if his son should have any lawful children, that his property be equally divided among them, the shares of the daughters to be paid on marriage, and those of the sons at 24 years of age. In case his son dies without lawful issue, he wished that his widow be comfortably supported out of his estate during her widowhood, and the residue of his estate, not required for such comfortable support of his son's widow, he wishes divided into four parts,—one-fourth to his natural daughter, Mrs. Fowler, one-fourth to the lawful children of Nicholas Perkins, one-fourth to the children of John Heisner, and one-fourth to the children of his sister, Sophia Choen; all these in subordination to his wife's dower. By a codicil to his will he revoked the gift of the one-fourth to the children of John Heisner and also of the one-fourth to the children of Sophia Choen. He appointed the persons named as trustees his executors also. The will was duly filed for probate, and the trustees and executors took charge of the estate. On April 24, 1884, a bill was filed in the circuit court of the United States for the district of West Virginia by Henry J. Fisher, the son, to which Mrs. Eliza S. Fisher, widow of the testator, Hogg and Campbell, trustees and executors, Henrietta Blackburn, Nicholas Perkins and Susan Perkins, his wife, Elma Perkins, Shelby Perkins, Lila Perkins, Mary Perkins, and Eugene Perkins were made defendants. This bill sought to have the will of Henry J. Fisher declared invalid, by reason that it created perpetuities. By a decree of that court, made upon hearing the issues of the bill, the will of Henry J. Fisher, the elder, was declared invalid, and the trustees and executors were ordered to deliver up the whole property to Henry J. Fisher, the younger, the heir at law of the testator. This order of the court was carried into effect by the trustees and executors. On June 11, 1890, a bill of review of this decree was filed in the same circuit court by Elma Perkins et al. against all the other parties to the first suit, which bill and the answers thereto were heard by the circuit court. The cause came up by appeal into this court, and by its order and decree the validity of the will was sustained, and, as the testator had revoked in a codicil to his will the one-fourth of his residue bequeathed to the children of John Heisner and the one-fourth bequeathed to the children of Sophia Choen, this court declared that these are fourths of the residue of the estate, after a comfortable support for the widow of the son of the testator during her widowhood is secured. Subject to this charge, these two-fourths have been undisposed of by the testator, and to that extent went to his son as heir at law. Perkins v.

Fisher, 8 C. C. A. 277, 59 Fed. 801. Pending this bill of review, Mrs. Maria P. Fisher, widow of the son, Henry J. Fisher, Jr., filed her petition in the cause, in which she set forth that her husband had died childless; that she had received nothing from the estate of the testator toward a comfortable living, and prayed that, in case the will be declared valid, her provision, which was a charge on the whole estate, should be secured to her, and to that end that the executors and trustees, who had possessed themselves of the personal estate, and had converted the same to their own use, be compelled to account for the same. The cause having been remanded to the circuit court, this petition was pressed, and upon some of the questions arising under it the cause is in this court. A special master was appointed upon the presentation of the petition, who was instructed to inquire and report: (1) Of what real estate the testator, Henry J. Fisher, died seised; (2) who claim to be the present owners of such real estate, and under what title; (3) the fair rental value of each tract or house and lot, and what has been the yearly rental value of each for each year since the death of testator; (4) the annual rental value of each of them at this time; (5) the value of improvements made on each of them since the death of the testator, and the increase of rental value because of these improvements; (6) the age of Mrs. Maria P. Fisher, widow of H. J. Fisher, Jr.; (7) what sum would give her a comfortable support during her widowhood; (8) what personalty came into the hands of the executors of H. J. Fisher, the testator, and what disposition has been made of it. The master made a full and elaborate report on all of these points.

The age of Mrs. Fisher is 39 years, and the amount necessary to give her a comfortable support is fixed at $700. All the realty of which H. J. Fisher died seised has been sold, between July 4, 1885, and June 15, 1886; that is to say, during the interval of the decree declaring the will invalid and the filing of the bill of review. The great majority of these tracts and lots were sold and conveyed by H. J. Fisher, Jr., his wife joining in the deeds so as to release her dower. One lot was forfeited for taxes, one or two sold and conveyed by Mrs. Maria Fisher, she having obtained a tax title therefor, and one was sold by her as executrix of her husband. The master reports in full detail the present rental value of each parcel, its average rental value during the period stipulated, the average between these and the amount apportioned to each upon the assumption that each of them is liable to contribute to the comfortable support of Mrs. Maria P. Fisher, at $700 per annum. The report having been filed, the court, on February 20, 1897, confirmed so much of it as stated the age of Mrs. Fisher, and fixed the amount of $700 as a sum for her comfortable support, ordering the compensation to begin as of June 18, 1887, the date of her husband's death. And, further, the court, after reciting the several tracts and parcels of land and the owners thereof, and the aliquot annual payment each should make in order to get the said sum of $700 per annum, adds:

"And the court doth charge upon the several parcels of real estate and other property, as now divided up among the several holders above named, the several amounts so decreed to be paid as an annual charge against the

several parcels of property claimed by them, respectively, as aforesaid, from June 18, 1887."

This order was suspended as to the Ohio River Railroad Company, one of the owners of a part of Fisher's land, on March 30, 1897, and on the same day that company filed a petition hereinafter mentioned. On March 5, 1898, at the instance of Maria P. Fisher, a receiver was appointed to collect from each tract of land the sum apportioned against it by the master, with all arrearages from February 20, 1897, and an injunction issued to enforce the same. As has been stated, the Ohio River Railroad Company, having obtained an order suspending the decree of March 30, 1897, filed its petition in the cause. This petition, after stating that it was a party to the bill of review, refers to the decree of January 21, 1885, declaring Fisher's will invalid; that thereupon the lands of the testator were conveyed by Hogg and Campbell, trustees and executors, to Henry J. Fisher, Jr., among these a farm adjoining the town of Point Pleasant, known as the "Fisher Farm"; that on January 28, 1885, Fisher, the son, executed a deed of trust of this farm to Bright and Sehon, trustees, as security for debt, and on January 29, 1885, and February 10, 1885, executed two other deeds of trust to same trustees; that these deeds of trust were foreclosed, and J. N. Camden became the purchaser at public sale May 14, 1887; that Mrs. H. J. Fisher was notified of a motion to confirm this sale, but made no objection; that the sale was confirmed and title made to J. N. Camden; that J. N. Camden conveyed the land so purchased to the Point Pleasant Manufacturing & Extension Company, who divided the land into town lots, sold some of them to other parties and conveyed the remainder to the Ohio River Railroad Company, and so it claims title; that another piece of the Fisher land was condemned by regular proceedings instituted against Hogg and Campbell, trustees, and the money assessed for the value of the land paid to them, Mrs. Fisher never interposing or offering any objection. The petition also sets up that there was a large amount of personalty in the estate of Fisher, out of which this legacy to Mrs. Fisher should be paid, also that petitioner holds the legal title from trustees named in the will, and also that Mrs. Maria P. Fisher recognized the title of the lands to be in her husband by renouncing dower therein, by standing by and seeing them sold and being silent. Mrs. Fisher, in her answer, denies the statements of the petition. On June 29, 1898, Lewis Pfalzgraf obtained permission to file an answer to the petition of Maria P. Fisher. The master reported that he had acquired title to 300 or 322 acres in Wood county, W. Va., by deed from Henry J. Fisher and wife to him, dated July 14, 1885, and duly recorded. In his answer Pfalzgraf denies that his land should be assessed for any annuity or arrears of annuity to Mrs. Fisher, for these reasons: He was a bona fide purchaser without notice from Henry J. Fisher, Jr., by deed dated July 14, 1885, in which deed Mrs. Maria P. Fisher joined with her said husband, and that the title accrued before the bill of review was filed or decided. He avers also that the testator, Henry Fisher, Sr., left a large amount of personal estate, which should be first exhausted before the lands can be assessed for the

support of the widow of his son, and that Mrs. Fisher has, in fact, received large sums from said personal estate. He also avers that the estate of H. J. Fisher, the testator, has long since been forfeited for taxes. The master reports the accounts of Hogg and Campbell, executors and trustees, by which it is claimed that, after disbursements because of the estate, they paid to H. J. Fisher, Jr., $17,383, and to the widow of the testator, presumably for her dower, $8,242, leaving due by them to the estate $100. The master also reports the accounts of Mrs. Maria P. Fisher, as executrix of her husband, H. J. Fisher, Jr. By this it appears that she received as her award, as widow, in all, $1,455, and that she is indebted to that estate $547.85. This debt she claims to have accounted for, but the master does not report it. All credits to the estate came from the estate of the testator.

The cause came on to be heard on the petitions of Mrs. Fisher and the Ohio River Railroad Company, and on the answers of Pfalzgraf and the other parties, with the report of the master. The court, after argument, held:

(1) That the transactions of Mrs. Maria P. Fisher, as executrix of her husband, do not bar her claim to a support out of the estate of H. J. Fisher, Sr., notwithstanding the fact that all of the property so administered by her as the property of the son was, in fact, part of the father's estate. The reason given is that all of this occurred after the will was declared invalid, and before the bill of review was filed. And also because her accounts as executrix were settled in a court of competent jurisdiction.

(2) The court also held that the joinder of Mrs. Fisher with her husband in the deeds conveying the lands left by the testator did not bar her from claiming comfortable maintenance out of these lands, for the reason that by so doing she only barred her contingent right of dower.

(3) With regard to the right of way over the Fisher lands, obtained by way of condemnation by the Ohio River Railroad Company and the Kanawha & Michigan Railroad Company, the court sustains this acquisition, the trustees and executors, in whom was the fee, being parties thereto, and remits Mrs. Fisher to her claim on the fund, or so much of it as exists, which was paid under the award of the commissioner.

(4) The court also held that Mrs. Maria P. Fisher has settled or compromised with some parties holding parcels of the lands of the estate of Fisher, the elder, and to the extent of the amounts assessed on such parcels, diminishing the sum to be paid her for her comfortable support. As a result, the court assesses against each several parcel of land, not so released, its share in the annuity allowed Mrs. Fisher, calculating the same to begin from the death of her husband, June 18, 1887. It also ordered executions to issue against the several parties now owning the respective parcels of land assessed for the several sums assessed against them, respectively, and, in case these executions be not paid, the land, the owner of which is in default, be levied upon, and, after advertisement, sold for the payment of the assessments, respectively; all such sales to be made subject to

the future annual payments of the several sums assessed on each of said parties.

From this decree the Ohio River Railroad Company and Lewis Pfalzgraf applied for and obtained leave to appeal. Mrs. Maria P. Fisher also applied for and obtained leave to appeal. These appeals are here on the errors assigned. The Ohio River Railroad Company and Pfalzgraf join in their appeal.

The conclusion we have reached in this case renders unnecessary a discussion in detail of the first of these assignments of error. The Ohio River Railroad Company and Lewis Pfalzgraf are bona fide purchasers for valuable consideration, without notice, from H. J. Fisher, Jr., after a final decree declaring his father's will invalid and recognizing his right as heir at law, and after a decree directing the trustees and executors named in the will to convey to him the realty and deliver to him the personalty. This decree, filed January 21, 1885, invested H. J. Fisher, Jr., with all the evidence of an absolute title. Then these appellants purchased, paid their money, entered into and remained in possession of the realty thus acquired. "No equity can be stronger than that of a purchaser who has put himself in peril by purchasing for valuable consideration without notice of any defect in the title." Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388. How are they affected, as respects the rights of Mrs. Maria P. Fisher, by the bill of review filed in 1890, several years after their purchase? In Recter v. Fitzgerald, 8 C. C. A. 277, 59 Fed. 808, we find this: A bill of complaint had been filed by R., and a final decree had been entered May 2, 1881, dismissing the bill. R. appealed from the decree, but failed to prosecute the appeal, and it was dismissed December 6, 1881. On February 29, 1884, one F. took a mortgage on lands, the subject matter of the litigation, from one who had purchased from successful party. On April 29th thereafter R. filed his bill of review, to which he made F., the mortgagee, and his mortgagor parties. He sought to reverse the former decree for error appearing on the record. F. pleaded his equity as a bona fide purchaser without notice. After a full and elaborate discussion, the court held that the purchaser without notice bona fide, after a final decree in favor of his grantor, had a title which could not be affected by a decree rendered on a bill of review subsequently filed; that a bill of review will not be regarded as a continuation of the original suit, so as to affect a person purchasing the property in controversy in good faith from the successful party, after a final decree and without notice of any intention to file a bill of review. This case cites Ludlow's Heirs v. Kidd's Ex'rs, 3 Ohio, 541. Certain infants filed a bill to obtain the legal title to certain lands. The bill was dismissed on final hearing. The defendants, who were in possession of the land and had an apparent legal title, sold the same to third persons, strangers to the suit. A statute of Ohio allowed infants five years after attaining majority to bring a bill of review in cases of this character. The complainants availed themselves of this statutory right after becoming of full age, and prayed a reversal of the original decree. It was held, after a careful scrutiny of the authorities, that the intermediate purchasers were not affected

by the decree of reversal. This case also quotes Lee Co. v. Rogers, 7 Wall. 181, 19 L. Ed. 160, in which it is held that a purchaser bona fide of bonds, after a final decree declaring them valid, and before a decree on bill of review declaring them invalid, was not affected by the latter decree, because they were distinct and independent suits. This doctrine seems also to have been recognized in Bank v. Ritchie, 8 Pet. 146, 8 L. Ed. 890. On a bill of review Chief Justice Marshall set aside sales made under the authority of a decree which he reverses. He, however, gives it as a reason for this that the title acquired by the purchasers was defective in itself, inasmuch as the executor, who made the sale, had not complied with the terms of the decree under which he claimed to act, and because it also appeared that the bill of review asked that these conveyances be set aside on this ground. These authorities present a strong case. When we apply them to the circumstances of this case, the equities of the purchasers without notice, as compared with the equity of Mrs. Fisher, seem the stronger. It can scarcely be possible that she did not know of the recorded will of H. J. Fisher, Sr., in which he had practically cut his son, her husband, off from any but the smallest interest in his estate in favor of his children, with incidental benefit to her, if she became his widow; or that she was not aware of the purpose of her husband to contest the will, of his action in this regard and his success. She certainly was aware that he was conveying away all the realty his father left, as she joined in the conveyances, renouncing her dower. Upon the death of her husband she, as his executrix, took possession of that part of the estate which was left, sold parts of the realty, purchased at tax sales a part which had been forfeited, and sold it again. She received part of the purchase money from persons who had purchased from her husband, notably Pfalzgraf, one of these appellants. She administered her husband's estate and received in cash over $2,000, as a wife's portion. She never took any steps to review or reverse the conclusion of the final decree, and when the bill of review was filed, she having been made a party to it, asked only that if the former decree be reversed she be allowed her annuity. It is true that she was a married woman, but under the laws of West Virginia she was not under disability. Under these circumstances we are of the opinion that the equities of the Ohio River Railroad Co. and of Lewis Pfalzgraf must prevail as against those of Mrs. Fisher.

It is contended, however, that the decree of this court in Perkins v. Fisher, 8 C. C. A. 270, 59 Fed. 801, is res judicata, and settles the right of Mrs. Fisher to this annuity. That case came up on demurrer. The sole question was as to the validity of the will of H. J. Fisher, Sr. This court held the will valid, but inasmuch as by codicil the testator had revoked certain bequests and legacies in his will, without making further disposition, it was held that as to these bequests he died intestate, and that they descended to his heir at law, subject, however, to the charge of a comfortable support for the wife of the heir at law, if she became his widow. This charge had been made before the disposition of the estate. The sole question was as to the validity of the will, and, being on demurrer, the

conclusion was only on the facts stated on the record (Gould v. Railroad Co., 91 U. S. 526, 23 L. Ed. 416); upon the exact point raised in the pleadings, and on nothing else (Wiggins Ferry Co. v. Ohio & M. R. Co., 142 U. S. 397, 12 Sup. Ct. 188, 35 L. Ed. 1055). The judgment was conclusive only upon the matter within the issue and necessarily involved in the decision (McCall v. Carpenter, 18 How. 297, 15 L. Ed. 389; Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859). Even were it not so, it would not preclude the inquiry whether the widow had not parted with all or any part of her right. In the decree we are reviewing the court held that she had either compromised or released a large part of her annuity.

Mrs. Maria P. Fisher also assigns error in the decree as follows:

First. Because the court doth release one-half of the land owned by Lewis Pfalzgraf, and also doth release one-half of the remaining one-half of said land of Lewis Pfalzgraf from the claim of the said defendant to her support as fixed by the commissioner in said cause.

Second. Because the court released the right of way of the Kanawha & Michigan Railroad Company from the lien or charge of the defendant fixed against the same as ascertained by the commissioner in said cause.

Third. Because the court released the right of way of the Ohio River Railroad Company from the lien or charge against the same as ascertained by the commissioner in said cause.

Fourth. Because the court sustained the exceptions of the Ohio River Railroad Company to the report of John T. Harris, commissioner in said cause, to the extent of releasing the right of way of said Ohio River Railroad Company from the lien claimed by the said defendant.

Fifth. Because the court reduced the annuity or charge against the estate of Henry J. Fisher, Sr., from the amount, to wit, $700, as ascertained by the commissioner, to the sum of $337.93 per annum.

What has been said supra meets the first assignment of error.

With regard to the second, third, and fourth assignments of error, it appears that proceedings for condemnation of a right of way were regularly entered by the Kanawha & Michigan Railroad Company, and by the Ohio River Railroad Company, to which the trustees and executors of H. J. Fisher, the elder, were made parties. Under the will they had in them the fee and the legal estate. There is nothing to show that these proceedings were irregular and unauthorized, and the conclusion of the court below as to them must be sustained.

With regard to the fifth assignment of error, the master and the court below both found that Mrs. Fisher had compromised and released lands held by some persons which had been assessed to an amount which would reduce her claim to $337.93. We see no error in this.

Her counsel object to the appeal upon the ground that the order of 20th February, 1897, and the decree of 5th March, 1898, are final, and that from them there was no appeal. A final decree is one which concludes all matters in controversy and can execute itself. Neither

of these orders are of that character. The court itself went into further examination, made references to the master, received his report, and then only finally fixed the amount and mode of distribution.

It is ordered that so much of the petition of Mrs. Maria P. Fisher as relates to the appellants, the Ohio River Railroad Company and Lewis Pfalzgraf, be dismissed, and that in all other respects the decree of the court below be affirmed.

Decree below modified.

HUTCHINSON v. OTIS et al.

In re HUTCHINSON.

(Circuit Court of Appeals, First Circuit. May 22, 1902.)

Nos. 415, 416.

1. BANKRUPTCY—REVIEW BY APPELLATE COURT.
The question whether proceedings relating to an adverse claim to a fund in the hands of a trustee in bankruptcy arise strictly on the bankruptcy side of the court, or should be regarded as within the rules governing summary intervening petitions, reserved.

2. SAME—PROOF OF CLAIM—AMENDMENT.
A court of bankruptcy may permit the amendment of a proof of claim after the expiration of the year allowed for proving claims, where there was sufficient to amend by in the original proof.

3. SAME—RELINQUISHMENT OF LIEN THROUGH MISTAKE—RIGHT TO REINSTATEMENT.
A nonresident creditor of a bankrupt brought garnishment suits against him in other states within four months prior to the beginning of proceedings in bankruptcy, and obtained judgments, which he collected from the garnishees in the belief that the garnishments were valid. At the time of such payment both he and the garnishees knew of the bankruptcy, but it did not appear that the creditor knew that the bankruptcy proceedings were commenced within four months after his garnishments. Thereafter the seat of the bankrupt in a stock exchange was sold, upon the proceeds of which, under the rules of the exchange, the creditor had a lien for his debt; but in the belief that he had received payment he waived his lien by an informal letter, and the proceeds were paid over by the exchange to the trustee in bankruptcy. The trustee having brought suits against the garnishees, they made demand on the creditor on his bond of indemnity, which he had given them, and he subsequently settled such suits by paying over to the trustee the amounts he had received. He then proved his claim against the estate in bankruptcy, and asked to be restored to his lien on the fund received from the stock exchange. *Held*, that having acted apparently under a mistake of fact, by which no one had been prejudiced, he was equitably entitled to such relief.

4. SAME—ENFORCEMENT OF LIEN GIVEN BY RULES OF STOCK EXCHANGE.
Where the rules of a stock exchange, which give members a lien for debts due them from a defaulting member upon the proceeds of his seat, by proving their claims before a committee while the fund remains in their hands, do not expressly assume to make the remedy by so proving the claims exclusive, a court of bankruptcy, when equity requires it, may properly recognize and enforce such lien after the fund has come into its possession.

5. SAME—ADVERSE CLAIMS—ALLOWANCE OF INTEREST AGAINST TRUSTEE.
Where a creditor of a bankrupt entitled to a lien upon a particular fund, through oversight or mistake, waived his lien, and permitted the

fund to be paid over to the trustee without objection, but thereafter asserted his lien in the bankruptcy court, and the trustee merely retained the fund until the courts should determine to whom it belonged, although in his official capacity he took an appeal to settle a matter of substantial doubt, the creditor on establishing his right is not entitled to interest, it not being shown that any was received by the trustee.

Appeal from and Petition for Revision of Proceedings in the District Court of the United States for the District of Massachusetts.

See 111 Fed. 503; 113 Fed. 202.

Freedom Hutchinson, for appellant.

Roland Gray and Robert S. Gorham, for appellees.

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

PUTNAM, Circuit Judge. These cases relate to proceedings in the district court for the district of Massachusetts, sitting in bankruptcy, with reference to questions between the trustee of E. C. Hodges & Co., in bankruptcy, and Otis, Wilcox & Co. The leading facts are well stated in the opinion of the learned judge of the district court, as follows:

"Wilcox, a creditor of the bankrupt, sued him and garnished Post & Flagg less than four months before the filing of the petition. Thereafter he proceeded to judgment, took out execution, and collected from Post & Flagg the amount due him from the bankrupt, in the belief that it had been duly recovered under a valid garnishment, and that there had thus been effected a full settlement of the judgment rendered against the bankrupt. The judgment was entered satisfied. At that time Wilcox knew that bankruptcy proceedings were pending, and that Swift's trustee claimed the debt owed by Post & Flagg. As Post & Flagg had been informed of the bankruptcy, they took a bond from Wilcox to indemnify them in case of loss. Still later, Wilcox was notified that the bankrupt's seat in the New York Stock Exchange had been sold. The rules of the exchange gave Wilcox a lien upon the proceeds of the seat for the amount of the bankrupt's debt to him, and he was invited to prove his claim against the bankrupt in the manner prescribed by the rules. To this notice he replied that he had already made a settlement with the bankrupt, and that he relinquished whatever claim he had against the bankrupt's membership. The trustee brought suit against Post & Flagg to recover their debt to the bankrupt's estate. As the garnishment made by Wilcox was void under section 67 of the bankrupt act, the payment by Post & Flagg to Wilcox did not avail them to resist the trustee's suit. Wilcox was called upon under his bond of indemnity, and agreed with the trustee that the trustee's suit against Post & Flagg should be settled by the payment by Wilcox of the money due the trustee from Post & Flagg. The payment was made, and the trustee received and applied the same in full settlement of his suit. Wilcox now seeks to prove against the bankrupt's estate, and to reinstate his lien upon the proceeds of the bankrupt's seat in the stock exchange which have been paid over to the trustee."

This statement, however, requires to be supplemented by a few additional facts. There were two garnishee suits instead of one, each standing on the same basis. The bankrupts, who are residents of Massachusetts, made a voluntary assignment for the benefit of creditors on December 26, 1899. Otis, Wilcox & Co., who are residents of Illinois, and therefore not affected by the assignment so far as as-

sets beyond the jurisdiction of the state of Massachusetts were concerned, brought trustee suits, as explained by the learned judge of the district court, in Illinois and New York, on the same day that the assignment was made. The petition in bankruptcy was filed against E. C. Hodges & Co. in the district of Massachusetts on April 6, 1900. They were adjudged bankrupts on the 27th day of the same month of April, and Mr. Hutchinson was appointed trustee on the 23d day of the following May. The agreed statement which we find in the record, referring to the amounts which Otis, Wilcox & Co. received by virtue of their garnishee suits, says that they received them in the belief that they had been duly recovered under valid attachments, and that thus there had been effected full settlements of their judgments against E. C. Hodges & Co. It is true it also states that Otis, Wilcox & Co. received the proceeds of their judgments knowing of the pendency of the bankruptcy proceedings against E. C. Hodges & Co., and knowing that the trustee in bankruptcy claimed that the garnishees were liable to pay to him the debts covered by the garnishments. These statements, however, need explanation.

Under the bankruptcy act of 1867, with its amendments, the transfer of the bankrupt's assets was accomplished by a formal assignment, executed by the district court or the register in bankruptcy. That assignment, on its face, related back to the date of the commencement of proceedings in bankruptcy, and expressly stated what that date was; so that any person informed of the assignment was thereby informed of this essential fact. Under the present act there is no formal assignment, but merely an order, which fails to state the date of the commencement of the proceedings, and therefore necessarily fails to make known that the transfer of the assets of the bankrupt relates to that date. Otis, Wilcox & Co., so far as the record is concerned, received their knowledge of the pendency of the bankruptcy proceedings, and of the claim of the trustee that he was entitled to the debts which they had garnished, by letters sent by the trustee to the garnishees, or one of them, under date of May 28, 1900. These inclosed copies of the appointment of Mr. Hutchinson as trustee, but, so far as the record goes, they gave no information as to the date of the commencement of the proceedings. On April 27, 1900, the garnishee suits of Otis, Wilcox & Co. had been running four months, so that their claims were then apparently secured; and, so far as the case shows, never, until after the collection of their judgments in the garnishee suits, were they informed that the proceedings in bankruptcy were commenced in the early part of that month. The record does not expressly state whether the belief of Otis, Wilcox & Co. as to the status of the garnishee suits was based on a mistake of law, or on a mistake of fact arising through ignorance of the date when the proceedings in bankruptcy were commenced. Inasmuch as, on one of the proceedings before us, we are limited to "matter of law," it is fortunate that we do not find it necessary on this point to make a finding of fact. We reach this conclusion as the result of putting an interpretation on the record. We would not be justified, in the absence of a necessary conclusion to

that effect, in finding, to the prejudice of a resident of the United States, that he was ignorant of the laws thereof. Therefore, as the record leaves the matter open, we are bound to conclude that, in all the proceedings which it is necessary for us to consider, Otis, Wilcox & Co. acted under a mistake of fact, and not a mere mistake of law, although it is settled beyond question that parties acting under a mistake of law will not necessarily be held to that mistake by a court of bankruptcy when the result would be to do substantial injustice.

In this connection we ought to observe that whatever mistake Otis, Wilcox & Co. made has not resulted to the prejudice of any one, that no one has relied on it in such way that he would now be harmed by its being corrected, and that the trustee cannot build up any estoppel thereon, because, as we said in Hutchinson v. Le Roy (C. C. A.) 113 Fed. 202, a trustee in bankruptcy, like all other representatives of insolvent estates, takes only the equities of the bankrupt.

Within the year limited by the statute for proof of claims in bankruptcy, Otis, Wilcox & Co. filed a proof which failed, in very substantial particulars, to comply with the general orders of the supreme court in reference to such matters. Subsequently, after the expiration of the year, they filed a substituted proof of a claim, alleged to be secured in part by that portion of the proceeds of the sale of the seat of the bankrupts in the New York Stock Exchange which had been paid over to the trustee. Previously they had filed a petition that the court should direct the amount so received by the trustee to be paid to them. After a full hearing of the case, the court, on November 4, 1901, entered the following decree:

"At Boston, in said district, on the fourth day of November, A. D. 1901, upon the question certified to the court by the referee in said matter, on the 1st day of August, A. D. 1901, now, therefore, after hearing arguments of Freedom Hutchinson, trustee, and of R. S. Gorham, Esq., of counsel for Otis, Wilcox & Company, creditor, and after due consideration of the same, and the said Otis, Wilcox & Company having filed, by consent of the trustee, an amended proof of claim to be substituted for the proof annexed to their original petition, it is hereby ordered and decreed that the judgment of the referee be reversed, and that the said substituted proof be allowed, and that the trustee pay to Otis, Wilcox & Co. the balance of the proceeds of the seat in the New York Stock Exchange, to the amount of $4,091.28, on account of their claim, and that for the remainder they may be admitted to receive dividends; and it is further ordered and decreed that Otis, Wilcox & Co. pay to the trustee three hundred dollars paid by him to counsel in suit against Post & Flagg, and recover no costs of these proceedings."

This decree covers two subject-matters: First, an allowance of the substituted proof of a claim partly secured; and, second, a judgment that the trustee pay to Otis, Wilcox & Co. the balance of the proceeds of the seat in the exchange which he had received. The result is that we have pending before us with reference to that decree both an appeal and a revisory petition. Among the errors assigned on the appeal is that the court below erred in allowing the substituted proof. This, of course, raises a question which properly comes before us on appeal. The substance of the other errors assigned is that Otis, Wilcox & Co. are not entitled to any lien on the money received by the trustee on account of the seat in the ex-

change. This, of course, raises a question which comes before us only on the petition.

Heretofore, when we have had before us an appeal and a simultaneous revisory petition, with regard to proceedings by the district court which were supposed to be on its bankruptcy side, we have assumed that each had reference to supervision in the appellate tribunals in accordance with section 57 of the bankruptcy act of July 1, 1898. The first instance of this kind was in Re Worcester Co., 42 C. C. A. 637, 102 Fed. 808, decided by us on April 20, 1900. Then there was no question that the proceedings before us arose under section 57, because nothing was involved except a proof of debt and a priority in bankruptcy. In subsequent cases we have assumed that all the proceedings were taken by virtue of section 57, because the parties themselves so assumed; but such instances have now become so numerous that we deem it necessary to express ourselves in a cautionary way, in order that it may not be accepted that we have determined anything on that particular point. In Hutchinson v. Le Roy, already referred to, the question was one of an adverse claim on the part of Le Roy to a fund in the hands of the trustee, and the substantial question in the proceedings now before us is of the same character. We wish merely to say that we have not determined, and we do not now determine, whether such claims arise strictly on the bankruptcy side of the district court, or should be regarded as within the rules governing summary intervening petitions against a fund in the registry of a court, or in the hands of its officers or appointees, whether the court be one of equity, bankruptcy, admiralty, or even sitting at common law. We reserve all such questions for determination at some future time, when they have been raised by parties and it becomes necessary to pass on them. They are of a substantial character. With reference to a proceeding in the district court in the nature of a summary intervening petition under general juridical rules, and not controlled by section 57 of the bankruptcy act of July 1, 1898, an appellate tribunal would not be limited to matters of law, and it could pass on the entire merits, as on other ordinary appeals concerning such petitions. Moreover, under those circumstances, the right to an appeal to the supreme court from the circuit court of appeals might depend on the statute establishing the latter court, and not on anything found in the statutes of bankruptcy.

We now come to the appeal. The only ground to which it can relate is the objection to the substituted proof because it was not filed within the year limited by the terms of the statute. This, however, is easily disposed of. Courts of bankruptcy, like courts of admiralty, permit amendments with a most liberal hand; and as there was enough in the original proof by which to amend, and as the district court thought it was equitable to allow the amendment, the appeal cannot be maintained. In addition thereto, it may well be observed that the provision of section 57 of the bankruptcy act of July 1, 1898, which limits the time for proving claims, reads as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the

expiration of such time, then within sixty days after the rendition of such judgment."

If the statute is to be construed in the same spirit in which other remedial statutes are, and not in a literal way, there might be reason for holding that this provision, extending the time for proof with reference to claims "liquidated by litigation," reaches every case in which a question arises, and which comes into a judicial tribunal within the year limited, if the question, in any manner, involves the determination of the net amount for which the claim shall be finally allowed. In any event, the appeal cannot be sustained.

Coming now to so much of these proceedings as relates to the right of Otis, Wilcox & Co. to the amount remitted by the New York Stock Exchange to the trustee, we wish to observe, first of all, that the trustee relies on the fact, as stated by him, that Otis, Wilcox & Co., having given indemnity to the garnishees, settled the trustee's claims against them by themselves paying the trustee; so that the trustee seems to understand that, inasmuch as Otis, Wilcox & Co. did not repay to the garnishees the amounts collected from them, the transactions growing out of the garnishments were not annulled. But it is not necessary to state with detail the various propositions pro and con relating to these transactions, because the law does not look at the mere form of effecting restitution. The ultimate result was that Otis, Wilcox & Co. received nothing by their proceedings against the garnishees; and, inasmuch as they acted under a mistaken belief of fact, it follows, according to the well-settled rules of law, that all their transactions with which the record is incumbered went for naught, and that, therefore, in the eyes of the law, everything stands precisely as though they had taken no steps whatever. The law itself restores the prior condition, without any resort to the peculiar remedies of the chancery courts, or to any other formalities whatever, except, merely, that it was necessary that Otis, Wilcox & Co. should advise the parties concerned that they reclaimed their original position.

Of course, if, meanwhile, any individual or official, relying on the notice given by Otis, Wilcox & Co. to the exchange that they made no claim on the proceeds of the bankrupt's seat, had done, or omitted to do, anything, so that he would have been prejudiced by the effect of a subsequent reclamation by Otis, Wilcox & Co., further examination of this point would be required; but we have seen that there is nothing of this kind. So, also, if Otis, Wilcox & Co. had executed to the exchange, or to the trustee, or to any one else, a formal instrument under seal, releasing or transferring any right, it might be necessary to ask a chancery court, or the district court exercising its equity powers, to decree a cancellation. That such a decree would unhesitatingly be conceded, in the event the rights of no other persons had meanwhile intervened, is so well settled that we need not dwell on the point. Indeed, even where, under a mistake, mortgagees have discharged mortgages of real estate on the public records in the most formal manner, chancery has not hesitated to order cancellation. We refer to this, not because any such special remedy is needed in the case at bar, as we have said it is not, but for the purpose of illustrating the underlying principle. In lieu of a formal re-

lease or assignment, what appears in the record is only the following letter from a gentleman representing Otis, Wilcox & Co. to the New York Stock Exchange:

"Chicago, Aug. 25, 1900.

"I am in receipt of your favor of the 23d, requesting my appearance before the committee on admissions on Thursday, the 30th, at twelve o'clock, to substantiate our claim against E. C. Hodges.

"With regard to this claim, we wish to say that we have made a settlement, and relinquish whatever claim we had against Mr. Hodges' membership. Kindly communicate the above to committee on admissions, and oblige,

"Yours very truly, J. E. Otis, Jr."

Although not directly so stated, the letter makes it plain that the condition of the relinquishment of the exchange was that Otis, Wilcox & Co. understood that they had made a full settlement of the debt which E. C. Hodges & Co. owed them. Therefore, as there was merely this letter of advice, the law itself, without the aid of the equity courts, could, and, on Otis, Wilcox & Co. discovering their mistake and making their claim on the trustee, did, annul all their prior proceedings, and restore all the same rights as though such proceedings had not taken place. Therefore we have no occasion to discuss the proposition that no man is entitled to the aid of courts of equity when that aid becomes necessary through his own fault, because, in the first place, it is too broad in any view, in that it is among the highest prerogatives of those courts to accomplish justice sometimes in behalf even of one who has been imprudent, and because, in the present case, as we have said, the restoration of the rights of Otis, Wilcox & Co. was effected without the aid of any of the special remedies to which chancery is accustomed.

The only substantial doubt is raised by the constitution of the New York Stock Exchange, extracts from which are found in the record. These are susceptible of such a construction as to bar any lien in favor of a member of the exchange who does not prove his claim to its committee named in the constitution. They are, however, equally susceptible of a different construction; and, inasmuch as their substantial purpose is to secure other members against a defaulting member by a lien on the proceeds of his seat, we ought, in the absence of clear language to the contrary, to adopt such an interpretation as accomplishes that intent. Appreciating the fact that the New York Stock Exchange, like other similar exchanges in the great commercial marts, is, so to speak, "domestic" in its character, and reserves to itself the determination of all questions arising between its various members so far as it is practicable and lawful so to do, we perhaps would decline to interfere in the disposition of this fund if it still remained with the exchange. But, after the exchange had parted with it, the possibility of its taking jurisdiction in reference thereto ceased, and we do no injustice to any one, and do not interfere with any "domestic" policy, by now substituting ourselves in place of its committee. We are encouraged in this, if not fully sustained, by the expressions in Clews v. Jamieson, 182 U. S. 461, 495, 496, 21 Sup. Ct. 845, 859, 45 L. Ed. 1183, with reference to the rules of the Chicago Stock Exchange, although it is true that the rules there referred to related to the adjustment of accounts between its members, and not to the particular topic which we have before us. The opinion says:

"The sales were made subject to the rules referred to, but, so far as regards a remedy for their violation, those rules provide a means by which parties may seek and obtain relief in accordance with their terms. They do not assume to exclude the jurisdiction of the courts, or, in other words, they do not assume to provide an exclusive remedy which the parties must necessarily follow, and which they have no right to refuse to follow without violating such rules, and thereby violating their contract."

So, in the present case, we may well say that, inasmuch as the extracts from the constitution of the exchange before us do not "assume to exclude the jurisdiction of the courts," or "assume to provide an exclusive remedy" because they contain no express terms to that effect with reference to the existing circumstances shown by this record, we may now justly adjudicate in reference hereto. Consequently we hold that Otis, Wilcox & Co. had a lien and equitable security on the fund while it was in the hands of the exchange, that the rules of the exchange did not interpose any limitation of time, that their rights thereto were only intermitted and not lost, and that their lien followed the fund into the hands of the trustee in bankruptcy, so that the decree of the district court in that respect was correct.

The parties have raised before us no question with reference to interest on the fund in issue, but we find it necessary to consider it. Ordinarily, an appellant, or other party, who has postponed by a proceeding in an appellate tribunal the payment of an amount justly due, should pay damages therefor equal, at least, to legal interest, even if he has not received any increment of the fund corresponding thereto. In Hutchinson v. Le Roy (C. C. A.) 113 Fed. 202, already referred to, we allowed interest against the petitioner; but there the fund which it was determined belonged to him had been held adversely from the outset, as it grew out of a tort of the bankrupt which arose before proceedings in bankruptcy were commenced. In the present case, however, the fund came into the hands of the trustee in bankruptcy, not through any tort, but through the oversight of Otis, Wilcox & Co. The trustee merely held it until the courts could determine to whom it belonged, and the record does not show that the trustee has received any increment thereof. Under the circumstances, and as this appeal was taken by the trustee in his official capacity to settle a question involving substantial doubts, we think that interest should not be allowed. We have discussed the matter of interest under circumstances of like special character in New England R. Co. v. Carnegie Steel Co., 21 C. C. A. 219, 75 Fed. 54, 59, and in The H. F. Dimock, 23 C. C. A. 123, 77 Fed. 226, 239, 240. In New England R. Co. v. Carnegie Steel Co., the fund was, for a portion of the time, held under conditions analogous to those at bar, in that it was in the hands of the court. So far as that period was concerned, we followed Thomas v. Car Co., 149 U. S. 95, 116, 13 Sup. Ct. 824, 37 L. Ed. 663. For the remaining period the fund was in the hands of the New England Railroad Company, having been transferred to it by the order of the court, and as that corporation took out the appeal, which was decided against it, we awarded interest from the time it was taken.

In No. 415 (Hutchinson, Trustee, Appellant, v. Otis, Wilcox & Co., Appellees) the decree of the district court allowing the appellees' proof

of claim is affirmed, and the costs of appeal are awarded to the appellees.

In No. 416 (Hutchinson, Trustee, Petitioner) the decree of the district court directing the payment by the trustee to Otis, Wilcox & Co. of $4,091.28 is affirmed, without interest, the costs on the petition are awarded to the respondents, and the district court is directed to give effect to this decree, both as to debt and costs.

CONTINENTAL COAL CO. v. BOWNE.

BOWNE v. CONTINENTAL COAL CO.

(Circuit Court of Appeals, First Circuit. April 24, 1902.)

Nos. 424, 425.

SHIPPING—CONSTRUCTION OF BILL OF LADING—SPECIAL DEMURRAGE.

A clause of a charter party or bill of lading providing that, after arrival and notice to the consignee, the vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival, and stipulating for special demurrage in case of a violation of such provision, is in the nature of one for a penalty, which should not be imposed unless the case comes clearly within the purpose which it intended to accomplish; and where the original consignee of the cargo, to whom notice of arrival was given, refused to receive it, and the master was instructed by the shipper to deliver to another, the latter became from that time the consignee, for the purposes of such clause, and the special demurrage is not recoverable because precedence in discharging was given to another vessel, through the action of the original consignee, after its refusal to accept the cargo.

Appeal from the District Court of the United States for the District of Rhode Island.

William B. Greenough, for Continental Coal Company.

Frank Healy (Archibald C. Matteson, on the brief), for William B. Bowne.

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

PUTNAM, Circuit Judge. This is a question of demurrage. By the bill of lading, a lien was reserved against the cargo, not only for freight, but for demurrage. Both parties have appealed. The leading facts are stated in the opinion passed down in the district court. Questions arising from the same forms of charter party and bill of lading were raised in "1,755 Tons of Cumberland Coal," decided by us on March 4, 1902 (Evans v. Blair, 114 Fed. 616).

One question is whether any demurrage should have been allowed. The district court allowed it at the ordinary rate, and the appeal of the Continental Coal Company is against this allowance. It is based on two propositions. R. B. Little & Co., the consignees named in the bill of lading, refused to receive the cargo. Thereupon communication was had with the shipper, which was the Continental Coal Company; and it is claimed that the shipper promptly telegraphed

the master of the vessel to deliver to the Providence Coal Company, that the master was absent, and that if he had not been absent, and had attended immediately to delivery, the cargo could have been discharged in season to have avoided demurrage. It is true that the master went to his home over Sunday; that he did not provide for proper attention to telegrams, as he should have done; and that the dispatch from the Continental Coal Company was received on the afternoon of Saturday, when he was absent. Nevertheless, on his return on Monday morning he was ready to attend to the delivery of his cargo; but there was no person ready to pay his freight or guaranty his demurrage, and the duplicate bill of lading was not at hand. This last was necessary, because R. B. Little & Co. had merely refused to receive the cargo, and had not signified the status of the duplicate bill of lading, so that in its absence the master could not be sure of right delivery. Therefore it follows that no detriment came to the Continental Coal Company from his absence over Sunday.

During Monday or Tuesday the master was satisfied with reference to the freight and demurrage, and the duplicate bill of lading was at hand. At this point, however, the Continental Coal Company claims that the master delayed docking his vessel. The record is obscure on the question whether this delay was caused by the master, or by the fault of the Providence Coal Company, which, acting for the Continental Coal Company, had agreed to notify the master, through the tugs which were to dock the vessel, when it would be ready to receive delivery; but it is clear that this is not essential, because the crucial delay was caused by the fact that a coal-laden barge was already discharging at the same dock, and that both vessels could not be there unladen simultaneously. On the whole, we are of the opinion that the decree of the district court in allowing demurrage was correct.

The appeal of William B. Bowne, who represents the vessel, is against the refusal to allow special demurrage under the following clause:

"After arrival and notice to the consignee as aforesaid, and the expiration of said twenty-four hours, 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."

This clause is in the nature of a penalty, so that it ought not to be imposed unless the case comes clearly within the purpose which it intended to accomplish. That is the preventing of unjust discrimination. It has no proper relation to what occurs through contingencies like that in the case at bar. From the time that R. B. Little & Co. refused to accept the cargo, and the Providence Coal Company consented to receive it, the latter became its real consignee, notwithstanding the bill of lading was not indorsed to it. R. B. Little & Co. might, necessarily, have been considered the consignees, for the purpose of notifying them of the arrival of the vessel. But after they refused to receive the cargo, they no longer remained the consignees for any other substantial purpose. Therefore, even if the Providence

Coal Company might not be regarded as the consignee for all purposes, within a literal construction of the charter party and the bill of lading, yet, under the circumstances, they became such in substance, and the relations of the parties on this question should be treated from that standpoint. Inasmuch as the precedence given to another vessel was given by R. B. Little & Co. after they had refused to accept the cargo, there would be no substantial justice in holding the clause in question applicable to this case; and there is no such condition of the law relating to the construction of mercantile instruments as requires us to stand by the mere letter for the purpose of enforcing what is, in substance, a penalty.

Both parties having appealed, and the appeal of each failing, interest on the amount decreed should not be allowed.

In each case the decree of the district court is affirmed, and the appellee recovers the costs of appeal.

ROCKPORT GRANITE CO. v. BJORNHOLM.

(Circuit Court of Appeals, First Circuit. April 25, 1902.)

No. 421.

1. MASTER AND SERVANT—ASSUMED RISKS.
   While an employé assumes the known risks of his employment, he assumes them with all of their qualifications, which include the exercise of the care which the employer is accustomed to use to obviate or minimize the danger from such risks.
2. SAME—SAFETY OF WAYS AND WORKS—CARE REQUIRED OF SERVANT.
   It was not error to refuse an instruction that an employé could not recover for an injury alleged to have resulted from the negligence of the master, in failing to make proper examination and test of a ledge of rock before a blast was made, if he "had as good an opportunity as defendant's superintendent to examine the situation," where he was not charged by his employment with any duty in that respect, and the defect which caused the accident was not so obvious that he must be held to have known of it as matter of law. Railroad Co. v. O'Leary, 93 Fed. 737, 741, 35 C. C. A. 562, applied.

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

Frank E. Dunbar, for plaintiff in error.

William A. Pew, Jr., for defendant in error.

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

PUTNAM, Circuit Judge. This case comes up on a writ of error brought by the defendant below. For convenience, we will style it the defendant, and the defendant in error plaintiff. The case was tried to a jury, with a verdict for the plaintiff.

The defendant says that the plaintiff is 25 years old; that for 5 or 6 years he had been working at cutting paving blocks in quarries, during which time he had seen the usual quarrying and blasting operations; that he then went to work for the defendant in its quarry,

where he continued to the time of the accident; that while there he had seen a great number of blasts, including "snapping" or "jogging" blasts; and that he had himself "struck off" 50 or 60 of the latter. The defendant's quarry is one where large stones are quarried. The "snapping" or "jogging" blasts in question in this case are light, intended to slightly move from the ledge large rocks, already split out, and not involving heavy explosions, or throwing rocks in the air unless some portion of the ledge is shaky, or all ready to throw off. Indeed, these blasts are intended to be so managed as to avoid breaking up the ledge.

The plaintiff was a quarryman, although receiving somewhat advanced pay on account of his experience and capacity. He claims to have been injured by a stone thrown out by one of the blasts to a very considerable distance, to which he had retired. He rests his case on the alleged negligence of one Swanson, the defendant's superintendent. Swanson testified, among other things, as follows:

"Before making the blast, I examined the stone to see if it was safe for powder. It is usual to examine the seams to see if they will throw rocks. I thought the split would not throw rocks. I examined the back part and depression. I concluded no stone would fly. Where stone is perfectly solid there is sometimes danger of pieces flying. I hollered to the men a hundred feet away. I always do that, even when I think nothing is going to fly. I holler 'Look up.' I shouted to the people so far away because it is my custom. I blow a whistle when there is danger from a heavy Lewis hole, and shout when there is only a 'jogging' blast. Those are my orders. We mean everybody should look in the air. Sometimes, in 'jogging' blasts, stones will fly. There might be a piece break off. I know when a rock is shelly; find it out sometimes by tapping. I didn't tap this stone to see if it was shelly. It didn't occur to me to tap it. I thought it was all right. I made enough examination to satisfy me the stone was perfect."

The plaintiff claims on this testimony that, on the question whether the stone was safe for powder, Swanson might have determined most satisfactorily by tapping it. Whether he should have tapped it or whether he used reasonable care in view of not tapping it is not before us. We refer to this testimony for the mere purpose of showing the methods of testing whether a ledge is safe for powder or is shelly, with the view of applying properly the propositions on which the defendant claims the verdict should be set aside.

The defendant seasonably and properly moved for a direction for a verdict in its favor on the grounds now submitted to us, and the record shows that it is entitled to their consideration at our hands. The first which we have to consider is couched by the defendant in the following language:

"The evidence in the case shows indisputably that the plaintiff knew and appreciated the danger of being hit by a stone thrown up by the blast.

"The doctrine is too well established to require argument that one who knows of a danger and voluntarily exposes himself to it, understanding and appreciating the risk in so doing, is precluded from recovering for a resulting injury."

The last proposition need not be questioned, but the first, to the effect that the evidence shows that the plaintiff knew and appreciated the danger of being hit by a stone, does not meet the case. Of course, as a matter of common knowledge, there is always danger

that any quarryman may be hit by a flying stone so long as blasting in any form is continued; but when an employé assumes the known risks of his employment he assumes them with all their qualifications. An employer cannot set up this rule and deny the employé the benefit of the qualifications. While there is always danger of flying stones, yet it is plain from this record that, as the danger here came mainly, if not wholly, from shelly rock, it was one which might have been largely, if not entirely, guarded against by care on the part of the superintendent of the kind which he was accustomed to exercise. It may be true that such reasonable care would not entirely obviate the danger, but it certainly would minimize it; so that, on clear principles, while the plaintiff must be said to have accepted the danger, he cannot be said to have accepted it without the benefit of its being thus minimized. Therefore, on this proposition, it follows that there is in this record no evidence of any assumption of risks by the employé which waived the minimizing of them by reasonable care on the part of the employer; and, as the verdict of the jury necessarily involves finding that his superintendent did not use reasonable care, and that the plaintiff was injured in consequence thereof, the verdict must stand, so far as this portion of the defense is concerned.

The only other proposition made by the defendant is that the court refused to give the following instruction, which was requested:

"If the plaintiff had as good an opportunity as the defendant's superintendent to examine the situation and determine the liability of material to be thrown up by a blast of the character described in this testimony, and was not excused from making such examination by any assurance of safety or act of the defendant's superintendent, he must be held to have assumed the risk, and cannot recover."

It is apparent that we would not be justified in holding that this request had any application to the facts of the case, because it is entirely plain that the plaintiff did not have as good an opportunity as defendant's superintendent to examine the situation. It must be assumed that he could not leave his work and examine the ledge by tapping it, as the superintendent was able to do. Moreover, the request is not in harmony with Railroad Co. v. O'Leary, 35 C. C. A. 562, 93 Fed. 737, 741. Of course, it is understood that, on questions of general law like this now involved, we have no occasion to examine the local decisions when we have the supreme court to guide us. We there showed that it is settled by the supreme court that it is not the duty of an employé to use "ordinary care in ascertaining the condition of his employer's appliances," and that there rests on him the peril only of "defects known to him, or plainly observable by him." The requested instruction at bar, in that it is based on the claim that the "plaintiff had as good an opportunity as the defendant's superintendent to examine the situation," departs from the law as thus stated by us.

The case comes down, however, to a simple proposition. There is nothing in the record which would have justified the circuit court, or would justify us, in determining that the plaintiff waived the protection which would have come to him from the use of reasonable

care on the part of the superintendent in testing the ledge before the blast in question was made, or in holding that the defect in the ledge was known to the plaintiff or was plainly observable by him, or that he had any duty in reference thereto, and nothing therein which would have justified the circuit court in submitting to the jury any such issue. Therefore, none of the defendant's propositions lay the basis of any exception to be approved by us.

In Roytio v. Litchfield (C. C. A.) 113 Fed. 240, which was also a case of an employé against an employer, alleging negligence of a superintendent with reference to loose rock which had been quarried from a ledge, the court held that a verdict for the defendant was properly ordered; but there the superintendent made use of the usual care to prevent possible injury, and he was not in a position requiring him to understand that there was any requirement for anything unusual on his part. In other particulars, which it is unnecessary to detail, that case was unlike the one at bar.

The judgment of the circuit court is affirmed, with interest, and the costs of appeal are awarded to the defendant in error.

FIELDS v. KARTER.

(Circuit Court of Appeals, Fifth Circuit. May 20, 1902.)

No. 1,127.

BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.

Specifications in opposition to the discharge of a bankrupt, on the ground that he concealed from his trustee, while a bankrupt, property belonging to his estate in bankruptcy, cannot be sustained on proofs showing that the transfers of property relied on were of record, and made more than a year before the bankruptcy, and that they were fully detailed and explained by the bankrupt on his examination.

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

S. S. Pleasants, for appellant.

J. J. Curtis, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. On the 4th day of March, 1901, J. H. Karter, residing in Cullman county, state of Alabama, filed a voluntary petition in bankruptcy, annexing thereto the formal schedules, and thereupon was duly adjudged a bankrupt, and a meeting of creditors duly ordered. The meeting was held on the 25th day of March, 1901, and one creditor, the appellant in this case, appeared and proved his claim. Thereupon the referee appointed a trustee, who duly qualified, and gave the bond required. On April 6, 1901, the bankrupt was examined before the referee. That examination covered the disposition the bankrupt had made more than a year prior to the bankruptcy of real estate and merchandise, the organization of the J. H. Karter Company, and the transfer by the bankrupt to his wife, Mary B. Karter, of 559 shares of the stock of the said company, and the bankrupt's

subsequent connection with the company as president and employé. On the 11th day of July, 1901, the bankrupt applied for his discharge, and a hearing thereon was duly ordered; whereupon the appellant appeared and filed an opposition to the discharge, specifying that the bankrupt had concealed while a bankrupt, from his trustee, property belonging to his estate in bankruptcy, to wit, 559 shares of the capital stock of the J. H. Karter Company; one lot of ground in the town of Falkville, Morgan county, Ala.; 40 acres of land in Blount county, Ala.; a general mercantile business in the town of Cullman, Ala.; and sundry pieces of real estate, not necessary to describe. All of these acts of concealment were charged as having been committed knowingly and fraudulently, for the purpose of concealing his property from his creditors. To this opposition the bankrupt filed an answer, as follows:

"First, that he is not guilty of the matters and things alleged in said specifications; second, that at the time of the formation of the corporation of J. H. Karter & Co., in August, 1899, he did not owe the said A. E. Fields one cent, and that he was not indebted to him in any sum whatever for more than thirteen months thereafter, which could be proved in bankruptcy; third, that at the time of the alleged conveyance of the bankrupt's property to said corporation he was not indebted to said objecting creditor in any amount whatsoever, and was not for more than twelve months thereafter, on any claim provable in bankruptcy; fourth, that at the time of the alleged transfer of real estate in Morgan and Blount counties to bankrupt's son, F. A. Karter, that said bankrupt was not indebted to said objecting creditor in any amount whatsoever, and was not for more than seven months thereafter; fifth, that any and all debts that bankrupt owed at the time of the alleged fraudulent transfers, if he owed any, have been discharged in full more than four months before the filing of his petition in bankruptcy; sixth, that the claim of said objecting creditor was for damages for a tort alleged to have been committed by bankrupt, and same was not provable in this court, and that said tort was never reduced to judgment until about September 20, 1900, or more than a year after the transfers complained of."

The case was then certified to the district judge, as follows:

"I, Jere Murphy, Jr., one of the referees of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, specifications in opposition to discharge were filed, notice under rule 27 (32 C. C. A. xxvii, 89 Fed. xi) was given. Creditor relies on testimony of bankrupt to support specifications. Bankrupt relies on his own testimony and affidavits on file. The petition for discharge and specifications in opposition thereto, the testimony, and the entire record is certified under rule 27 regulating practice. And the said specifications are certified to the judge for his action thereon.

"Dated at Huntsville, the 14th day of October, 1901.

"Jere Murphy, Jr., Referee in Bankruptcy."

On the certificate and the evidence as certified the district judge overruled and disallowed the specifications and opposition, and ordered the discharge of the bankrupt.

In our opinion, the opposition might have been overruled without evidence, because, on the face of the opposition, it appears that all the transfers and alleged concealments charged therein were of record, and antedated the adjudication in bankruptcy more than a year, and at a time when, so far as the record shows, the bankrupt had not a single creditor. But, be that as it may, the evidence of the bankrupt

upon which the opponent relies fully shows that all the transfers and concealments of which the opponent complained were fully set forth and detailed in the examination of the bankrupt, which took place within a little over a month after the adjudication in bankruptcy, and within two weeks after the appointment of a trustee. We, therefore, conclude that there could have been no substantial concealment from the trustee of the property belonging to the estate in bankruptcy, nor of the bankrupt's former dealings with his property; and, considering all the matters exhibited in the record, we are unable to discover any such fraudulent conduct on the part of the bankrupt as would justify a refusal of his discharge.

The judgment appealed from is affirmed.

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

(Circuit Court of Appeals. Fifth Circuit. May 13, 1902.)

No. 1,141.

1. RAILROADS—CONTRACT RESTRICTING LOCATION OF STATIONS—VALIDITY.
A contract by which a railroad company agrees to establish and maintain a station at a particular place, and not to establish or maintain any other station within a certain distance therefrom, is contrary to public policy, and cannot be enforced in a court of equity; but it would seem that the illegality of the agreement should not deprive one who on the faith of it, and without wrongful intent, has conveyed valuable property to the company, of a remedy at law.

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

Mrs. Matilda R. Beasley, complainant in the circuit court, appellant here, brought her bill against the Texas & Pacific Railway Company, and therein alleged: "(1) That she is the owner in her own separate right of a large plantation in the parish of Caddo, in said Western district of Louisiana, situated on the right descending bank of Red river, in a rich alluvial district. (2) That in the year 1899 a corporation organized under the laws of Louisiana, with its domicile at Shreveport, under the name of the Texarkana, Shreveport & Natchez Railway Company, with G. W. Fouke as president, was engaged in constructing a railway from Texarkana, in the state of Texas, to the city of Shreveport, Louisiana. (3) That the route of said railroad traversed your orator's plantation for a distance of one (1) and five-eighths (5/8) miles, and through the land of her friend W. F. Dillon for a distance of four and a half miles (4½), and that the right of way through these lands was well worth more than six thousand dollars ($6,000.00). (4) That, in order to secure said right of way through all of said lands, the said Texarkana, Shreveport & Natchez Railway Company entered into a contract of purchase from orator of a right of way through orator's land for the consideration of five hundred dollars ($500.00), and the further consideration that said railway company shall establish and build and maintain a depot and platform, and a switch and side track, to be not less than fifteen hundred feet in length, at such point upon said strip of land so conveyed as might be designated by your orator, and the further consideration that the said grantee or its assigns shall not build or establish, or permit to be built or established, any other depot along the line of said railroad within three miles north or south of the one above stipulated for, as will be seen

¶ 1. See Contracts, vol. 11, Cent. Dig. § 570.

by a duly certified copy of said act of sale, hereto annexed and made a part of this bill; and that the said W. F. Dillon thereupon signed and executed a deed of sale of the right of way through his lands above mentioned, without other costs to said grantee than the considerations above stipulated in favor of your orator. (5) That under said contract the said grantee built its road over said lands, and established and built a depot and switch at Uni Station on said plantation, and your orator spent more than eight thousand dollars for buildings and improvements in the way of building a town, upon the faith that no rival depot would be built or established in less than the distance of three miles. (6) That there is no public necessity or demand for any depot within said limits. (7) That on the 9th day of February, 1901, the said Texarkana, Shreveport & Natchez Railway Company sold said railroad from Texarkana to Shreveport, with all of its right of way and other property and franchises, to the Texas & Pacific Railroad Company, a corporation organized under the acts of congress of the United States above recited in the beginning of this bill. (8) That said Texas & Pacific Railroad Company purchased said railroad and right of way and franchises subject to the obligations and stipulations contained in the said act of sale from your orator, and is bound by the same not to build, operate, or establish a depot on said railroad within three miles of said depot at Uni Station. (9) That, in violation of said contract and obligation, the said Texas & Pacific Railway Company is now constructing a depot on said railroad at a point called 'Belcher,' within less than three miles, to wit, about one and one-eighth (1⅛) miles, from the said depot at Uni Station on orator's plantation, and unless restrained and enjoined by the order and process of this court it will proceed to build and operate said depot in violation of said contract, and that your orator will be damaged by the destruction of the value of improvements placed upon said property, and by the loss of all advantages derived from said contract, amounting to more than fifty thousand dollars ($50,000.00), which loss and destruction of her property will be irreparable, and for which she has no adequate remedy at law, and that this suit arises under the laws of the United States, within the meaning of the act of congress of March 3, 1875, as amended by the acts of congress of March 3, A. D. 1887, and August 13, A. D. 1888." The prayer of the bill was for an injunction pendente lite, to be in due course made perpetual.

The Texas & Pacific Railway Company appeared, and filed a demurrer to the bill, and for cause of demurrer showed: "That it appeareth by the plaintiff's own showing in her said bill that she is not entitled to the relief prayed for therein against this defendant, for the reason that it appears from the allegations of said bill that she has a full, adequate, and complete remedy at law, if any remedy she has, and this court is without jurisdiction; and, further, there being no allegation or averment in said bill that this defendant is not solvent or able to respond to any recovery she may obtain in a court of law." This demurrer was heard, and on argument was sustained by the circuit court, and thereupon the complainant's bill was dismissed; whereupon the complainant sued out this appeal, assigning as error the ruling on the demurrer.

W. P. Hall and E. W. Sutherlin, for appellant.

E. H. Randolph, T. J. Freeman, W. B. Spencer, W. W. Howe, and C. P. Cocke, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). As the circuit court rendered an absolute decree dismissing the bill, which would probably bar proceedings instituted at law for the recovery of damages, it is probable that the court in hearing the demurrer allowed other causes of demurrer to be orally assigned in addition to the cause assigned upon the record. The rule permitting this is thus declared in 1 Bates, Fed. Proc. § 204, as follows:

"A defendant is not limited to one cause of demurrer, but may assign as many causes as his counsel may deem proper, either to the whole bill or to each part of the bill demurred to, and if any one of the causes assigned be held good by the court the demurrer will be allowed; and the defendant may on the argument, at the hearing, orally assign other causes of demurrer, different or in addition to those assigned upon the record, which if valid will support the demurrer, although the causes of demurrer stated upon the record be held to be invalid."

In this court the appellee urges in support of the decree appealed from that the bill is defective, because one of the original contracting parties, the Texarkana, Shreveport & Natchez Railway Company, is not made a party; that the complainant has a complete and adequate remedy at law; and that the contract as alleged, in so far as it stipulates and restricts as to the location of depots along the line of railway, is contrary to public policy and void. As there is no averment that the Texarkana, Shreveport & Natchez Railway Company is doing anything or proposes to do anything in violation of its contract with complainant, and no relief is prayed against said railway company or affecting it, it does not seem to be a necessary party to the suit, and if it is a necessary party the defect can be cured by amendment to the bill.

It is not clear that the complainant has, for the wrong alleged, a complete and adequate remedy at law. Damages are not always easily ascertained, and sometimes do not and cannot adequately compensate. A remedy which prevents a threatened wrong is in its essential nature nearer adequate and complete than a remedy which permits the wrong to be done, and then attempts to compensate by damages assessed by a jury. See 3 Pom. Eq. Jur. § 1357.

These remarks are pertinent to the case in hand, for the bill alleges only indirect and remote damages, and the case presented seems to be one in which before a jury it would be very difficult to point out and prove much if any actual damage. However, in the matter of damages from the threatened wrong in this case, if the bill is defective in not being sufficiently specific or in not alleging direct damage, the complainant might perhaps amend, and, before her bill should be dismissed on that sole ground, she should be given an opportunity to amend.

The objection based on public policy presents the real difficulty in maintaining this bill. The appellee, as owner and operator of the Texas, Shreveport & Natchez Railway Company, is a public common carrier, operating public franchises, and is under duties and obligations to the state and public. Operating in Louisiana and under a Louisiana charter, it is, by article 284 of the Louisiana constitution of 1898, subject, as to the building and location of depots (and in many other matters), to the control of the Louisiana railway commission. Aside from this, it is bound in the public interest, and in its own interest, to establish such stations, and build and locate such depots, along and near the railroad as the convenience to the public, the transaction of business, and the rapid and economical transportation of goods and passengers may require.

In Railroad Co. v. Scott was involved the right of the railway company to abandon a depot originally located, constructed, and maintained in consideration of the right of way granted, and this court said:

"It must be that such an agreement is made subject to the general exigencies of business, the public interests, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business." 23 C. C. A. 424, 429, 77 Fed. 726, 37 L. R. A. 94.

In Florida Cent. & P. R. Co. v. State, 31 Fla. 509, 13 South. 106, 20 L. R. A. 419, 34 Am. St. Rep. 30, in dealing with a restrictive contract as to the location of railroad depots, the supreme court of Florida well says, on principle and authority:

"We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantages of such individual. Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by the complainant we would regard as against public policy. In People v. Chicago & A. R. Co., 130 Ill. 175, 22 N. E. 857, the court says: 'It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points, and in such manner, as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void.' The same doctrine was announced by Chief Justice Shaw in Fuller v. Dane, 18 Pick. 472; and also in Railroad Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357; Railroad Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Currie v. Railroad Co., 61 Miss. 725. In Mobile & O. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556, the court says: 'The location of stations for the receipt and discharge of passengers and freight at points most desirable for the convenience of travel and business being indispensable to the efficient operation of a railroad and the enjoyment of it by the public, the railway company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to the communities on the line of the road reasonable access to its use. A railway company cannot be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point. A railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require.' The same doctrine is held in Holladay v. Patterson, 5 Or. 177, in which case the court says: 'A railroad company is a quasi public corporation, and the public have an interest in the location of their lines of roads and depots. An agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate or betray them will not be enforced.'"

In Texas & P. R. Co. v. City of Marshall it is held that a contract to forever maintain a terminus, shops, and offices at a particular place, without regard to the business of the company and the interests of the public, is not one to be enforced in a court of equity. 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

The present bill alleges "that there is no public necessity or demand for any depot within said limits," i. e., within three miles north and south of Uni Station; but we take this to be largely a conclusion of the pleader, and not to be taken as conclusively admitted by the demurrer. Whether or not the interest of the public or the railway company demands a depot within the said limits is a question involving

facts and judgment which a court of equity, under proper allegations, might perhaps deal with, but which, in our opinion, should be left to the determination of the officials of the railway company under the regulations of the railroad commission. It is not probable, and certainly not to be assumed on a naked allegation, that the railway company will voluntarily locate and build a depot not believed by the officials of the company to be necessary for the transaction and furtherance of the railway's business or the just and proper convenience of the public.

In Texas & P. R. Co. v. City of Marshall, supra, a case much relied upon by both parties, there is an intimation that, while equity will not grant relief in cases of this kind, there may be a remedy at law in an action for damages.

It would seem that where, under a contract which is in part contrary to public policy, a valuable consideration in the way of property has passed, the courts should not deny all relief, and thus allow one party to be enriched at the expense of another not guilty of actual turpitude; and it has been held that where, under a contract absolutely void, because unlawful, a valuable property has been transferred, while no action based on the contract will lie to recover the property, still the right of recovery may be permitted in a proper case, based on a disaffirmance of the contract, because of the desire of the courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement which in justice he ought to recover. See Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108.

The real question presented in the court below, and renewed in this court, is whether the complainant for the matters alleged in her bill can have relief in a court of equity, and it is only incidentally involved here as to whether the complainant for the same matters can have relief in a court of law. For the reasons given, we are of opinion that the complainant can have no remedy in equity. As to the right to a remedy elsewhere, we express no opinion further than as herein outlined.

The decree appealed from is absolute as to the dismissal of the bill, and, as it may be considered a bar to an action at law, it is ordered and adjudged that said decree be reversed, and the cause remanded to the circuit court, with instructions to enter a decree dismissing the bill for want of jurisdiction in equity, and without prejudice to any action at law to which the complainant, as advised by counsel, may think herself entitled.

JULIAN, Sheriff, et al. v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1902.)

No. 438.

1. RAILROADS—EFFECT OF SALE UNDER FORECLOSURE.

A railroad company of North Carolina executed a mortgage on all its property and franchises, as authorized by law, the effect of which, under the law of the state, was to convey the legal title to the property to the mortgagee, leaving in the company only the equity of re-

demption. Subsequently, it executed a second mortgage covering the same property and franchises, which was foreclosed, a sale was made under the decree and confirmed, and the purchaser put in possession. Afterward, a judgment was rendered against the company on a cause of action which arose subsequent to the foreclosure sale, and the sheriff levied an execution issued thereon on the property and franchises so sold and conveyed, and advertised the same for sale. *Held*, that there was no estate, right, or interest in such property or franchises remaining in the mortgagor upon which the judgment could operate, and that the action of the sheriff was illegal, and entitled the owner of the property to an injunction to restrain its sale.

2. SAME—VALIDITY OF SALE—POWER OF PURCHASER TO HOLD PROPERTY.
Neither the mortgagor company, which was a party to the foreclosure sale and received the benefit of the purchase money, nor the judgment creditor, whose claim arose thereafter, could set up the claim that the property did not pass by such sale because the purchaser was a foreign corporation not authorized to hold railroad property in the state; both being estopped by the decree of confirmation, and the question of the purchasers' power being one which could only be raised by the state.

3. FEDERAL COURTS—INJUNCTION—STAYING PROCEEDINGS OF STATE COURTS.
Rev. St. § 720, which prohibits a federal court from granting an injunction to stay proceedings in a state court, has no application to the granting of an injunction to restrain a sheriff from selling, under an execution from a state court, property of a third person who was not a party to the judgment, in which he is not acting under the process of the state court, but in abuse of it, and as a trespasser.[1]

4. RAILROADS—EFFECT OF SALE UNDER FORECLOSURE—NORTH CAROLINA STATUTE.
Code N. C. § 1255, providing that a judgment against a corporation for a tort shall take precedence over a prior mortgage upon its property, does not operate to render railroad property in the hands of a purchaser at foreclosure sale subject to a judgment recovered against the mortgagor for a tort committed after the sale.

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

See 39 C. C. A. 126, 98 Fed. 489; 47 C. C. A. 374, 108 Fed. 929.

This case comes up on appeal from the decree of the circuit court of the United States for the Western district of North Carolina, granting an injunction.

The bill of complaint was filed by the Central Trust Company, a corporation of the state of New York, and the Southern Railway Company, a corporation of the state of Virginia. It was a supplemental bill, or, more properly, a bill in the nature of a supplemental bill, to a bill theretofore filed in the same court by the Central Trust Company of New York, the same complainant, against the Western North Carolina Railroad Company, a corporation of the state of North Carolina, et al., to which proceedings the Southern Railway Company had been made a party, as purchaser under a decree made therein. The defendant to this bill was David R. Julian, sheriff of Rowan county, N. C., a citizen and resident of the state of North Carolina. He demurred to the bill, and his demurrer, claiming that he acted solely in his official capacity, having been overruled, Mrs. Clemye James, administratrix, and Fannie E. Howard, administratrix, were also added as parties defendant. The facts disclosed by the pleadings are these:

W. A. James and John H. A. Howard, the one an engineer and the other a fireman, both in the service of the Southern Railway Company, and whilst in the actual employment of that company, lost their lives on 17th November, 1896, on the railroad of that company known as the Western North Carolina Railroad. Thereupon separate actions were brought in the superior court of Rowan county, N. C., on the 30th January, 1897, by Mrs. Clemye James,

[1] See Courts, vol. 13, Cent. Dig. §§ 1418, 1422.

who had administered upon the estate of W. A. James, and Mrs. Fannie E. Howard, who had administered on the estate of John H. A. Howard, against the Western North Carolina Railroad Company, a corporation of the state of North Carolina, wholly distinct from the Southern Railway Company, and which was not a party thereto, seeking damages. In these actions verdicts were rendered on 21st February, 1898, against the Western North Carolina Railroad Company, one in favor of Mrs. Clemye James, administratrix, in the sum of $15,000, and one in favor of Mrs. Fannie E. Howard, administratrix, in the sum of $5,000. Judgments were entered on these verdicts, and executions were issued, and placed in the hands of D. R. Julian, who then was and is now sheriff of Rowan county, N. C. Each execution, after reciting the judgment, proceeds as follows: "You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said defendant [the Western North Carolina Railroad Company], within your county, or, if sufficient personal property cannot be found, then out of the real property of the defendant, and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate, as owned and held by it on the day when the said judgment was so docketed in said county of Rowan, or at any time thereafter, in whose hands soever the same may be." The execution states that the judgment was rendered on 21st February, 1898, and is dated itself 3d September, 1901. The sheriff proceeded under said execution, and advertised for sale the property levied on as follows:

"Sale of the Western North Carolina Railroad under Execution.

"By virtue of execution issuing from the superior court of Rowan county, North Carolina, one in favor of Clemye James, admrx. of W. A. James, for $15,000, interest and costs, and the other in favor of Fannie E. Howard, admrx. of John H. A. Howard, for $5,000, interest and costs, upon judgments duly docketed in the superior court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof, and by virtue of the levy made thereunder, the undersigned, as sheriff of Rowan county, state of North Carolina, will sell, agreeably to the laws of the state in this behalf provided, at public auction, to the highest bidder, at the court house door in Salisbury, on Monday the 7th day of October, A. D. 1901, at the hour of 12 m., all and singular, the corporate property of the defendant, the Western North Carolina Railroad, existing in the state of North Carolina, including its corporate franchises, rights, privileges, immunities, easements, and appurtenances of every kind appertaining, belonging to, or in anywise connected therewith, or issuing out of and relating to the said the Western North Carolina Railroad, together with all of its property in the state of North Carolina, and including its roadbed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turntables, water tanks, viaducts, culverts, superstructures, passenger, freight, and other houses, machine shops, buildings and fixtures, the said railroad extending from the town of Salisbury, through Statesville, Newton, Hickory, Morganton, Marion, Asheville, to Paint Rock, in Madison county, and from Asheville westward, by way of Waynesville, to Murphy, in Cherokee county —reference being had for a further description of said road, and its property, rights, and franchises, to the charter of the said road, and the amendments thereto enacted from time to time by the general assembly of North Carolina."

Under section 674 of the Code of North Carolina, it is provided that:

"The officer making such a sale shall, by deed, convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll, and the officer shall, immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise belonging to such corporation in whatever county the same may be situated, and the purchaser

may thereupon demand and receive for his own use all the fare and toll which may accrue within the time limited by the terms of purchase in the same manner and under the same regulations as such corporation was before authorized to demand and receive."

It was stated at the bar that the executions for the recovery of $20,000 in the aggregate were levied on property valued at $5,000,000.

The purpose and prayer of the bill of complaint were for an injunction against this action on the part of David R. Julian, the sheriff.

A. C. Avery (B. F. Long and Lee S. Overman, on the briefs), for appellants.

Charles Price, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and KELLER, District Judge.

SIMONTON, Circuit Judge (after stating the facts). The first question is: Was the property so levied upon and advertised for sale corporate property of the Western North Carolina Railroad Company, as owned and held by it on the day when said judgment was so docketed in said county of Rowan, or at any time thereafter, in whose hands soever the same may be? The Western North Carolina Railroad Company was created a corporation of that state by its legislature. The sovereign power made of the corporators a single entity, and conferred upon them the franchises of acting as a person. This new person, creature of the law, and existing through the grace of and at the will of the sovereign, was then clothed with certain powers, and granted certain privileges. These are called franchises. They were: First. To construct a railroad from Salisbury to Asheville, etc. Second. To this end, it was empowered to acquire and hold lands for railroad purposes, by purchase, gift, or by condemnation proceedings, in the exercise of eminent domain. Third. Over the road so constructed, it was endowed with the franchise of acting as a common carrier of persons and property, and to demand and receive toll and fare therefor. The franchise to be a corporation is its life. It is inseparable from it. When it surrenders it, or is deprived of it, it parts with its existence. But with regard to the other franchises mentioned, these are not inseparable from its existence. They constitute its property. They are distinct from the franchise to be a corporation. They may be mortgaged without it, and may pass to a purchaser by sale; may be levied upon and sold under execution. Railroad Co. v. Berry, 112 U. S. 610, 5 Sup. Ct. 299, 28 L. Ed. 831. Under the laws of North Carolina a corporation can sell and transfer its franchises. Code N. C. §§ 671, 673, 675. And the franchise, so far as it relates to the receiving of fare or tolls, may be sold under execution, with or without the other property of the corporation. Code N. C. §§ 671, 672. Pursuing the power conferred upon it by its charter, the Western North Carolina Railroad executed a mortgage of its property and franchises to the Central Trust Company of New York, on 1st day of September, 1884, to secure an amount of bonds not exceeding $12,500 for each mile of said road. This mortgage having been executed, the legal title, under the operation of law in North Carolina, passed to the

Central Trust Company of New York, leaving in the Western North Carolina Railroad Company the equity of redemption only. Hemphill v. Ross, 66 N. C. 477; Ellis v. Hussey, Id. 501; Isler v. Koonce, 81 N. C. 378; Williams v. Teachey, 85 N. C. 402, 405; Parker v. Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231. The mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes. Whitehurst v. Gaskill, 69 N. C. 449, 12 Am. Rep. 655, cited and approved in Re Macay, 84 N. C. 63; Hill v. Nicholson, 92 N. C. 24. On the 2d day of September, 1884, the Western North Carolina Railroad Company executed to the same Central Trust Company of New York its second mortgage, being the mortgage of this equity of redemption, to secure two bonds, one in the sum of $3,090,000, and the other in the sum of $1,020,000. Default having been made on the bonds secured by this second mortgage, the Central Trust Company of New York, the mortgagee, filed its bill of foreclosure of this second mortgage, in the circuit court of the United States for the Western district of North Carolina, on 20th April, 1894, to which bill the Western North Carolina Railroad Company and its lessee were made parties defendant. Answers were duly filed and, the cause being at issue, proceedings were had thereunder, whereby a decree for the foreclosure of said mortgage was made, and an order for the sale of the interests mentioned in said mortgage, and that by said sale all right and equity of redemption in the Western North Carolina Railroad Company, and all persons claiming by, through, or under it would be forever barred and foreclosed. It goes without saying that the right to execute a mortgage carried with it the right of the mortgagee to obtain foreclosure of such mortgage. New Orleans, S. F. & L. R. Co. v. Delaware, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244. After due advertisement, this sale was had under the order of that court. The Southern Railway Company became the purchaser. Upon report of sale, it was confirmed on 22d August, 1894. The order of confirmation is in these words, after reciting that the special master execute his conveyance to the purchaser:

"Upon the delivery of said conveyance by the special master, the Southern Railway Company shall fully possess and be invested with all of the estate, right, title, and interest in, to, and of such railroad, equipment, property, and franchises so sold under the decree of this court as the absolute owner thereof, to have and to hold the same to it and its successors and assigns, forever."

This conveyance was duly executed and recorded. The purchaser was put into possession. To all these proceedings the Central Trust Company, holder of the first mortgage, was a party, moving for and assenting to all the decrees therein, recognizing the Southern Railway Company as the owner of the equity of redemption, and as the party liable for the payment of the bonds first issued under the first mortgage. It thus appears that the Western North Carolina Railroad Company, originally the owner of this property, with authority to alien, sell, or mortgage the same, then the mortgagor, then the owner of the equity of redemption, its only means of procuring release of

the mortgage, then the mortgagor of this equity of redemption, by a decree of a court of competent jurisdiction, in a suit to which it was a party, appearing and answering, was forever debarred and foreclosed of all right, title, interest, and estate at law therein, and of all right and equity therein, including this equity of redemption. This being so, it did not have, on 21st February, 1898 (the day on which the judgment upon which the execution complained of in this case was rendered), any interest, right, estate, or property in the road levied upon or in its equipment, rolling stock, franchises, or property of any description. All of these had become and were vested in the Southern Railway Company, the purchaser, under the decree of the circuit court of the United States for the Western district of North Carolina. The sheriff, under his precept, had no right to levy upon and advertise the same for sale. A purchaser at a sale under execution takes only the right of the debtor at the time the judgment was entered. A judgment at law does not overreach a prior equity of a third person acquired bona fide for valuable consideration. Georgetown v. Smith, 4 Cranch, C. C. 91, Fed. Cas. No. 5,347. The supreme court of the United States, in Simmons v. Railroad Co., 159 U. S. 288, 289, 16 Sup. Ct. 5, 40 L. Ed. 150, quoted with approval Lansing v. Goelet, 9 Cow. 346, to the effect that a judicial sale of the estate under the decree of the court, if the court has the power to make a decree, whether it be in the form of a decree of sale preceded by a formal decree of foreclosure, or in the form of a decree of sale without a formal decree of foreclosure, effectually bars the right of the mortgagor to redeem, and the purchaser will hold it under the title he acquires to it by virtue of the sale and conveyance he receives from the master, free and discharged from the equity of redemption. They also quote with approval 3 Pom. Eq. Jur. § 1228, as follows:

"The sale, under a valid decree, immediately cuts off, bars, and forecloses the rights of the mortgagor and of all subsequent grantees, owners, incumbrancers, and other persons interested, who were made parties defendant, and of all grantees, owners and incumbrancers subsequent to the filing of a notice of lis pendens, although not made defendants."

The case of Jeffrey v. Moran, 101 U. S. 286, 25 L. Ed. 785, resembles very much the case at bar. A railroad company of Ohio was sold under foreclosure proceedings 3d June, 1863, and was purchased by Moran. It was reorganized on 11th March, 1864; and on 12th March, 1864, Moran conveyed the whole railroad property to the new company, taking bonds and a mortgage for the purchase money. The bonds not having been paid, Moran filed his bill for foreclosure 30th April, 1869. On 6th October, 1869, sale was ordered, Moran purchased at the sale, and it was confirmed on 2d December, 1869. On 22d June, 1866, one Zentmeyer was killed on the railroad. His administrator sued the road, and got judgment 28th February, 1871, a year and some months after the sale of the road. The administrator intervened, and claimed part of the proceeds of sale. The mortgage to Moran had been executed subject to an act of 11th April, 1861, as follows:

"The lien of mortgages and deeds of trust authorized by this act, shall be subject to the lien of judgments recovered against said corporation after

its reorganization, for labor thereafter performed for it or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by misconduct of its agents or in any action founded on its contracts or liabilities as a common carrier, thereafter made or incurred." 58 Ohio Laws, p. 72.

On this state of facts, the court says:

"When this judgment was rendered, there was no real estate of any kind in Clinton county belonging to the railroad company. The road, with all its appurtenances, had been sold to Moran under a decree upon the mortgage and sale, confirmed more than a year before that time. Thereafter the relation of the property to the company was in all respects as if the company had never owned it. A lien by judgment, therefore, was impossible."

The act of the sheriff in levying on this property, clearly, was illegal. And inasmuch as under the law of North Carolina it would have been his duty to have put the purchaser into immediate possession, and into the enjoyment and use of all the franchises of the company, and so work irreparable injury to the Southern Railway, the owner in possession, the court, having right and authority to do so, was bound to issue its writ of injunction. Marshall v. Holmes, 141 U. S. 596, 12 Sup. Ct. 62, 35 L. Ed. 870; Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407.

It is insisted upon in argument that the Southern Railway Company, being a corporation of the state of Virginia, cannot hold railroad property in North Carolina. This question cannot arise in this discussion. Whatever may be the law in this regard, the title of the Southern Railway cannot be disputed by the Western North Carolina Railroad Company, or any person claiming by, through, or under it. The decree of the circuit court of the United States for the Western district of North Carolina, confirming the sale in a cause to which the Western North Carolina Railroad Company was a party, estops it. The purchase money was paid, and was applied to the debts of this railroad. It would be monstrous to affirm that, in despite of this, the railroad property and its franchises still remained in the Western North Carolina Railroad Company, subject to its debts, to its obligations incurred after the sale. If the Southern Railway Company holds this property contrary to the will of the sovereign power of the state, it is for the state to interfere. No private individual can usurp its prerogative. Bank v. Matthews, 98 U. S. 628, 25 L. Ed. 188; Leazure v. Hilleyas, 7 Serg. & R. 313.

The only remaining question is, can the circuit court of the United States interfere with this state officer, or is it precluded by the provisions of section 720 of the Revised Statutes of the United States? It will be observed that no question is made upon the validity of the judgments of James, administratrix, and of Howard, administratrix, in the state court. We do not sit to review these judgments, nor have we the right to do so. The case made shows that Julian, the sheriff, is attempting to sell, for the satisfaction of judgments against the Western North Carolina Railroad Company, property in which that company has no interest or estate whatsoever. He has been enjoined, not from or because of the use of process, but because of the abuse of process. When he seeks to subject the property of the Southern Railway Company, by levying upon it under a judgment

to which it was not a party, for the payment of the judgment against the Western North Carolina Railroad Company, he goes outside of his official duty, and becomes a bald trespasser. The supreme court of North Carolina has held in a current of cases, such as Logan v. Railroad Co., 116 N. C. 940, 21 S. E. 959, that the lessor of a railroad cannot devest himself of the public duties cast upon him by his charter by transferring them to another, without the express sanction of the state; that, so, a lessor is liable for any injury or trespass committed by his lessee, and his property may be levied upon for damages. This must proceed upon the idea that the property is still the property of the lessor, and so liable for his obligations. But it cannot be held that the property of the lessee can be levied upon and sold under a judgment against the lessor, to which the lessee was not a party. Such a proceeding would be abhorrent to all law.

It is said, also, that under the statute law of North Carolina judgments for torts committed by a mortgagor take precedence of the lien of any mortgage executed by the mortgagor upon his property. Code, § 1255. This, doubtless, is so as to any property held by the mortgagor at the time the tort was committed. But can it be said that the commission of a tort and judgment had thereon shall have such retroactive operation as to spring and create a lien upon property which, by operation of law, had passed out of the possession, ownership, and control of the mortgagor, long before the tort was committed? Surely not. Jeffrey v. Moran, 101 U. S. 286, 25 L. Ed. 785, quoted supra. Under authority of the legislature the Western North Carolina Railroad Company mortgaged its property and franchises to the Central Trust Company of New York. These mortgages included the whole estate of the mortgagor, the fee under the first mortgage, subject to the equity of redemption, and the equity of redemption itself under the second mortgage. Until this equity of redemption was exercised, the fee remained in the first mortgagee. This equity of redemption was foreclosed, and the Western North Carolina Railroad Company lost it; was forever debarred from setting it up and exercising it. All of these proceedings were legal,—sanctioned by the action of the legislature. The Southern Railway Company purchased this equity of redemption and the franchises sold, and thenceforward, going into possession, claimed to be the owner thereof. Its rights were derived from proceedings inaugurated by creditors, establishing their rights under the mortgage, making these defeasible rights absolute. It does not claim under, but against, the Western North Carolina Railroad Company. It conducts its road in no sense as the agent of this railroad company. There is no privity between it and this railroad company which can make its property liable for the obligations of, or subject to levy under a judgment against, the Western North Carolina Railroad Company.

The decree of the circuit court is affirmed.

PHENIX INS. CO. OF BROOKLYN, N. Y., v. GUARANTEE COMPANY OF NORTH AMERICA.

(Circuit Court of Appeals, Eighth Circuit. April 21, 1902.)

No. 1,602.

1. INDEMNITY INSURANCE — CONSTRUCTION OF CONTRACT — WARRANTIES IN APPLICATION.

An application to a surety company for a bond to secure the faithful performance of his duties by the cashier of the applicant, a corporation, contained the following question and answer: "Will he receive remittances from customers on open accounts? If so, how often will you render customers a statement of balances due by them, and by whom will this be done? This should be done by some other person than the applicant, and is important as a means of verifying balances appearing on the ledger." Answer: "Yes. Monthly by bookkeeper." *Held*, that such answer was not a warranty that such monthly statements should be delivered to the customers, or deposited in the mail, by the bookkeeper personally, but that it was complied with where such statements were made out by the bookkeeper, and deposited by him, in sealed envelopes, in the receptacle used for outgoing mail, according to the customary practice of the corporation's business.

2. SAME.

Such application also contained the following question and answer: "It is suggested: (1) That all moneys and checks received be deposited intact in bank, and all disbursements be made either by check or from a petty cash fund drawn from the bank as required; and (2) that all checks received be indorsed 'For deposit,' to prevent any loss or conversion. To what extent will these practices be followed?" Answer: "Fully." *Held*, that the employer complied with such warranty by adopting a regulation requiring all checks to be deposited, indorsed as therein specified, and by exercising reasonable supervision over its cashier to see that the practice was pursued; that the answer to such question could not be construed as an absolute warranty by the employer that its cashier would deposit all checks, properly indorsed, and to relieve the surety from liability for the failure to make such deposits, contrary to the employer's regulations, and without its knowledge, where it exercised reasonable diligence in the premises, which would render the contract nugatory as one for indemnity.

Sanborn, Circuit Judge, dissenting.

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

H. C. Brome (A. H. Burnett, on the brief), for plaintiff in error.

Warren Switzler (L. C. Cooper and Clency St. Clair, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Phenix Insurance Company of Brooklyn, N. Y., the plaintiff in error, hereafter called the "plaintiff," is a fire insurance company incorporated under the laws of the state of New York and carries on its business in other states of the Union, including the state of Nebraska, having its state agency for that state in the city of Omaha. The Guarantee Company of North America, the defendant in error, hereafter called the "defendant," is a surety company incorporated under the laws of the dominion of Canada, and has an agency and carries on its business in the state of Nebraska.

The plaintiff employed Fred S. Kelly as its cashier at its state agency in Omaha, and required him to give security for the honest and faithful performance of his duties as such. Upon application therefor, the defendant, on the 27th day of May, 1895, became the surety of Kelly in the sum of $5,000 for one year, for which it received a premium of $50, and issued a policy, termed in the instrument a "bond," in the usual form of such instruments, which was renewed and extended from year to year upon the payment of the like premium. While the policy was in force, Kelly embezzled and converted to his own use moneys of the plaintiff amounting approximately to $5,000. The defendant refused to pay this loss, and thereupon the plaintiff brought this suit. There was a trial to a jury, and a general verdict for the plaintiff. The jury also made special findings in answer to 25 interrogatories propounded by the court. On motion the court set aside the general verdict for the plaintiff and rendered judgment for the defendant on the special findings, which are as follows:

"The jury are instructed to answer the following questions: First. Did plaintiff, at the time of making the application to defendant for the insurance bond, know that said Fred S. Kelly had speculated, or gambled, or engaged in other disreputable and unlawful pursuits, or that he had been irregular in his habits or associations, or in his attention to his duty? Answer. No. Second. Did plaintiff, at the time of making application for the last renewal of said bond, know the facts stated in the foregoing question? Answer. No. Third. Did the plaintiff make out and render to its several agents or customers monthly statements? Answer. Yes. Fourth. Were such monthly statements made out and rendered by the bookkeeper of the plaintiff, or were they, after being made out, intrusted to the care of said Fred S. Kelly, and did he withhold any of them from such customers? Answer. They were made out by bookkeeper, and deposited in mailing basket, as customary. Fifth. Were the books of said Fred S. Kelly balanced and verified, and a monthly trial balance regularly rendered? Answer. Yes. Sixth. Were the books of account of the said Fred S. Kelly examined and audited by the bookkeeper monthly, and by the auditor of the plaintiff semiannually, and all money, securities, vouchers, and property on hand examined and verified, and a balance sheet prepared, and the correctness of same certified to? Answer. Yes. Seventh. At each periodical examination was the plaintiff's pass book balanced by the bank, and verified with the bank ledger, and compared with plaintiff's cash book by the party examining? Answer. Yes. Eighth. Did plaintiff, by its regulations, require that all checks drawn should be signed by its agent, H. B. Coryell, and countersigned by Fred S. Kelly? Answer. Yes. Ninth. Did said Fred S. Kelly sign checks of plaintiff without same being also signed by said Coryell? Answer. No. Tenth. If your answer to the last question is 'Yes,' then answer when plaintiff first knew of such fact,—whether before or after said Kelly left the employ of plaintiff? Answer. ———. Eleventh. Did the said Fred S. Kelly receive any checks belonging to the plaintiff which he did not deposit to the account of plaintiff in the bank, but which he indorsed, and received the money thereon? Answer. Yes. Twelfth. If you answer the last question 'Yes,' then answer, Did the plaintiff know of his so doing before he quit the employ of plaintiff? Answer. Yes. Thirteenth. If you answer the last question above 'Yes,' then give the date, as near as possible, when the plaintiff first knew such fact. Answer. On or about the day of Kelly's discharge."

We agree with the trial court that these special findings cover all the issues embraced in the pleadings, and raise the questions in controversy in the case. Among the questions propounded by the defendant to the plaintiff, and made part of the application for the policy, was this:

"(9) Will he receive remittances from customers on open accounts? If so, how often will you render customers a statement of balances due by them, and by whom will this be done? This should be done by some other person than the applicant, and is important as a means of verifying balances appearing upon the ledger."

To this question the plaintiff answered: "Yes. Monthly by bookkeeper."

Question 17 propounded by the defendant to the plaintiff reads as follows:

"(17) It is suggested: (1) That all moneys and checks received be deposited intact in bank, and all disbursements be made either by check or from a petty cash fund drawn from bank as required; and (2) that all checks received be indorsed, 'For Deposit,' to prevent loss or conversion. To what extent will these practices be followed?"

The answer to this question was, "Fully."

The action of the trial court in setting aside the general verdict for the plaintiff and rendering judgment for the defendant on the special findings was based on the plaintiff's answers to these two questions, and, in order that the grounds of its judgment—which are the same upon which it is sought to be upheld—may be clearly understood, we here insert all the court said on the subject:

"The special finding of facts that the monthly statements guarantied to be rendered by the bookkeeper of plaintiff to the several agents or customers of plaintiff is that such monthly statements were rendered by the bookkeeper making the same out and depositing them in the mailing basket. This I do not think was a compliance with the guaranty upon the part of plaintiff. They should have been either delivered to the customers or deposited in the United States mail. The jury further find the fact to be that said Kelly received checks belonging to the plaintiff which he did not deposit to the account of plaintiff in the bank, but which he indorsed, and received the money thereon. It seems to me that, if this provision in the policy is a guaranty, it was a guaranty upon the part of the plaintiff that the deposit of such checks would be made by Kelly. At the trial I was disposed to think that all that plaintiff was required to do was to adopt a regulation requiring this to be done on the part of Kelly, and that, if he violated the regulation in this respect without the knowledge of the plaintiff, that defendant would be liable therefor. I have, however, upon more mature consideration, reached the opposite conclusion. It is further found by the jury that said Kelly deposited checks belonging to plaintiff without having the same indorsed 'For Deposit.' If we are right in saying that this provision in the application was a guaranty upon the part of plaintiff, then the guaranty was violated."

We think the trial court misconstrued the warranty contained in the answers to questions 9 and 17 of the application. By its answer to question 9 the plaintiff agreed that it would render its customers a statement of the balance due by them, and that this should be done, not by its cashier, but by its bookkeeper. This warranty was satisfied by requiring its bookkeeper to make out the statements, and place them, when made out, in sealed envelopes in the receptacle used for outgoing mail. It did not bind itself nor agree that its bookkeeper should personally deposit these statements in the post office. The jury found that the statements were made out by the bookkeeper, and that, when made, they were placed in the mailing basket, according to the customary practice. It would be a most unreasonable construction of this warranty to hold that it required the plaintiff

to exclude its cashier from all possible access to its mail, and to that end conduct its business and correspondence in a different mode from that pursued by all persons and corporations engaged in like business pursuits. By its answer to question 17 the plaintiff did not agree that it would employ a person to watch its cashier, and see that he deposited all the money and checks received by him in bank in the form in which he had received the same, and that he would make all disbursements by check, and that all checks should be indorsed "For Deposit." If it had undertaken to do this, it would not have needed a bond of indemnity. It was asked to what extent the practice would be followed, and it answered, "Fully." The natural and plain meaning of this answer was that it would adopt that method of transacting its business, and exercise a reasonable supervision over its cashier to see that the practice was pursued. We cannot give the warranty any greater scope than this without leading to an absurdity. In the eleventh, twelfth, thirteenth, fourteenth, and sixteenth special findings the jury found that, while the cashier did receive certain checks belonging to the plaintiff, which he did not deposit to the plaintiff's account in bank, and while he did not indorse all checks "For Deposit," yet that his conduct in this respect was contrary to regulations made by the plaintiff, and that the fact of his violation of duty was not known to the plaintiff until his discharge. The jury further found in the sixth finding that the accounts of Kelly were examined and audited by the bookkeeper monthly, and by the plaintiff's auditor semiannually, and that in such examinations the balance sheet was certified to as correct by the examining officer. They further found that the cashier succeeded in keeping his accounts in such a manner that the acts of dishonesty of which he was guilty were not discovered when his accounts were audited and examined. In effect, the contention of the defendant is that the plaintiff warranted that its cashier, Kelly, would indorse all checks "For Deposit," and deposit the proceeds in bank to the credit of the plaintiff, and pay the same over to its proper agent; and that the plaintiff took upon itself the burden of seeing that this was done, and that, if Kelly was guilty of a breach of his duty in this regard, although the fact was unknown to the plaintiff, and could not be discovered by it with reasonable diligence, it nevertheless constituted a breach of the plaintiff's warranty, and imposed no liability on the defendant to pay the resulting loss. Such a construction of the contract would devest it of all semblance to a contract of indemnity against Kelly's malfeasance or misfeasance. If the indemnity company cannot be held liable in this case, it never can be held liable in any case. In short, if we give the alleged warranties the scope which the defendant claims should be given to them, no bond of indemnity would ever be taken out by an employer, because he would assume the full burden of watching his employé, and relieve the indemnity company of all responsibility.

The special findings of the jury show that plaintiff was entitled to recover in the action, and the judgment of the circuit court for the defendant is reversed, and the cause remanded, with instructions to that court to render judgment on the general verdict in favor of the plaintiff for $4,836 and interest computed to the day of the rendition

of said verdict, amounting to $603.69, as agreed upon by the parties, and such interest on said verdict after that date as may be allowed by the laws of Nebraska, and for costs.

SANBORN, Circuit Judge (dissenting). I agree with the district judge who tried this case below, and I think the judgment he rendered should be affirmed. It is neither a fulfillment nor a lawful excuse for a failure to fulfill a covenant to pay a debt, to perform an act, or to cause the performance of an act by a third party that the covenantor made a rule for the payment of the debt, or for the performance of the act, and carefully inspected, but was ignorant of, the failure to make the payment or the failure to do the deed while the debt was not paid and the covenanted act was not performed. It is true, as the majority remark, that the requirement of such a covenant is not that the promisor shall pay a watchman or a spy to see whether or not the payment is made or the covenanted deed is done. The requirement of the covenant is more. It is that the promisor shall make the payment, or cause the third party to perform the covenanted act. And a careful inspection by the covenantor of the acts of the third person, and the adoption of a rule that such person shall do a promised act, that he shall make a covenanted indorsement of checks with the words "For Deposit," and ignorance of his failure while he utterly fails to make the indorsement are no more a fulfillment, or a lawful excuse for the failure to fulfill, a covenant that he shall do the act, than a careful inspection of the failure to make a promised payment of a debt, the adoption of a rule that it shall be paid, and ignorance that it is not paid while no part of it is in fact paid are a fulfillment, or a lawful excuse for a failure to fulfill, a covenant to pay a debt. The very purpose of a covenant is to relieve the covenantee of all inquiry relative to the matters covenanted, and to impose upon the covenantor the absolute obligation to make them as he guaranties that they shall be; and nothing short of that is a fulfillment of his warranty. The application and bond in this case are to be read together, and they constitute but a single contract. By this contract the plaintiff covenanted with the defendant that during the term of the bond its employé Kelly, who was under its control, and subject to its orders, should "fully" practice indorsing the checks he received with the words "For Deposit" for the purpose of preventing the loss or conversion by him of the funds those checks represented; and the defendant, as the surety of Kelly on his bond, covenanted that it would insure the plaintiff against loss by his dishonest or fraudulent acts. In this state of the case the performance of the covenant of the plaintiff was a condition precedent to the liability of the defendant, the surety on the bond. The plaintiff received the bond, and knew that the defendant stood in the relation of a surety. By the application which it tendered to induce the plaintiff to become the surety it agreed in so many words that the indorsement of the words "For Deposit" by its cashier, Kelly, on the checks he received, should be a condition of the defendant's liability as surety. And the general rule is that if a condition known to the obligee, upon which a surety agrees to be bound, is not complied

with, the surety is discharged. 2 Brandt, Sur. § 403; Jones v. Keer, 30 Ga. 93, 95; Cunningham v. Wrenn, 23 Ill. 64, 65; Lynch v. Colegate, 2 Har. & J. 34, 37; Holl v. Hadley, 4 Nev. & M. 515, 520; Bonser v. Cox, 4 Beav. 379, 384; U. S. v. Hillegas, 3 Wash. C. C. 70, 76, Fed. Cas. No. 15,366; Whitcher v. Hall, 5 Barn. & C. 269; Combe v. Woolf, 8 Bing. 156, 161.

Again, the contract of these parties consisted of mutual covenants,—a covenant by the plaintiff that its cashier, Kelly, should invariably indorse its checks with the words "For Deposit," and a covenant by the defendant that it would pay the losses resulting from the fraudulent and dishonest acts of Kelly if he failed to do so. The plaintiff failed to fulfill any part of its covenant. It failed in toto. Kelly received and used many of his employer's checks, but he never indorsed one of them with the words "For Deposit" during the entire term of the bond. As the plaintiff has committed a complete breach of its covenant, it cannot enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of a covenant cannot maintain an action against the other contracting party for a subsequent failure to perform it. Rice v. Deposit Co., 103 Fed. 427, 432, 433, 43 C. C. A. 270, 276; Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 463, 467, 14 Sup. Ct. 379, 38 L. Ed. 231; Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co. (decided by the supreme court Jan. 6, 1902) 22 Sup. Ct. 124, 46 L. Ed. ——; Hubbard v. Association, 100 Fed. 719, 40 C. C. A. 665; Seal v. Insurance Co., 59 Neb. 253, 80 N. W. 807; Brady v. Association, 60 Fed. 727, 9 C. C. A. 252. The case of Rice v. Fidelity Deposit Co., 103 Fed. 427, 432, 433, 43 C. C. A. 270, 276, which was decided by this court on July 16, 1900, was, in my opinion, identical in every essential particular with the case in hand, and the law applicable to the facts of these cases has not changed since that case was decided. In that case the covenant contained in the answer of the employer in the application for the bond was that the checks should be countersigned by the bookkeeper, and the bookkeeper did not countersign them. We held that the employer could not recover, and, among other things, we said:

"The legal effect of these contracts was to create the relation of principal and surety between Perry and the fidelity company. The plaintiffs were necessarily aware of this relation. They agreed, in so many words, by the instrument of August 30, 1895, that the countersignature of their bookkeeper on the checks of Perry against their account should be a condition of the liability of this surety; and the general rule is that if a condition, known to the obligee, upon which a surety agrees to be bound, is not complied with, the surety is discharged. 2 Brandt, Sur. § 403; Jones v. Keer, 30 Ga. 93, 95; Cunningham v. Wrenn, 23 Ill. 64, 65; Lynch v. Colegate, 2 Har. & J. 34, 37; Holl v. Hadley, 4 Nev. & M. 515, 520; Bonser v. Cox, 4 Beav. 379, 384; U. S. v. Hillegas, 3 Wash. C. C. 70, 76, Fed. Cas. No. 15,366; Whitcher v. Hall, 5 Barn. & C. 269; Combe v. Woolf, 8 Bing. 156, 161. Again, the bond and the instrument of August 30, 1895, must be read, construed, and enforced together. The contract of these parties consists of all the stipulations and agreements in both instruments. Both instruments are parts of a single contract. When they are so read, the agreement of these parties is found to contain mutual covenants,—a covenant of the employers that they will invariably require the countersignature of their bookkeeper, Gribble, on all checks of Perry against their account, and a covenant of the

fidelity company that it will pay the losses resulting from the dishonest and fraudulent acts of Perry. Now, the plaintiffs have entirely failed to keep their covenant. Consequently they cannot enforce the fulfillment of the covenant of the fidelity company. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform. Cattle Co. v. Martindale, 63 Fed. 84, 89, 11 C. C. A. 33, 38, 27 U. S. App. 277, 284, 285; Norrington v. Wright, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19. 29 L. Ed. 372; Rolling Mill Co. v. Rhodes, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 3 C. C. A. 248, 52 Fed. 700, 10 U. S. App. 465, 470; King Philip Mills v. Slater, 12 R. I. 82. 34 Am. Rep. 603; Smith v. Lewis, 40 Ind. 98; Hoare v. Rennie, 5 Hurl. & N. 19; Pope v. Porter, 102 N. Y. 366, 371, 7 N. E. 304; Dwinel v. Howard, 30 Me. 258; Robson v. Bohn, 27 Minn. 333, 344, 7 N. W. 357; Reybold v. Voorhees, 30 Pa. 116, 121; Stephenson v. Cady, 117 Mass. 6, 9; Branch v. Palmer, 65 Ga. 210; Fletcher v. Cole, 23 Vt. 114, 119."

These remarks are applicable to, and should control the decision of, this case.

It is further submitted that, if these views are erroneous, and if the mere adoption of a rule that one shall do an act, and ignorance whether it is complied with or not, constitute either the fulfillment, or a legal excuse for the failure to fulfill, a guaranty that he will perform it, then, by the same mark, the adoption of a rule by the defendant that the plaintiff's loss from the fraudulent or dishonest acts of the cashier shall be paid without the payment of it must constitute either a payment of that loss or a legal excuse for a failure to pay it, and the judgment ought not to require the defendant to do more than to adopt such a rule. It ought not to require it to pay the loss. The defendant should have the benefit of the rule applied to the plaintiff.

KNIGHT v. WEEKS et al.

(Circuit Court of Appeals, Fifth Circuit. May 20, 1902.)

SURETIES—CONTRIBUTION—ENFORCEMENT OF EXECUTION AGAINST CO-SURETY.

Under Rev. St. Fla. § 983, which provides that co-sureties shall be bound to each other for a proportional contribution, and section 1177, which provides that any one who has paid money as a surety shall have the right to control the judgment, a surety who has paid a judgment at law after execution issued has the right to cause such execution to be levied on property of a co-surety, who is also a judgment defendant, and to enforce payment of his proportional share; and the court cannot arrest the execution on a petition of such co-surety setting up prior equities between the parties, which it is the sole provision of a court of equity to determine.

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

H. L. Anderson, for plaintiff in error.

G. C. Martin, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The transcript in this case embraces the opinion of the judge of the circuit court, as announced on the hearing of the motion to stay execution, as follows:

"On the 9th day of April, 1900, the Gulf Transportation Company, a corporation under the laws of the state of Florida, made two certain promissory notes in the sum of fifteen hundred ($1;500.00) dollars each, and delivered the same to the Brunswick & Hawkinsville Transportation Company, a corporation under the laws of the State of Georgia, but before the delivery of the same R. J. Knight, E. P. Rose, J. S. Weeks, Sr., and J. S. Weeks, Jr., and L. P. Weeks, doing business as J. S. Weeks & Sons, and G. W. Varn, indorsed the said promissory notes. Afterwards judgment was entered against the above-named persons in the circuit court of the United States for the Southern district of the state of Florida, and execution thereon issued in the sum of three thousand five hundred and thirty and $^{50}/_{100}$ ($3,530.50) dollars, and the said execution was levied upon certain lands and property in said district belonging to the defendants Weeks and Varn, and the same was advertised by the marshal of the said district for sale. Before the day of the said sale so advertised, certain of the defendants,—E. P. Rose, J. S. Weeks & Sons, and G. W. Varn,—paid to the Brunswick & Hawkinsville Transportation Company and its attorneys the full amount of the principal and interest of the said execution, and, instead of having the said execution satisfied of record, and returned into the office of the clerk of this court, procured from the Brunswick & Hawkinsville Transportation Company an alleged assignment of said execution to one Lazarus B. Varn. After having procured the alleged assignment of said execution, the defendants Rose, Weeks & Sons, and G. W. Varn procured the marshal of the said district to make a levy upon the property belonging to Robert J. Knight and J. B. Martin as copartners under the firm name of J. B. Martin & Co. It is admitted that the payment and assignment was made for the purpose of holding the judgment in force in order to recover from R. J. Knight, the fourth surety, one-quarter part of the judgment recovered, under sections 1177 and 983 of the Revised Statutes of Florida. The petitioner herein does not deny that he is a codefendant and co-surety, and owes his share of the judgment, but claims that, as the co-debtors have advanced the money and paid the same in full, it should be satisfied of record, and he not held to pay his share in this proceeding.

"Section 983 of the Revised Statutes of Florida provides that co-sureties shall be bound to each other for a proportional contribution, and, if one is compelled to pay the debt, he shall have his remedy against his co-surety; and section 1177, Id., provides that any one who has paid money as a surety shall have a right to control the said judgment. These principles seem to determine the questions presented, and the court cannot consider in this motion for a stay of execution the matters set up in the petition, which are irrelevant and immaterial to that issue, although they might be urged in a chancery suit. This court, as a common-law court, has no power to go back of the judgment and make inquiry as to the relations and equities existing between the parties prior thereto. This is especially the privilege of a court of equity. It will therefore be ordered that upon payment of the petitioner's contributory portion of the judgment further enforcement of the execution be stayed, otherwise to be enforced to the extent of that amount."

On a careful examination of the record and on consideration of the briefs submitted in this court, we find no reason to dissent from the views expressed by the trial judge as above given. The judgment of the circuit court is therefore affirmed.

McKNIGHT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1902.)

No. 1,078.

1. CRIMINAL LAW—INSTRUCTIONS—BURDEN OF PROVING INTENT.
A charge in a criminal case, in which intent was an essential ingredient of the offense, was erroneous, where, after correctly stating that the burden rested upon the government to prove such intent beyond a reasonable doubt, but that it might be inferred from the acts of the defendant, who was presumed to have intended the natural and probable consequences of his acts, it was further stated that, if the acts proven were such as to raise an inference of guilty intent, the burden was thrown upon defendant to rebut such inference by evidence sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no guilty intent; and the error cannot be held harmless where the general instruction that the burden of proof rested on the government, and continued throughout the case, was qualified by the words, "subject to what will be thereafter said upon the question of proof of intent."

2. SAME—CONSTITUTIONAL RIGHTS OF DEFENDANT—DEMAND FOR PRODUCTION OF INCRIMINATING DOCUMENTS.
To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the constitution, providing that no person in any criminal case shall be compelled to be a witness against himself, even though no order for the production of the paper is made, and the demand is made solely because of its supposed necessity to authorize the introduction of secondary evidence.

3. SAME—REMARKS OF COURT OR COUNSEL — REFERENCE TO DEFENDANT'S RIGHT TO TESTIFY.
It is prejudicial error for the court or counsel to call to the attention of the jury, in a criminal case, in any manner, the right of the defendant, under the statute, to testify in his own behalf; and such an error can only be cured, if at all, by a clear and emphatic statement by the court that the jury are not permitted to attach any importance to the failure of the defendant to testify. Such comment is not rendered harmless by the fact that the defendant does afterwards testify, since it virtually compels him to do so to avoid unfavorable inferences by the jury.

4. NATIONAL BANKS—EMBEZZLEMENT BY OFFICER—INSTRUCTIONS.
Under an indictment charging an officer of a national bank with embezzlement of its funds by causing money of the bank to be paid to persons known by him to be insolvent, for the purpose of bribery, and with intent to defraud the bank,—such payment being made under the guise of a loan, for which such persons executed their note to the bank,—the insolvency of such persons is an important consideration, going to the question of intent; and an instruction which, in effect, tells the jury that the question of their insolvency may be ignored, is misleading.

5. SAME—ELEMENTS OF OFFENSE—KNOWLEDGE AND CONSENT OF DIRECTORS.
An averment, in an indictment charging an officer of a national bank with embezzlement by paying out money on a note which he knew to be worthless, with intent to injure and defraud the bank, that the transaction was without the knowledge or consent of the directors or the discount committee, need not be specifically proved, where the transaction which the evidence tends to prove was one to which it cannot be presumed the directors or committee would consent; but in such case, if consent is relied on, it must be proved as matter of defense, and by evidence showing that it was given in good faith and with knowledge of the facts.

¶ 5. See Banks and Banking, vol. 6, Cent. Dig. § 973.

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

See 97 Fed. 208; 113 Fed. 450.

A. E. Richards and W. C. P. Breckinridge, for plaintiff in error.

R. D. Hill, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case having been before this court upon former writs of error, it is unnecessary to state in detail the facts upon which it depends. McKnight v. U. S., 38 C. C. A. 115, 97 Fed. 208; Id., 49 C. C. A. 594, 111 Fed. 735. We shall proceed to notice some of the assignments of error:

1. Upon the question of the burden of proof to establish the intent of the accused to defraud the bank in doing the acts charged, the court, in response to a request of the defendant, gave the charge as follows:

"On motion of the defendant the court instructs the jury that intent is a fact to be proved as any other fact; it is the state of mind with which an act is done; it is the motive from which an act springs; and in this case a fraudulent intent is the purpose of the defendant to do an act to defraud or cheat the bank, and to convert to his own use the sums of money set out in counts Nos. 2 and 39, in which he is charged with embezzlement with such fraudulent intent; and unless the jury believe that it has been established by the testimony beyond a reasonable doubt, as a fact existing at the time that the act was so done, it is the duty of the jury to acquit. The court has given this charge No. 11, asked for by the defendant, and now the court further charges you that the rule of law in regard to intent in this case is this: The intent to defraud is to be inferred from willfully and knowingly doing that which is wrongful or illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act. But this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction. The presumption is that a person intends the natural and probable consequence of acts intentionally done, and that an unlawful act implies an unlawful intent. The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If, therefore, you believe from the evidence, to the exclusion of a reasonable doubt, that the defendant willfully and knowingly appropriated to his own uses either the $2,000 of the bank's money mentioned in one count of the indictment, or the $3,736.60 of the bank's money mentioned in the other count thereof, or both of those sums, then from those facts, if proved to your satisfaction, you should deduce the presumption that he intended thereby to injure or defraud the said bank in either or both instances which such character of appropriation was made, if at all, by the defendant. This presumption, however, as I have said, is not conclusive; still, when it is drawn by you from the evidence, it would be sufficient to support a conclusion that the intent of the defendant in willfully and knowingly appropriating those parts

of the bank's money to his own use, if that was done, was to injure or defraud the bank, unless this presumption is overcome or rebutted by evidence in behalf of the defendant, or other evidence in the case. Agnew v. U. S., 165 U. S. 49, 17 Sup. Ct. 235, 41 L. Ed. 624."

To the part of the charge as to the shifting of the burden of proof, counsel for the defendant took a specific exception. This portion of the charge is as follows:

"But this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent. But such inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in the transaction."

When exception was taken to this language, the learned trial judge responded:

"That takes only a part of it, and it takes it out of its connection; but the court thinks the whole connection expresses the law accurately, because it is expressed in the exact language of the supreme court of the United States, but taking out some part of it may not make it entirely accurate. The court will not undertake to modify that particular part for the reason indicated."

It is elementary law that the burden of proof to establish the commission of a crime, and every essential element thereof, rests upon the prosecution. The statute under cover of which McKnight was prosecuted makes it essential, in order to work conviction, that the acts charged shall be done with intent to defraud the bank. In the absence of such intent, however culpable the acts charged may be, there can be no conviction for a violation of this part of the law. McKnight v. U. S., 49 C. C. A. 594, 111 Fed. 735. How is this intent to be proven? In view of the fact that intent or purpose is involved in a mental process which can only be known to the actor, the law requires only such proof as the nature of the thing to be proven admits; and it has long been the practice to instruct juries in such trials that the intent may be proven by the act done, and that one may be presumed to have intended the natural and probable consequences of acts intentionally done. This is a rule of logical probability from the usual course of events, rather than a conclusive legal presumption. The presumption is a rebuttable one, and, if other proof in the case shall repel the presumption which would ordinarily arise from the things done, the jury is under no necessity of resorting to presumptions, but should give weight to the facts which show the lack of intent or purpose in the particular case. This method of making proof of intent to defraud, as necessarily flowing from acts whose legitimate tendency is to defraud, does not absolve the prosecution from the requirement of showing intent, when that is an essential element of the crime, by the rule of evidence which requires proof in criminal cases to be sufficiently certain as to exclude reasonable doubt of guilt. If the burden of proof shifted to the defendant when the prosecution has introduced testimony from which the jury, in the absence of other proof, may infer the presence of guilty purpose or intent,—especially if the defendant was required to establish this want

of intent beyond a reasonable doubt,—the accused may be convicted when the proof leaves in the minds of the jurors a reasonable doubt of his guilt as to an essential element of the crime. In the present case, if the jury should find that the natural and probable consequence of the acts of McKnight charged and proven under the counts of the indictment was to defraud the bank, then the jury would be authorized to conclude that such was his purpose, in the absence of proof in the case rendering such inference inadmissible. While the jury may be properly instructed as to the manner in which intent—"dwelling in the mind, invisible to the outward sight"—may be proven from inferences from acts done, the burden of proving evil intent, where an essential element of the crime, is with the prosecution, and does not shift to the accused. Chaffee v. U. S., 18 Wall. 516, 21 L. Ed. 908; Jones, Ev. § 175; Whart. Cr. Ev. § 344; Com. v. McKie, 1 Gray, 61, 61 Am. Dec. 410.

The learned judge justified the charge given in this respect by the case of Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. That case was a prosecution against a bank cashier for violation of the section of the statute under which McKnight is prosecuted in this case. The question here involved arose on exception to that part of the charge of the court which said:

"The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value, and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction."

On this charge the chief justice said:

"Undoubtedly in criminal cases the burden of establishing guilt rests upon the prosecution from the beginning to the end of the trial. But when a prima facie case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused. The circuit court, in this part of the charge, was dealing with the intent to defraud the bank, and rightly instructed the jury that, if they found certain facts, such intent was necessarily to be inferred therefrom. This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. 1 Greenl. Ev. § 18; 3 Greenl. Ev. §§ 13, 14; Jones, Ev. § 23; Bish. Cr. Prac. §§ 1100, 1101, and cases cited. The circuit court, however, told the jury that the presumption of the intent to defraud and injure, if the facts were found as stated, was not conclusive, but, in substance, that its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in other words, that, as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidence of at least equivalent weight were adduced to the contrary. The question of the particular intent was not treated as a ques-

tion of law, but as a question to be submitted to the jury, and, conceding that the statement of the court that the evidence to overcome the presumption must be sufficiently strong to satisfy the jury 'beyond a reasonable doubt' was open to objection for want of accuracy, we are unable to perceive that this would have tended to prejudice the defendant, when the charge is considered as a whole."

The chief justice then goes forward to show that in the particular case the inaccurate instruction had worked no harm to the accused, and a reversal on that ground was refused. But clearly the chief justice did not mean to approve any such doctrine as requires the defendant to take upon himself the burden of establishing his innocence. This is shown by the emphatic declaration that in criminal cases the burden of establishing guilt rests upon the prosecution from the beginning to the end of the trial. In the case then before the court, as we read it, no other doctrine was intended to be established than the familiar one thus stated in the opinion. A reversal in that case was prevented because the inaccurate charge, in the opinion of the court, worked no harm, in view of the repeated and emphatic instructions that the crime, and every element of it, including the intent to defraud the bank, must be proven beyond a reasonable doubt. In the present case the language used was not, as the learned trial judge seemed to conclude, a statement of the doctrine of the supreme court, but was the language of the trial judge which is denominated as inaccurate by the chief justice. It is true that the charge below in the present case lays down the correct rule in other parts of the charge, but it is also true that the jury was told:

"The burden of proof in the case is upon the United States, and, subject to what will be hereafter said upon the question of proof of intent, continues throughout the case until the United States has shown by the evidence, to the exclusion of a reasonable doubt, that the defendant is guilty."

Later the court gave the charge as to proving the intent of the accused, which is excepted to. We cannot say that this was harmless error. The intent to defraud was a vital element of the case to be made out by the United States. If McKnight loaned the money to irresponsible persons for an illegal purpose, as the government's testimony tended to prove, the intent to defraud might well be inferred. If, on the other hand, as the defendant's testimony, if credited, tended to prove, the loan was made to persons believed to be good, for no illegal purpose, the intent to defraud would be negatived. In any aspect, the question was for the jury, under instructions which kept in view the settled rule of the criminal law which requires the allegations of the indictment as to the essential elements of the crime to be established by the government by proof beyond a reasonable doubt.

2. We might conclude this opinion with the disposition just made of the question raised, but, in view of a new trial of the case, we deem it proper to notice other assignments of error as to matters which have been fully argued, and concern questions likely to again arise.

In order to support the allegations of count 2, upon which there was a conviction, the government proposed to introduce in evidence a copy of a certain paper showing the agreement of McKnight, Britt,

and Reeder, and other aldermen of Louisville, to "caucus" together in order to control legislation and official appointments in said city. This was the agreement, as is claimed and charged in the indictment, which was the consideration for paying to Britt and Reeder the sum of $2,000 of the funds of the bank. This document was an important item of evidence for the government, and highly incriminating in character against the accused. After the introduction of evidence tending to show that the original was last seen in the possession of the defendant, the district attorney proceeded to offer a copy in evidence, when, as the record discloses, the following occurred:

"A. My recollection is that I was in his office, and he either had this paper on his desk or brought it in there,—I don't remember which,—and I made a copy of it in pencil. Q. What did he say when he brought it to you? A. I don't remember any conversation that took place between us at that time. Q. But he had a paper in his possession, which you copied in pencil, and then you made that copy from the pencil copy. A. Yes, sir. Q. Is that a copy or the original? A. This does not contain any name of McKnight, does it? Q. I think so. A. It seems to me that the 'McKnight' was put in here in pencil. Mr. Breckinridge: We want to save an exception to any statement of the contents of that paper. The Court: You can tell whether that is an accurate copy of the paper you saw in the defendant's possession at this time? A. I think it is. I believe it is. Q. Did you attempt to make an exact copy when you wrote these copies? (Question objected to by the defendant. Objection overruled, to which the defendant, by counsel, excepted.) A. I did. Q. You say you do not remember anything that was said to you by Mr. McKnight at the time he told you he had that paper? A. No, sir; I do not recollect anything.—any conversation at all that we had at that time. Q. Do you remember before that time of him having told you anything about it? A. Yes, sir; my recollection is he mentioned something about the matter. Q. What did he say about it? A. Simply that he had the paper. I don't think I had ever seen the paper up to that time that I saw it on his desk. Q. What did he tell you before you saw it on his desk,—about it? A. I do not remember of any conversation at all that passed between us. Q. Will you please read that paper? (Question objected to by the defendant.) By the Court: The paper from which this was taken was last found in the possession of the defendant. Now, if the district attorney chooses, he can demand the production of that paper. Mr. Hill: I do demand that paper. The Court: Is it produced, or is it desired to produce it, by the defendant? Col. Breckinridge: We deny the right of the district attorney to make the demand. By the Court: That, of course, is involved in your objection. The question is, do you produce it? Col. Breckinridge: We want to save exception to your honor's suggestion. The Court: You can reserve any exception you please. The court rules this can be received as secondary evidence only after a demand has been made for a production of the original. The district attorney has demanded, in the presence of the court, the original paper. Col. Breckinridge: The defendant first excepts to the demand being made now, as not being legal; second, there is no such paper in his possession. The Court: That is not the question. You do not produce the paper? Col. Breckinridge: In answer to the demand of the district attorney, counsel for the defendant announce that there was no such paper in existence. Therefore, it never was in his possession, and no such demand can be complied with. By the Court: The essential thing is, you decline to produce it. Col. Breckinridge: No, sir; 'declining' means we have the power to do so. The Court: Oh, no. Col. Breckinridge: I should think it does. The Court: You decline to produce it. The defendant failing to produce the paper upon the demand of the district attorney, this can be offered. Col. Breckinridge: We desire an exception to your honor's ruling that the district attorney has a right to demand a production of the paper from us. The Court: The court does not rule anything, except to inquire whether the district attor-

ney has made this demand. The court says it cannot allow the contents of that paper to be presented unless the proper foundation has been laid by a demand for the production of the original. The district attorney, as I understand it, has made this demand now for the production of the original paper, which was last heard of in the possession of the defendant. That demand not having been complied with, the court rules that this paper may be read. Col. Breckinridge: To that the defendant excepts. We desire to go further, and not merely to except, but to say in answer to that demand that there was no such paper ever in the possession of the defendant, and therefore he does not decline to deliver the paper, but answers that there is no such paper to deliver. The Court: That is a question of proof, entirely. Counsel cannot testify for the defendant. Col. Breckinridge: No one can make answer for the defendant but the defendant himself. The Court: He can testify in rebuttal to this proposition. Col. Breckinridge: He can do more than that, and we object to the statement as to his right to testify. The Court: I did not mean he could testify in person, but he can introduce testimony in rebuttal of the proposition. (And thereupon the jury were told by the court to disregard the statement first made.) Col. Breckinridge: A demand is made in the presence of the jury, and the defendant simply answers the demand which, under the permission of the court, and in the presence of the court and this jury, the district attorney has made. By the Court: The court makes no suggestions, except as stating the rule of law in regard to proof by secondary evidence of the contents of this paper on the part of the United States. The rule of law is perfectly familiar to counsel, as well as to the court, that secondary evidence cannot be produced unless the original is accounted for, and the foundation for the introduction of secondary evidence is laid, which is well understood to be a demand on the party in whose possession the paper was last seen to produce it. Then, if that paper is not produced, the question is concluded, or evidence can be heard on one side or the other as to whether the paper was ever in existence; and that is a matter for the jury to determine after hearing all the testimony. Col. Breckinridge: If your honor will allow me, one ground upon which we make objection is that there is already testimony that the government took possession of all the papers that were in that bank, including this dictation. Now, your honor has ruled, as a matter of law, that the defendant is obliged to produce that paper, when there is already testimony that all the papers were taken possession of by the government, so that your honor has ruled that secondary evidence can be introduced simply upon a demand on the defendant for the production of the paper, without any evidence going to explain whether that paper was or was not in his possession. By the Court: Counsel, if he will recall, will understand that the court has made no such rule as he states. Furthermore, there is no proof that this paper was ever taken by any officer of the United States. Mr. Hill: Or that it was one of the bank's papers. The Court: That suggestion is very proper. So, to put an end to the matter, the court permits the witness to answer the question. Col. Breckinridge: We desire to object to the signatures because there is no proof that the signatures were made to that paper. The court allows the paper to be read? The Court: Yes. (Exception for the defendant.) Q. Read that. A. 'Louisville, Ky., Feb. 5, 1896. We do this day and date agree with one another, and bind ourselves on our sacred words and honors, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the board of aldermen of the city of Louisville; that we will so caucus with our friend,'—then with that blank filled in afterwards in pencil, with 'J. M. McKnight'— Q. Was that in the original? A. That is my recollection. I made a copy of it, and my recollection is, I left that out. Q. Read it right along. A. 'And act wisely, and secure for our friends an equal division of the offices and any profits that may arise therefrom; that we, as men and members of the upper board, will not allow the mayor to force upon us any appointment that we do not deem wise and to our interests, and, in so doing, will not act the first night on any proposition sent in by the mayor, but will take one week for consideration and caucus.

Now, we have calmly considered the above, and do again pledge ourselves, one to the other, before subscribing our names this day and date, February 5th, 1896, in the presence of one and the other.' By Mr. Hill: I ask that he be permitted to read the signatures. The Court: Does he know that those signatures were there? Q. Were those signatures on the original? A. Yes, sir. By Mr. Breckinridge: Does he know the signatures? The Court: He says they were there. A. I don't know the signatures of these gentlemen."

In what thus took place between the court and counsel, it is claimed that error was committed by the trial judge in two particulars: (1) In permitting the defendant to be called upon to produce the paper in open court, and while upon trial before the jury; (2) in the comments of the court upon the right of the defendant to testify in his own behalf. Of the first alleged error, it is argued that to thus call upon the defendant for the production of this criminating document was to violate the immunity secured to him by the fifth amendment to the constitution of the United States, providing that no person in any criminal case shall be compelled to be a witness against himself. The construction of this amendment was before the supreme court of the United States in the leading case of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in which the opinion is by Mr. Justice Bradley, whose language has been very frequently cited with approval in later cases before the supreme court. In that case the court had under consideration a section of the customs revenue laws of the United States, authorizing a court of the United States, in revenue cases, on motion of the government's attorney, to require the production of books, invoices, and papers in court, or else the allegations of the attorney to be taken as confessed; and it was held that such act was unconstitutional and void, as applied to suits for penalties or forfeitures of the party's goods, as being repugnant to the fourth and fifth amendments to the constitution. In the course of his elaborate opinion in that case, which may be justly styled one of the great opinions of the distinguished justice who wrote it, reference is made to the fact that, in empowering the courts of the United States to compel parties to produce books and papers in their possession containing evidence pertinent to the issue, the right is limited to cases and under circumstances where they might be compelled to produce the same (books or writings) by the ordinary rules of proceedings in chancery; and Justice Bradley says:

"The restriction of this proceeding to cases and under circumstances where they [the parties] might be compelled to produce the same [books or writings] by the ordinary rules of procedure in chancery shows the wisdom of the congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now, it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime or to forfeit his property. And any compulsory discovery, by extorting the party's oath, or compelling the production of his private books or papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman. It is abhorrent to the instincts of an American. It may suit the purposes

of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In that case it was held that the compulsory production of books and papers in a case which sought the forfeiture of estate was within the reasoning of criminal proceedings, and the case leaves no room for doubt that the compulsory production of a criminating document by the accused when on trial for crime is compelling him to testify against himself, within the meaning of the fifth amendment to the constitution. The chief justice and Justice Miller dissented from the opinion of the majority, holding that the compulsory production of documents did not come within the fourth amendment, as an unreasonable search or seizure, but concurred with the majority in holding the act to be in violation of the fifth amendment, and, in effect, equivalent to a subpœna duces tecum, disobedience to which, though not punishable by fine and imprisonment, "is one which may be made more severe, namely, to have charges of a criminal nature taken as confessed, and made the foundation of the judgment of the court." Nor is it essential to the ends of justice that the accused may be thus called upon to produce evidence of a documentary character. The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so. The court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing. The notice would therefore be futile as a means of compelling the production of the document, and refusal to comply therewith might work injustice to the defendant in the inferences drawn from its nonproduction. The rule in this respect is thus stated in 3 Rice, Ev. p. 45:

"If the indictment alleges that the accused is the custodian of a document needed in evidence, or where the evidence in the case shows it to be in his possession, or that of an accomplice who refuses to produce it on the ground of its criminating tendency, the state is not obliged to give notice to produce it."

This statement seems amply sustained by well-considered cases. U. S. v. Reyburn, 6 Pet. 352, 8 L. Ed. 424; State v. Gurnee, 14 Kan. 111; U. S. v. Doebler, Baldw. 519, Fed. Cas. No. 14,977.

In the case just cited the question is elaborately discussed by Mr. Justice Baldwin, of the supreme court, sitting at the circuit. Among other things, that learned judge says:

"The secondary evidence was in all these cases admitted on the ground of the paper being in the possession of the defendant or third person, which accounted for their nonproduction, and showed that there has been no default in the prosecutor, where the paper had been secreted to protect the prisoner, or is in his own possession. In such cases the admission of the

secondary evidence depends on tracing the original paper to the hands of the defendant or third person, from whom it cannot be procured, and not on the question of notice. This is the rule laid down in Rex v. Layer, 6 How. St. Tr. 319, and adopted in Le Merchant's Case, 2 Term R. 203, note, in Snell's Case, 3 Mass. 82, and in U. S. v. Reyburn, 6 Pet. 366, 368, 8 L. Ed. 424. The evidence goes to the jury, who will decide whether the paper has been so traced. It is a legal foundation for a verdict against the defendant, as if the original had been produced, and it is not restricted to papers which are the immediate subject of the indictment. Rex v. Gordon, 1 Leach, 300, note."

See, also, 3 Russ. Crimes, 373; McGinnis v. State, 24 Ind. 500.

A perusal of the decisions of the supreme court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself. The right to such protection existed at the common law, and was carried into the constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment. In the present case the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document which it was alleged contained the corrupt agreement which was the basis of the note given by irresponsible persons for the funds of the bank by McKnight's direction. The production of such a paper would have been self-criminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before the jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this procedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution. Recurring to the opinion of Mr. Justice Bradley in the Boyd Case, supra, we may quote:

"It may be, it is the obnoxious thing in its least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be legally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the court to be watchful of the constitutional right of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'Obsta principiis.'"

In the course of the colloquy as to the admission of secondary evidence as to the writing in question, the comment was made concerning the right of the accused to testify which is here complained of. The court having observed that counsel could not testify for the defendant, his counsel responded:

"No one can make answer for the defendant but the defendant himself. The Court: He can testify in rebuttal to this proposition. Col. Breckinridge: He can do more than that, and we object to the statement as to his right

to testify. The Court: I did not mean that he could testify in person, but he can introduce testimony in rebuttal of the proposition. (And thereupon the jury were told by the court to disregard the statement first made.)"

The act of congress of March 16, 1878, provides:

"That in the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, territorial courts and courts-martial, and courts of inquiry, in any state or territory, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such a request shall not create any presumption against him."

The act was under consideration in the case of Wilson v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. In that case the comprehensive opinion of Mr. Justice Field leaves little to be added in a discussion of the provisions and scope of this act. The act was passed in order to give the defendant the privilege denied him at the common law of testifying in his own behalf. It recognized that, while such a statute might be available in the vindication of the innocent, it does not permit enforced testimony from one on trial for an offense. It is distinctly provided that a failure to testify should not create any presumption against the defendant. In the case of Wilson v. U. S., supra, Mr. Justice Field said:

"To prevent such presumption being created, comment—especially hostile comment—upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."

In many of the states it is especially provided that no mention shall be made of the failure of the accused to testify. This provision is not in the federal statutes, but, as the supreme court has construed it, it is only available to the defendant if all reference thereto is withheld. The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege puts him in a position where the jury will draw inferences against him from his silence, and the statute which was intended as a shield for protection will be turned into a weapon of attack in establishing his guilt. There are two lines of decisions in the state courts arising upon facts disclosing a reference to this right of the defendant to testify by the court or prosecuting attorney. One line of cases holds that, when any reference has been made in the presence of the jury to the fact that the accused may testify, the error is irretrievable, and no subsequent instruction can dispel the effect of the allusion. In the very instruction not to draw inferences from the silence of the accused, the fact is brought to the minds of the jury that he may, if he will, testify in his own behalf. Another line of cases holds that when the jury are told, in clear and emphatic terms, that no inference can be drawn against the accused because of his failure to testify in his own behalf, this dispels the effect of the allusion, and the error is cured. In the Wilson Case, supra, while the question was not directly before the court as to whether such an instruction would cure the error, Mr. Justice Field said:

"It [the court] should have said that counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify."

If this will prevent a reversal, where unfortunately reference is made to the right of the defendant to testify in his own behalf, we do not think the record discloses in this case such correction of the impression as must have been left upon the jury by the statement of the judge that the defendant might testify in rebuttal. The jury was not told specifically what the statement first made was, and, if the jury understood the court to refer to the right of the defendant to testify, they were not told, as Mr. Justice Field says is the duty of the court under such circumstances, in clear and emphatic terms, that no importance whatever could be attached to the failure of the defendant to testify. Nor does it make any difference that the defendant afterward testified. As has been said in some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak.

We are of the opinion that what was said by the trial judge in response to the objection of counsel as to the right of the defendant to testify was not cured by any subsequent statement to the jury upon that subject.

3. When this case was first before this court (McKnight v. U. S., 38 C. C. A. 115, 97 Fed. 208), it was held that the count charging the Britt and Reeder note transaction was valid as against the objection then urged that it did not charge that the $2,000 was converted to the use of McKnight. We then held that the indictment sufficiently averred the conversion, in the allegation of the wrongful payment of the money to Britt and Reeder for the unlawful purpose charged against the defendant. In charging the jury, the court told them, in language of which there can be no just complaint, that the elements of the offense of embezzlement were defined in the statute under consideration to be as follows:

"First, the person accused must have been an officer of a national bank at the time the offense, if any, was committed by him; second, he must, as such officer, have been intrusted by said bank with the care and custody of its money; third, he must have fraudulently appropriated to his own use some of the money so intrusted to him; fourth, such fraudulent appropriation thereof must have been with the intent to injure or defraud the bank."

Subsequently the court charged:

"I have already endeavored clearly and explicitly to state to you the four essential elements necessary to constitute the offense charged in this count of the indictment, and I repeat to you that each of those elements must be established to your satisfaction by the evidence to the exclusion of a reasonable doubt; but I equally as explicitly charge you that if you believe from the evidence, to the exclusion of a reasonable doubt, that each such element of the offense charged is so proved in its substance and general scope, it is sufficient to warrant a conviction of the defendant, whether all of the particulars set forth in the indictment are specifically and exactly proved or not; and therefore if you believe from the evidence, to the exclusion of a reasonable doubt, that the defendant fraudulently converted the $2,000 mentioned in this count to his own use, with the intent to injure or defraud the German National Bank, —he being then its president, and intrusted with the custody of its money, if such are the facts,—then you should find the defendant guilty under this count, whether Reeder or Britt, or either of them, was insolvent or not, or whether any person or persons

other than said Britt and Reeder signed so-called caucus agreement or not; or whether any of the persons named in this count of the indictment ever in fact thereafter caucused with the defendant."

The theory of this count of the indictment is that McKnight, having the custody and control of the funds of the bank, as president, paid or directed to be paid $2,000 thereof to Britt and Reeder for the purpose of bribing them to "caucus" with him, and "stand together" to secure division of the offices and profits ensuing therefrom, with the intent to defraud the bank, by this means, of the funds so intrusted to him. That this transaction may also have taken the character of a loan does not deprive it of the essential elements of criminality, if proved as charged. U. S. v. Fish (C. C.) 24 Fed. 585. This fraudulent scheme involved the turning over of $2,000 of trust funds upon the written obligation of insolvent persons, as charged in the indictment. The court charged that McKnight might be convicted if the jury believed that he fraudulently converted the $2,000 to his own uses with intent to defraud the bank; he being then its president, and intrusted with the custody of its money. And in that connection the court told the jury that it would make no difference whether Britt and Reeder were insolvent or not. But if the money was given to Britt and Reeder upon their paper, which they could be made to pay, it was, it seems to us, a very weighty circumstance in determining whether McKnight intended to defraud the bank or not. Indeed, if Britt and Reeder were responsible financially, it is difficult to perceive how the bank could be defrauded. It is to be remembered that McKnight is here charged with an offense under the banking laws of the United States, not with the bribery of aldermen. This may be, and, no doubt, is, a separate offense against the laws of Kentucky. It is important in this case only as a part of the scheme by which he is charged to have embezzled the funds of the bank. Britt and Reeder could certainly not defend against the note in the hands of the bank because McKnight had intended to bribe them. In determining his guilt, therefore, under the charge made, it was important to know what McKnight's understanding was as to the solvency of the makers of the note. While technically true that McKnight might be convicted if he intended to defraud the bank by paying out trust funds to Britt and Reeder, yet in determining that issue the jury should not have been allowed to ignore the solvency or insolvency of the makers of the note, because no fraud upon the bank could result if it received a good note, although its proceeds were put to bad uses. It is quite true, as the learned judge charged, that, if the money was paid to Britt and Reeder with the intent and in the manner charged, it is wholly immaterial whether the caucus agreement was fully signed, or ever, in fact, carried out.

4. It is further alleged that it is necessary to prove that McKnight did the things charged in the indictment without the consent of the board of directors or the discount committee. The embezzlement feature of the act was before the supreme court of the United States in Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966. In this case it was held sufficient to charge that the defendant was the president of a national bank association, and that by virtue of

his office he received into his possession the funds of the bank, and fraudulently converted them to his own use. Mr. Justice Gray, delivering the opinion of the court, said:

"There can be no doubt of the sufficiency of the first count on which the defendant was convicted. It avers that the defendant was president of a national bank association; that by virtue of his office he received and took into his possession certain bonds, fully described, the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged. U. S. v. Britton, 107 U. S. 655–659, 2 Sup. Ct. 512, 27 L. Ed. 520; Rex v. Johnson, 3 Maule & S. 539–549; Starkie, Cr. Pl. (2d Ed.) 454; 3 Chit. Cr. Law, 981; 2 Bish. Cr. Proc. §§ 315–322."

In the case of U. S. v. Britton, 108 U. S. 193, 2 Sup. Ct. 529, 27 L. Ed. 701, the court had under consideration an indictment attempting to charge willful misapplication of certain funds of the bank, with intent to defraud the association, and held insufficient a count which charged the president of the bank with procuring the discount by the bank of a note not well secured, and of which both the maker and the indorser were insolvent, to the knowledge of the president, who applied the proceeds to his own use. Mr. Justice Woods, delivering the opinion of the court in this case, said:

"One branch of the business of a banking association is the discounting and negotiating of promissory notes; and this to be done by its board of directors, or duly authorized officers or agents. Rev. St. § 5136. There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note, if they see fit; and it might, under certain circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears, the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts, in the utmost good faith, and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of its discount. But whether the discount of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes would be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution. The count under consideration charges nothing more than this against the defendant. We are of the opinion, therefore, that it does not charge an offense under Rev. St. § 5209."

In a later case (Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830), in which Evans was indicted for aiding and abetting a cashier in misappropriating the funds of a bank, the sufficiency of the indictment was under consideration. Mr. Justice Brown, delivering

the opinion of the court, distinguished this case from the case of U. S. v. Britton, and said:

"It is objected, however, to this count, that there was no averment that the cashier, in discounting the note, acted in excess of his powers, or outside of his regular duties; nor was there any averment that the cashier was not the duly authorized officer of the bank to discount paper; nor was there any averment that the discount was procured by fraudulent means, or that Evans was at the time of such discount insolvent, or knew himself to be so. It was held by this court in Bank v. Dunn, 6 Pet. 51, 8 L. Ed. 316, that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present day. Morse, Banking, § 117. If the directors had authorized their cashier, either generally or in this particular case, to discount the paper, it was clearly matter of defense. But even if he did possess such power, and willfully abused it by discounting notes which he knew to be worthless, and did this with the deliberate intent to defraud the bank, it is not perceived that his criminality is any less than it would have been if he had acted beyond the scope of his authority."

In the present case, while it is averred that the transactions of McKnight were without the consent of the board of directors or of the discount committee, when the proof tended to establish that McKnight loaned the funds of the bank to irresponsible persons under the facts set forth, this certainly would raise no presumption that the board of directors had authorized the transactions; and if the defendant relied upon such authority, as Justice Brown says:

"If the directors of the bank had authorized their cashier, either generally or in this particular case, to discount paper, it was clearly matter of defense."

In criminal cases, as we have seen, the burden of proof rests upon the government to make out the guilt of the defendant beyond the existence of a reasonable doubt; but when it is shown that the illegal transaction had the character of that charged in the indictment, and the authority of the board of directors is relied on to sanction it, it would be matter of defense. In the Britton Case Mr. Justice Woods said that under the allegations of that indictment the defendant might be convicted, although the board of directors had discounted the note knowing the facts. Undoubtedly, in making out the offense of embezzlement, it is essential to show the fraudulent conversion of the funds of the bank; and if the directors, knowing all the facts, and acting in good faith, approve of the discount or other appropriation of the bank's money, the crime would be deprived of one of its essential elements. In the Britton Case, supra, the court was dealing with the misapplication feature of the statute, and, for aught that appears in the record, the misapplication charged might have consisted of the discount of a note concerning which the board of directors were fully advised, and had authorized such action. But where the proof shows transactions so extraordinary as those charged in this indictment, and which the testimony tended to establish, we think the issue may be submitted to the jury without affirmative proof as to the want of consent of the directors. And when such consent is relied upon as a defense, we think it essential to prove that the directors acted with knowledge and in good faith. Certainly if the directors conspired with the president to defraud the bank, and there-

fore gave consent to the appropriation of the bank's funds, it would be no defense to a prosecution under this act. U. S. v. Eno (C. C.) 56 Fed. 218. In the case of U. S. v. Taintor, Fed. Cas. No. 16,428, 11 Blatchf. 374, where the defendant had been charged with embezzling, abstracting, and willfully misapplying the funds of a national bank, it was offered to show that the purposes for which the funds were taken were known to the president and some of the directors of the bank, and were sanctioned by them, and the dealings were for the interest and benefit of the bank, and believed by the defendant to be sanctioned by the president and some of the directors, although without any resolution of that body. This proof was offered for the purpose of showing that the dealings were carried on without any intention of injuring or defrauding the association. After consideration, upon motion for new trial, the circuit court, consisting of Woodruff, circuit judge, and Blatchford and Benedict, district judges, held the testimony incompetent, and overruled the motion. In the present case we have not discovered any testimony in the record tending to show the consent of the board of directors to the transaction. It is true that one member of the discount committee is alleged to have been consulted, but it does not appear that he was fully advised as to the facts. We are not willing to sanction a doctrine which prevents conviction for embezzlement, because the funds were converted with the consent of the board of directors, unless it appears to have been given in good faith and with knowledge of the facts. Where such circumstances are disclosed as indicate that such may have been the action of the board, as in Britton's Case, supra, it will be incumbent upon the government to negative the consent of the directors of the bank. But where the allegations and proof raise no such presumption of authority, if the accused relies upon such consent as removing one essential element of embezzlement or misapplication, it is a matter of defense, to be proven by him. Evans v. U. S., 153 U. S. 593, 14 Sup. Ct. 934, 38 L. Ed. 830.

For the reasons hereinbefore stated, the decision of the district court will be reversed, and the case remanded for a new trial.

UNITED STATES v. GERMAN.

(District Court, W. D. Kentucky. April 12, 1902.)

1. CRIMINAL LAW—TRIAL—SUBMITTING QUESTION OF INSANITY AT TIME OF TRIAL.
   Where the question whether a defendant in a criminal case was insane at the time of the trial is submitted to the jury for a preliminary finding, a unanimous verdict of insanity is required, to authorize the court to take action thereon.
2. SAME—ARGUMENTS OF COUNSEL.
   Where counsel for the accused in a criminal trial comments to the jury, in argument, upon the appearance and conduct of defendant during the trial, for the purpose of supporting a claim that he is insane, counsel for the government is entitled to comment on the same matters in reply.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1681.

3. NATIONAL BANKS—OFFENSES BY OFFICERS OR AGENTS—PROOF OF INTENT.
In a prosecution, under Rev. St. § 5209, against an officer or clerk of a national bank for embezzlement or the making of false entries, with intent to injure or defraud the bank or to deceive, if the acts charged are proved the intent must be inferred therefrom; and, while such inference or presumption is not conclusive, it throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy the jury, beyond a reasonable doubt, that there was no such guilty intent in the transaction, though, if the use of the words "beyond a reasonable doubt" was technically erroneous, such use was not prejudicial to the case, when the charge is viewed as a whole and in connection with the uncontradicted evidence of the acts which constituted the prima facie case.

Prosecution for Violation of National Banking Law. On motion for new trial.

R. D. Hill, U. S. Atty.
Augustus E. Willson, for defendant.

EVANS, District Judge. The defendant, a clerk in the Third National Bank of Louisville, Ky., was indicted, under section 5209 of the Revised Statutes, for knowingly making many false entries on the books of that bank, with intent thereby to injure and defraud it. He was convicted, and his motion for a new trial is now to be disposed of.

When the case was called for trial at this term the defendant's counsel moved the court for a continuance upon a statement and affidavits which claimed that the defendant was then of unsound mind, whereupon the court, in order to be officially and satisfactorily informed as to whether the motion should be granted, appointed three very competent (not to say eminent) physicians to make a careful and impartial examination of the accused. They did so, and made report that in their opinion he was entirely sane, and, upon considering that report and the affidavits filed by the accused, the motion for a continuance was overruled. When the case was tried, the court, in its charge to the jury, after having admitted all the testimony offered in support of the plea of present insanity, submitted a preliminary question to the jury, viz., was the accused at that time of unsound mind? The court asked the jury, in the event they should be unanimously of opinion that the accused was at that time insane, to report orally to the court, stating that in that event he would advise them as to their future course; it being the intention of the court, though not announced, that, if the accused was found to be then insane, to advise the jury to disagree on the plea of not guilty, so that the case could hereafter be again tried if the mental condition of the accused justified it. The jury were told that, if they did not so agree unanimously, then that they should proceed to consider and determine the case upon the other issues. The accused excepted to the suggestion or requirement of unanimity in this connection, though upon what ground is not quite clear. The obvious ground upon which the court acted was that a verdict or any binding conclusion upon the preliminary question could not be reached by a minority, merely, nor otherwise than by unanimity; and I suppose it

would hardly be insisted that, even if a few of the jury thought that the accused was then insane, their opinion alone could be made binding upon anybody, although, if any one of the jury so thought, he was at liberty not to agree to an ultimate verdict of guilty.

The court recalls no testimony admitted which was incompetent or prejudicial to the defendant. Little of the testimony was seriously objected to, and that part of it which was, appears to the court to afford aid in illustrating some issue in the case. It seems unnecessary to go into details in respect to them. The opinions of witnesses as to the sanity of a human being are admissible evidence, and a layman, as well as a physician, is competent to give one, although the jury will judge as to the value and weight of such opinions, considering them with reference to the experience and capacity of those who give them. Brown v. Com., 14 Bush, 405. While the rule appears to have been ignored, or at least not followed, by the circuit court of appeals for this circuit in the recent case of Robinson v. Railroad Co., 50 C. C. A. 357, 112 Fed. 484, still in the case of Glycerine Co. v. Kizer, 113 Fed. 894, decided a few days later, that court yielded to the well-established doctrine that the competency of witnesses to give opinions is a preliminary question, which the trial court must determine in its discretion, and with the advantage of seeing the witnesses who are produced. That rule was followed in this case, as I suppose it ought to be in every case, and I think the discretion of the court in deciding that the witnesses were qualified to give an opinion was in no way abused. As indicated, however, it was for the jury alone to judge of the value of these opinions.

The charge of the court was prepared with industrious care, and I see no reasonable ground for regarding it as erroneous. Some parts of the comment of the court upon the evidence were objected to by counsel for the accused, but I think all of these matters were clearly submitted to the decision of the jury alone; and they were not only told that they were the sole judges of the weight and credibility of the evidence, but they were told, also, that they were in no way bound by the comments of the court upon the testimony. This seems to conform to an old and hitherto well-established rule in that regard. Indeed, the comments of the court were entirely neutral and colorless, and, in the main, only placed the points argued by counsel upon the one side and the other in antithesis, leaving it to the jury to determine which opposing theory was the correct one. It should not be overlooked that such comments are usually made for that very purpose in the practical workings of a trial.

During the argument the counsel for the accused pointed out to the jury the fact that the accused had during the entire trial sat stolid and still, and had in no way appeared to afford, and had not afforded, counsel any assistance at the trial. In replying the attorney for the United States made some comment upon this argument and upon the facts stated, whereupon the counsel for the accused arose and objected. The court thought that the district attorney had not done more than respond to what the counsel for the accused had in this connection himself voluntarily brought into the argument, and overruled the objection. I adhere to that ruling, and think it was mani-

festly proper, though it might not have been so if the defendant's counsel had not in his argument to the jury and in the first instance himself brought the subject to the attention of the jury. His client, in the presence of the jury, had, with remarkable powers of endurance, sat during the trial for four consecutive days without saying a word, and almost without changing position while the sessions lasted, and this fact was made matter of comment and argument by his own counsel in support of the plea that he was insane. It would be carrying tenderness for persons accused of crimes against the United States to a ridiculous excess, as it seems to me, if the attorney for the United States, under these circumstances, may not at least reply to such an argument of counsel for the person accused, even if he might not be permitted otherwise to allude to the conduct of the defendant occurring in the presence of the jury while the trial was in progress.

The counsel for the accused, in the course of his argument to the jury, also claimed that there was a failure of proof as to the intent charged in the indictment, and argued that there was no proof that the accused was ever benefited by any entry alleged to have been made, and that there was no evidence that he ever got any money from making them. When the district attorney argued to the contrary, and urged that the accused had been able to get many thousands of dollars of the bank's money by means of the entries, the counsel for the accused objected, but the court overruled the objection; expressing the opinion that the argument was legitimate in reply to that of the defendant's counsel, and probably upon the evidence as well. I think counsel for one side in each of these matters had the right to follow counsel on the other in the respects indicated, and that the accused was in no way legally prejudiced thereby.

Section 5209 of the Revised Statutes of the United States is in this language:

"Every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

Another ground upon which the motion for a new trial is urged is that the court erred in charging the jury upon the subject of the proof of the intent mentioned in that section. After pointing out to the jury that the accused was presumed to be innocent until his guilt was established by the evidence to the exclusion of a reasonable doubt, the court, among many other things, charged the jury that that principle and presumption should be applied separately to each of the 13 counts in the indictment, and said:

"There are six elements necessary to make up each one of the offenses charged, and you should believe that each one of those elements has been established by the evidence to the exclusion of a reasonable doubt before you would be authorized to convict upon any particular count. I also charge you to consider each count, and the evidence applicable thereto, separately from the others."

The jury were told that these elements were:

"First, that the accused at the time of doing the alleged acts was a clerk in the Third National Bank; second, that while acting as such he made on a certain book of the bank the entry described in the count which you may be considering; third, that such entry meant a certain thing alleged in the count as explanatory thereof; fourth, that, when he made it, it was false; fifth, that the accused well knew it to be false when he made it; and, sixth, that, knowing it to be false, he made the entry with the intent to which I have referred. I repeat that you must believe, before you can convict upon any one of the counts, that each one of these elements necessary to constitute the offense charged in the count has been established by the evidence applicable to that count to the exclusion of a reasonable doubt. If you do not so believe, you should acquit the defendant as to each count as to which you entertain such reasonable doubt."

The court then observed that:

"At this point I may say to you that the burden of proof, speaking generally, is upon the United States; but if you shall believe from the evidence that the accused was a clerk in the said Third National Bank, that he made the entries described in the respective counts of the indictments upon the books of the bank, and that he then knew them to be false, then the burden is upon him to show the absence of an intent thereby to defraud or deceive or injure, to which I have referred."

This outline of one feature of the charge has been given in order to an intelligent presentation of the principal objection to the charge, and which seems to arise upon the use by the court of the following language:

"The court further charges you that the rule of law in regard to intent in this case is this: The intent to defraud or to deceive is to be inferred from willfully and knowingly doing that which is wrongful or illegal, and which, in its necessary consequences and results, must injure or deceive another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act. But this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction. The presumption is that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action."

This language was read by the court from the opinion of the supreme court of the United States in the case of Agnew v. U. S., 165 U. S., at page 53, 17 Sup. Ct. 240, 41 L. Ed. 624. It had been used by the trial judge in charging the jury in that case, and was criticised as unsound by counsel in arguing the writ of error before the su-

preme court; but that court thought it was correct, and so held, in plain and explicit language, and affirmed the judgment of conviction. That was a case also arising under section 5209 of the Revised Statutes, against a national bank officer, and is exactly in point. No case, therefore, could more perfectly be an authority for another than that is for this. In seeking for light as to the law of this case, and as to the proper construction to be put upon section 5209, I naturally looked for decisions by the supreme court upon the section referred to. I had done this, also, in the somewhat earlier case of U. S. v. McKnight (D. C.) 112 Fed. 982, now under submission in the circuit court of appeals on a writ of error, and where I had also charged the jury in the same way, and where I, of course, laid down the same rule upon the sole, but overwhelming, reason that the highest judicial tribunal in the land had approved its correctness. The court upon that question was therefore upon safe and reliable ground, if any can be found in the trial of criminal cases. Besides, the rule thus established is manifestly sound law, and based upon sound logic. No credible witness can ever positively and affirmatively testify to the exact intent—the mental purpose—of another, and hence there must always be an inference from acts; and the jury were told that, if the evidence was clear as to acts, they should draw the fair inferences, unless there was evidence to rebut those inferences. The court, in the language used, told the jury that if the evidence showed, to the exclusion of a reasonable doubt, that the accused, while a clerk of the bank, had willfully and knowingly made an intentional false entry on the books of the bank intrusted to him for accurate keeping, then, if there was an innocent reason actuating him in knowingly and intentionally doing such an unlawful act, it was for him to show it, as, in the absence of such showing, or at least of some explanation by him, the jury should draw the logical conclusion that there was an intent to injure or defraud the bank. An entry of that sort was otherwise unimaginable. This rule is founded on manifest common sense,—an element which should not be banished from judicial proceedings. The natural presumption would be that such unlawful acts, if willfully and knowingly done, could not have an innocent intent, but still the accused should have a chance; and in this case he had the liberty, if so choosing, to prove that his case afforded an exception to the general rule. Indeed, when we read the clear, satisfactory and authoritative reasoning upon which the supreme court based its approval of the charge of the trial court in the Agnew Case, no room is left for doubt as to the principle that court meant to establish for the guidance of lower courts, and therefore none as to the accuracy of what was charged in this case, when the charge given is viewed as a whole, and not in detached sentences. The language referred to is found on pages 49, 50, 165 U. S., pages 240, 241, 17 Sup. Ct., and page 624, 41 L. Ed., and is as follows:

"Undoubtedly, in criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial. But when a prima facie case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused. The circuit court, in this part of the charge, was dealing with the intent to injure and defraud the bank, and rightly instructed the jury that, if they

found certain facts, such intent was necessarily to be inferred therefrom. This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. 1 Greenl. Ev. § 18; 3 Greenl. Ev. §§ 13, 14; Jones, Ev. § 23; Bish. Cr. Proc. §§ 1100, 1101, and cases cited. The circuit court, however, told the jury that the presumption of the intent to injure and defraud, if the facts were found as stated, was not conclusive, but, in substance, that its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in other words, that, as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidence of at least equivalent weight were adduced to the contrary. The question of the particular intent was not treated as a question of law, but as a question to be submitted to the jury; and, conceding that the statement of the court that the evidence to overcome the presumption must be sufficiently strong to satisfy the jury 'beyond a reasonable doubt' was open to objection for want of accuracy, we are unable to perceive that this could have tended to prejudice the defendant, when the charge is considered as a whole."

This last remark of the supreme court would appear to fit this case perfectly. The testimony against German was clear, positive, and, in this connection, entirely uncontradicted; and it would seem to be impossible for him to have been prejudiced by the charge, taken as a whole, unless we are to assume that every utterance of the trial court is prejudicial to an accused person which leaves the jury a chance to convict him of a public offense, even when the proof is obvious. At all events, the great tribunal which passed its judgment upon the Agnew Case has held that such a charge to the jury was not prejudicial; and this court, even if by any possibility it would doubt the accuracy of that judgment, has neither the power nor the disposition to overrule it. The United States was entitled to have this court follow the rule established by the supreme court, and it was accordingly done.

Without going into more detail, it seems to the court that the motion for a new trial should be overruled, and it is so ordered, and the sentence of the court will now be pronounced upon the accused.

In re REESE.

(District Court, N. D. Alabama, S. D. May 10, 1902.)

1. BANKRUPTCY—ALLOWANCE OF EXEMPTIONS—POWER TO REOPEN.
   When property has been set apart to a bankrupt as exempt, and he has been granted a discharge, the propriety of which is not questioned, the power of the court to exercise summary jurisdiction over the property so set off is exhausted, and it cannot entertain a petition by a creditor to reconsider the question of exemptions.

2. SAME—LACHES OF CREDITOR.
   A creditor of a bankrupt, who was scheduled and duly notified of the filing of the petition, is chargeable with notice of the bankrupt's claim to exemptions made therein, and of the subsequent action taken by the court thereon; and his failure to appear and contest the allowance of such claim, or to except to its allowance, is such laches as precludes him from any right to have the matter reopened on his allegation that the property was worth more than the exemption allowed by law,—at least, unless his petition therefor sets out specific facts which excuse his delay.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 764, 769.

In Bankruptcy. On petition of creditor to reopen and rehear the bankrupt's claim to exemptions.

Petition by Rowan, a creditor of Reese, a discharged bankrupt, to "have the bankruptcy proceedings reopened and re-referred to the referee," that Rowan may "have an opportunity to file exceptions to the claim of exemptions, that equity may be done the creditors, and for general relief." The facts disclosed by the petition are as follows: Reese, the bankrupt, and Rowan are and were residents of Calhoun county, Ala. On February 17, 1902, Reese filed his petition, and next day was duly adjudicated a bankrupt. His debts did not exceed $500. Rowan was in the list of creditors scheduled. The bankrupt, in his schedules, claimed as exempt certain personal property and a homestead in Calhoun county, Ala.; being all of the property returned by him. The lands and property so claimed were duly set apart to the bankrupt as exempt. Reese was discharged the 27th of March, 1902. On April 28, 1902, Rowan filed his petition, which admits he knew he had been scheduled among the list of creditors, averring "that he did not know that Reese was claiming all his lands as exempt to him; that he did not receive any notice that the same had been set apart to him and was subject to contest and exceptions; that he was unacquainted with the value of the lands at the time Reese filed his petition, and had no idea of their value; when he found out that Reese was claiming the lands as exempt, he commenced to inquire about them, and examined them as soon as he could, after he found that they had been set apart as exempt." It is further alleged that the lands are worth from $2,500 to $3,000, and "that there are persons who would purchase the lands at those figures, so as to leave Reese two thousand dollars, the value of the homestead exemptions to which he is entitled," and still leave an excess sufficient to pay in full the debts scheduled. The petition further avers "that petitioner has acted as diligently and timely in protecting his rights in the premises as the circumstances would permit."

Joseph J. Arnold, for petitioner.

JONES, District Judge. No fraud or breach of duty of any sort is charged against the bankrupt. Before the filing of Rowan's petition the court had set apart the homestead to the bankrupt as a part of his exemptions, and had granted him a discharge. All power of the court of bankruptcy to exercise any summary jurisdiction over the bankrupt or to meddle with his exempt property had been exhausted. If this difficulty of want of jurisdiction could be surmounted, it would not benefit the petitioner. It appears on the face of the petition that the petitioner has been guilty of laches which bar him of all right to the relief he seeks. He admits that he was scheduled in the list of creditors, and does not aver that he did not receive timely notice of the filing of the petition. He lived in the same county with the bankrupt. The admission that he had notice of the filing of the petition, the fact that he lived in the same county with the bankrupt, and the presumption which the court must indulge that public officers have done their duty, all force the conclusion that Rowan received notice of the filing of the petition shortly thereafter. Proceedings in bankruptcy are in the nature of a proceeding in rem, and certainly a creditor who has received notice of the filing, and that he has been scheduled as a creditor, is charged with notice of whatever transpires in the further administration of the bankrupt's estate. As was said in Broderick's Will Case, 21 Wall. 518, 22 L. Ed. 599, "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and conditions, and

of the vicissitudes to which they are subject." A mere reading of the petition would have informed Rowan that Reese "claimed all the lands as exempt." Being charged with this notice, the law conclusively charged Rowan with the further knowledge that in due course of administration of the bankrupt's estate, these lands might be set apart as exempt; that he could prove his debt, and contest the claim of exemptions, if excessive, before the referee, and, if dissatisfied with his ruling, could except and bring the matter here for review. He was not entitled to any other notice. He had actual or constructive knowledge of all the facts, the ignorance of which is now set up as an excuse for not pursuing his rights, whatever they were, in the time and mode prescribed by law. Ignorance in fact, resulting from his failure to avail himself of the sources of knowledge open to him, is negligence and fault which deprives of all right to reopen the matter of which he complains.

If petitioner could set up his ignorance of facts, to avoid the consequences of the notice imputed to him by law, and thus excuse his failure to appear before the referee and contest the exemptions, the facts stated in the petition do not present a good excuse, or show that he was without fault. General allegations of diligence in such matters will not avail. When did Rowan ascertain that Reese "was claiming all his lands as exempt to him"? Was it before or after the lands had been set apart? When he discovered that the lands had been set apart, had the time expired in which he could appear and file exceptions? He merely says, "When he found that Reese was claiming these lands as exempt, he commenced to inquire, and examined the lands as soon as he could after he found that they had been set apart as exempt." Construing his petition (as it must be construed) most strongly against him, it must be held at least that he ascertained that the lands had been set apart before the 20 days had elapsed in which he could file execptions, and he was therefore without the slightest legal excuse for not taking that mode of raising the contest which he now seeks to bring forward by his petition. These fatal defects of the petition cannot be cured by the general allegation that the petitioner "has acted as diligently and timely in protecting his rights in the premises as the circumstances would permit." The facts must be given, that the court may judge for itself. It is a settled rule of law that a party who relies on ignorance of facts material to his rights as an excuse for laches and delay in asserting them before a tribunal where he had a right and opportunity to assert them must show by positive and circumstantial averments why he was ignorant, and set forth with particularity the facts and circumstances as to the time he discovered the matters of which he claims to be ignorant, and why they could not sooner be ascertained.

The petition is denied, with costs.

UNITED STATES PROJECTILE CO. v. SHARPLESS.

(Circuit Court, E. D. Pennsylvania. May 31, 1902.)

No. 40.

REFERENCE—REVIEW OF FINDINGS OF REFEREE—CONSTRUCTION OF STIPULATION.

By stipulation of the parties to an action at law, the case was referred to a referee; the stipulation providing that his rulings on the admission or rejection of testimony and conclusions of law should be reviewable on exceptions by the court, and that his findings of fact should have the same force and effect as the verdict of a jury. *Held*, that the referee's findings of fact were equivalent, under such stipulation, to a special verdict, and could not be modified by the court or reviewed, except in so far as to determine whether they were supported by any evidence.

At Law. On exceptions to report of referee.

Joseph C. Fraley, for plaintiff.
V. Gilpin Robinson, for defendant.

J. B. McPHERSON, District Judge. When this case was called for trial before a jury, the parties entered into the following agreement:

"It is hereby agreed that the above case shall be referred to Carter Berkeley Taylor, Esq., as referee, who shall hear and determine the case, and report his conclusions thereon to the court. His rulings on the admission or rejection of testimony and conclusions of law shall be reviewable on exceptions by the United States circuit court, and his findings of fact shall have the same force and effect as the verdict of a jury. Judgment shall be entered on said report in accordance with the decision of the United States circuit court, and on appeal or writ of error from said judgment all questions raised by said exceptions or by the final decision of the United States circuit court shall be reviewable by the United States circuit court of appeals."

Under this agreement a large amount of testimony was taken, and the report of the referee, finding in favor of the plaintiff, is now before the court. The exceptions that were filed before the referee by the defendant were overruled, and the first question to be determined is whether, under the foregoing agreement, I have power to modify the findings of the referee. The exceptions all relate to findings of fact, and, as I understand the agreement, these findings are equivalent to the special verdict of a jury. If such a verdict were before me, it is obvious that I should have no authority to put in its place my own findings of fact. At the best, I could do no more than examine the testimony in order to see whether there was any evidence to support the conclusions of the jury. If more than a scintilla of evidence should be found, the verdict would be final, although the opposing testimony might seem to me to be convincing; and to require a different conclusion.

The only conclusion of law is based upon the referee's findings of fact, and is the general conclusion that the plaintiff is entitled to recover. This I can only review so far as to determine whether the referee's findings of fact properly support such a conclusion. An examination of the findings will show clearly that, if they are supported

by evidence, the conclusion of law indubitably follows; and I need only add that there is sufficient evidence to support them all. No doubt, the testimony is conflicting, but with this conflict I have nothing whatever to do.

The exceptions are accordingly overruled, and judgment may be entered in favor of the plaintiff, upon the report of the referee, for the sum of $5,228.35, with interest from March 19, 1902, and with costs of suit, including the referee's fee.

In re MEYER.

(District Court, N. D. Texas. June 7, 1902.)

No. 41.

1. BANKRUPTCY—PREFERENCES—PAYMENTS TO PLEDGEE.
   Payments made on a note by an insolvent within four months prior to his bankruptcy, to an indorsee, who holds the note as collateral security for a debt of the payee, are payments to the payee, and must be surrendered by him before he can prove a further indebtedness against the bankrupt's estate.
2. SAME—SEPARATE CLAIMS—DEBTS SUBSEQUENTLY CONTRACTED.
   Where a note, which covered all the then existing indebtedness of the maker to the payee, remains the property of the latter when further indebtedness is contracted, its payment thereafter, in whole or in part, while the debtor is insolvent, and within four months prior to his bankruptcy, is a partial payment on the entire indebtedness, of which it is a part, and constitutes a preference, which must be surrendered before the subsequent debts can be proved against the estate of the debtor in bankruptcy.

In Bankruptcy. On certificate from referee.

G. N. Harrison, for claimant.

MEEK, District Judge. The referee certifies that E. M. Meyer was adjudged a voluntary bankrupt on his petition filed December 23, 1901; that the bankrupt, who had been a retail grocer, closed his account with Walshe & Co., wholesale grocers, from whom he made purchases, on the 1st day of July, 1901, by giving them his promissory note for $350, the same being dated July 1, 1901, and due October 15, 1901, and bearing 10 per cent. interest from date; that shortly after this note was given it was assigned as collateral by Walshe & Co. to Brooke Smith & Co. to secure their indebtedness to Brooke Smith & Co.; that after this settlement of July 1st the bankrupt continued to make purchases from Walshe & Co., and on November 9, 1901, he executed to them two other promissory notes, for $279.23 each, bearing 10 per cent. interest from date. These latter notes were given for indebtedness incurred subsequent to the closing of the account by the note of July 1, 1901. On November 9, 1901, the bankrupt paid $41.25 on the $350 note, and on November 21, 1901, he paid $150 on same. At the time these payments were made the note was still held by Brooke Smith & Co. as collateral security for the indebtedness of Walshe & Co., and the payments were made to

Brooke Smith & Co., and credited on Walshe & Co.'s indebtedness. The bankrupt was insolvent, within the meaning of the bankrupt act, at the time these partial payments were made. The $350 note was not tendered for proof either by Brooke Smith & Co. or by Walshe & Co. The claim tendered was based on the two notes for $279.23 each. The referee found that the account current between Walshe & Co. and the bankrupt was closed on July 1, 1901, and that the note executed by the bankrupt at that time was a separate and distinct debt from the two notes offered for proof before him. He held that Walshe & Co. could not prove their claim based upon the two notes last given until they had surrendered the preferential payments made on the $350 note, notwithstanding the last mentioned was given in extinguishment of an entirely separate and distinct indebtedness.

Walshe & Co. excepted to the ruling of the referee, and urge that the payments made by the bankrupt to Brooke Smith & Co. on the $350 note held by them as collateral to secure the indebtedness of Walshe & Co. could not be considered a preference received by Walshe & Co. It is also urged that where a creditor holds two separate and distinct debts against the estate of a bankrupt a payment on one of the debts, which is a preference as to it, does not prevent the proving of the other debt, upon which no payment has been made without a surrender of the payments on the first debt, the first debt not being tendered for proof or allowance.

Walshe & Co. transferred the bankrupt's note for $350 to Brooke Smith & Co. as collateral to secure an indebtedness of their own. By pledging this note for the payment of their debt, they did not surrender all their interest in it. While the note was held by Brooke Smith & Co. as collateral security, and while they might have collected it under certain conditions, yet, in event Walshe & Co. paid their indebtedness, Brooke Smith & Co. would be compelled to surrender this collateral note. Brooke Smith & Co. stood in the position of trustee for the beneficial interest of Walshe & Co. in the note, and could only deal with it according to the settled rules of the law merchant. The debt of Walshe & Co. was reduced by the payments made by the bankrupt to Brooke Smith & Co., and therefore Walshe & Co. enjoyed the fruits of such payments as much as if they had been made direct to them. It would be inequitable and unjust to other creditors to say that they had received nothing on the $350 note given them by the bankrupt. The referee was correct in holding that for all purposes of this proceeding the payments made on the note would be considered as having been received by Walshe & Co.

Section 60a of the bankruptcy act provides as follows:

"A person shall be deemed to have given a preference if, being insolvent, he * * * has made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class."

Section 57g of the act provides as follows:

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

The bankrupt's indebtedness to Walshe & Co. at the time of the filing of his voluntary petition was represented by three notes,—one for $350, dated July 1, 1901 (on which two partial payments had been made on November 9th and 21st, respectively); and two for $279.23 each, dated November 9, 1901. While the note for $350 was given to settle a prior, separate, and distinct indebtedness on the part of the bankrupt to Walshe & Co., yet at the time of bankruptcy a portion of this note was still owing, and constituted a portion of the whole debt owing by the bankrupt to Walshe & Co. To rule that a creditor could withhold from proof a note upon which he had received substantial partial payments, and present for allowance other obligations of indebtedness without a surrender of partial payments received, would be, in the judgment of the court, to ignore the plain import of the language above quoted from the bankruptcy act. While the authorities on this question are in confusion and conflict, yet the views entertained by the court are enunciated in several recently decided cases. In re Conhaim (D. C.) 97 Fed. 923; In re Bashline (D. C.) 109 Fed. 965; In re Abraham Steers Lumber Co. (D. C.) 110 Fed. 738. The contrary rule is announced in Re Seay (D. C.) 113 Fed. 969, and cases therein cited. After reading the published adjudicated cases, the writer is of the opinion that the conflicting views will not be harmonized until the supreme court speaks.

The action of the referee in refusing to allow the claim without a surrender of the preferences will be affirmed.

In re GARLINGTON.

(District Court, N. D. Texas. June 7, 1902.)

BANKRUPTCY—PROVABLE DEBTS—COLLECTION FEE STIPULATED IN NOTE.

Under Bankr. Act 1898, § 63a, providing that "debts of a bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition," etc., attorney's fees stipulated for in a note "in case it shall be placed in the hands of an attorney for collection" cannot be proved as a part of the debt, where the note had not matured at the time of the filing of the petition in bankruptcy against the maker.

In Bankruptcy. On certificate of referee.

Coke & Coke, for claimant.

MEEK, District Judge. The referee certifies that Charles F. Garlington was adjudicated a bankrupt on his voluntary petition November 27, 1901; that among other indebtedness scheduled by the bankrupt as owing the National Exchange Bank of Dallas was an indebtedness evidenced by a promissory note, which was submitted in support of proof of claim, and reads as follows:

"Dallas, Texas, August 31, 1901.

"On the 28th day of February, 1902, without grace, I, we, or either of us, promise to pay to the order of M. N. Garlington nine thousand three hundred and seventy-five dollars, with interest at the rate of ten per cent. per

annum from maturity until paid, for value received; and further promise that, if this note is placed in the hands of an attorney for collection, to pay ten per cent. additional on the full amount due for attorney's fee. Payable at the office of the National Exchange Bank, of Dallas, Texas."

This note was secured by a mortgage upon certain real estate in the city of Dallas. It is set forth in the proof of claim that this note, together with others, was placed in the hands of attorneys for collection, and that thereby there has become due thereon, in addition to the principal and interest, 10 per cent. on the full amount of principal and interest as attorney's fees. The referee allowed the claim for $9,375, and this was declared a lien upon the mortgaged property. The claim for 10 per cent. additional as attorney's fees was disallowed, and the National Exchange Bank of Dallas asks for a review of the action of the referee in ordering such disallowance.

Chapter 7, § 63, of the bankruptcy act, reads in part as follows:

"Debts which may be proved—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

The debt evidenced by the note in question was proved and allowed under this provision of the act. All that was absolutely owing on this note at the time of the filing of the petition by the bankrupt was the principal. It is not shown anywhere in the record that this note was placed in the hands of an attorney for collection prior to the institution of bankruptcy proceedings. In any event, the holder thereof would have no right to mature the additional obligation of 10 per cent. for attorney's fees until after the due date of the note.

The parties, in stipulating for an attorney's fee contemplated an enforced collection of the debt from the maker through the medium of an attorney, and possibly the courts, but did not contemplate the collection of all or a part of the debt from a bankruptcy estate. The rights and equities of the owner became fixed at the institution of this proceeding by virtue of the provisions of the bankruptcy act, and he cannot, by placing this note in the hands of an attorney for collection at a subsequent date, further burden the estate of the bankrupt to the extent of 10 per cent. on the amount rendered due by the filing of the petition.

The action of the referee in disallowing the attorney's fee is affirmed.

THE CAPTAIN SAM.

(District Court, S. D. Alabama. March 6, 1902.)

1. COLLISION—SUIT FOR DAMAGES—EVIDENCE.
   The testimony of officers and witnesses as to what was actually done on board their own vessels is entitled to greater weight than that of witnesses who form their opinions merely from observation.
2. SAME—NEGLIGENT TOWING—LENGTH OF LINE.
   It is not negligent under all circumstances for a tug to tow a vessel with a great length of line; and, to render her liable for a collision on that ground, it must be shown that it resulted from such cause.

8. SAME—SIGNAL ON LEAVING BERTH.
Under pilot rule 8, requiring boats when moved from their docks or berths, and other boats are liable to pass from any direction toward them, to give a signal, a tug should give such signal on taking a tow from its berth; but the failure to do so will not render her liable for a subsequent collision between the tow and another vessel, where the latter saw the tug at the slip, and knew she was taking out a tow.

4. SAME—TUG WITH TOW AND FREE BERTH.
As between a tug with a heavy tow and an overtaking tug without any tow, the duty is imposed on the latter to keep out of the way.

5. SAME—TUG OVERTAKING TOW—FAILURE TO KEEP LOOKOUT.
The tug Captain Sam, on a clear morning, took a large and heavily laden barge from her slip in Mobile, and started up the river against a strong wind and current. At the time she took the barge out, the tug Hero was further down stream, also coming up the river. Both tugs proceeded up stream, the Hero for some time gaining, until she had passed the barge, when she, in some manner, was struck by the barge and injured. The weight of evidence showed that the barge was following directly in the course of her tug on a line which had been run out to a length of about 250 feet, and that, after passing, the Hero went on a course diagonally crossing that of the tug and tow, although there was plenty of room in the channel to keep away. The Hero had no lookout, and did not see the barge until immediately before the collision. *Held*, that the Captain Sam was not in fault, but that the collision resulted from the fault of the Hero, whose duty it was to see and watch the tug and tow, and to keep out of their way.

In Admiralty. Suit for collision.

Smith & Gaynor, for A. J. Stone
R. H. & N. R. Clarke, for J. B. Stiggins.
Pillans, Hanaw & Pillans, for the tug Sam.

TOULMIN, District Judge. These are libels for collision, by A. J. Stone, the master and pilot of the steam tug Hero, and J. B. Stiggins, the owner of said tug, against the steam tug Captain Sam. The collision happened near the middle of Mobile river, opposite the north side of the Mobile & Ohio Railroad wharf, in the city of Mobile, shortly after 7 o'clock in the morning of January 20, 1900, between the barge Jerry, in tow of the Captain Sam on a hawser, and the tug Hero. Both tugs were bound up the river. The Hero was damaged, and her said master and pilot was thrown into the water and greatly injured.

The negligence charged is that the towline of the Captain Sam was too long for the proper management and control of the tow, and that the barge was pulled by the Captain Sam from her berth at the dock with so long a line and at such great speed that it swung therefrom, quartering across the river below the Hero, turned in behind her, and struck her on her port quarter some 7 or 8 feet from the stern; and that the Captain Sam, on leaving the slip at the dock with the barge, negligently failed to give a signal by blowing her whistle as required by rule 8 of the pilot rules. The evidence, without conflict, is that the morning was bright and clear; that there was a strong north wind blowing, and a strong current in the river; that the tug Captain Sam left the dock in the lower part of the city, and came up to what is known as the elevator slip, where she took

in tow the barge Jerry, loaded with about 55,000 feet of timber and lumber; that the Jerry is a very large barge; she was rigged with steering appliances, and had a captain or steersman aboard of her. There were several other men on board, who were stevedores going up the river to load a vessel with said timber and lumber; that the Hero left her berth in a slip some 800 yards below the elevator slip a little before 7 o'clock; that the Captain Sam had preceded her up the river, and when the Hero got out of the slip of her berth the Captain Sam was near by, and opposite the elevator slip, and in the act of taking the barge in tow. The Hero headed northeastwardly, and went out in or near the middle of the river; that the river from the Mobile & Ohio Railroad wharf to the east line of the channel is 950 feet. A. J. Stone testified that when he got out of the slip he looked up the river and saw the Captain Sam lying quartering up the river, and apparently about 30 yards from the elevator wharf or slip; and, seeing that she was going to pull a vessel out, he went out in the middle of the river, and headed north; that when he reached a point about opposite to the Captain Sam she passed ahead, and about 30 yards to the westward, and proceeded up the river; that he never did get abreast of her; that she ran off from him and left him in the rear; that he did not see the barge or any towline; that the first time he saw the barge was when the fireman on the Hero called out to him to "look out for the barge." He looked out through the window of the pilot house, and saw the barge 15 or 20 feet from, and a little below, him, coming quartering towards the Hero's stern. He did not see the towline, but said he "did not notice particularly"; that when he saw the barge he put the wheel of the Hero to starboard and the helm to port, but it did not have much effect,—the barge was then too close. When the barge struck the Hero the Captain Sam was going straight up the river, and nearly 100 yards ahead of him,—at least 250 feet,—and a little to the westward of him; she appeared to be going at full speed; that the Captain Sam blew no whistle when she came out with her tow, and the Hero blew no whistle as she proceeded up the river behind the Captain Sam, and had no lookout. He further testified that it was the custom to blow a whistle when leaving the dock with or without a tow, as required by the rule. Horace Samuels also testified, for the libelants, that he was the fireman on the Hero; that when he first saw the barge, just before the collision, it was coming towards the Hero on the port side in an angling direction, and was about 10 feet of the Hero; that his attention was called to the barge by hearing some one laughing, and he looked out and saw her as stated. He was in the hole of the boat, putting in coal, and had been down there ever since he left the wharf, except when he came on deck one time to straighten out a rope; that the Captain Sam was about 100 yards from the Hero at the time of the collision, and that the tow line was taut; that when he first saw the Captain Sam going out in the stream she was about 150 yards from the Hero, and that before the collision happened she was in 60 or 75 yards of her. It appears that the Hero had a crew of three men,—pilot, fireman, and engineer. The pilot and fireman testified substantially as hereinabove stated. The engineer

unfortunately lost his life in the disaster. A number of other witnesses testified, both for the libelants and the claimants, some of whom were on shore, and witnessed the collision and circumstances connected with it, and some were aboard the Captain Sam, and on the barge Jerry.

The decided weight of the evidence is that the towline was comparatively a short one when passed to the barge,—not more than 30 or 35 feet long,—but was gradually let out until it was perhaps 250 feet long, though there was some discrepancy in the testimony on this point; that when the Captain Sam stopped to take the tow she occupied a very few minutes in doing so; that the barge was ready to be taken up, and the Captain Sam halted in the stream, hardly coming to a dead stop. There is a want of harmony in the testimony as to whether the barge was entirely out of the slip when the line was passed to it, or whether it was only partly out. Some of the witnesses—even some who aided in moving the barge out—said it was entirely out of the slip and in the stream, while others said it was only partly out of the slip, and that the tug passed the line to it and pulled her clear of the slip. However, they all substantially agreed in saying that a very short time was consumed by the tug in getting the tow and going ahead, and that it went out in the stream, quartering or angling in a northeasterly direction, and with a little swing or sheer by the barge, and that the tug went off slowly, and did not quite reach the middle of the river when she headed north, and the barge straightened up behind her, and was so following her at the time of the collision; that the Captain Sam had not attained full speed when the collision occurred, but was going faster than she was when she started out with the tow. The weight of the evidence, further, is that the Hero was farther down the river than the Captain Sam when the latter left the elevator slip, and was about 150 yards southeastwardly from her; that the Hero was making more speed than the Captain Sam up to a few minutes before the collision. The Hero was unencumbered, while the Captain Sam was encumbered with a heavy tow going against a strong current and north wind; that for some few minutes before the collision the Hero was abreast of the barge to the eastward of her, and approaching on a line intersecting the course of the barge, and had gotten partly ahead of the barge, bearing northwestwardly across her course, when the collision happened. The weight of the evidence also is that the manner in which the barge was being towed was a proper, and the customary, manner. The Captain Sam was a much larger, more powerful, and faster boat than the Hero. The captain of the barge and others on board of her with him, who testified, stated that he was at the helm, steering the barge, from the time they left the slip up to the time of the collision, and that she was straight behind the Captain Sam when the collision happened. There is some other testimony, which tends to show he was not steering at the time; but it is of a negative character. Furthermore, "the established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessels is entitled to greater weight than of witnesses * * * who judge or form opinions merely from observation." The Havana

(D. C.) 54 Fed. 413; The Alexander Folsom, 3 C. C. A. 165, 52 Fed. 411.

It is negligence for a tug to tow a vessel on a hawser that is so long that it is unmanageable and liable to sudden sheer. The theory of the libelants' case is based on this rule. But the facts of the case as developed by the evidence do not sustain their theory. "It is not negligent under all circumstances for a tug to tow a vessel with a great length of line. To render her liable, it must be shown by a fair preponderance of proof that the collision resulted from such dangerous length of line." Spenc. Mar. Coll. § 128; The Ashford (D. C.) 44 Fed. 703. I find that the preponderance of proof is the contrary.

"As between a steamer and a tug with a heavy tow, the tug and tow are to be treated as a sailing vessel, and the duty of avoiding them is imposed on the steamer." Spenc. Mar. Coll. § 123, and authorities cited in note. "The rule gives the right of way to a sailing vessel as against a steamer, and requires the steamer to keep off the course of the sailing vessel if it is practically possible to do so." The Marguerite (D. C.) 87 Fed. 953.

The evidence shows that there was ample room in the river to the eastward of the Captain Sam and her tow for the Hero to have kept out of their course. Moreover, the Hero was the overtaking vessel, and it was her duty as such to keep out of the way of the Captain Sam and her tow. 1 Supp. Rev. St. p. 787, arts. 24, 25; The Sylvan Grove (D. C.) 29 Fed. 336; Spenc. Mar. Coll. § 69. That the Hero was the overtaking vessel is clearly shown by the testimony of the witness Horace Samuels, the fireman on the Hero. He stated that when he saw the Captain Sam with the barge going out in the stream the Hero was 150 yards southeastwardly of her, and that before the collision occurred she was in 60 or 75 yards of her. His testimony, which is corroborated by other evidence in the case, establishes several material facts, namely: That the Hero was the overtaking vessel; that she was running faster than the Captain Sam, at least up to a few minutes before the collision occurred; that she had gained on the Captain Sam the difference between 150 yards and 60 or 75 yards before that time; and that when the Hero was 150 yards, say 450 feet, of the Captain Sam she was a greater distance from the Captain Sam than the barge was by 150 to 200 feet. It was the duty of the Hero to see the Captain Sam with her tow as soon as she could be seen, to watch her progress and direction, to take into account all the circumstances of the situation, and so govern herself as to guard against peril to either. The Falcon, 19 Wall. 75, 22 L. Ed. 98; The Carroll, 8 Wall. 302, 19 L. Ed. 392. And the Hero should have had a lookout, and especially was it her duty, knowing that the Captain Sam was in the river, and when first seen by the master and pilot of the Hero at or near the elevator slip was in the act of taking a tow.

I think the fact that the barge and tow line were not seen is sufficient to impute negligence to the Hero. Her failure to have a lookout was a direct violation of the regulations, and it may be fairly presumed that if she had been properly manned in this respect the accident would have been avoided. Pilot rule 8 provides that:

"When boats are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in case of boats meeting at a bend," etc.

The Captain Sam gave no signal at the time she left the elevator slip with her tow. She was not leaving her dock or berth. Her situation and movements did not bring her within the letter of the rule. But it may be said that she was within the spirit and purpose of the rule, which required her to give notice to other boats liable to pass that she was in motion. The Captain Sam was taking a tow. The barge to be towed was in a berth, and being brought out from it. Some of the evidence, as I have said, is that the barge was only partly out of the slip when the towline was passed to it, and that it was pulled out by the tug. Conceding this to be true, and that the tug and its tow should be treated as one vessel under the circumstances, I think the Captain Sam should have complied with rule 8. But her failure to do so does not, in my opinion, affect this case. She was plainly seen by the pilot of the Hero. He saw her steam up to the point where she temporarily stopped to take the tow. He saw her lying in the stream a short distance from the slip, and saw she was going to pull a vessel out. So he required no signal to give him notice that she was in motion or about to move. And there is no reason to believe from the evidence that the failure to give a signal had any relation to the collision, or caused, or could have caused, it. My judgment is that the libelants are not entitled to recover, and that the libels must be dismissed, at the libelants' cost.

The claim of Kate Y. Baker, as administratrix, being based on the same facts, as far as a right to recover for the collision is concerned, is also dismissed.

UNITED STATES MIN. CO. v. LAWSON et al.

(Circuit Court, D. Utah. May 12, 1902.)

No. 467.

1. FEDERAL COURTS—EQUITY JURISDICTION—SUITS TO QUIET TITLE.
   A federal court of equity, though sitting in a state where by statute a suit to quiet title or to determine an adverse claim may be brought, regardless of possession, cannot entertain such a suit by the holder of the legal title unless the bill shows affirmatively either that complainant is in possession, or that both complainant and defendant are out of possession.

2. SAME—EFFECT OF PRAYER FOR INJUNCTION.
   A federal court of equity is not given jurisdiction to try the title to a mining claim, where the bill does not show that complainant is without an adequate remedy at law, merely because an injunction is prayed for to prevent alleged trespasses by defendant, an adverse claimant, in removing ore from the claim.

In Equity. Suit to quiet title to a mining claim. On demurrer to bill.

Bennett, Sutherland, Van Cott & Allison and Robert Harkness, for plaintiff.

Ogden Hiles, for defendants.

¶ 1. See Courts, vol. 13, Cent. Dig. § 907.

MARSHALL, District Judge. This case is before the court upon a demurrer to the complainant's bill. The bill, after alleging the diverse citizenship of the parties, in substance states: That the complainant is the owner of the Jordan Extension mining claim, in which claim, within the surface boundaries extended downward vertically, there is a vein of rock in place, carrying precious metals, the property of the complainant, and exceeding in value the sum of $2,000; that the defendants assert and claim an interest in the premises and mineral vein adverse to the complainant, and that the claim of the defendants is without right; that in the assertion of their said claim, without the knowledge or consent of the complainant, the defendants have within two years last past, by means of secret underground workings, entered beneath the surface of the Jordan Extension mining claim, and mined and extracted and removed therefrom large quantities of valuable ore; that the said defendants threaten to continue their wrongful and unlawful invasion of the plaintiff's premises, and to continue to mine and extract ore therefrom, to the great and irreparable injury of complainant, and will do so unless enjoined and restrained by the order of this court. The complainant further, under equity rule 21, sets up the claim which it supposes will be insisted upon by the defendants, viz., that the defendants are the owners of the adjoining mining claim known as the "Kempton Mine," and claim that the ore found in the Jordan Extension mining claim belongs to a vein having its apex in the Kempton mine, and, for the purpose of avoiding this claim, by counter averment, the complainant alleges that it is the owner and in possession of a mining claim usually known as the "Old Jordan," and of a mining claim known as the "Mountain Gem," and that, if there is any mineral vein or lode in the Kempton mining claim existing in or in any wise extending to or under the Jordan Extension mining claim, such vein or lode does not have an apex in the Kempton mining claim, but the same apexes in the Old Jordan and Mountain Gem lodes. The decree prayed for is that an injunction be granted restraining the defendants from continuing their workings in the plaintiff's mining claim, or removing ore therefrom, and that the plaintiff's title to the Jordan Extension mining claim be quieted against the claim of the defendants. The defendants demur to the bill on the ground of a want of equity, and because the complainant has an adequate remedy at law, and also on the ground of a want of certainty, for the alleged reason that it cannot be ascertained therefrom whether the proceeding is to quiet the title of the plaintiff to the Jordan Extension mining claim, or to the Old Jordan and Mountain Gem mining claims.

It will be perceived that the complainant does not allege that it is in possession of the Jordan Extension mining claim, nor, on the other hand, does it allege that the defendants are not in possession of that claim. The allegations as to the defendants' trespasses upon the claim cannot be considered an affirmative averment of possession on the part of the defendants. Coal Co. v. Doran, 142 U. S. 417, 449, 12 Sup. Ct. 239, 35 L. Ed. 1063. If we consider the bill as one to quiet the plaintiff's title to the Jordan Extension mining claim, or to determine the adverse claims thereto of the defendants, and without

reference to the injunction asked, it will be seen that it would be sufficient in a state court of this state, under sections 2915 and 3511 of the Utah Statutes, which provide:

"Sec. 2915. In an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and, if the judgment be for the plaintiff, he may have a writ of possession for the premises as against the defendants in the action against whom the judgment has passed."

"Sec. 3511. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

As stated in Wehrman v. Conklin, 155 U. S. 314, 323, 15 Sup. Ct. 129, 132, 39 L. Ed. 167, such statutory provisions enlarge the ancient jurisdiction of courts of equity in the following particulars:

"(1) It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment. (2) It dispenses with the necessity of his title having been previously established at law. (3) The bill may be filed by a party having an equitable as well as a legal title. (4) In some states it is not even necessary that the plaintiff should be in possession of the land at the time of filing the bill."

These enlarged equitable rights are to be administered in federal courts so far as they do not conflict with any provision of the constitution or with the statutes of the United States. Holland v. Challen, 110 U. S. 15, 26, 3 Sup. Ct. 495, 28 L. Ed. 52; U. S. v. Wilson, 118 U. S. 86, 89, 6 Sup. Ct. 991, 30 L. Ed. 110; Frost v. Spitley, 121 U. S. 552, 557, 7 Sup. Ct. 1129, 30 L. Ed. 1010.

The seventh amendment to the constitution of the United States declares, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" and section 723, Rev. St. U. S., which is identical with the sixteenth section of judiciary act of 1789, provides, "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." If a plaintiff be in possession of land, and complains of a trespass of a continuing nature, so that redress at law would require a multiplicity of actions, the remedy at law would not be so adequate as that afforded by a court of equity; and in Holland v. Challen, supra, it was held that, when neither plaintiff nor defendant was in possession, the circuit court of the United States, sitting in equity, had jurisdiction, under a similar statute, to determine the adverse claim of the defendant, although there had been no prior proceeding at law to enforce it. In such a case it was pointed out that plaintiff could bring no action at law, and the statute gave him the right to proceed in equity. In Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, however, under a similar statute, the plaintiff filed a bill in the United States court to quiet his title to land alleged by him to be in the possession of the defendant. It was held that his remedy was at law, that a defendant had a constitutional right to a trial by jury, and that the rule declared in Holland v. Challen was restricted to cases in which neither the plaintiff nor the defendant was in possession. So that it must be conceded that,

if the plaintiff had alleged that the defendants were in possession of the mining claim, the bill, considered solely as a bill to quiet title, could not be sustained in this court. Is the plaintiff in any better position, owing to the fact that there is no allegation concerning the possession? It is not averred that the defendants are not in possession, or that the land is unoccupied. The title of the plaintiff is legal. It is invoking the concurrent jurisdiction of a court of equity. The burden is upon the plaintiff to show its right to the equitable remedy sought, and for this reason that it has no adequate remedy at law.

In Railroad Co. v. Goodrich (C. C.) 57 Fed. 879, it was held by McKenna, Circuit Judge, as stated in the syllabus of the case, that:

"In federal courts sitting in states where the local statutes have dispensed with possession by complainant as a prerequisite to maintaining the suit, a bill in equity to quiet title to land is demurrable which fails to allege affirmatively either that the plaintiff is in possession, or that both complainant and defendant are out of possession."

There seems to have been no contrary holding.

It follows that, unless the case alleged for an injunction distinguishes the case at bar from the authorities cited, the demurrer must be sustained. If the defendants are in possession, the property can be recovered and the title determined in an action of ejectment. The entire function of the injunction sought would be to preserve the property pending the litigation. It is a familiar rule that, where a part of the relief to which the plaintiff is entitled is equitable, a court of equity, having jurisdiction for this purpose, will ordinarily assume jurisdiction of the entire case, and grant both the legal and equitable relief that the case demands. It is no less well settled that the right to an injunction to prevent the continuance of a wrong may be a sufficient equitable incident to give a court of equity jurisdiction of what would otherwise be a legal action. Root v. Railroad Co., 105 U. S. 207, 209, 26 L. Ed. 975; Jesus College v. Bloom, 3 Atk. 262, 263; 1 Pom. Eq. Jur. § 236. To have this effect, however, the equitable relief must be something more than simply in aid of a legal action or during its pendency. Courts of equity do not usually undertake to try disputed legal titles to land. American Dock & Improvement Co. v. Trustees for Public Schools, 37 N. J. Eq. 266. And before a plaintiff is entitled to a permanent injunction restraining the violation of a common-law right, he must ordinarily establish this right at law. Coke Co. v. Broadbent, 7 H. L. Cas. 601, 606. In the federal courts, at least, it is common practice to proceed in equity for an injunction to preserve real property pending legal proceedings for the determination of the title. Erhardt v. Boaro, 113 U. S. 527, 528, 5 Sup. Ct. 560, 28 L. Ed. 1113; Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45, 49; St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co. (C. C.) 58 Fed. 129; Stevens v. Williams, 5 Morr. Min. Rep. 449. In all of these cases injunctions were sought to restrain trespasses upon mines, and in the last case, at page 452, it is said:

"To draw the question of title into this court upon a merely collateral matter, such as the preservation of the property pending the litigation,

would be a usurpation of authority. * * * Regularly, the law action should be brought before application is made for an injunction, and that fact should be averred in the bill; but, where that has been omitted through mistake or inadvertence, the rule has been so far relaxed to admit of the bringing of such suit after the filing of the bill; the plaintiff being put upon terms of commencing the suit within a short time, and prosecuting it with diligence."

In Davidson v. Calkins (C. C.) 92 Fed. 230, the complainants' bill was substantially identical with the bill in the case at bar, with the exception that the defendants were alleged to be in the possession of the mining claim in controversy. It was held that no case was stated for equitable relief. The court said at page 232:

"One of the grounds on which the defendants resist the application for an injunction is that a suit to quiet title cannot be maintained in the federal courts when the defendant is in possession of the property, and that therefore an injunction pendente lite will not be granted under such circumstances. If the premise above stated be true, defendants' deduction therefrom logically follows. To me it seems too plain to admit of controversy that an injunction will not be issued at the instance of one of two or more conflicting claimants merely to protect and preserve property for the party who may show himself ultimately entitled thereto, unless the question of ownership can be determined by the court whose conservative jurisdiction is invoked. It is true that where ejectment is pending in the federal court the court may, on its equity side, by injunction or otherwise, protect the property until the common-law action is disposed of. Buskirk v. King, 18 C. C. A. 418, 72 Fed. 22. It is also true that ejectment will lie for a mining claim, although paramount title be in the United States (Rev. St. U. S. § 910). No such situation, however, is here presented. The case at bar is not auxiliary to any action pending on the law side of the court, but is an independent suit to quiet title in which complainants seek a temporary injunction against threatened waste by the defendants who are in possession of the property. Unless this court can grant the ultimate relief, it will not apply a provisional remedy."

In Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, the suit was to set aside a conveyance claimed to have been made in fraud of creditors, and to subject the property of the defendant to the payment of a simple-contract debt of one of the defendants in advance of any proceeding at law either to establish the debt, or to enforce its collection. The Code of Mississippi, in which state the case arose, specially permitted the maintenance of such a suit in the courts of the state. Mr. Justice Field, delivering the opinion of the supreme court of the United States, at page 109, 140 U. S., page 713, 11 Sup. Ct., and page 358, 35 L. Ed., said:

"The general proposition as to the enforcement in the federal courts of new equitable rights created by the states is undoubtedly correct, but subject, however, to this qualification: that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the states by whose legislation it is created. The constitution, in its seventh amendment, declares that, 'in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid in the federal courts must be sought in separate pro-

ceedings, to the end that the right to a trial by jury in the legal action may be preserved intact."

The first, second, and fourth grounds of demurrer will be sustained, and the third ground of demurrer overruled. The plaintiff will be granted leave to file an amended bill on or before the next rule day of the court.

THE ARDANROSE.

(District Court, S. D. Alabama. March 4, 1902.)

No. 936.

1. COLLISION—STEAMER AND SAILING VESSEL—BURDEN OF PROOF.
   In case of collision between a sailing vessel and a steamer the presumption of law is that the steamer was in fault, and she has the burden of proof to establish the misconduct of the sailing vessel and her own proper navigation, or that the collision resulted from inevitable accident.
2. SAME—EVIDENCE CONSIDERED.
   When a steamer was coming up the channel in Mobile Bay, she sighted a schooner about 1½ miles distant on a tack which would take her across the channel. The wind was light, and the schooner was not making more than two miles an hour. The schooner did not change her course, and, as she was crossing the channel, which was about 200 feet wide, she was struck by the steamer. The day was clear. *Held*, on the evidence, that no fault was shown on the part of the schooner, which had an equal right with the steamer in the channel, and that the fault was entirely that of the steamer, which might have avoided the collision by the exercise of proper care, and was in duty bound to do so.

In Admiralty. Suit for collision.

Stevens & Lyons, for libelant.
Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. This is a libel for damages alleged to have resulted from a collision by the steamship Ardanrose with the schooner Josie Johnson, which is owned by the libelant. The collision occurred on January 9, 1901, in the channel of Mobile Bay, and near light No. 14. The schooner was beating up the bay with a light north or northwest wind. The steamer was also coming up the channel. The schooner was tacking, and came into the channel from the west side, heading to the east. The steamer was below the schooner, and heading north.

There is some conflict in the evidence, as is usual in cases of collision, but it is not so sharp or material as to make it very difficult to arrive at the substantial facts of the case. It appears from the evidence without conflict that the collision occurred between 8 and 9 o'clock in the morning; that the day was bright and clear; that the wind was light, or, as some of the witnesses express it, "a moderate breeze"; that it was from the north or west of north; that when the steamer and schooner sighted each other the schooner was west of the channel and the steamer some distance down the channel; that at the time of the

¶ 1. See Collision, vol. 10, Cent. Dig. §§ 54, 257.

collision the schooner was in the channel heading eastward or northeast across the channel, and that the port bow of the steamer struck the starboard bow of the schooner, and knocked a hole in the schooner, and otherwise injured her. There is some conflict in the evidence as to the location of the schooner in the channel. Three witnesses for libelant, who were members of the crew of the schooner, and who were on deck of the schooner at the time of the collision, testify: That the schooner was becalmed at the time of the collision, and had been lying totally unmanageable for about half an hour, as stated by two of said witnesses, and for at least 10 minutes, as stated by the third witness. That the schooner kept on her course when she entered the channel and until the wind suddenly died out. That when she made her last tack she was about a half mile to the west of the channel. After she tacked, her course was about northeast. The wind was very light, and the schooner was making about a mile and a half or two miles at most. One of said witnesses testifies that the schooner was about the middle of the channel, and another that she was two-thirds across the channel, heading northeastward. That they first saw the steamer two or three miles down the channel; when lying in the channel, and they saw the steamer coming ahead, they put the schooner's helm down, and tried to tack her, but she would not "stay." They had no wind. The steamer was a mile or more off at that time, and continued to come on. That they made signals to her, and when she came near enough they called to her. The steamer whistled twice, but continued to come ahead. Her speed at that time was, in the opinion of these witnesses, four or five miles an hour. It had been at least six or seven miles when they first sighted her. After the second whistle the steamer slowed down to about four or five miles an hour. Was then very near the schooner,—perhaps not over 40 yards. She struck the starboard bow of the schooner, and swung her around alongside the steamer, which passed on up the channel to the eastward of the schooner. That the channel is about 200 feet wide at the top, and the depth of the water on the outside of the channel is about 14 feet. That the schooner is 50 or 60 feet long, and that there was sufficient room for the steamer to have gone astern and westward of the schooner without getting out of the channel. There was proof that the cost of the repairs of the schooner was $1,098, and the value of her services during the time she was undergoing repairs was at least $25.

The captain of the steamer testifies on behalf of claimant: That the day on which the collision occurred was a bright, clear day. That after he first sighted the schooner he ran about a mile and a half or two miles before reaching the point of collision. That when he first saw the schooner she was about one and a half or two miles northwest of his ship, and about the same distance from the channel. That the schooner was heading towards the channel almost at right angles to it, and the breeze was moderate. That the schooner was just inside the west bank of the channel at the time the steamer struck her, and was making more headway at that time than his ship was. When about one-half mile from the point of collision, the speed of his vessel was reduced from half speed to slow speed, and when in 50 or 60 feet from the schooner the engines of his vessel were reversed, and when she

struck the schooner she was almost stopped. He says he did not run astern of the schooner because he would have gone aground on the west bank of the channel. That the schooner was rather close to the west bank. The draught of his vessel was about 13 feet 1 or 2 inches, her register about 1,400 tons, and the bay outside the channel 11 or 12 feet. He says that at the time he reduced his speed from half to slow speed the danger signals were blown, and that he did not reverse his engines sooner because he thought that the schooner would get out of the way; that the schooner had time after the blowing of the danger signals to bear away from the channel and keep clear of the steamer. The steamer had no cargo aboard, but was water ballast. The chief officer of the steamer also testified for claimant: That he saw the schooner seven or eight minutes before the collision. That she was then a little more than a quarter of a mile west of the channel, standing about east-northeast on the starboard tack. That she did not change her course. That she was crossways in the channel at the time the steamer struck her. There was room to go astern of the schooner. The steamer would have gone ashore because of her depth. The breeze was light, but strong enough to keep a small boat under way. The schooner was under way when she was struck. The third mate of the steamer, a witness for claimant, testifies: That he was on the bridge of the steamer when he first saw the schooner about 1½ miles off to the west of the channel, heading nearly east on the starboard tack, standing about right angles to the channel. She was going about two miles an hour. When the steamer was about 200 yards from the point in the channel to which the schooner was heading, the pilot blew the danger signal. He saw from the schooner no indication of notice of the signal nor change in her direction. The engines of the steamer were then slowed down, and when they approached nearer the schooner were put full speed astern. The schooner was almost in the middle of the channel,—a little to the east of it. That the schooner was under way when she was struck. That the schooner and the steamer were about the same distance from the point of collision when he first saw the schooner. The steamer was then making about nine knots. The speed of the schooner when she entered the channel was about two miles an hour. That there were several men on the deck of the schooner, where they could plainly see the steamer at all times, and he saw them do nothing to alter the course of the schooner before the collision occurred.

Where a sailing vessel and a steamer collide, the presumption of law is that the steamer is at fault, being required to keep out of the way; and nothing but inevitable accident or the misconduct of the sailing vessel can overcome this presumption, and the fault of the sailing vessel must be clearly proven by the steamer. The fact of the collision being shown, the burden of proof is on the steamer to show the prudence of its own conduct and the negligence of the other. Where there is no decisive fault on the part of the sailing vessel, the steamer must answer for the collision. Prima facie, it is at fault. Rev. St. U. S. § 4233; The Iron Chief, 11 C. C. A. 196, 63 Fed. 289; Spencer, Mar. Coll. § 93. The supreme court, in The Carroll, 8 Wall. 302, 19 L. Ed. 392, referring to the navigation rules, said:

"They require, when a steamship and a sailing vessel are approaching from opposite directions, or on intersecting lines, that the steamship, from the moment the sailing vessel is seen, shall with the utmost diligence watch her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact."

And in The Falcon, 19 Wall. 75, 22 L. Ed. 98, the supreme court said:

"It was the duty of the steamer to see the schooner as soon as she could be seen, to watch her progress and direction, to take into account all the circumstances of the situation, and so govern herself as to guard against peril to either vessel."

"The rule gives the right of way to a sailing vessel as against a steamer, and requires the steamer to keep off the course of the sailing vessel if it is practically possible to do so; that is, if she can do so without accident, such as collision with another vessel, running aground, or the like." The Marguerite (D. C.) 87 Fed. 953.

Has the burden of proof imposed by law on the steamship been sustained? Has it shown affirmatively the prudence of its own conduct and the fault of the schooner? Without endeavoring to reconcile the conflict in the evidence as to whether the schooner, at the time of the collision, was going ahead or lying becalmed and unmanageable in the channel; the conflict as to her exact location in the channel, whether in the middle of the channel, a little to the east of it, two-thirds across it towards the east, or close to its west bank; the conflict as to whether the crew of the schooner made any effort to get out of the way of the steamer and to avoid the collision, or gave any indication or warning of a helpless condition,—my opinion is that the steamer fails to meet the burden of proof which rests on her; that she not only fails to show diligence in adopting such timely measures of precaution as would have prevented the collision, and to show misconduct or fault of the schooner, but that the testimony of the captain and other witnesses for the steamer, if it correctly states the facts, clearly shows that it was practically possible for the steamer to have kept out of the way of the schooner, and to have avoided the collision, without accident to herself, such as collision with another vessel, running aground, and the like. It seems to me that the testimony referred to shows that the steamer had three courses she could have pursued and kept out of the way of the schooner. It shows that when the steamer first sighted the schooner she was a mile and a half or two miles from the point of the collision, and that the schooner was the same distance from it on the west of the channel, and was on her starboard tack, heading almost at right angles toward the channel; that her speed was 1½ or 2 miles an hour, and that of the steamer 9 knots (according to the mate's testimony). The other witnesses for the steamer do not state her speed at that time, but say when they subsequently gave the danger signals she slowed down to half speed. Now, if the steamer had kept on her course at the same speed she was going, she would have passed the point of the collision long before the schooner reached there. They had the same distance to travel, and the steamer, at three or four miles an hour, would have reached the point in half the time it took the schooner to get there. Again, if these witnesses are mistaken as to the distance the respective vessels were from the point

of the collision or as to their speed, but the captain and first officer of the steamer are correct in stating that the schooner when she was struck was under way,—at least steerageway,—and was going ahead nearly as fast as the steamer was, and was close to the west bank of the channel, then by reversing or stopping the steamer's engines or reducing her speed to steerageway only at the time she reduced her speed from half to slow speed, which they say was about one-half mile from the point of collision, the schooner would have had ample time to have crossed the channel and gotten out of the way. The captain gives no reason for not doing so, except that he thought the schooner would get out of the way when he blew the danger signal. Moreover, if the schooner was close to the west bank at the time of the collision, no reason is shown why the steamer could not have passed on the eastward of her without colliding with her. It appears that the channel was 200 feet wide at the top. The schooner was between 50 and 60 feet long. It does not appear from this testimony that she extended one-half way across the channel. Where, then, was the danger of the steamer going aground on the east bank? I am not informed as to the width of the steamer, but it could not have been as much as 120 feet, or even 100 feet. There was something said by the claimant's counsel in argument to the effect that the steamer could not have reversed her engines or stopped when she first saw the danger of a collision and signaled the schooner, because she might have collided with the dredgeboat Bismark, which was in the channel below; but I find nothing in the testimony to support that suggestion. There was nothing about the dredge Bismark in the testimony for the claimant; and in that for the libelant it does not clearly appear how far the Bismark was lying from the point of collision. One witness stated it was a mile, another that it was several hundred yards. It is, however, clear that it was a considerable distance beyond where the steamer blew her danger signal, and beyond all danger of a collision with it. The real ground on which the schooner is charged with misconduct or negligence by the claimant is that, when the danger signal was blown, she did nothing to get out of the way of the steamer, and that she should not have entered the channel at all; that she was blamable for needlessly taking a course which invited risk of collision; that she should have kept on the west of the channel, and passed through an open spread of shallow water, but deep enough for her. A like contention was made in the case of The Iron Chief, supra, and the court said: "But it cannot be said that the schooner was in fault in taking the well-known navigated channel. * * * The schooner had the same privilege to navigate the channel that the steamer had." My opinion is that there was no such risk of collision when the schooner was on her starboard tack, and attempted to cross the channel (quoting the language of the court in The Iron Chief), "as to warrant the imputation that she was guilty of misconduct in claiming and exercising her common right, and she was justified in expecting from the steamer that she would carefully continue to watch the schooner's movements until all danger should be passed." My opinion further is that the steamship was wholly at fault.

A decree will be entered for the libelant for $1,212.84.

THE LIZZIE BURRILL.

(District Court, S. D. Alabama. March 19, 1902.)

No. 972.

1. SHIPPING—MASTER—DUTY TO PROTECT SEAMEN.
It is the duty of the master of a ship while at sea to protect his crew from violence and brutal treatment by other officers under his command.

2. SAME—LIABILITY OF SHIP AND OWNER FOR TORTS OF MASTER.
The master of a ship while on board is the agent of the owners in respect to all matters which come within the scope of his duty, and the owners and ship are liable in damages to a seaman, not only for the unwarranted illtreatment of such seaman by the master himself, but for his failure to perform his duty to protect the seaman from assaults and illtreatment by other officers.

In Admiralty. Action by seaman for damages.

Smith & Gaynor, for libelant.
Mitchell & Tonsmeire, for respondent.

TOULMIN, District Judge. "It is the duty of the master while at sea to protect the crew from violence and brutal treatment, in violation of the implied contract that such protection will be afforded." The Marion Chilcott (D. C.) 95 Fed. 688; The A. Heaton (C. C.) 43 Fed. 592. "It is his duty to restrain the violence of the officers, and to set an example of discretion and temper." Desty, Shipp. & Adm. § 127, and authorities therein cited. While seamen must submit to a reasonable discipline, and to such privations and punishment as are necessary to enforce a faithful performance of their duties, they must, nevertheless, be treated as men, with the feelings of men, always entitled to the rights of humanity and the protection of the law. Magee v. The Moss, 16 Fed. Cas. 384 (No. 8,944). The law demands a strict adherence to duty from both master and crew, and the use of proper language no less than proper acts. The vessel will be liable in damages for loss or injury to a mariner from the willful misconduct of any officer. Desty, Shipp. & Adm. § 156. The master and the seaman are not fellow servants. The A. Heaton, supra. The court (opinion by Mr. Justice Gray) in the case of The A. Heaton, supra, cites with evident approval the doctrine laid down by Mr. Justice Story in Sherwood v. Hall, 3 Sumn. 127, Fed. Cas. No. 12,777, where he said that "the owners of a vessel are responsible for the torts of the master in acts relating to the service of the ship and within the scope of his employment in the ship. * * * In cases of injuries from negligence * * * and other torts from the fault of the master, the owners are, by the maritime law, made responsible for his acts and omissions of duty." And the court also quotes approvingly from Dr. Lushington in the high court of admiralty of England, where he said that he "must hold and ever shall hold that the owners of a vessel are responsible for the whole conduct of the master whilst on board his vessel, and in command of that vessel; not criminally speaking, but civilly speaking, the owners are responsible for any deviation from that line of conduct which it behooves a master to perform, not simply in the navigation of the vessel and in the care of his own seamen, but for the performance of any office of humanity." The case of Gabrielson v. Waydell (C. C.) 67 Fed. 342, was an action against the owners of a bark for injuries

alleged to have been done the plaintiff, a seaman, by the master on the high seas. The court said it was not an action for assault and battery, but was to be considered as an action rather for breach of duty of good treatment and care for violation of the person. The court further said: "That the master of a ship at sea is agent for the owners as to everything about the crew is not disputed or disputable;" and the court cites a case where the owners were held liable to the mate for the consequential damages from shooting by the master. Gabrielson v. Waydell, supra. See, also, as to the agency of the master for the owners, The A. Heaton, supra.

The weight of evidence clearly shows not only bad treatment, consisting of assaults and beating by the third mate and the boatswain, but by the master himself. The master's personal violence does not appear to have been so frequent or continuous, but it does appear that he not only did not protect libelant from the bad treatment, and from violence committed by the mate and boatswain, of the mate particularly, which it seems was continuous and persistent, but that he on more than one occasion at least encouraged it. His acts of omission as well as commission, and which were more frequent, were a breach of duty on his part, for which, in my judgment, the vessel is liable.

The testimony for claimant is mainly of a negative character, at least so far as the master's acts of violence or illtreatment of the libelant is concerned, except that of the master himself. He testifies that he did not commit any personal violence on libelant, except on one occasion, and his account of that occurrence as to the character and manner of the assault is in conflict with the weight of evidence on behalf of the libelant. He also testifies that he did not encourage the mate and boatswain in their bad treatment of libelant, which is also in conflict with the weight of evidence. The other witnesses for claimant say generally that they did not see any assault or other illtreatment of libelant by the master, and that the master was generally good in his treatment of the men. Some of them, however, testify that libelant was harshly treated and assaulted by the third mate and boatswain, and this seems from the evidence to have been pretty generally known aboard the ship. But the specific allegations of the libel as to the illtreatment of the libelant are not put in issue by the answer. The answer denies in a general way that the master did "illtreat David Jones, or that said David Jones was unjustly or illegally assaulted by any one for whose conduct the owners of said vessel are responsible."

I find from the evidence that he "was unjustly and illegally assaulted" by those for whose conduct the owners of said vessel are responsible, and that he failed to get that protection to which he was entitled under the law. No legal justification or excuse is shown for the harsh treatment he received. If he was a poor seaman,—one without much or any knowledge or experience as such,—as appears from the evidence to have been the fact, this did not justify the illtreatment he received. Other remedies are provided for and authorized by the law. It, however, does not appear that libelant was seriously injured by his treatment,—no special damage is shown,—and I think that $50 would be ample to compensate him in the case made.

Let a decree be entered for this amount, with costs.

MEMORANDUM DECISIONS.

ALEXANDER et al. v. UNION PAC. R. CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 6, 1902.) No. 1,707. Appeal from the Circuit Court of the United States for the District of Colorado. Caesar A. Roberts, Charles C. Post, and R. S. Morrison, for appellants. Willard Teller, Clayton C. Dorsey, and Henry T. Rogers, for appellees. Dismissed, without costs to either party in this court, on motion of appellees. See (C. C.) 113 Fed. 347.

BELTON OIL CO. v. KENTUCKY REFINING CO. (Circuit Court of Appeals, Fifth Circuit. May 27, 1902.) No. 1,123. In Error to the Circuit Court of the United States for the Northern District of Texas. Geo. Clark and D. C. Bolinger, for plaintiff in error. Saml. R. Perryman, for defendant in error. Before PARDEE, McCORMICK and SHELBY, Circuit Judges.

PER CURIAM. Under the facts developed in this case the proper rules to apply are the same as in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, as follows: "The rule is that, after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it, but that an option should be allowed to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance, of the contract when due. As to the question of damages, when the action is not premature, the plaintiff is entitled to compensation, based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself." These were the principles applied by the trial judge. We therefore find no reversible error in the case. The judgment of the circuit court is affirmed.

CALIFORNIA OIL & GAS CO. OF ARIZONA v. MILLER et al. (Circuit Court of Appeals, Ninth Circuit. May 6, 1902.) No. 799. Appeal from the Circuit Court of the United States for the Southern District of California. William H. H. Hart and Aylett R. Cotton, for appellant. Bicknell, Gibson & Trask and L. L. Cory, for appellees. Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The jurisdiction of the circuit court in this case was invoked solely upon the ground that the complainant's cause of suit, as presented by its bill, involved the construction of laws of the United States. The bill was demurred to upon various grounds, one of which was that no question of the construction of any law of the United States was involved, and that therefore the court had no jurisdiction. The demurrer was sustained, and an order was entered "that said bill be dismissed for want of jurisdiction." The appellees now move to dismiss the appeal on the ground that this court has no jurisdiction of the appeal. On the authority of American Sugar Refining Co. v. City of New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859, and Huguley Mfg. Co. v. Galeton Cotton Mills, 22 Sup. Ct. 452, 46 L. Ed. —, the motion is allowed, and the appeal is dismissed.

CHICAGO G. W. RY. CO. v. FEECHTER. (Circuit Court of Appeals, Eighth Circuit. March 17, 1902.) No. 1,647. In Error to the Circuit Court of the United States for the Northern District of Iowa. A. B. Cummins and J. P. Hewitt, for plaintiff in error. Henry Rickel, E. H. Crocker, P. W. Tourtellot, and John Jamison, for defendant in error. Dismissed, per stipulation, without costs to either party in this court.

CHICAGO G. W. RY. CO. v. PROWSE. (Circuit Court of Appeals, Eighth Circuit. May 29, 1902.) No. 1,690. In Error to the Circuit Court of the United States for the Northern District of Iowa. A. G. Briggs and D. E. Lyon, for plaintiff in error. J. C. Longueville and J. W. Kintzinger, for defendant in error. Dismissed, with costs, pursuant to stipulation of the parties.

CHICK et al. v. MERCANTILE TRUST CO. et al. (Circuit Court of Appeals, Ninth Circuit. May 6, 1902.) No. 782. Appeal from the Circuit Court of the United States for the Southern District of California. Works, Lee & Works, for appellants. Charles Monroe and Alexander & Green, for appellees. Motion to dismiss argued, submitted, and granted, and appeal dismissed, at the cost of the appellees.

CITY OF ANOKA et al. v. ANOKA WATERWORKS, ELECTRIC LIGHT & POWER CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 12, 1902.) No. 1,657. Appeal from the Circuit Court of the United States for the District of Minnesota. Albert F. Pratt and Marshall A. Spooner, for appellants. W. E. Hale, for appellees. Dismissed, pursuant to stipulation, without costs to either party in this court. See (C. C.) 109 Fed. 580.

CUDAHY PACKING CO. v. GILLIN. (Circuit Court of Appeals, Eighth Circuit. June 5, 1902.) No. 1,734. In Error to the Circuit Court of the United States for the District of Nebraska. Edson Rich, for plaintiff in error. F. T. Ransom, for defendant in error. Dismissed with costs pursuant to stipulation of parties.

CUSTER COUNTY v. WESTERN RANCHES, Limited. (Circuit Court of Appeals, Ninth Circuit. May 15, 1902.) No. 798. In Error to the Circuit Court of the United States for the District of Montana. J. H. Johnston, J. W. Strevell, and T. J. Porter, for plaintiff in error. Clayberg & Gunn, for defendant in error. Suggestion of want of jurisdiction submitted, and writ of error ordered dismissed for want of jurisdiction.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. HANLEY. (Circuit Court of Appeals, Ninth Circuit. June 3, 1902.) No. 843. Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho. W. B. Heyburn, for appellant. John R. McBride, for appellee. Appeal dismissed, upon motion of counsel for the appellant, without prejudice to appellant to pray and perfect another appeal from the order of the United States circuit court appealed from.

FIRST NAT. BANK OF DENVER v. SIMPSON. (Circuit Court of Appeals, Eighth Circuit. March 8, 1902.) No. 26. Petition for Leave to File Certain Pleas in the Circuit Court of the United States for the District of Colorado. A. Moore Berry and Tyson S. Dines, for petitioner. T. J. O'Donnell, for respondent. Denied, and petition dismissed, at the costs of petitioner.

FORSYTHE v. UNITED STATES ex rel. ISPARHECHER. (Circuit Court of Appeals, Eighth Circuit. May 27, 1902.) No. 1,702. In Error to the Court of Appeals of the United States in the Indian Territory. N. B. Maxey, for plaintiff in error. Dismissed, at costs of plaintiff in error, pursuant to stipulation of the parties. Attorney fee waived.

FOWLER et al. v. CITY OF KINGMAN. (Circuit Court of Appeals, Eighth Circuit. May 28, 1902.) No. 1,704. Appeal from the Circuit Court of the United States for the District of Kansas. C. H. Nearing, for appellants. S. S. Ashbaugh and George L. Hay, for appellee. Dismissed, with costs, on motion of appellants.

GLASS v. MASONS' FRATERNAL ACCIDENT ASS'N OF AMERICA. (Circuit Court of Appeals, Eighth Circuit. June 10, 1902.) No. 1,723. In Error to the Circuit Court of the United States for the Northern District of Iowa. H. T. Reed and C. W. Reed, for plaintiff in error. Dismissed, pursuant to stipulation, without costs to the defendant in error. See (C. C.) 112 Fed. 495.

HASTINGS LUMBER CO. v. CRYON. (Circuit Court of Appeals, First Circuit. July 11, 1902.) No. 396. In Error to the Circuit Court of the United States for the District of New Hampshire. R. N. Chamberlin, for plaintiff in error. Crawford & Hening, for defendant in error.

PER CURIAM. The judgment of the circuit court is reversed by stipulation, the verdict set aside, and the case is remanded to that court for further proceedings in accordance with law, and the plaintiff in error recovers costs of appeal.

THE J. D. PETERS. HOO KIN et al. v. CALIFORNIA NAV. & IMP. CO. et al. (Circuit Court of Appeals, Ninth Circuit. May 21, 1902.) No. 775. Campbell, Metson & Campbell, for appellants. Appeal dismissed, upon motion of counsel for the appellants.

LANDIS v. LAMAR et al. (Circuit Court of Appeals, Eighth Circuit. March 12, 1902.) No. 1,730. Appeal from the District Court of the United States for the Western District of Missouri. Thomas J. Porter and George W. Groves, for appellant. James W. Boyd, for appellees. Appeal docketed and dismissed, with costs, on motion of appellees, pursuant to rule 16.

LAWRENCE et al. v. WEIS. (Circuit Court of Appeals, Fifth Circuit. May 20, 1902.) No. 1,147. Appeal from the District Court of the United States

for the Eastern District of Texas. Geo. E. Mann, for appellants. J. Z. H. Scott, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We find nothing in the record in this case, nor in the very able oral argument and printed brief submitted by counsel for the appellants, to justify the court of bankruptcy in refusing the application of the appellee for his discharge. Therefore, finding no error in the action of the district court, its judgment herein is affirmed.

LOUP CITY TP., SHERMAN COUNTY, NEB., v. NATIONAL LIFE INS. CO. (Circuit Court of Appeals, Eighth Circuit. May 12, 1902.) No. 1,675. In Error to the Circuit Court of the United States for the District of Nebraska. Frank H. Gaines, John A. Storey, and James E. Kelby, for plaintiff in error. S. L. Geisthardt, for defendant in error. No opinion. Affirmed, with costs.

McCLAIN, Collector of Internal Revenue, v. PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT CO. (Circuit Court of Appeals, Third Circuit. May 5, 1902.) No. 14. In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. J. Whitaker Thompson and James B. Holland, for plaintiff in error. Joseph H. Taulane, for defendant in error. Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. Upon the opinion this day filed in the case of McClain v. Warehouse Co., 115 Fed. 295, the judgment of the circuit court in this case is affirmed.

McKAY et al. v. UNITED STATES ex rel. STOUT. (Circuit Court of Appeals, Ninth Circuit. May 16, 1902.) No. 724. Appeal from the District Court of the United States for the District of Alaska, Second Division. Jackson, Pittman & Fink, W. T. Hume, Jas. E. Fenton, P. C. Sullivan, and Samuel Knight, for appellants. C. S. Johnson, for appellee. Appeal dismissed upon motion of counsel for the appellants.

MILNER v. BRACKEN et al. (Circuit Court of Appeals, Eighth Circuit. March 8, 1902.) No. 1,630. In Error to the Circuit Court of the United States for the Western District of Missouri. Frank S. Heffernan, for plaintiff in error. J. T. White and J. P. McCammon, for defendants in error. Dismissed, with costs, on motion of defendants in error. See (C. C.) 104 Fed. 522.

OLCOTT v. CARTWRIGHT et al. (Circuit Court of Appeals, Fifth Circuit. May 20, 1902.) No. 1,022. In Error to the Circuit Court of the United States for the Northern District of Texas. T. D. Cobbs, for plaintiff in error. S. R. Frost, R. S. Neblett, M. L. Crawford, and W. L. Crawford, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After an attentive and careful examination of the voluminous transcript, and full consideration of the many assigned errors in the proceedings on the trial in the circuit court, aided by full oral argument and able and exhaustive briefs, we are constrained to hold that none of the errors assigned are well taken, and that on the face of the record there is no plain reversible error. The judgment of the circuit court is affirmed.

OLCOTT v. ENNIS-CALVERT COMPRESS CO. (Circuit Court of Appeals, Fifth Circuit. May 27, 1902.) No. 1,120. In Error to the Circuit Court of the United States for the Northern District of Texas. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The petition for rehearing filed herein substantially asks this court to disregard the first finding of facts, referring to the case of Houston & T. Cent. R. Co. v. Ennis-Calvert Compress Co. (Tex. Civ. App.) 56 S. W. 367, and to pass upon the sufficiency of the other facts as found by the trial judge and as shown by the evidence found in the bill of exceptions. From an examination of the record in the light of the arguments presented, we are of opinion that to grant this petition would be of no avail to the plaintiff in error; for, if it be conceded that all the property of every kind and description of the Houston & Texas Central Railway Company, including the right of re-entry, passed under the decree of sale and foreclosure to the plaintiff in error, and that the right of re-entry to the lands herein sued for, whether the same was a real right or a chose in action, was not appurtenant to the said railroad, still under the conveyance made by Frederick P. Olcott to the Houston & Texas Central Railroad Company, which recites the sale under foreclosure and refers to the deed for a description of the property acquired from the Houston & Texas Central Railway Company, the title to the property herein sued for passed from Olcott to the Houston & Texas Central Railroad Company, because of the following provision in said conveyance, to wit: "It being the intent and purpose of these presents that there shall be hereby granted and conveyed to the party of the second part all the railways, properties, rights, privileges, and franchises purchased by and conveyed to the party of the first part 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 of, 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 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,"—it not being shown in this record, but rather to the contrary, that the lands in controversy were included within the exceptions above recited. The petition for rehearing is denied.

SHAPTER v. CITY AND COUNTY OF SAN FRANCISCO. DE CRANO v. SAME. AMES v. SAME. KING v. SAME. SWIFT v. SAME. (Circuit Court of Appeals, Ninth Circuit. May 27, 1902.) Nos. 806–810. In Error to the Circuit Court of the United States for the Northern District of California. Page, McCutcheon, Harding & Knight, for plaintiffs in error. Franklin K. Lane and Geo. W. Lane, for defendants in error.

PER CURIAM. Upon authority of Mather v. City and County of San Francisco (No. 739) 115 Fed. 37, decided by the circuit court of appeals, Ninth circuit, March 3, 1902, ordered, judgments of circuit court reversed, with costs, and cause remanded for further proceedings not inconsistent with the opinion of this court in the case of Mather v. City and County of San Francisco, supra.

STEPHENSON v. OSAGE COAL & MINING CO. (Circuit Court of Appeals, Eighth Circuit. May 19, 1902.) No. 1,684. In Error to the Court of

Appeals of the United States in the Indian Territory. Samuel A. Wilkinson, for plaintiff in error. Dismissed, with costs, on motion of plaintiff in error.

TAYLOR v. DECATUR MINERAL & LAND CO. (Circuit Court of Appeals, Fifth Circuit. June 2, 1902.) No. 1,115. Appeal from the Circuit Court of the United States for the Northern District of Alabama. Milton Humes, for appellant. Lawrence Cooper, for appellee. Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. Without concurring fully in all the reasons given by the learned judge of the circuit court, we are satisfied that the decree rendered by him was correct, and the same is affirmed.

TEXAS & P. RY. CO. v. SMITH. (Circuit Court of Appeals, Fifth Circuit. May 20, 1902.) No. 1,111. In Error to the Circuit Court of the United States for the Eastern District of Texas. F. H. Prendergast and T. J. Freeman, for plaintiff in error. S. P. Jones, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. All the errors assigned and relied upon in this court are based upon the charge as given by the trial judge and his refusal to charge as requested. We find that the charge as given was correct, and fully stated the propositions of law involved in the case, and that the requested charges, so far as they announce correct propositions of law, were included in and covered by the main charge as given, and hence were properly refused. The judgment of the circuit court is affirmed.

THOMAS v. UNITED FIREMEN'S INS. CO. OF PHILADELPHIA. (Circuit Court of Appeals, Seventh Circuit. May 6, 1902.) No. 714. In Error to the Circuit Court of the United States for the Northern District of Illinois. William M. Jones and Almon W. Bulkley, for plaintiff in error. William B. Cunningham, for defendant in error. Dismissed on motion of counsel for plaintiff in error.

THOMPSON et al. v. HERREN et al. (Circuit Court of Appeals, Fifth Circuit. May 20, 1902.) No. 1,139. In Error to the Circuit Court of the United States for the Northern District of Texas. W. M. Sleeper, for plaintiffs in error. S. H. Lumpkin and Jas. M. Robertson, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The finding of the trial judge, a jury having been waived, as to the amount in controversy, is conclusive. The judgment of the circuit court is affirmed.

TYSON v. HURFORD et al. (Circuit Court of Appeals, Eighth Circuit. March 24, 1902.) No. 1,680. Appeal from the District Court of the United States for the District of Kansas. C. S. Bowman, for appellant. Dismissed, without costs to either party in this court, on motion of appellant.

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES, to Use of GOLDEN PRESSED & FIRE BRICK CO. (Circuit Court of Ap-

peals, Eighth Circuit. March 24, 1902.) No. 1,589. In Error to the Circuit Court of the United States for the District of Colorado. Questions certified to the supreme court of the United States.

WHEELOCK et al. v. UNITED STATES. (Circuit Court, S. D. New York. April 21, 1902.)

COXE, District Judge. The decision of the board of general appraisers is reversed; the question involved being the same as in the case of Milne v. U. S. (just decided) 115 Fed. 410.

In re BAIRD et al. In re EMPORIUM FURNACE CO. (District Court, E. D. Pennsylvania. May 15, 1902.) Nos. 852, 859. Application of Juniata Limestone Company for Dissolution of Restraining Order. Saml. W. Cooper, Hazard Dickson, and John Dickey, for trustee. Thos. J. Baldridge, for creditor.

J. B. McPHERSON, District Judge. In passing upon the report of the special referee in March of last year, I did not find it necessary to decide the question of fact whether the iron in controversy was the property of the Emporium Furnace Company or of Chester R. Baird & Co. It now appears, however, that there was more iron on storage than the 10,000 tons that had been pledged before the Juniata Limestone Company levied its execution, and to this surplus the limestone company asserts title by virtue of the sheriff's sale under its writ. The writ was against the Emporium Furnace Company, and the question is now raised whether the special referee was right in deciding that the iron was the property of Chester R. Baird & Co. If it was, the limestone company acquired no title by the sale, and has no right to the relief now asked. I have accordingly examined the testimony on this point, and agree with the conclusion of the referee "that the iron in question, at the time of the sheriff's sale, belonged to the said C. R. Baird & Co., the said iron having been sold and delivered to them, and that such ownership was subject to the rights of the holders of the said receipts (storage warrants) to be repaid such sums as were due or to become due on their several notes, and that the surplus or excess, if any, of said iron, either remaining after the payment of said sums or not covered by said receipts, pledged as collateral as aforesaid, was the property of the said C. R. Baird & Co." It follows that the present application must be refused.

STATE TRUST CO. et al. v. KANSAS CITY, P. & G. R. CO. et al. (TURNER, Intervener). (District Court, W. D. Arkansas, Ft. Smith Division. May 1, 1902.) Scott, Lake & Head, for intervener. Read & McDonough, for railway.

ROGERS, District Judge. The questions involved in this case are determined by the opinion rendered in State Trust Co. v. Kansas City, P. & G. R. Co. (decided at this term) 115 Fed. 367. The judgment is in favor of the intervener, Matilda Turner, for the full amount of her judgment, interest, and costs, and that the same be ordered paid by the Kansas City Southern Railway Company.

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Of estate of bankrupt, see "Bankruptcy," § 5.
Of estate of decedent, see "Executors and Administrators."
Of estate of insolvent, see "Insolvency," § 1.
Of property by receiver, see "Receivers," § 1.

ADMIRALTY.

See "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Shipping"; "Towage."

§ 1. Jurisdiction.

A suit to recover wharfage from the owner of a domestic vessel is maritime in its nature, and within the jurisdiction of a court of admiralty.—Braisted v. Denton (D. C.) 428.

§ 2. Parties, process, claims, and stipulations or other security.

The proper mode of procedure stated for the enforcement of a lien on subfreights reserved in a charter.—American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (C. C. A.) 669.

ADMISSIONS.

As evidence, see "Evidence," § 3.

ADVANCES.

By agent, see "Principal and Agent," § 1.

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

See "Limitation of Actions."

AFFREIGHTMENT.

Contracts, see "Shipping," § 3.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

ALIENS.

§ 1. Exclusion or expulsion.

A proceeding to deport a Chinese person will be dismissed, where he appears to have been already ordered deported by the commissioner of another district; the latter having acquired an exclusive jurisdiction of the case.—United States v. Luey Guey Auck (D. C.) 252.

Where, in proceedings under 27 Stat. 25, and 28 Stat. 7, for deportation of an unregistered Chinese laborer, he is taken before a commissioner, where the testimony is taken without objection, and on appeal to the judge no objection is made to the findings of facts, the court then has jurisdiction to act as upon agreed statement of facts.—In re Chin Ark Wing (D. C.) 412.

Under 27 Stat. 25, § 6, as amended by 28 Stat. 7, a Chinese person who was a merchant and lawfully in the United States in 1892–94, and afterwards became a laborer, cannot be deported for failing to have a laborer's certificate.—In re Chin Ark Wing (D. C.) 412.

The fact that during the six months following the passage of the Chinese exclusion act appellants were engaged in business as merchants *held* not conclusive of their present right to remain in the United States, when they afterwards left the country.—United States v. Moy Yim (D. C.) 652; Same v. Chung You, Id.; Same v. Dong War, Id.; Same v. Fee Toy, Id.; Same v. Moy Shang, Id.; Same v. Leong Han Che, Id.

§ 2. Immigration.

Debt is the proper form of action in which to recover the penalty imposed by 23 Stat. 332, for assisting the importation of an alien under contract to perform labor or services in the United States.—United States v. McElroy (C. C.) 252.

In an action to recover the penalty imposed by 23 Stat. 332, for assisting the importation of an alien under labor contract, a declaration which fails to show the character of the labor or services in which he was to be employed is insufficient.—United States v. McElroy (C. C.) 252.

In an action to recover the penalty imposed by 23 Stat. 332, for assisting the importation of an alien under labor contract, a declaration which fails to show the acts of assistance rendered is insufficient.—United States v. McElroy (C. C.) 252.

ALTERATION.

Of geographical or political divisions, see "Municipal Corporations," § 1.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Courts," § 5.

APPEAL AND ERROR.

Review of criminal prosecutions, see "Criminal Law," § 2.

§ 1. Decisions reviewable.

An order in a proceeding to recover property in the possession of a bankrupt, overruling exceptions to the report of a referee and approving such report, is not a final decree, and appealable.—Walter Scott & Co. v. Wilson (C. C. A.) 284.

An order of a circuit court authorizing a railroad receiver to issue certificates, and providing that they shall be prior in lien to a mortgage indebtedness or to certificates previously issued, is a final decision in such sense as to be appealable. — Bibber-White Co. v. White River Val. Electric R. Co. (C. C. A.) 786.

§ 2. Presentation and reservation in lower court of grounds of review.

A question arising on the charge of the trial court, presented for review by an appellate court, is limited by the exception taken in the court below, and cannot be broadened by the assignment of errors or by the brief of counsel.—Louisville & N. R. Co. v. McClish (C. C. A.) 268.

§ 3. Record and proceedings not in record.

Where by stipulation an action at law is tried in a circuit court without a jury, a part of the facts being stipulated and others specially found by the court, in the absence of a bill of exceptions, the only question open for consideration by the appellate court is whether the judgment is warranted by the pleadings and sustained by the facts stipulated and found by the trial court.—Garth v. Arnold (C. C. A.) 468.

An assignment of error, to be considered by the appellate court, must be based on some objection or exception taken in the trial court and shown by the record.—Parker v. Moore (C. C. A.) 799.

§ 4. Review.

Where by stipulation a jury is waived in the circuit court, the facts as found by the court are not subject to review by the appellate court.—Wolff v. Wells, Fargo & Co. (C. C. A.) 32.

The exclusion of a question asked of a witness on cross-examination, if erroneous, is error without prejudice, where the party asking the question was afterwards permitted to examine the witness fully as to the facts to which the question had reference.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

Where both parties, without objection, called witnesses to express their opinions as experts, based on the facts shown, upon the question whether an insured committed suicide or was murdered, which opinions were conflicting, such testimony necessarily required the submission of the issue to the jury, and its finding thereon is conclusive.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

Bill having been dismissed as to defendant as against whom it was multifarious, other defendants *held* not entitled to complain of such defect.—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 112.

Findings of fact by special master *held* conclusive on appeal, there being some evidence to support them.—Murphy v. Southern Ry. Co. (C. C. A.) 257.

Where plaintiff claims injury resulted from defective appliances furnished by his employer, evidence that the accident was caused by the carelessness of fellow servants is improperly excluded.—Westall v. Osborne (C. C. A.) 282.

A writ of error only brings up errors of law, while on an appeal the facts also are open to inquiry.—United States v. Diamond Match Co. (C. C. A.) 288.

Where an equity cause was heard by the chancellor on testimony taken in open court, very clear and palpable error must appear to justify a reversal on the facts by the appellate court.—Espenschied v. Baum (C. C. A.) 793.

A decree *held* not final, in such sense as to prevent a review of the matters determined on an appeal from a subsequent decree entered in the same cause.—Ohio River R. Co. v. Fisher (C. C. A.) 929.

§ 5. Liabilities on bonds and undertakings.

A bond given on an "appeal" inadvertently allowed by a federal court in an action at law is a nullity, which does not operate as a supersedeas, and is not based on any consideration which can bind the parties thereto.—Jabine v. Oates (C. C.) 861.

APPORTIONMENT.

Of salvage compensation, see "Salvage," § 1.

APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," § 3.

APPROPRIATION.

Of water rights in general, see "Waters and Water Courses," § 1.

ARBITRATION AND AWARD.

See "Reference."

ARGUMENT OF COUNSEL.

In criminal prosecutions, see "Criminal Law," § 1.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy," § 3.
Of patents, see "Patents," § 6.

§ 1. Requisites and validity.

Where accounts and bills receivable are transferred as collateral security for a loan, notice to the debtors is not necessary to make the transfer effectual as against the creditors of the borrower.—Young v. Upson (C. C.) 192.

Contract for the delivery of bonds in consideration of the assignment of a judgment against a railroad company *held* not to create an equitable assignment of an aliquot part of such bond issue.—Cushing v. Chapman (C. C.) 237.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," §§ 2–6.

§ 1. Requisites and validity.

A general assignment, valid at common law and by the law of the place where made and where the parties reside, will be recognized and enforced in another state as to lands there situated, when acknowledged in proper form for a conveyance in such state, although in other respects it may not conform to the requirements of the state statute relating to assignments.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

Creditors who have assented to a composition agreement by which lands previously conveyed by the debtor by a general assignment are to be held in trust by the assignee to secure the notes given to all the creditors are estopped to deny such trust.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

Act Pa. March 24, 1818, requiring assignments in trust by debtors to be recorded, does not apply to a transfer of property to the receiver of a national bank to secure a debt due to the bank alone.—McCartney v. Earle (C. C. A.) 462.

ASSOCIATIONS.

See "Building and Loan Associations."

ASSUMPSIT, ACTION OF.

In a jurisdiction where the rule prevails that a defendant in trover may defeat recovery by showing the ownership and right of possession of the property sued for in a third person, the same defense is available where the plaintiff elects to waive the tort and sue in assumpsit to recover the value of the property.—Phelps v. Church of Our Lady, Help of Christians (C. C. A.) 882.

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

ATTACHMENT.

See "Execution."
Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.
Exemptions, see "Exemptions"; "Homestead."

ATTORNEY AND CLIENT.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 1.
Attorneys in fact, see "Principal and Agent."

§ 1. Duties and liabilities of attorney to client.

A contract for the employment of a person by a corporation, so long as the agents making the agreement should remain in its employ, or so long as it continued in business, is not for such a definite term that attorneys employed by such person after his discharge to enforce his rights thereunder were negligent in bringing an action to recover wages up to that date, instead of one to recover full damages for the breach.—Eberhardt v. Harkless (C. C.) 816.

Evidence considered in an action to recover damages from attorneys for alleged negligence, and *held* insufficient to warrant the submission of the case to the jury.—Eberhardt v. Harkless (C. C.) 816.

BAILMENT.

See "Carriers," § 2; "Pledges."

BANKRUPTCY.

See "Assignments for Benefit of Creditors"; "Insolvency."

§ 1. Petition, adjudication, warrant, and custody of property.

Averments in a petition in involuntary bankruptcy intended to show that the indebtedness of defendant to one of the petitioners was fraudulently contracted are impertinent, and on motion therefor should be stricken out.—In re Ewing (C. C. A.) 707.

A petition alleging payments to a creditor while insolvent as an act of bankruptcy is demurrable, unless it further avers that such payments were made with intent to prefer such creditor over the other creditors of the defendant.—In re Ewing (C. C. A.) 707.

Order issued to show cause why party in possession of funds of bankrupt should not pay over the same to receiver of bankrupt appoint-

ed by court in another state.—In re Peiser (D. C.) 199.

Under Bankr. Act 1898, § 5, and general order No. 8, where a petition in bankruptcy is filed by one partner, and the other partner defaults after due notice, the proceeding should be deemed voluntary as to both, as against a creditor who seeks to intervene and contest the adjudication. —In re Carleton (D. C.) 246.

A creditor cannot intervene to oppose an adjudication under an ordinary voluntary petition in bankruptcy by setting up that the petitioner is not insolvent.—In re Carleton (D. C.) 246.

Where the members of a firm which files a voluntary petition in bankruptcy seek a discharge from individual as well as firm debts, each should file individual petitions, and the matter should be otherwise treated as if there were separate cases as to each partner.—In re Farley (D. C.) 359.

A respondent, against whom a petition in involuntary bankruptcy has been filed, is entitled to costs on its dismissal; but no allowance of counsel fees or damages is authorized, unless his property has been taken from his possession thereunder.—In re Morris (D. C.) 591.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

A final decree rendered in a proceeding by a third person to recover property in the possession of the receiver of a bankrupt is reviewable by a direct appeal as in cases in equity.—Walter Scott & Co. v. Wilson (C. C. A.) 284.

§ 3. —— Assignment, and title, rights, and remedies of trustee in general.

Under Bankr. Act, § 70, where goods were sold to the bankrupt on credit, and understanding that the title to such as should not be sold by him should remain in the vendor until payment of the purchase price, the title thereto vests in the trustee.—In re Garcewich (C. C. A.) 87.

Bankruptcy court *held* to have jurisdiction under Bankr. Law 1898, § 70, and V. S. § 2186, to sell so much of homestead, subject to mortgage thereon, as will satisfy debts of bankrupt existing before acquisition of homestead.—In re Gordon (D. C.) 445.

Under Bankr. Act 1898, § 70 (5), a trustee is vested with title to goods of the bankrupt which, though mortgaged, he was authorized by the terms of the mortgage to sell.—In re Hull (D. C.) 858.

§ 4. —— Preferences and transfers by bankrupt, and attachments and other liens.

Bankr. Act 1898, § 60c, entitles a creditor to deduct the amount of new credits from the preferences he would otherwise be required to surrender before proving his debt.—Kahn v. Cone Export & Commission Co. (C. C. A.) 290.

Building materials delivered by a contractor on the premises of an owner for use in the construction of a building thereon *held* to be in the possession of the owner as security for advances made, so far as to render his lien thereon valid under the statute of frauds, although not recorded, and to prevent the property from passing to the contractor's trustee in bankruptcy.—Duplan Silk Co. v. Spencer (C. C. A.) 689.

A trustee in bankruptcy, seeking by a proceeding at law to enforce the title of the bankrupt to personal property, will be subject to all legal and equitable claims of others to the property which exist against the bankrupt and which are not in fraud of the bankruptcy law or the rights of general creditors.—Duplan Silk Co. v. Spencer (C. C. A.) 689.

A creditor, establishing an adverse claim to a fund which, through his mistake, was paid over to the trustee without objection, is not entitled to recover interest, where the trustee merely retains the fund until the right thereto is determined by the courts.—Hutchinson v. Otis (C. C. A.) 937; In re Hutchinson, Id.

A court of bankruptcy *held* to have power to enforce a lien given by the rules of a stock exchange on the proceeds of the bankrupt's seat, where through mistake the lien was not asserted until after the fund had been paid over to the trustee.—Hutchinson v. Otis (C. C. A.) 937; In re Hutchinson, Id.

A creditor of a bankrupt, who relinquished a lien on a fund through mistake, *held* entitled to a reinstatement of such lien after the fund had passed into the hands of the trustee.—Hutchinson v. Otis (C. C. A.) 937; In re Hutchinson, Id.

The transfer by a merchant of notes and accounts as collateral to secure the repayment of a present loan does not create a preference within the scope of the bankrupt act.—Young v. Upson (C. C.) 192.

Method of application of proceeds of collateral determined in a case where money was advanced and collateral assigned at divers times under an agreement to loan to a merchant the money needed during a certain season, as the needs of his business required.—Young v. Upson (C. C.) 192.

Creditor, though putting more money into the bankrupt's estate than he took out, *held* to have received a preference, which would have to be surrendered before he could prove the balance of his claim. Bankr. Act, §§ 57g, 60a.—In re Colton Export & Import Co. (D. C.) 158.

A secret preference received by a creditor of a bankrupt in a former composition is fraudulent, and may be recovered back by the bankrupt's trustee, although received more than four months prior to the bankruptcy, and it must be surrendered before the creditor can prove an independent debt against the estate.—In re Chaplin (D. C.) 162.

A chattel mortgage on goods, giving the mortgagor the right to sell the goods and replace the same with others, to come under the mortgage, is fraudulent and void in bankruptcy proceedings.—In re Hull (D. C.) 858.

A chattel mortgage, given within four months prior to the bankruptcy of the mortgagor, to secure the purchase price of goods then bought,

and including such goods and also other goods previously owned by the mortgagor, is void as an illegal preference under the bankruptcy act as to the goods previously owned, but is valid as respects the new goods.—In re Hull (D. C.) 858.

Bankr. Law, § 67, subd. "f," is the only law regarding liens of attachment obtained against the insolvent within four months of the adjudication.—In re Tune (D. C.) 906.

Whatever benefit results from the annulment of attachment liens extends to exempt property, as well as to that which is not exempt.—In re Tune (D. C.) 906.

An attachment in a suit on a simple contract debt is a lien obtained through legal proceedings, and is annulled by an adjudication in bankruptcy of the defendant within four months.—In re Tune (D. C.) 906.

Payments on a note which remains the property of the payee when further indebtedness is contracted are payments on the entire indebtedness then existing, and constitute preferences, which must be surrendered before the subsequent indebtedness can be proved, when such indebtedness existed at the time the payments were made.—In re Meyer (D. C.) 997.

Payments made on a note by an insolvent within four months prior to his bankruptcy, to an indorsee, who holds the note as collateral security for a debt of the payee, are payments to the payee, and must be surrendered by him before he can prove a further indebtedness against the bankrupt's estate.—In re Meyer (D. C.) 997.

§ 5. —— Administration of estate.

Where the lien of an attachment from a state court is annulled by an adjudication in bankruptcy, such court loses jurisdiction of the property, which passes into the exclusive jurisdiction of the court of bankruptcy.—In re Tune (D. C.) 906.

Where an adjudication in bankruptcy is properly pleaded by defendant in an attachment suit in a state court, the only remaining jurisdiction in that court is to stay proceedings until the question of discharge has been determined by the court of bankruptcy, and, if not granted, the state court may render a personal judgment.—In re Tune (D. C.) 906.

A court of bankruptcy may inquire in a summary way into an adverse claim made by a stranger to property of the bankrupt, and if the claim is manifestly without foundation it may order the property turned over to the trustee; but if it appears that questions of fact are involved its jurisdiction is ousted, and the right of possession must be tried in a plenary action.—In re Tune (D. C.) 906.

Where a state court in an attachment suit refuses to regard an adjudication in bankruptcy or a discharge properly pleaded by the defendant, and renders judgment for sale of the property, defendant's trustee is entitled to an injunction from the court of bankruptcy, on petition and service on the parties adversely interested.—In re Tune (D. C.) 906.

Where a justice of the peace refuses to regard an adjudication in bankruptcy, but proceeds to render judgment and order the sale of attached property, which by virtue of such adjudication has passed into the jurisdiction of the court of bankruptcy, the latter court is justified in directing the seizure of the property by the marshal.—In re Tune (D. C.) 906.

§ 6. —— Claims against and distribution of estate.

A court of bankruptcy may, in its discretion, permit the amendment of a proof of claim after the expiration of the year allowed for proving claims, where there was sufficient to amend by in the original proof.—Hutchinson v. Otis (C. C. A.) 937; In re Hutchinson, Id.

Where a creditor of a bankrupt has received a fraudulent preference, recoverable by the trustee, such preference will not be treated as a set-off, either to reduce the amount of his claim or against the dividend to be received thereon, but the amount must be surrendered to the trustee before he will be permitted to prove an independent debt.—In re Chaplin (D. C.) 162.

A note of a third person received by a creditor from his debtor as part of a secret preference in a composition must be charged to him at its face value, where it was at the time taken and credited at such value.—In re Chaplin (D. C.) 162.

Where a note given on an account has been discounted in the usual course of business, even with the indorsement of the payee, and the proceeds applied on the debtor's account, it should be regarded as a payment of money by the debtor as of that date, for the purpose of determining the question of preference after the debtor's bankruptcy, provided the note did not come back to the payee for failure of the bankrupt to pay the same.—In re Wiessner (D. C.) 421.

An attorney's fee, stipulated for in a note in case it should be placed in the hands of an attorney for collection, cannot be proved as part of the debt in bankruptcy, where the note had not matured when the petition in bankruptcy against the maker was filed.—In re Garlington (D. C.) 999.

§ 7. Rights, remedies, and discharge of bankrupt.

Objection by a bankrupt that the specifications of a creditor, objecting to his discharge on the ground that he had concealed his assets, were defective because not averring that he acted knowingly and fraudulently, was waived where not taken in the court below, and where, notwithstanding the defective specifications, the issue as to fraud was fully heard.—In re Osborne (C. C. A.) 1.

The district court has discretion to permit specifications to be filed by a creditor objecting to a bankrupt's discharge after the 10 days allowed by law, where it appears that they are merely enlargements of specifications already filed and purely amendatory thereof.—In re Osborne (C. C. A.) 1.

The fact that loans made to a bankrupt and not entered by him in his regular account books

were made before the bankrupt act was passed did not excuse his failure to enter them, as required by the bankrupt act.—In re Feldstein (C. C. A.) 259.

Failure of bankrupt to keep proper books of account *held* to have been with "fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," within Bankr. Act, § 14.—In re Feldstein (C. C. A.) 259.

Books of account kept by bankrupt *held* not a compliance with the requirements of the bankruptcy act.—In re Feldstein (C. C. A.) 259.

Specifications in opposition to the discharge of a bankrupt on the ground of concealment of property *held* not supported by the proofs.—Fields v. Karter (C. C. A.) 950.

The homestead exemption will not be allowed, where the homestead waiver creditors, and not the bankrupt's family, will secure the benefit thereof.—In re Garner (D. C.) 200.

The mere act of a bankrupt in claiming a homestead exemption in the schedule filed by him *held* not a compliance with Code Va. §§ 3631, 3639.—In re Garner (D. C.) 200.

A bankrupt *held* debarred from the right to a discharge on the ground that he knowingly and fraudulently concealed from his trustee money standing to his credit in bank.—In re Otto (D. C.) 860.

The court of bankruptcy should see to it, pending a discharge, that remedies for the collection of debts from which the discharge might absolve the debtor shall not be perfected, so as to condemn exempt property in satisfaction of debts from which the discharge is intended to free it.—In re Tune (D. C.) 906.

A bankrupt *held* not debarred from his right to a homestead exemption under the laws of Georgia because of his previous conveyance of the property to defraud creditors, where it was reconveyed prior to the bankruptcy proceedings and was scheduled by him.—In re Thompson (D. C.) 924.

A court of bankruptcy cannot reopen the matter of a bankrupt's exemptions, after they have been set off to him and he has been granted a discharge, the validity of which is not questioned.—In re Reese (D. C.) 993.

A creditor, duly scheduled and notified of bankruptcy proceedings, is chargeable with the action taken therein; and, where he fails to appear to contest the allowance of the exemptions claimed, his laches debars him from the right to have the matter reopened on the ground that the property set apart exceeded in value the exemptions allowed by law.—In re Reese (D. C.) 993.

§ 8. Costs and fees.

Under Bankr. Act 1898, §§ 5, 40a, 48a, 52a, in a partnership case wherein the partners sought and received individual discharge, the clerk, referee, and trustee, respectively, *held* entitled to separate fees as though there were distinct cases as to each partner, in addition to the partnership case.—In re Farley (D. C.) 359.

BANKS AND BANKING.

§ 1. Functions and dealings.

A president of a bank, without special authority, cannot bind the bank by an incorrect statement as to the cashier's accounts, furnished to a surety company to assist the cashier to obtain a bond to secure the faithful discharge of his duties.—United States Fidelity & Guaranty Co. v. Muir (C. C. A.) 264.

§ 2. National banks.

The validity of dealings by the receiver of a national bank with securities pledged for a debt to the bank, which inured to the benefit of all parties in interest, *held* not subject to attack in equity by the administrator of the pledgor.—McCartney v. Earle (C. C. A.) 462.

A suit brought by the receiver of a national bank, by direction of the comptroller, to enforce a liability to the bank and secure a sale of pledged securities, is one for winding up the affairs of the bank, and within the jurisdiction of a circuit court, without regard to the citizenship of the parties.—McCartney v. Earle (C. C. A.) 462.

The only authorized procedure for enforcing the individual liability of the shareholders in a national bank which has gone into voluntary liquidation is by a creditors' bill in the district where the bank is located.—Williamson v. American Bank (C. C. A.) 793.

Under an indictment for embezzlement by an officer of a national bank, by causing money of the bank to be paid out to insolvent persons on their note, with intent to injure and defraud the bank, the insolvency of such persons is an important consideration for the jury, going to the question of fraudulent intent.—McKnight v. United States (C. C. A.) 972.

Where the evidence in support of an indictment for embezzlement by an officer of a national bank tends to prove a transaction to which the consent of the directors cannot be presumed, an averment of want of such consent need not be specifically proved; but, if consent is relied on, it must be shown as matter of defense.—McKnight v. United States (C. C. A.) 972.

In a prosecution of an officer or clerk of a national bank, under Rev. St. § 5209, where the acts charged are proved, the intent must be inferred therefrom, and such inference can only be overthrown by evidence sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no such guilty intent in the transaction.—United States v. German (D. C.) 987.

BAR.

Of action by former adjudication, see "Judgment," § 2.

BASTARDS.

§ 1. Illegitimacy in general.

Nothing may impugn the legitimacy of the issue of a lawful marriage, less than proof of

facts which show it to have been impossible that the husband could have been the father.—Adger v. Ackerman (C. C. A.) 124.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BEQUESTS.

See "Wills."

BETTING.

See "Gaming."

BILL OF LADING.

See "Carriers," § 2.

BONA FIDE PURCHASERS.

Mortgagee as bona fide purchaser of goods fraudulently procured by mortgagor, see "Mortgages," § 1.
Of land, see "Vendor and Purchaser," § 1.
Of municipal bonds, see "Municipal Corporations," § 3.

BONDS.

Municipal bonds, see "Municipal Corporations," § 3.
Town bonds, see "Towns," § 1.

Bonds in legal proceedings.

See "Appeal and Error," § 5; "Removal of Causes," § 3.

BREACH.

Of contract, see "Contracts," § 3.
Of warranty, see "Insurance," § 5.

BUILDING AND LOAN ASSOCIATIONS.

A building and loan association, whose original charter was invalid under the laws of Tennessee, *held* to have been validly incorporated and to have acquired the powers of such an association under a later act.—Deitch v. Staub (C. C. A.) 309.

Where under the laws of the state a building and loan association is authorized to contract for premiums upon loans in certain cases, the presumption is that such a contract was legal, and the burden of proving that the premium was usurious rests upon the borrower.—Deitch v. Staub (C. C. A.) 309.

A purchaser of property, who assumed payment of a loan thereon to a building and loan association as part of the purchase price, *held* not entitled to interpose the defense of usury or to be credited on the principal with the amount of premiums paid.—Deitch v. Staub (C. C. A.) 309.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title."
Cancellation of insurance policy, see "Insurance," § 3.
Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 3.

§ 1. Control and regulation of common carriers.

A shipment of grain over a single railroad between points within the same state is not an interstate shipment, and within the terms of the interstate commerce act, because the line of road between such points passes through other states.—United States v. Lehigh Val. R. Co. (D. C.) 373.

Agreement for division of traffic need not be reduced to writing to constitute an offense against the interstate commerce act.—In re Pooling Freights (D. C.) 588.

The interstate commerce act prohibits both a physical pool and a money pool between competing railroads.—In re Pooling Freights (D. C.) 588.

Where carrier is a corporation, both it and its officers *held* indictable for violation of interstate commerce act.—In re Pooling Freights (D. C.) 588.

§ 2. Carriage of goods.

The receipt by a ship of goods purporting to be those covered by bills of lading previously issued by an agent of the carrier without authority is not a ratification of such bills, where through a fraudulent substitution the goods delivered are not the same as those therein described.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

The unauthorized execution by an agent of a steamship company of bills of lading for goods then in a public warehouse subject to the orders of a third party does not bind the company, so as to make it responsible for the goods before they are actually delivered into its custody or control.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

A bill of lading is both a receipt and a contract of carriage, and as a receipt it is open to explanation.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

The giving of a bill of lading as a matter of accommodation for goods not actually delivered at the time, and which the owner contracts to deliver, does not impose upon the carrier the duty of making an effort to obtain possession of the goods, wherever they may be.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

CERTIFICATE.

Receiver's certificates, see "Receivers," § 1.

CERTIFICATION.

Of Chinese residents, see "Aliens," § 1.

CHANCERY.

See "Equity."

CHARACTER.

Of witness, see "Witnesses," § 2.

CHARGE.

Of legacies on property by will, see "Wills," § 1.
To jury in civil actions, see "Trial," § 1.
To jury, in criminal prosecutions, see "Criminal Law," § 1.

CHARTER PARTIES.

See "Shipping," § 1.

CHATTEL MORTGAGES.

See "Pledges."

CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

CHOSE IN ACTION.

Assignment, see "Assignments."

CIRCUIT COURTS OF APPEALS.

See "Courts," § 2.

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Aliens."
Citizenship ground of jurisdiction of United States courts, see "Courts," § 4; "Removal of Causes," § 2.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 6.
Mining claims, see "Mines and Minerals," § 1.
Of patent, see "Patents," § 5.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 6.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 1.

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Guaranty."

COLLISION.

§ 1. Rules and precautions for preventing collisions in general.

A tug with a tow and a steamship both *held* in fault for a collision between the steamship and tow while passing on crossing courses in East river.—The Ocean (D. C.) 229.

A collision at sea, during a thick fog, between a schooner and a steamship, *held* due to unavoidable accident, and not to any fault of either vessel.—Dunton v. Allan Line S. S. Co. (D. C.) 250.

A vessel which assents by signal that another shall cross her bows cannot urge the attempted manuever as a fault, though it results in a collision.—The Arthur M. Palmer (D. C.) 417.

§ 2. Steam vessels meeting or crossing.

Where two steamships meeting on the Great Lakes came in collision because one failed to change her course and the other changed insufficiently, although there was room for both to have changed so as to pass in safety, both will be held in fault.—The Mary C. Elphicke (D. C.) 375.

A steamship which had exchanged signals with a pilot boat in the night for a pilot *held* solely in fault for a collision which resulted from her failure to stop headway to enable the pilot to be put on board, which fact the pilot boat did not ascertain until too late to avoid the collision.—The Ansgar (D. C.) 440; The Philadelphia, Id.

A ferryboat and tug each *held* in fault for a collision in East river, for improper maneuvers and for changing signals for crossing, causing confusion in the management of both.—In re Brooklyn Ferry Co. (D. C.) 564; The Richard Croker, Id.

§ 3. Steam vessels and sail vessels.

Evidence considered, and *held* to exonerate a steamer from fault for a collision with a meeting schooner in a channel in the night, and to show that the fault was that of the schooner in changing her course.—The Pilot Boy (C. C. A.) 873.

In case of a collision between a steamer and a schooner the steamer is presumptively in fault, it being her duty under the rules to keep out of the way, and the burden rests upon her, in order to avoid liability, to show that she took the proper precautions, and that they would have proved effective if the schooner had not changed her course.—The Pilot Boy (C. C. A.) 873.

In case of collision between a sailing vessel and a steamer, the presumption of law is that the steamer was in fault; and she has the burden of proof to establish the misconduct of the sailing vessel and her own proper navigation, or that the collision resulted from inevitable accident.—The Ardanrose (D. C.) 1010.

A steamer *held* solely in fault for a collision with a schooner in Mobile Bay.—The Ardanrose (D. C.) 1010.

§ 4. Vessels in tow.

A steamboat and a tug with a tow, meeting on the Delaware river at night, both *held* in fault for a collision between the ship and the tow.—The John I. Brady (D. C.) 204; The Wildcroft, Id.

The navigation of a tug with tows at sea involves such danger of collision that the utmost care is required on the part of those in charge, and unusual maneuvers which increase the danger are not justified, unless in case of necessity, and then extraordinary precaution should be taken.—Consolidation Coal Co. v. The Admiral Schley (D. C.) 378; American Mail S. S. Co. v. The Charles F. Mayer, Id.

Each of two steamers *held* in fault for a collision in a fog; the one for unnecessary maneuvering with her tow in the course of other vessels, and the other for excessive speed.—Consolidation Coal Co. v. The Admiral Schley (D. C.) 378; American Mail S. S. Co. v. The Charles F. Mayer, Id.

The failure of a tug to give a signal required by the rules on taking a tow from her berth will not render her liable for a collision between the tow and another vessel, occurring soon after, when the other vessel saw the tow being taken out.—The Captain Sam (D. C.) 1000.

As between a tug with a heavy tow and an overtaking tug without any tow, the duty is imposed on the latter to keep out of the way.—The Captain Sam (D. C.) 1000.

It is not negligent, under all circumstances, for a tug to tow a vessel with a great length of line, and to render her liable for a collision on that ground it must be shown that it resulted from such cause.—The Captain Sam (D. C.) 1000.

The fault for a collision between a barge in tow and an overtaking tug without any tow *held* to have been solely that of the tug, which had no lookout, and failed to see and observe the tow, as it was her duty to do.—The Captain Sam (D. C.) 1000.

§ 5. Vessels at rest, at anchor, or at piers.

An error by which a steamer in a fog anchored somewhat outside the limits of an anchorage ground *held* not a fault, contributory to a collision with a passing tow, which would not have occurred if the tug had been properly navigated.—The A. P. Skidmore (C. C. A.) 791; The City of Lawrence, Id.

A tug *held* solely in fault for a collision between her tow and a steamship, which was lying at rest at the quarantine station in the Delaware river, undergoing inspection, when the tug, without necessity, passed so near her in passing down the river that the tow, which was without a rudder, sheered and struck her.—The John F. Gaynor (D. C.) 382.

Sailing vessels have no right to anchor, in thick and stormy weather, so as to obstruct a channel used by passenger steamers and create danger of collision, where it can be avoided by reasonable effort on their part; and, where it cannot, they should display such lights as will be effective under the conditions to give warning of their position.—The Maggie Ellen (D. C.) 442.

A schooner, anchored without necessity in a channel in stormy weather, with insufficient lights, *held* in fault for a collision with a passing steamer.—The Maggie Ellen (D. C.) 442.

A barge negligently moored outside of others at a pier in a high wind *held* liable for a collision caused by the parting of a line holding the inside vessel.—The Atlas (D. C.) 856; The Leonard J. Busby, Id.

Evidence *held* to show that the parting of a line by which a barge was made fast to a pier was due to the strain put upon it by other barges tied up to the first on the outside, where they were negligently permitted to remain during a high wind.—The Atlas (D. C.) 856; The Leonard J. Busby, Id.

§ 6. Lights, signals, and lookouts.

The absence of a properly stationed lookout on a steamer at the time of a collision with a sailing vessel, other than the officer of the deck or the helmsman, casts upon her the burden of showing that the collision could not have been avoided, had there been a lookout.—The Pilot Boy (C. C. A.) 873.

A steam vessel, which did not have a proper lookout as required by the rules, cannot be exonerated by the court from fault for a collision, unless it appears that she could not possibly have avoided the accident, even if the lookout had been in his place.—The Arthur M. Palmer (D. C.) 417.

§ 7. Narrow channels, harbors, rivers, and canals.

Each of two tugs *held* in fault for a collision in the Hudson river between one, which was coming out of a slip without a proper lookout, and a float which the other was towing up the river unnecessarily near the ends of the piers.—The Arthur M. Palmer (D. C.) 417.

A tug navigating with her tow too near the Brooklyn shore in passing down East river, in violation of the statute, where its observance was possible, though not convenient, must be held in fault for a collision there occurring, although she was not otherwise in fault.—The Emperor (D. C.) 447.

Evidence *held* to show that a sailing lighter was in fault for a collision with a car float in tow of a tug in East river, for attempting to go about on the other tack, in front of the tug and tow.—The Emperor (D. C.) 447.

A steamship *held* not in fault for the sinking of a tug in collision caused by the premature fastening of a line which was being taken out by the tug, which swung the tug in front of the ship, where the preponderance of the evidence showed that the line was made fast on a signal from the tug.—Thomas v. Atlantic Transport Co. (D. C.) 852; The Minnehaha, Id.

§ 8. Suits for damages.

The testimony of officers and witnesses as to what was actually done on board their own vessels is entitled to greater weight than that of witnesses who form their opinions merely from observation.—The Captain Sam (D. C.) 1000.

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMITY.

Between courts, see "Courts," § 7.

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Means and methods of regulation.

Wilson Act Aug. 8, 1890, does not authorize a state to interfere with the sale and purchase of liquors between citizens of different states, or with the soliciting of orders in a state by a dealer whose place of business is in another state.—In re Bergen (C. C.) 339.

Sess. Laws Kan. 1885, c. 149, § 12, making it a criminal offense to take orders for liquors in the state, is an attempted interference with interstate commerce, and unconstitutional and void as applied to a commercial traveler soliciting orders for a dealer in another state, which are forwarded for his acceptance or rejection. —In re Bergen (C. C.) 339.

State statutes giving liens for repairs and supplies furnished to a ship cannot be classed as laws imposing burdens on interstate or foreign commerce, although applied to foreign ships.—The Robert Dollar (D. C.) 218.

To constitute an offense under the provisions of Act May 25, 1900 (31 Stat. 187), relating to the interstate shipment of game, it is essential that such game should have been shipped or delivered to a carrier for shipment.—United States v. Smith (D. C.) 423.

It is essential that an indictment for the evasion or violation of Act May 25, 1900 (31 Stat. 187), relating to the interstate shipment of game, should charge that the game in question was killed in violation of the local law. —United States v. Smith (D. C.) 423.

COMMON CARRIERS.

See "Carriers."

COMMON COUNTS.

See "Assumpsit, Action of."

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 1.
Of agent, see "Principal and Agent," § 1.

COMPETENCY.

Of experts as witnesses, see "Evidence," § 7.

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 3.

COMPOSITIONS WITH CREDITORS.

A secret preference given by a debtor to one creditor in a composition is fraudulent and voidable, and may be recovered back, if paid. Its further effect is to avoid the composition as to the innocent creditors, but to leave it binding on the one preferred.—In re Chaplin (D. C.) 162.

COMPROMISE AND SETTLEMENT.

See "Compositions with Creditors"; "Release."

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 7.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

Precedent to enforcement of trust, see "Trusts," § 2.

CONFLICT OF LAWS.

As to contracts, see "Contracts," § 1.
As to insurance policy, see "Insurance," § 2.
As to validity of assignments for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.

CONSIDERATION.

Of contract, see "Contracts," § 1.

CONSPIRACY.

§ 1. Criminal responsibility.

In construing an indictment for conspiracy to defraud the United States, on demurrer, general averments stating the scheme and purpose of the conspiracy, made in one count, must be read into all counts.—United States v. Greene (D. C.) 343.

An indictment under Rev. St. § 5440, for conspiring to defraud the United States, construed, and *held* sufficient.—United States v. Greene (D. C.) 343.

It is not necessary, in charging a conspiracy to defraud the United States under Rev. St. § 5440, to aver that it succeeded; but the crime is complete when the conspiracy is shown, and that one or more of the parties have done some act to effect the object of the conspiracy.—United States v. Greene (D. C.) 343.

An indictment under Rev. St. § 5438, for a conspiracy to defraud the United States by obtaining the allowance of a fraudulent claim, must set out the particulars in which such claim was fraudulent.—United States v. Greene (D. C.) 343.

CONSTITUTIONAL LAW.

Special or local laws, see "Statutes," § 1.

§ 1. Vested rights.

A person having suffered loss to property by reason of the default of a railroad company, and brought an action under Sand. & H. Dig. Ark. § 6251, prior to Act March 31, 1899, *held* to have acquired a vested right in the lien provided by the prior statute, which could not be affected by the latter act.—State Trust Co. v. Kansas City, P. & G. R. Co. (C. C.) 367.

§ 2. Obligation of contracts.

Obligation of contract *held* not impaired by legislation permitting defectively organized corporation to become corporation de jure.—Deitch v. Staub (C. C. A.) 309.

Enactments of a city relating to a contract with a water company and the granting of its franchise, passed under legislative authority, are laws of the state within the meaning of the contract clause of the federal constitution.—American Waterworks & Guarantee Co. v. Home Water Co. (C. C.) 171.

A city, having granted a telephone company right to use its streets, cannot, after it has so occupied them, impose a new condition that it pay for such use.—Sunset Telephone & Telegraph Co. v. City of Medford (C. C.) 202.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTRACTS.

Assignment, see "Assignments."
Damages for breach, see "Damages," § 1.
Impairing obligation, see "Constitutional Law," § 2.
In restraint of trade, see "Monopolies," § 1.
Operation and effect of gaming laws, see "Gaming," § 1.
Parol or extrinsic evidence, see "Evidence," § 6.

Contracts of particular classes of parties.

See "Carriers," § 2; "Municipal Corporations," § 2.

Contracts relating to particular subjects.

See "Patents," § 6.

Particular classes of express contracts.

See "Guaranty"; "Indemnity"; "Insurance"; "Liens"; "Marriage"; "Principal and Surety"; "Sales"; "Vendor and Purchaser."
Affreightment, see "Shipping," § 3.
Bills of lading, see "Carriers," § 2.
Charter parties, see "Shipping," § 1.

Particular classes of implied contracts.

See "Assumpsit, Action of."

Particular modes of discharging contracts.

See "Release."

§ 1. Requisites and validity.

A contract, although recognized as valid by the laws of the state where made, will, in general, not be enforced by the courts of another state, where it is contrary to morals, or to the public policy or statutes of such state.—Parker v. Moore (C. C. A.) 799.

A contract by which a railroad company agrees to establish and maintain a station at a particular place, and not to establish or maintain any other station within a certain distance therefrom, is contrary to public policy, and cannot be enforced in a court of equity.—Beasley v. Texas & P. Ry. Co. (C. C. A.) 952.

Where a railroad company failed to perform its contract to deliver bonds in consideration of the assignment of a judgment, plaintiff *held* not entitled to enforce an equitable interest in the bonds issued, but only entitled to recover on an implied contract for the payment of the money value.—Cushing v. Chapman (C. C.) 237.

Whether a complaint by savings and loan association to foreclose mortgage executed by shareholder was without equity was determinable by the law of the forum.—Interstate Savings & Loan Ass'n v. Badgley (C. C.) 390.

§ 2. Construction and operation.

A written contract between two stockholders in a corporation, by which one agreed "to provide as a loan to the said [corporation] whatever additional capital is needed to provide a working fund," is too uncertain and vague to be enforceable in a court of law by an action to recover damages for its breach.—Jones v. Vance Shoe Co. (C. C. A.) 707.

§ 3. Performance or breach.

A provision of a building contract giving the owner the right, on default by the contractor, to complete the building and to use the materials delivered by the contractor for that purpose, construed.—Duplan Silk Co. v. Spencer (C. C. A.) 689.

Under a building contract which gives the owner the right, on default of the contractor, to complete the building, using the materials provided by the contractor, materials brought upon the premises by the contractor are so far delivered into the possession of the owner as to make them a security for advances made by him on the contract.—Duplan Silk Co. v. Spencer (C. C. A.) 689.

Contract for construction of dry dock of the United States construed, and *held*, that a civil engineer in charge of the work could not bind the United States by consenting to deviations from specific requirements of the specifications as to workmanship or materials, which fact the contractors were bound to know.—United States v. Walsh (C. C. A.) 697.

Neither acceptance of a dry dock for the United States by an engineer nor his acquiescence as the work proceeded, and final acceptance of the dock by a board of officers designated by the navy department, is of controlling effect, so as to deprive the government of its right of action for a breach of contract in material and substantial particulars.—United States v. Walsh (C. C. A.) 697.

A contract for the construction of a dry dock for the United States provided that the contractors should not be entitled to full payment until the dock had been tested by officers designated by the United States and accepted after their approval. *Held*, that an acceptance and payment of the contractors after such test did not conclude the government, if made in ignorance of facts which, if known, would have led to a refusal to accept.—United States v. Walsh (C. C. A.) 697.

CONTRIBUTION.

Among sureties, see "Principal and Surety," § 2.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Conveyances by or to particular classes of parties.

See "Guardian and Ward," § 1; "Infants," § 1.

Conveyances of particular species of property.

See "Mines and Minerals," § 2.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Deeds"; "Mortgages."

COPYRIGHTS.

§ 1. Nature and acquisition.

Rev. St. U. S. § 4963, imposing penalty for inserting false notice of copyright, *held* not to have extraterritorial effect. — McLoughlin v. Raphael Tuck & Sons Co. (C. C. A.) 85.

Rev. St. U. S. § 4963, as amended by Act March 3, 1897, imposing penalty for issuing or selling books bearing false notice of copyright, *held* not to apply to sale of books imported to United States prior to its passage, though sold therein afterwards. — McLoughlin v. Raphael Tuck & Sons Co. (C. C. A.) 85.

CORPORATIONS.

Right to remove cause to federal court, see "Removal of Causes," § 1.

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Railroads."

§ 1. Corporate existence and franchise.

A member of a building and loan association, who obtains a loan from it and executes his note and mortgage therefor, waives the right to deny the power of the association to make such loan or to carry on the business of such an association, and is estopped to set up an irregularity in its organization in defense to an action to enforce the contract.—Deitch v. Staub (C. C. A.) 309.

§ 2. Members and stockholders.

A judgment against a Kansas corporation, rendered in that state, is conclusive upon a stockholder in an action against him to enforce his individual liability under the constitutional and statutory provisions of the state, unless impeached for want of jurisdiction or for fraud and collusion in its procurement.—American Nat. Bank v. Supplee (C. C. A.) 657.

The cause of action given creditors of a corporation by Rev. St. Me. 1857, c. 46, § 34, to reach dividends improperly paid does not accrue until execution against the corporation is returned nulla bona, and limitations do not run until such time.—Bowker v. Hill (C. C.) 528.

A stockholder in a corporation has the right to vote for its dissolution, even though he is influenced to that course by a wish to terminate a contract beneficial to the corporation, but onerous to himself. — Windmuller v. Standard Distilling & Distributing Co. (C. C.) 748.

§ 3. Officers and agents.

Neither the mortgagee of a water company nor one subrogated to its rights can maintain an action in a federal court against a city to enforce payment of water rentals claimed to be due under a contract with the water company, where both the company and city are corporations of the same state.—American Waterworks & Guarantee Co. v. Home Water Co. (C. C.) 171.

§ 4. Corporate powers and liabilities.

Mortgage bondholders of a water company in North Carolina, whose property had been sold in foreclosure proceedings under a second mortgage and bought by a new company, which assumed the first mortgage debt with the consent of the bondholders, *held* to have become mortgagees of the new company, so as to render their mortgage subject to the prior lien of a judgment for tort against such company under the state statute.—Guardian Trust & Deposit Co. v. Greensboro Water Supply Co. (C. C.) 184.

One whose property is injured by fire through the negligence of a water company in failing to comply with its contract with the city to sup-

ply water for fire protection may sue the company in tort or contract at his election, and when he sues in tort his judgment is within Code N. C. § 1255, which give judgments against corporations for tortious injury to person or property priority of lien over mortgages on the corporation property.—Guardian Trust & Deposit Co. v. Greensboro Water Supply Co. (C. C.) 184.

§ 5. Dissolution and forfeiture of franchise.

Trustees of a dissolved corporation can only pursue such claims against third persons as inure to all the creditors; and, if recovery depends on equities of particular creditors, they must sue themselves.—Bowker v. Hill (C. C.) 528.

COSTS.

In bankruptcy, see "Bankruptcy," §§ 1, 8.

CO-SURETIES.

See "Principal and Surety," § 2.

COUNTIES.

See "Municipal Corporations."

COURTS.

Power to review action of patent commissioner, see "Patents," § 4.
Province of court and jury, see "Trial," § 1.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."

Jurisdiction of particular actions, proceedings, or subjects.

See "Quieting Title," § 1.
For infringement of patent, see "Patents," § 7.
In state court after remand from federal court, see "Removal of Causes," § 5.

§ 1. Establishment, organization, and procedure in general.

The title of bona fide purchasers of lands from one who had been decreed to be the owner *held* not to have been affected by the reversal of such decree on a bill of review filed several years after the purchase.—Ohio River R. Co. v. Fisher (C. C. A.) 929.

Where a decree of the circuit court has been affirmed by the circuit court of appeals, the circuit court cannot review the action of the court of appeals, or entertain a petition to amend the decree.—Martin v. People's Bank (C. C.) 226.

§§ 2, 3. United States courts.

Where a federal court has acquired full jurisdiction of the cause and all necessary parties in a suit to administer a trust, it may protect such jurisdiction by ancillary proceedings against persons attaching the trust property on process from a state court, without regard to the citizenship of such persons.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

The inhibition of the federal judiciary act against the bringing of a suit in any district, except one of which either the plaintiff or defendant is an inhabitant, is waived by a defendant who removes into a federal court a suit brought in a court of a state of which neither party is an inhabitant.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

A municipal ordinance, passed under color of delegated power, is a law of the state, within the meaning of section 5 of the act creating the circuit courts of appeals; and in a suit to enjoin its enforcement as in contravention of the federal constitution an appeal lies to the supreme court.—City of Owensboro v. Owensboro Waterworks (C. C. A.) 318.

Where the jurisdiction of a circuit court is based solely on the ground that a law of a state is claimed to be in contravention of the constitution of the United States, and not on diversity of citizenship, the supreme court has exclusive jurisdiction of an appeal; and an appeal to the circuit court of appeals will not lie, although other questions may also be involved.—City of Owensboro v. Owensboro Waterworks (C. C. A.) 318.

A court of the United States will follow the rule laid down by the highest court of the state in determining whether a contract is governed by the laws of the place where it was made and to be performed, or by the law of the forum, and also upon the question whether a contract is contrary to the public policy or statutes of the state.—Parker v. Moore (C. C. A.) 799.

A suit to restrain the enforcement of enactments of a city passed in the exercise of its delegated legislative powers, on the ground that they attempt to annul a contract made by a prior ordinance without notice to the other party or due process of law, involves a question arising under the constitution of the United States, and is within the jurisdiction of a federal court, regardless of the citizenship of the parties.—American Waterworks & Guarantee Co. v. Home Water Co. (C. C.) 171.

Federal court having taken jurisdiction of a suit to foreclose a railroad mortgage, it had jurisdiction of an intervention to establish the priority of a creditor's lien under a judgment recovered in the state court.—State Trust Co. v. Kansas City, P. & G. R. Co. (C. C.) 367.

An undenied allegation, in a bill for infringement against a nonresident corporation, that defendant "has a regular and established place of business" within the district, relates to the date of the suit, and establishes such fact for jurisdictional purposes.—Streat v. American Rubber Co. (C. C.) 634.

§ 4. —— Jurisdiction dependent on citizenship, residence, or character of parties.

Where the jurisdiction of the federal court to grant an injunction is based on a diversity of citizenship, the omission of a necessary party, who cannot be made a party without defeating the jurisdiction of the court, requires a dismissal of the cause.—Evans v. Gorman (C. C.) 399.

A corporation, organized under the laws of a state for the purpose of taking over railroad property owned by a number of other corporations of different states, in accordance with an agreement between them for consolidation, under which they conveyed their properties to the new company and then went out of existence, is a citizen of the state where it was created by individual corporators, for the purposes of the jurisdiction of a federal court.—Westheider v. Wabash R. Co. (C. C.) 840.

§ 5. —— Jurisdiction dependent on amount or value in controversy.

The jurisdiction of a federal court is determined by the amount claimed by the plaintiff in his pleading in good faith, and not by the amount recovered.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

When, from the nature of the action as set forth in plaintiff's complaint, there could not legally be a judgment for the amount necessary to the jurisdiction of a federal court, jurisdiction cannot attach, though the damages are laid in a larger sum.—Battle v. Atkinson (C. C.) 384.

The law of Arkansas (Sand. & H. Dig. c. 70, § 3458) having limited plaintiff's recovery in an action of unlawful detainer to the rent due and damages for withholding the premises, the federal court in that state does not have jurisdiction of an action when the amount of rent due is for nine months at $25 a month, though damages are also claimed in the sum of $2,500. —Battle v. Atkinson (C. C.) 384.

The courts of Arkansas having settled the nature of the action of unlawful detainer, under Sand. & H. Dig. c. 70, §§ 3349–3466, the jurisdiction of the federal court in that state in such an action does not depend on the value of the detained premises in fee, but their rental value for a limited time.—Battle v. Atkinson (C. C.) 384.

The federal court in Arkansas in an action of unlawful detainer will, by analogy to the requirements of Sand. & H. Dig. c. 70, § 3449, regard the amount in controversy to be a sum double the amount of the rent of the premises detained for two years, in determining the question of jurisdiction.—Battle v. Atkinson (C. C.) 384.

§ 6. —— Procedure, and adoption of practice of state courts.

A federal court of equity *held* to have jurisdiction of a suit by a creditor to reach lands alleged to have been fraudulently conveyed by a decedent, notwithstanding the pendency of probate proceedings in a state court in which no license to sell the lands had been granted.—Hale v. Tyler (C. C.) 833.

A federal court of equity cannot be given jurisdiction by a state statute of a suit to quiet title or to determine an adverse claim, unless the bill shows affirmatively either that complainant is in possession or that both complainant and defendant are out of possession.—United States Min. Co. v. Lawson (C. C.) 1005.

§ 7. Concurrent and conflicting jurisdiction, and comity.

Neither the jurisdiction of a federal court in a suit to administer a trust in lands, nor the rights of the complainant as a beneficiary under the trust, can be affected by an unauthorized appearance by the court's receiver in a subsequent action in a state court.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

Rev. St. § 720, does not prevent a federal court from granting an injunction to restrain a sheriff from selling, under an execution from a state court, property of a third person who is not a party to the judgment.—Julian v. Central Trust Co. (C. C. A.) 956.

Under Rev. St. § 720, considered in connection with Const. Ark. art. 7, § 34, and Sand. & H. Dig. Ark. § 80, the federal court cannot enjoin a sale of real property, ordered sold by the probate court to pay judgments against an estate, even though the injunction suit is ancillary to a suit to set aside the judgments for fraud.—Evans v. Gorman (C. C.) 399.

Rev. St. Me. 1857, c. 46, § 34, giving judgment creditors of a corporation a bill in equity in the supreme judicial court of the state to reach dividends improperly paid, was not intended to exclude the jurisdiction of a federal circuit court, where the obligation as to the citizenship of the parties was sufficient to give the latter jurisdiction.—Bowker v. Hill (C. C.) 528.

The inherent jurisdiction in equity of courts of the United States cannot be narrowed by state laws conferring jurisdiction of certain matters upon a particular state court, even though such jurisdiction is made exclusive so far as the state courts are concerned.—Hale v. Tyler (C. C.) 833.

Where a state court which has obtained possession of property by attachment loses its jurisdiction by operation of a federal law, as by an adjudication in bankruptcy, which annuls the attachment and transfers exclusive jurisdiction over the property to the bankruptcy court, the question of comity cannot affect such jurisdiction.—In re Tune (D. C.) 906.

CREDIBILITY.

Of witness, see "Witnesses," § 2.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Compositions with Creditors"; "Fraudulent Conveyances"; "Insolvency."

Rights and remedies of surety, see "Principal and Surety," § 2.

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

Restraining criminal prosecution, see "Injunction," § 1.

Offenses by particular classes of parties.

Bank officers, see "Banks and Banking," § 2.

Particular offenses.

See "Conspiracy," § 1; "Robbery."

§ 1. Trial.

Remarks of court and counsel reflecting upon defendant and his attorney, made in the presence of the jurors, and which the court refused to permit defendant to controvert, *held* prejudicial, and ground for reversal, as preventing defendant from having a fair and impartial trial.—Allen v. United States (C. C. A.) 3.

The prejudicial effect of remarks made by court or counsel and heard by the jurors who tried the case is not lessened nor affected by the fact that the jury had not then been impaneled.—Allen v. United States (C. C. A.) 3.

An instruction in a criminal case as to the burden of proof on the question of intent *held* erroneous.—McKnight v. United States (C. C. A.) 972.

Where counsel for the accused in a criminal trial comments to the jury in argument upon the appearance and conduct of defendant during the trial, for the purpose of supporting a claim that he is insane, counsel for the government is entitled to comment on the same matters in reply.—United States v. German (D. C.) 987.

Where the question whether a defendant in a criminal case was insane at the time of the trial is submitted to the jury for a preliminary finding, a unanimous verdict of insanity is required to authorize the court to take action thereon.—United States v. German (D. C.) 987.

§ 2. Appeal and error, and certiorari.

The failure of defendant to except to prejudicial remarks made by court or counsel will not preclude him from having the same reviewed on appeal, where they were the basis of a subsequent offer of evidence tending to cure their effect, the refusal to receive which was duly excepted to.—Allen v. United States (C. C. A.) 3.

It is prejudicial error for the court or counsel to call to the attention of the jury in a criminal case in any manner the right of the defendant under the statute to testify in his own behalf, and such an error can only be cured, if at all, by a clear and emphatic statement by the court that the jury are not permitted to attach any importance to the failure of the defendant to testify.—McKnight v. United States (C. C. A.) 972.

CROSS-EXAMINATION.

See "Witnesses," § 1.

CUSTOMS DUTIES.

§ 1. Validity, construction, and operation of customs laws in general.

The commercial designation of an article, when clearly established, and shown to have been definite, uniform, and general, will control in the construction of a tariff statute.—Nordlinger v. United States (C. C.) 828.

§ 2. Goods subject to duty, rate, and amount.

Decision of the board of general appraisers sustaining the collector in refusing to admit performing horses and dogs free, under paragraph 686 of the tariff act of 1890, as "tools of trade," affirmed.—Barrett v. United States (C. C.) 206.

Catgut and wormgut *held* free from duty under Free List, par. 517, and not dutiable under Tariff Act 1897, par. 448.—Davies, Turner & Co. v. United States (C. C.) 232; Kny-Scheerer Co. v. Same, Id.

Buckles used on shoulder straps of overalls *held* dutiable, under Act 1897, par. 193, as articles of steel or iron not specially provided for.—United States v. Topken (C. C.) 233.

Cylindrical tubes of plain glass *held* dutiable as blown glassware, under Act 1897, par. 100.—Rogers v. United States (C. C.) 233.

Cotton net, cut into narrow strips or small pieces, known as "cotton net," "cotton net cut," "hat tips," "hat crowns," or "hat sides," *held* dutiable at 50 per cent. ad valorem as cotton net, under Tariff Act 1894, par. 276, and not at 35 per cent. as manufactures of cotton, under paragraph 264.—Tilge v. United States (C. C.) 254.

Tungsten ore, or wolfram, *held* dutiable at 20 per cent. ad valorem, under paragraph 183 of Act July 24, 1897.—Hempstead v. United States (C. C.) 256.

The words "bar iron," as used in paragraph 123 of the tariff act of 1897, and the words "iron bars," as used in the last proviso of paragraph 124, mean the same thing; and bar iron, of whatever dimensions, in the manufacture of which charcoal is used as fuel, is dutiable at the uniform rate fixed by the proviso.—Milne v. United States (C. C.) 410.

Leghorn citron has been commercially designated as a dried fruit since prior to the tariff act of 1883, and is properly classified as such under paragraph 704 of the free list in that act (22 Stat. 519), and not under paragraph 302 (Id. 504) as a fruit preserved in sugar.—Nordlinger v. United States (C. C.) 828.

Shells, advanced in value by being cleansed with chloride of lime to remove all adhering animal and vegetable matter, are dutiable under paragraph 450 of the tariff act of 1897 by virtue of the similitude provision of section 7.—Schoenemann v. United States (C. C.) 842.

§ 3. Entry and appraisal of goods, bonds, and warehouses.

Proceedings in circuit court on appeal from board of general appraisers can only be reviewed on appeal, and not by writ of error.

Act June 10, 1890, § 15; Act March 3, 1891. —United States v. Diamond Match Co. (C. C. A.) 288.

Under Act June 10, 1890, § 10, the board of general appraisers *held* justified in adopting, as foreign market price of importations, the result reached by deducting all expenses from the price of goods when received.—Comacho v. United States (C. C.) 191.

An assessment of merchandise, comprising 11 bales of hides and skins mixed together indiscriminately, as "hides of leather raw," under Act July 24, 1897, par. 437, *held* proper under the facts.—Weil v. United States (C. C.) 592

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 1.
For infringement of patent, see "Patents," § 7.

§ 1. Measure of damages.

A party to a contract with a corporation, which by selling out its business had disabled itself from carrying out the contract, *held* entitled to recover as damages for its breach the value of the time and money expended in carrying it out on his part.—Griffen v. Sprague Electric Co. (C. C.) 749.

DEATH.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

§ 1. Actions for causing death.

In an action for the death of a locomotive engineer, caused by the explosion of the boiler, evidence *held* not to warrant submitting to the jury issue of decedent's physical suffering as an element of damages. Pub. St. N. H. c. 191, §§ 8, 12.—Hastings Lumber Co. v. Garland (C. C. A.) 15.

An action at law by the wife and minor children of a man killed in Mexico to recover damages for his death under the laws of that country cannot be maintained in a federal court in Texas; there being no form of procedure by which such court can administer the right given by such laws with substantial justice to both parties.—Mexican Nat. R. Co. v. Slater (C. C. A.) 593.

The laws of Mexico, giving a right of action to recover damages for wrongful death, are not contrary to the public policy of Texas, nor to natural justice or good morals, and may be enforced in the state or federal courts in that state having jurisdiction of the parties, in which the forms of procedure are such that substantial justice can be done between the parties.—Mexican Nat. R. Co. v. Slater (C. C. A.) 593.

The statutes of Mexico giving a civil right of action for wrongful death, although such right is based on the criminal nature of the act causing the death, are not for that reason criminal statutes, which can only be enforced by the courts of that country.—Mexican Nat. R. Co. v. Slater (C. C. A.) 593.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Compositions with Creditors"; "Fraudulent Conveyances"; "Insolvency."

DECEDENTS.

Estates, see "Executors and Administrators."

DEDICATION.

Of inventions, see "Patents," § 1.

DEEDS.

In fraud of creditors, see "Fraudulent Conveyances."

Deeds by or to particular classes of parties.

See "Guardian and Ward," § 1; "Infants," § 1.

Deeds of particular species of property.

See "Mines and Minerals," § 2.

Particular classes of deeds.

Of trust, see "Mortgages."

§ 1. Construction and operation.

A deed conveying land to a mother and to the heirs of her body gave to her, under Rev. St. Mo. 1855, c. 32, § 5, a life estate, and to her children living at the date of the conveyance a vested remainder in fee, which would open up to let in after-born children, if there were any.—Garth v. Arnold (C. C. A.) 468.

DELAY.

Laches, see "Equity," § 2.

DELIVERY.

Of insurance policy, see "Insurance," § 2.

DEMURRAGE.

See "Shipping," § 4.

DEMURRER.

Judgment on demurrer, conclusiveness, see "Judgment," § 3.

DEPOSITIONS.

See "Witnesses."

DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Wills."

DESIGN PATENTS.

See "Patents," § 1.

DEVISES.

See "Wills."

DISCHARGE.

From indebtedness, see "Bankruptcy," § 7; "Compositions with Creditors"; "Release."
From liability as surety, see "Principal and Surety," § 1.
Of indemnitor, see "Indemnity."

DISCRETION OF COURT.

As to taking judicial notice, see "Evidence," § 1.

DISMISSAL AND NONSUIT.

Conclusiveness of judgment on dismissal, see "Judgment," § 3.

DISSOLUTION.

Of corporation, see "Corporations," § 5.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 4; "Removal of Causes," § 2.

DOCKS.

See "Wharves."

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 5.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 4.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EMINENT DOMAIN.

§ 1. Compensation.

The owner of the fee in lands in which an easement for park purposes has been condemned by a city, on condemnation or sale by the city of right of way for a railroad over the lands, may maintain an action against the railroad company to recover the damages he has sustained by reason of the additional burden imposed by the new easement.—Newton v. Manufacturers' Ry. Co. (C. C. A.) 781.

§ 2. Title or rights acquired.

The condemnation of lands for park purposes by a city under the Ohio statute vests in the city only an easement, and upon the abandonment of such easement the land reverts to the owner from whom it was acquired or his successor in title.—Newton v. Manufacturers' Ry. Co. (C. C. A.) 781.

The condemnation of right of way for a railroad over lands previously condemned by a city for park purposes does not effect an abandonment by the city of its easement, so as to work a reversion of the land to the owner of the fee.—Newton v. Manufacturers' Ry. Co. (C. C. A.) 781.

EMPLOYES.

See "Master and Servant."

EQUITY.

Equitable assignment, see "Assignments," § 1.
Equitable estoppel, see "Estoppel," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Account"; "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Partition," § 1; "Quieting Title"; "Receivers"; "Trusts."
Suits for infringement of patents, see "Patents," § 7.

§ 1. Jurisdiction, principles, and maxims.

Complainants in a bill to enforce a constructive trust of goods fraudulently sold *held* not to have an adequate remedy by an action of replevin, and hence equity had jurisdiction.—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 112.

A court of equity, which had properly assumed jurisdiction of cross suits to determine rights under an insurance policy under which a loss was claimed, which were consolidated and tried together, *held* to have authority to render judgment for the loss.—German Ins. Co. v. Downman (C. C. A.) 481.

A right of action against a city to recover water rentals claimed to be due under a contract is at law, and a federal court of equity is without jurisdiction to enforce the payment of such rentals, even where it has acquired jurisdiction to determine other matters in controversy between the parties.—American Waterworks & Guarantee Co. v. Home Water Co. (C. C.) 171.

Complaint by loan association to foreclose mortgage executed by shareholder *held* to be without equity.—Interstate Savings & Loan Ass'n v. Badgley (C. C.) 390.

The Chicago Board of Trade *held* not entitled to an injunction against the use of the quotations made on its exchange by a concern conducting a bucket shop, on the ground that the greater part of the transactions on its exchange by its own members were bucket shop deals, and illegal, but which were permitted with its knowledge and consent.—Board of Trade of City of Chicago v. O'Dell Commission Co. (C. C.) 574.

Complainants *held* not entitled to relief in equity for breach of an agreement to co-operate in the consummating of a fraudulent or inequitable scheme.—Trice v. Comstock (C. C.) 765.

§ 2. Laches and stale demands.

Mere delay in suing for infringement will not warrant application of doctrine of laches to such suit within the time fixed by statute for commencement of analogous action at law.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

If extraordinary circumstances make it inequitable to allow prosecution of a suit after a briefer period than allowed by statute of limitation, the chancellor will determine the case in accordance with the equities thereof.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

§ 3. Parties and process.

Proceedings on a petition of intervention filed in a suit in equity, against a receiver therein, asserting a claim for damages for the death of an employé alleged to have resulted from negligence in the operation and management of a railroad by the receiver, are equitable in character, and the petitioner is entitled to have the receiver plead in conformity to the rules and practice in equity.—Mercantile Trust Co. v. Pittsburgh & W. Ry. Co. (C. C. A.) 475.

A petition of intervention by the owner of a brickyard to protect his right to the use of a spur track *held* not demurrable because the deed by which he held the property reserved the right to the grantor to sell the right of way for another railroad to cross such spur track, since the construction of a road on such right of way was not inconsistent with the continued use of the spur track.—Receiver of Central R. & Banking Co. v. Macon, D. & S. R. Co. (C. C.) 926.

§ 4. Pleading.

A bill to establish rights in the waters of a stream *held* not multifarious.—Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 543.

A creditors' bill considered, and *held* not multifarious.—De Hierapolis v. Lawrence (C. C.) 761.

§ 5. Masters and commissioners, and proceedings before them.

Where the defense of usury, pleaded by a defendant in a suit to foreclose a mortgage, was adjudged against him by an interlocutory decree, such decree can only be reopened, for the purpose of admitting further evidence on the issue, upon a regular application in accordance with the rules of equity practice and a proper showing that the evidence was newly discovered.—Deitch v. Staub (C. C. A.) 309.

Where it appears from the report of a master, which is not contradicted, that neither party requested a finding on a particular matter, but the same was virtually waived, the court will not, on exceptions to the report, refer it back to have such finding made.—Reading Ins. Co. v. Egelhoff (C. C.) 393.

The finding of a master as to the value of a stock of goods before and after a fire, made on a careful and impartial review of conflicting evidence, will be accepted by the court, unless manifestly erroneous.—Reading Ins. Co. v. Egelhoff (C. C.) 393.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of trusts, see "Trusts," § 2.

ESTATES.

Created by deed, see "Deeds," § 1.
Decedents' estates, see "Executors and Administrators."

ESTOPPEL.

By judgment, see "Judgment," §§ 2, 3.
To avoid or forfeit insurance policy, see "Insurance," § 6.
To deny corporate existence, see "Corporations," § 1.
To deny recitals in municipal bonds, see "Municipal Corporations," § 3.

§ 1. Equitable estoppel.

A purchaser of the property of a corporation at foreclosure sale *held* estopped to claim a greater sum as net earnings under the receivership, after the sale, than that shown by the receiver's report, to which no objection was made.—Washington Irr. Co. v. California Safe Deposit & Trust Co. (C. C. A.) 20.

Where a surety company agreed that indemnitors should assist in the defense of the suit on the original bond, and that an appeal should be taken, and after appeal paid the judgment without the indemnitors' consent, it was estopped to claim any benefit by virtue of the judgment.—American Surety Co. v. Ballman (C. C. A.) 292.

EVIDENCE.

See "Witnesses."
Review on appeal or writ of error, see "Appeal and Error," § 4.

As to particular facts or issues.

See "Fraudulent Conveyances," § 2; "Marriage"; "Release," § 1.
Cancellation of insurance policy, see "Insurance," § 3.
Delivery of goods to vessel, see "Shipping," § 3.
Fault for collision between sail and steam vessels, see "Collision," § 3.
Fault of collision with vessel at pier, see "Collision," § 5.
Novelty of invention, see "Patents," § 1.

In actions by or against particular classes of parties.

See "Railroads," § 2.

In particular civil actions or proceedings.

See "Negligence," § 1.
Admiralty, see "Collision," § 8.
For illegal use of trade-name, see "Trade-Marks and Trade-Names," § 3.
For infringement of patent, see "Patents," § 7.
For negligence of attorney, see "Attorney and Client," § 1.
On reference to master in chancery, see "Equity," § 5.

§ 1. Judicial notice.

Though it is well settled that the circuit court of appeals can take judicial knowledge of its own records, it is not clear that it is always required to do so, and the better way of proceeding with respect thereto is for the party to set them out by plea and proof.—In re Osborne (C. C. A.) 1.

§ 2. Relevancy, materiality, and competency in general.

In an action for injuries received from defective appliances, evidence of declarations after the accident by fellow servants that it was caused by their carelessness *held* admissible as part of the res gestæ.—Westall v. Osborne (C. C. A.) 282.

In an action against a carrier for nondelivery of goods, where it is shown that a substitution had been made in the contents of the packages prior to their delivery to the consignee, defendant is entitled to show, in support of its contention that the substitution was made by the seller, who shipped the goods, before their delivery for shipment, that other packages constituting part of the same purchase and shipped by another carrier arrived in the same condition.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

§ 3. Admissions.

Statements of son of corporation president, having charge of his father's office, made to party contracting with corporation, and purporting to be at his father's request, and in answer to the party's letter, *held* admissible to bind corporation.—Griffen v. Sprague Electric Co. (C. C.) 749.

§ 4. Hearsay.

In an action for the wrongful death of a locomotive engineer, caused by the explosion of the boiler, report made to witness by parties repairing the engine as to its condition *held* inadmissible, because not communicated to defendant.—Hastings Lumber Co. v. Garland (C. C. A.) 15.

§ 5. Documentary evidence.

Bills of lading do not prove themselves, and the burden rests upon a shipper, relying thereon, to prove their execution by a duly authorized agent of the carrier.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

§ 6. Parol or extrinsic evidence affecting writings.

Extrinsic evidence *held* admissible to assist in the construction of a contract, the terms of which were uncertain and in dispute.—Wolff v. Wells, Fargo & Co. (C. C. A.) 32.

A note promising to pay a certain sum at a certain time is varied by contemporaneous oral agreement that the payee and another might pay themselves that amount out of such funds as might be derived from operation of mines, which they agreed to operate, if the maker did certain things.—Keith v. Parker (C. C.) 397.

§ 7. Opinion evidence.

Parol evidence of experts learned in the law of a foreign country is admissible to supplement a statute of such country, introduced in evidence as the foundation of a right of action, by showing its construction by the courts and the unwritten law of the country affecting the right of recovery.—Mexican Nat. R. Co. v. Slater (C. C. A.) 593.

The testimony of a retail dealer is competent on the question of the commercial designation of an article as affecting the construction of a tariff statute.—Nordlinger v. United States (C. C.) 828.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 1.

EXCEPTIONS.

Necessity in criminal prosecution, see "Criminal Law," § 2.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," §§ 2, 3.

EXCISE.

Duties, see "Internal Revenue."

EXECUTION.

Exemptions, see "Exemptions"; "Homestead."

§ 1. Property subject to execution.

An execution defendant *held* to have an interest in mining claims which was subject to levy and sale on execution under the Colorado statute.—Green v. Daniels (C. C. A.) 449.

§ 2. Sale.

A redemption of property sold under execution *held* sufficient, within Code Civ. Proc. § 703, though the sheriff, receiving the money, and the judgment debtor, acting in good faith, made an error in the computation of the sum due, which the judgment debtor corrected on demand.—Walsh v. Erwin (C. C.) 531

EXECUTORS AND ADMINISTRATORS.

See "Wills."
Testamentary trustees, see "Trusts."

§ 1. Actions.

In the absence of devastavit, express promise to pay, or statutory authority, an executor or administrator *held* not personally liable in an action at law for a debt against the estate, either in the state of his appointment or elsewhere, even though he has received assets, un-

less such assets cannot be found.—Lewis v. Parrish (C. C. A.) 285.

Judgment creditors of an estate are indispensable parties to a suit to enjoin the administrator from selling estate real property for the payment of such judgments.—Evans v. Gorman (C. C.) 399.

§ 2. Accounting and settlement.

A creditor of decedent's estate has a sufficient interest therein to maintain proceedings in a probate court to compel the executor or administrator to account for assets received by him.—Lewis v. Parrish (C. C. A.) 285.

§ 3. Foreign and ancillary administration.

An executor or administrator is not liable to suit as such in the courts of any state other than that of his appointment, for any debt in the foreign state against the estate.—Lewis v. Parrish (C. C. A.) 285.

An executor or administrator, who carries assets into a foreign state, *held* personally liable to an accounting as trustee for breach of trust or maladministration, and not otherwise.—Lewis v. Parrish (C. C. A.) 285.

Failure to account is not such maladministration as will justify a suit against an executor or administrator for an accounting as trustee in a foreign state; the remedy being by proceedings for an accounting in the state of appointment.—Lewis v. Parrish (C. C. A.) 285.

EXEMPTIONS.

See "Homestead."
Of bankrupt, see "Bankruptcy," § 7.

§ 1. Waiver or forfeiture.

Under the laws of Alabama a waiver of exemptions in a promissory note does not amount to a lien or pledge of any of the debtor's exempt property, or confer any estate or interest in it.—In re Tune (D. C.) 906.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 7.

FEDERAL COURTS.

See "Courts," §§ 2–6.

FEDERAL QUESTIONS.

Grounds for jurisdiction, see "Courts," §§ 2–6.

FEES.

In bankruptcy, see "Bankruptcy," § 8.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

On reference, see "Reference," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 4.

FIRES.

Caused by operation of railroad, see "Railroads," § 2.

FORECLOSURE.

Of mortgage, see "Mortgages," § 2; "Railroads," § 1.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 3.

FORFEITURES.

Of homestead exemption by bankrupt, see "Bankruptcy," § 7.
Of seamen's wages, see "Seamen."

FORMER ADJUDICATION.

See "Judgment," §§ 2, 3.

FORMS OF ACTION.

See "Assumpsit, Action of."

FRANCHISES.

Corporate franchises, see "Corporations," § 1.

FRAUD.

See "Fraudulent Conveyances."
In obtaining judgment, see "Judgment," § 1.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 4.

§ 1. Transfers and transactions invalid.

A fraudulent intent to hinder and delay other creditors cannot be inferred from a provision of an instrument assigning securities to one creditor that, in the event a contemplated adjustment of the debtor's affairs is made, the securities shall be returned.—McCartney v. Earle (C. C. A.) 462.

Choses in action are not "goods and chattels," within the contemplation of Laws N. Y. 1897, c. 417, art. 2, § 25, and a transfer of notes and accounts on the books of a borrower to secure a present loan is not presumed fraudulent under such act.—Young v. Upson (C. C.) 192.

An annuity reserved by a grantor in a conveyance of his property in trust is liable for his debts, and an assignment thereof for the purpose of placing it beyond the reach of creditors may be set aside in a creditors' suit.—De Hierapolis v. Lawrence (C. C.) 761.

§ 2. Remedies of creditors and purchasers.

Evidence *held* insufficient to establish the invalidity of a transfer of property by an insolvent debtor to the receiver of a national bank by way of security for a debt due the bank, either on the ground of undue influence, duress, a fraudulent intent to hinder and delay creditors, or the insanity of the debtor.—McCartney v. Earle (C. C. A.) 462.

Allegations in a creditors' bill charging fraud in a conveyance *held* sufficient.—De Hierapolis v. Lawrence (C. C.) 761.

GAMING.

§ 1. Gambling contracts and transactions.

The statute of South Carolina declaring void contracts for the sale of cotton and other articles for future delivery, unless it is the bona fide intention of both parties that there shall be an actual delivery, does not preclude the recovery by a broker of margins advanced for his principal at his request on a contract for the purchase of cotton on a cotton exchange, although the principal did not in fact intend to receive and pay for the cotton, where he kept such intention secret and the broker had no knowledge of it.—Parker v. Moore (C. C. A.) 799.

Direction of a nonsuit suo motu in action to recover margins *held* erroneous, where under the evidence the question involved in such ruling was one for the jury.—Parker v. Moore (C. C. A.) 799.

GOOD FAITH.

Of purchaser, see "Vendor and Purchaser," § 1.

GUARANTY.

See "Indemnity"; "Principal and Surety."

§ 1. Rights and remedies of guarantor.

A guarantor of the bonds of a water company *held* entitled to maintain a suit in equity to prevent the annulment by a city of the company's franchise, where such action would render the company's property valueless and deprive complainant of the mortgage security to which it had the right to be subrogated for indemnity.—American Waterworks & Guarantee Co. v. Home Water Co. (C. C.) 171.

GUARDIAN AND WARD.

§ 1. Sales and conveyances under order of court.

A purchaser at a guardian's sale, taking with an understanding that he will mortgage the property and reconvey it subject to the mortgage, to circumvent the law prohibiting the mortgaging of a minor's property, cannot hold the property as against the minor.—Ladow v. North American Trust Co. (C. C.) 443.

HARMLESS ERROR.

In criminal prosecutions, see "Criminal Law." § 2.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 4.

HIGHWAYS.

See "Municipal Corporations," § 2.

HOMESTEAD.

See "Exemptions."

Of bankrupt, exemption, see "Bankruptcy," § 7.

§ 1. Abandonment, waiver, or forfeiture.

Premises permanently rented are not kept as a homestead, within V. S. § 2179, exempting premises "used or kept" as a homestead.—In re Vincent (D. C.) 236.

HUSBAND AND WIFE.

See "Marriage."

ILLEGITIMATE CHILDREN.

See "Bastards."

IMMIGRATION.

Regulation, see "Aliens," § 2.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

IMPLIED CONTRACTS.

See "Assumpsit, Action of."

Of marriage, see "Marriage."

IMPORTS.

Duties, see "Customs Duties."

INDEMNITY.

See "Guaranty"; "Principal and Surety."

Payment of a judgment in a suit against sureties, in which indemnitors had been acting with defendant, without the indemnitors' consent, *held* to discharge such sureties on the indemnity bond from further liability.—American Surety Co. v. Ballman (C. C. A.) 292.

INDICTMENT AND INFORMATION.

For particular offenses.
See "Conspiracy," § 1; "Robbery."

INFANTS.

See "Guardian and Ward."

§ 1. Property and conveyances.
The legislature of Missouri, prior to the constitution of 1865, had power by special act to authorize the sale of the lands of minors.—Garth v. Arnold (C. C. A.) 468.

One setting up title to land through the exercise of a power given by a legislative act to sell the interests of minors therein is not protected as an innocent purchaser, but has the burden of proving all facts essential to support the valid exercise of the power.—Garth v. Arnold (C. C. A.) 468.

Where the legislature confers power on persons to sell and convey the land of certain minors "for cash or on credit," a conveyance in exchange for personal property is void.—Garth v. Arnold (C. C. A.) 468.

A power conferred by the legislature on persons to sell land of minors terminates as to any one of such minors when he reaches majority.—Garth v. Arnold (C. C. A.) 468.

INFRINGEMENT.

Of patent, see "Patents," § 7.
Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

INJUNCTION.

Restraining infringement of patent, see "Patents," § 7.

§ 1. Subjects of protection and relief.
Equity is without jurisdiction to enjoin criminal prosecutions.—Davis & Farnum Mfg. Co. v. City of Los Angeles (C. C.) 537.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

§ 1. Assignment, administration, and distribution of insolvent's estate.
A contract made by the trustee for an insolvent corporation, giving to another full charge of a preceding suit for infringement of a patent, the second party to receive a share of the recovery, considered, and *held* valid.—Wooster v. Trowbridge (C. C.) 722.

A trustee in insolvency may lawfully make a contract by which the charge of a doubtful suit then pending on behalf of the estate is given to another, who is to receive for his services and expenditures a share of the recovery; and such contract operates as an equitable share of any sum recovered through the efforts of the assignee.—Wooster v. Trowbridge (C. C.) 722.

INSTRUCTIONS.

In civil actions, see "Trial," § 1.
In criminal prosecutions, see "Criminal Law," § 1.

INSURANCE.

§ 1. Control and regulation in general.
The statute of Arkansas, requiring insurance companies doing business in the state to give a bond to the state to secure the prompt payment of all claims "arising and accruing" under their policies during the term of such bond, renders the obligors in such a bond liable for the payment of the amount of a life policy, where the insured died during the term of the bond, although the policy did not become payable under its terms until after the term of the bond had expired.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

A provision of a life policy that "no suit to recover under this policy" should be brought after one year from the death of the insured does not apply to an action brought on a bond required by a statute of the state to be given to secure the prompt payment of claims.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

§ 2. The contract in general.
Contract of insurance *held* to have been governed by laws of Kentucky, and therefore that insured's answers in application were representations, and not warranties.—Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. (C. C. A.) 77.

A receipt given for a first premium on a policy of life insurance, paid when the application for such policy was made, construed, and *held* not to constitute a contract for temporary insurance, but merely a provisional acceptance of the risk, which did not become effective as a contract of insurance unless the application was accepted.—Mohrstadt v. Mutual Life Ins. Co. (C. C. A.) 81.

An agreement between an owner of property and a firm of insurance agents representing a number of companies for the issuance of policies in different companies, not designated, covering the property, *held* not to constitute a contract of insurance.—German Ins. Co. v. Downman (C. C. A.) 481.

A policy of insurance *held* not to have been delivered and accepted prior to a loss of the property, so as to create a liability therefor on the part of the company.—German Ins. Co. v. Downman (C. C. A.) 481.

§ 3. Cancellation, surrender, abandonment, or rescission of policy.
Return of unearned premium before surrender of insurance policy *held* not necessary for cancellation thereof.—Schwarzchild & Sulzberger Co. v. Phœnix Ins. Co. (C. C.) 653.

Facts *held* to show a cancellation of fire insurance policy.—Schwarzchild & Sulzberger Co. v. Phœnix Ins. Co. (C. C.) 653.

§ 4. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Misrepresentation by insured in application for insurance *held* material as matter of law.—Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. (C. C. A.) 77.

A material misrepresentation will avoid an insurance policy, though made by mistake, and not with fraudulent intent.—Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. (C. C. A.) 77.

The Inchmaree clause in a marine policy construed, and *held* to render the insurer liable for damage to the machinery of a steamboat due to a latent defect in a casting, which was brought to the surface, causing a fracture, by an unusual shock to the engine, resulting from the presence of a small quantity of water in the cylinders.—Cleveland & B. Transit Co. v. Insurance Co. of North America (D. C.) 431.

§ 5. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

A contract for indemnity by a surety company to secure to an employer the faithful performance of his duties by its cashier construed, with reference to the duties imposed on the employer by the warranties in its application to guard against defalcations by the employé.—Phenix Ins. Co. v. Guarantee Co. of North America (C. C. A.) 964.

§ 6. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Insurance company *held* estopped to assert that policy was avoided by reason of insured's misrepresentation of material fact.—Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. (C. C. A.) 77.

A life insurance company, which, after having notified an insured that the receipt for a premium on his policy had been sent to a certain bank, where payment could be made, withdrew such receipt before the last day for payment, and thus prevented payment, *held* estopped to claim a forfeiture because the payment was neither made nor tendered.—Provident Sav. Life Assur. Soc. of New York v. Duncan (C. C. A.) 277.

§ 7. Risks and causes of loss.

A carrier's liability for carrying goods on deck is a proper subject of marine insurance.—Ursula Bright S. S. Co. v. Amsinck (D. C.) 242.

§ 8. Extent of loss and liability of insurer.

A master's draft with a writing attached, signed by the managing owner, pledging the vessel, owners, and freight for its payment, is equivalent to a draft containing a pledge of vessel and freight on its face, for the purpose of a marine policy of insurance covering advances on such drafts.—Neal v. Union Marine Ins. Co. (C. C. A.) 776.

Under a marine policy insuring advances made on a master's draft pledging vessel and freight, the insured, who takes such a draft as collateral security for advances made to the owner, is not compelled to sue such owner before resorting to the insurance, where the collateral was lost through a peril covered by the policy.—Neal v. Union Marine Ins. Co. (C. C. A.) 776.

An insured, who, pending efforts at an arbitration to determine the damage to goods by fire, against the protest of the insurance companies proceeds to sell such goods at auction, cannot insist that the companies are concluded as to their value by the amount realized.—Reading Ins. Co. v. Egelhoff (C. C.) 393.

For a partial loss of goods under a valued marine policy, the insurer's liability is the proportion of the loss to the sound value at port of discharge.—Ursula Bright S. S. Co. v. Amsinck (D. C.) 242.

Under a valued policy on part of carrier's liability for carrying goods on deck, the insurer, on a total loss, is liable for the amount of the policy, and is not entitled to deduct anything by reason of the fact that the owners settled their liability for less than the value of the goods.—Ursula Bright S. S. Co. v. Amsinck (D. C.) 242.

§ 9. Payment or discharge, contribution, and subrogation.

The amount of insurance due under fire policies *held* to draw interest from a date 60 days after proofs of loss.—Reading Ins. Co. v. Egelhoff (C. C.) 393.

§ 10. Actions on policies.

Under the statute of Arkansas, a plaintiff who commenced successive actions on a life insurance policy, in each of which he suffered a nonsuit or dismissal for a reason not affecting the merits, may commence a new action within one year after the termination of the last of such actions, notwithstanding any limitation contained in the policy.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

INSURRECTION.

See "War."

INTEREST.

On insurance due under policy, see "Insurance," § 9.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1. Review on appeal or writ of error, see "Appeal and Error," § 4.

INTERNAL REVENUE.

Postal card, sent out by warehouse company, notifying consignee of goods of their house, etc., *held* not to be warehouse receipts within the war revenue act, and not subject to stamp tax as such.—McClain v. Merchants' Warehouse Co. (C. C. A.) 295.

War revenue act of 1898, requiring revenue stamps on memorandums of sale of shares of railroad stock, *held* not unconstitutional as a direct tax not laid in proportion to the census or apportioned among the several states.—United States v. Thomas (C. C.) 207.

INTERNATIONAL LAW.

See "Aliens"; "War."

INTERPLEADER.

§ 1. Right to interpleader.
Insurance company *held* entitled to maintain a bill of interpleader to determine adverse rights of the two defendants to proceeds of policy, though claiming right to deduct certain sum from the face of the policy.—Provident Sav. Life Assur. Soc. v. Loeb (C. C.) 357.

§ 2. Proceedings and relief.
A bill of interpleader by a life insurance company to determine the adverse rights of the two defendants to the proceeds of a life policy *held* good on demurrer, though it also averred complainant's right to deduct a certain sum from the face of the policy for a semiannual premium.—Provident Sav. Life Assur. Soc. v. Loeb (C. C.) 357.

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INTERVENTION.

In bankruptcy proceedings, see "Bankruptcy," § 1.
In equity, see "Equity," § 3.

INVENTION.

See "Patents."

JUDGES.

See "Courts."

JUDGMENT.

Decisions of courts in general, see "Courts," § 1.
On pleadings, see "Pleading," § 2.
Review, see "Appeal and Error."

In actions by or against particular classes of parties.

See "Corporations," § 4; "Executors and Administrators," § 1.

§ 1. Collateral attack.
Evidence considered, and *held* insufficient to warrant the submission to a jury of the question of the validity of a judgment, attacked by defendants on the ground that it was procured through fraud and collusion.—American Nat. Bank v. Supplee (C. C. A.) 657.

To impeach a judgment sued on for fraud and collusion, where it is fair and regular on its face, the burden rests on the defendant to prove his allegations by evidence that is clear, precise, and indubitable, and such proof must establish fraud on the part of both plaintiff and defendant in the judgment. — American Nat. Bank v. Supplee (C. C. A.) 657.

§ 2. Merger and bar of causes of action and defenses.
A judgment on demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action, where plaintiff declined to amend, is one on the merits, which may be pleaded in bar to a second suit on the same cause of action.—Lindsley v. Union Silver Star Min. Co. (C. C. A.) 46.

§ 3. Conclusiveness of adjudication.
A decree rendered on demurrer is conclusive only upon matters put in issue by the pleadings. —Ohio River R. Co. v. Fisher (C. C. A.) 929.

Where, in partition, the holder of a life estate in an undivided share voluntarily intervenes and presents his contention in the circuit court of appeals, he is bound by its decision.—Martin v. People's Bank (C. C.) 226.

State court having decided that an action under a state statute had been brought within the time required to entitle the judgment to a preferred lien, such question is not reviewable in the federal courts.—State Trust Co. v. Kansas City, P. & G. R. Co. (C. C.) 367.

The fact that a stipulation for the dismissal of a cause provided that each party should pay his own costs does not make the judgment entered thereon one upon the merits, which will conclude the parties.—Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 543.

Under the provisions of the California Code of Civil Procedure, a judgment of dismissal, entered on motion of defendant pursuant to a written stipulation between the parties, is not one on the merits, which concludes the rights of the parties.—Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 543.

§ 4. Lien.
Code N. C. § 1255, providing that a judgment against a corporation for a tort shall take precedence over a prior mortgage upon its property, does not operate to render railroad property in the hands of a purchaser at foreclosure sale subject to a judgment recovered against the mortgagor for a tort committed after the sale.—Julian v. Central Trust Co. (C. C. A.) 956.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Of property of infant, see "Guardian and Ward," § 1.
On execution, see "Execution," § 2.

JURISDICTION.

Amount in controversy, see "Courts," § 5.

Jurisdiction of particular actions or proceedings.

See "Quieting Title," § 1.
Actions for causing death, see "Death," § 1.
Enforcement of trust, see "Trusts," § 2.
For infringement of patent, see "Patents," § 7.
In state court after remand from federal court, see "Removal of Causes," § 5.

Special jurisdictions.

See "Admiralty," § 1; "Bankruptcy," § 1; "Equity," § 1.
Particular courts, see "Courts."

JURY.

Instructions in civil actions, see "Trial," § 1.
Instructions in criminal prosecutions, see "Criminal Law," § 1.

LACHES.

Effect in equity, see "Equity," § 2.

LARCENY.

See "Robbery."

LEGACIES.

See "Wills."

LEGITIMACY.

See "Bastards," § 1.

LETTERS PATENT.

For inventions, see "Patents."

LICENSES.

For making, use, or sale of patented articles, see "Patents," § 6.
Injuries to licensees, see "Railroads," § 2.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

Liens acquired by particular remedies or proceedings.

See "Judgment," § 4.

Particular classes of liens.

See "Maritime Liens"; "Railroads," § 1; "Salvage," § 2.
Freight, see "Shipping," § 3.
Pledge, see "Pledges."

Contract for the delivery of bonds *held* not to create a charge or equitable lien on the entire amount of bonds issued by the promisor, nor on bonds delivered by it to different persons under separate contracts.—Cushing v. Chapman (C. C.) 237.

LIFE ESTATES.

Creation by deed, see "Deeds," § 1.

LIMITATION.

Of liability for goods, see "Shipping," § 3.

LIMITATION OF ACTIONS.

Against corporate stockholders, see "Corporations," § 2.
Enforcement of maritime lien, see "Maritime Liens," § 2.
Laches, see "Equity," § 2.

§ 1. Statutes of limitation.

Under the statute of limitations of California (Code Civ. Proc. § 337), which requires an action on a written instrument to be brought within four years, an action on interest coupons attached to municipal bonds is barred in four years from the time the coupons respectively matured, although such coupons have not been detached from the bonds.—Mather v. City and County of San Francisco (C. C. A.) 37.

An action to charge directors with liability for a debt of the corporation, under a state statute, because of their having declared dividends when the corporation was insolvent, is one to recover a statutory penalty, which, under the statute of Oregon (1 Hill's Ann. Laws p. 136), must be brought within three years after the cause of action accrues.—Patterson v. Wade (C. C. A.) 770.

§ 2. Computation of period of limitation.

Under the statute of Oregon making directors of a corporation, who declare and pay dividends when it is insolvent, liable for its debts "then existing or incurred while they remain in office," a right of action against directors, in favor of a creditor entitled to enforce such provision, accrues on the maturity of the debt of the corporation.—Patterson v. Wade (C. C. A.) 770.

For the purposes of limitation of an action to charge directors of a bank with statutory liability for a debt of the bank to a depositor, the issuance of a certificate of deposit for the amount due on a prior certificate, which had matured, does not create a new debt, but merely extends the time for payment of the old one, and the right of action accrues at the time of such extension.—Patterson v. Wade (C. C. A.) 770.

LIMITATION OF LIABILITY.

Of owner of vessel, see "Shipping," § 5.

LITERARY PROPERTY.

See "Copyrights."

LOAN COMPANIES.

See "Building and Loan Associations."

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

MARINE INSURANCE.

See "Insurance," §§ 7, 8.

MARITIME LIENS.

For salvage, see "Salvage," § 2.

§ 1. Nature, grounds, and subject-matter in general.

The presumption that no maritime lien arises for supplies furnished on the order of the owner of a vessel is not overcome by proof of an undisclosed belief or understanding on his part, when the contract was made, that the person furnishing such supplies would be entitled to a lien.—Cuddy v. Clement (C. C. A.) 301.

The Washington statute, making every master or person in charge of the construction, repair, or equipment of a vessel an agent of the owner for the purpose of contracting debts on the credit of the vessel, is applicable to foreign, as well as domestic, vessels.—The Robert Dollar (D. C.) 218.

A charterer who has obtained necessary supplies on the credit of the ship, in violation of his agreement with the owner in the charter party, cannot plead such agreement to defeat a lien by the creditor.—The Robert Dollar (D. C.) 218.

Bar supplies and fixtures furnished to a vessel are not necessaries, for the price of which a suit in rem against the vessel may be maintained, under the twelfth admiralty rule.—The Robert Dollar (D. C.) 218.

§ 2. Enforcement.

A lien for repairs, given by a state statute which makes no provision for recording, must be asserted within a reasonable time, under the circumstances of the case, or it will not be enforced by a court of admiralty as against third persons whose rights have intervened.—Norfolk Sand & Cement Co. v. Owen (C. C. A.) 778.

A delay of 14 or 15 months before asserting a statutory lien on a vessel for repairs, where the lien is not recorded and during which time the vessel was within reach of process, is such laches as will deprive the claimant of the right to enforce it as against a purchaser of the vessel without notice.—Norfolk Sand & Cement Co. v. Owen (C. C. A.) 778.

MARRIAGE.

An implied contract of marriage is as binding as one expressed by written or spoken words.—Adger v. Ackerman (C. C. A.) 124.

An agreement of a woman and a man, competent to contract, to become husband and wife, is a valid marriage contract, and no ceremony, civil or religious, is necessary.—Adger v. Ackerman (C. C. A.) 124.

Marriage may be implied from general reputation among the acquaintances of the parties, their treatment of each other, and the christening of their offspring as their children, and other conduct having a natural tendency to show the existence of the marriage relation.—Adger v. Ackerman (C. C. A.) 124.

A subsequent ceremonial marriage is not inconsistent with a prior common-law marriage, and does not necessarily overcome the presumption thereof arising from matrimonial cohabitation, repute, and the declarations and acts of the parties.—Adger v. Ackerman (C. C. A.) 124.

Slight circumstances may be sufficient to establish a change from concubinage to matrimony, and evidence of the time or place of the change is not indispensable to its proof.—Adger v. Ackerman (C. C. A.) 124.

Where parties incompetent to marry enter an illicit relation with a manifest desire to live in a matrimonial union, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of a marriage immediately after the obstacle is removed.—Adger v. Ackerman (C. C. A.) 124.

Evidence *held* to show common-law marriage between A. and B. immediately after the divorce of A. from his former wife.—Adger v. Ackerman (C. C. A.) 124.

MASTER AND SERVANT.

§ 1. Master's liability for injuries to servant.

The receiver of a railroad *held* liable for the death of a brakeman in a wreck caused by a landslide, because of the failure of the train dispatcher to notify those in charge of the train of general damage to the track in the vicinity, due to a severe storm of which he had knowledge.—Mercantile Trust Co. v. Pittsburgh & W. Ry. Co. (C. C. A.) 475.

It is the duty of a master to notify a servant of special or extraordinary risks connected with his service, the responsibility of which he cannot escape by delegating it to another servant.—Mercantile Trust Co. v. Pittsburgh & W. Ry. Co. (C. C. A.) 475.

Where an employé assumes the known risks of his employment, he assumes them with all of their qualifications, which include the exercise of proper and reasonable care by the employer to obviate or minimize the danger from such risks.—Rockport Granite Co. v. Bjornholm (C. C. A.) 947.

A servant has a right to assume that the master will use reasonable care to make the appliances and place to work safe, and is not required to exercise ordinary care to ascertain their condition, but assumes the peril only from such defects as are known to him or plainly observable by him.—Rockport Granite Co. v. Bjornholm (C. C. A.) 947.

A ship *held* liable for the injury to a rigger, resulting from the giving way of a nail used as a substitute for a larger steel pin, which was part of the machinery of a winch.—The Nordfarer (D. C.) 416.

MASTERS IN CHANCERY.

See "Equity," § 5.

MASTERS OF VESSELS.

See "Shipping," § 2.

MAXIMS.

Of equity, see "Equity," § 1.

MEASURE OF DAMAGES.

See "Damages," § 1.

MEETINGS.

Of stockholders, see "Corporations," § 2.

MINES AND MINERALS.

§ 1. Public mineral lands.

Marking of the boundaries of a mining claim, and description thereof, *held* a sufficient compliance with Rev. St. § 2324.—Walsh v. Erwin (C. C.) 531.

§ 2. Title, conveyances, and contracts.

Under the law of New York as settled by its court of appeals, marble in place is a "mineral," and the title thereto does not pass by a conveyance of the land which excepts and reserves to the grantor all mines and minerals which may be found therein.—Phelps v. Church of Our Lady, Help of Christians (C. C. A.) 882.

A plaintiff *held* not to have shown such title or possession of marble, alleged to have been quarried and converted by defendant, as would support an action of assumpsit to recover its value.—Phelps v. Church of Our Lady, Help of Christians (C. C. A.) 882.

MINORS.

See "Infants."

MISREPRESENTATION.

By insured, see "Insurance," § 4.

MISTAKE.

As ground for reissue of patent, see "Patents," § 4.

MONOPOLIES.

§ 1. Trusts and other combinations in restraint of trade.

An association of tile, mantel, and grate dealers in a particular locality and manufacturers of such articles in other states, which bound the former to buy only from the latter and the latter to sell only to the former within the prescribed territory, *held* illegal, under the anti-trust law, as a combination in restraint of trade and commerce among the states, and an attempt to create a monopoly in such trade.—W. W. Montague & Co. v. Lowry (C. C. A.) 27.

It is no defense, to a suit to dissolve a combination as illegal under the anti-trust law, because in restraint of individual competition in interstate commerce, that it has not in fact been productive of injury to the public.—Chesapeake & O. Fuel Co. v. United States (C. C. A.) 610.

A contract construed, and *held* illegal, under the anti-trust law, as in restraint of interstate commerce and tending to create a monopoly therein.—Chesapeake & O. Fuel Co. v. United States (C. C. A.) 610.

A contract *held* to relate to and affect interstate commerce, and to be subject to the provisions of the anti-trust law.—Chesapeake & O. Fuel Co. v. United States (C. C. A.) 610.

The only question to be determined, in a suit to dissolve a combination as illegal under the anti-trust law, is whether or not it is in restraint of interstate commerce; the question whether such restraint is or is not unreasonable not being open for consideration by the courts.—Chesapeake & O. Fuel Co. v. United States (C. C. A.) 610.

MORTGAGES.

Of railroads, see "Railroads," § 1.
To building and loan association, see "Building and Loan Associations."

§ 1. Construction and operation.

Mortgagee under a mortgage for a pre-existing debt *held* not bona fide purchaser of goods fraudulently procured by the mortgagor, by reason of an extension of time to the mortgagor for payment of the debt secured.—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 112.

§ 2. Foreclosure by action.

A decree of foreclosure, directing the sale of the mortgaged property, cannot be construed to include in the property which will pass by the sale money in the hands of the court's receiver, unless it specifically so states.—Washington Irr. Co. v. California Safe Deposit & Trust Co. (C. C. A.) 20.

The foreclosure of a second mortgage on railroad property in North Carolina, and a sale thereunder, leaves no estate or interest therein in the mortgagor which can be levied on and sold under a judgment subsequently recovered against it.—Julian v. Central Trust Co. (C. C. A.) 956.

One recovering a judgment against a railroad company after its property and franchises have been sold under a decree of foreclosure cannot question the purchaser's title on the ground that it is a foreign corporation, having no power to hold the property under the laws of the

state.—Julian v. Central Trust Co. (C. C. A.) 956.

MOTIONS.

Relating to pleadings, see "Pleading," § 2.

MULTIFARIOUSNESS.

Of pleading in equity, see "Equity," § 4.

MUNICIPAL CORPORATIONS.

See "Towns."

§ 1. Creation, alteration, existence, and dissolution.

Kearny county, Kan., is the municipal successor of the old township of Lakin in Finney county, and liable for the obligations of such township, under the decision of the supreme court of the state, which is conclusive on the county in a federal court.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

§ 2. Use and regulation of public places, property, and works.

Power conferred on a city by its charter to grant privileges and franchises in the use of its streets "by ordinance" cannot be exercised by a mere resolution, nor can an ordinance of the city making such a grant be amended in respect to any of its terms or conditions by a resolution.—Board of Mayor, etc., of City of Morristown v. East Tennessee Telephone Co. (C. C. A.) 304.

Acceptance of an ordinance granting a franchise to a telephone company to use the streets of a city *held* valid and effectual, and to create a contract which the city could not thereafter abrogate by a repealing ordinance.—Board of Mayor, etc., of City of Morristown v. East Tennessee Telephone Co. (C. C. A.) 304.

§ 3. Fiscal management, public debt, securities, and taxation.

In an action against a municipal corporation on bonds of which it is the nominal maker, but which are to be paid from a special fund which it is the duty of the corporation to create by levying a special tax on the property within a specified district, the owners of such property are not necessary parties defendant.—Mather v. City and County of San Francisco (C. C. A.) 37.

The holder of bonds issued by a municipal corporation as maker may maintain an action thereon in a federal court, and recover a judgment against such corporation, to be enforced by appropriate proceedings, although the bonds are not liabilities of the corporation under the statute authorizing their issuance, but are payable from a special fund which it is the duty of the corporation to create by taxation.—Mather v. City and County of San Francisco (C. C. A.) 37.

Where city bonds recited that they were issued under a submission of a proposition to popular vote, it was no defense, as against a bona fide purchaser, that the proposition submitted was other than that recited.—City of Kearney v. Woodruff (C. C. A.) 90.

A bona fide purchaser of bonds issued by a municipality under Comp. St. Neb. §§ 3506, 5491, *held* required to ascertain only that the amount of the issue was not in excess of the statutory limit.—City of Kearney v. Woodruff (C. C. A.) 90.

Comp. St. Neb. § 5491, declaring that canals and other works constructed for irrigation and water power purposes should be works of internal improvement, *held* not invalid on the ground that water power purposes might be mere purposes of private gain.—City of Kearney v. Woodruff (C. C. A.) 90.

Bona fide purchasers of township bonds, reciting that they were issued in all respects in conformity to law, have a right to rely on the presumption that the appropriate formal action for their issuance was taken by the township board.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

As against bona fide holders of municipal bonds, the municipality is estopped to deny the truth of recitals therein that all conditions required by law to be performed precedent to and in their issuance have been performed.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

Bonds issued by an Iowa city under Acts 25th Gen. Assem. c. 9, which, as required, show on their face that they are payable only out of the proceeds of special assessments made for street improvements, do not constitute original obligations of the city; but its liability thereon is limited to the proper collection and application of such assessments.—Vickrey v. Sioux City (C. C.) 437.

Street improvement bonds, issued by a city in Iowa under Acts 20th Gen. Assem. c. 20, and which contain no contrary declaration on their face, constitute obligations of the city, which it is bound to pay at maturity, regardless of the condition of the special fund which the act requires it to create for their payment from the assessments made for the improvement.—Vickrey v. Sioux City (C. C.) 437.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

See "Waters and Water Courses"; "Wharves."

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of parties.

Attorney, see "Attorney and Client," § 1.
Employers, see "Master and Servant," § 1.
Railroad companies, see "Railroads," § 2.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.
Tugs, see "Towage."

Condition or use of particular species of property, works, or machinery.

See "Railroads," § 2.

Contributory negligence.

Of person injured by operation of railroad, see "Railroads," § 2.
Of tow, see "Towage."

§ 1. Actions.

It is not competent for a railroad company, in an action against it for killing a person on the track, where there was no eyewitness to the accident, to prove a habit of the deceased to jump on trains, for the purpose of raising an inference that his death resulted from such an attempt.—Louisville & N. R. Co. v. McClish (C. C. A.) 268.

NOTICE.

Of particular facts, acts, or proceedings.

Application to remove cause to federal court, see "Removal of Causes," § 3.
Of assignment, see "Assignments," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

OFFER.

Proposals for contract, see "Contracts," § 1.

OFFICERS.

Particular classes of officers.

See "Receivers."
Bank officers, see "Banks and Banking," § 1.

OPINIONS.

Of courts, see "Courts," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PARENT AND CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 6.

PARTIES

Death ground for abatement, see "Abatement and Revival," § 1.
Entitled to allege error, see "Appeal and Error," § 4.
Interpleading, see "Interpleader."
Persons concluded by judgment, see "Judgment," § 3.
Persons entitled to require accounting by executor or administrator, see "Executors and Administrators," § 2.

In actions by or against particular classes of parties.

See "Executors and Administrators," § 1; "Municipal Corporations," § 3.

In particular actions or proceedings.

See "Equity," § 3; "Removal of Causes," § 2.

PARTITION.

§ 1. Actions for partition.

Where a life tenant in an undivided share of real estate in North Carolina becomes a voluntary party in the circuit court of appeals to an action for partition, his rights can be fully protected by the circuit court on a sale of the property, under St. N. C. c. 214, § 3.—Martin v. People's Bank (C. C.) 226.

PATENTS.

§ 1. Patentability.

Letters patent No. 397,293, for novel combinations of mechanical elements for the automatic lubrication of the bearing of the cross-head wrist-pin of a horizontal engine, issued February 5, 1889, claims 3 and 4, are valid.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

Letters patent No. 11,730, reissued December 6, 1898, claims 3, 4, and 5, relating to automatic oiling of bearings of engines, *held* void.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

Where each of several applications of the same inventor describes the entire machine, and the invention claimed by no one application claims any invention claimed in any of the others, and they are all pending at the same time, they cannot be used to anticipate each other.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

A patentee dedicates to the public every combination and improvement apparent on the face of his specification which he does not distinctly claim as an invention.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

Clear evidence of an intention to dedicate an improvement to the public is indispensable to establish an abandonment of an invention.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

Where several inventors form different combinations in the perfection of an art, which accomplish the desired result with varying degrees of success, each is entitled to his own combination, so long as it differs from those of his competitors.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

A new combination of old elements, whereby an old result is attained in a more economical and efficient manner, may be patented.—Ide v.

Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

Sutton patent, No. 383,258, *held* not void for lack of novelty.—Cimiotti Unhairing Co. v. American Unhairing Mach. Co. (C. C. A.) 498.

An improvement of a patent combination, which consists merely in carrying forward the old idea by a mechanical change in the form of one of the elements, so as to produce a better result, but without changing the mode of operation, does not amount to patentable invention.—Galvin v. City of Grand Rapids (C. C. A.) 511.

The fact that a patented device went at once into extensive public use, and has continued therein, does not of itself conclusively establish either novelty or utility; but if, upon technical grounds, the matter is doubtful, it is persuasive evidence of those qualities, unless it appears that such commercial success was due to other causes.—Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.) 886; P. P. Mast & Co. v. Same, Id.

It is no objection to the validity of a patent for an improvement in a physical structure that its validity depends on the use of the structure in a particular manner, when such mode of use is described in the specification in terms intelligible to those skilled in the art.—Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.) 886; P. P. Mast & Co. v. Same, Id.

If a new combination of old elements is such that it produces a new mode of operation and a beneficial result, there may be a patentable invention.—Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.) 886; P. P. Mast & Co. v. Same, Id.

A patent so obscure in its terminology that two conflicting theories as to its meaning may be deduced therefrom and supported by equally plausible arguments is too indefinite to be utilized as an anticipation.—Cimiotti Unhairing Co. v. Comstock Unhairing Co. (C. C.) 524.

A design patent must relate to a matter of ornament, and the design must have an æsthetic value; and a fastening for machinery belting is not a proper subject for such a patent.—Eaton v. Lewis (C. C.) 635.

Where it is admitted that the device of complainant's patent consists entirely of a combination of old and well known elements, the burden rests on him to show that such combination produces a new and better result than that produced by prior combinations to sustain the claim of patentable invention.—Fairbanks, Morse & Co. v. C. A. Stickney & Co. (C. C.) 720.

The Schade patent, No. 473,087, for an improvement in plane irons, is void for lack of patentable invention.—Stanley Rule & Level Co. v. Ohio Tool Co. (C. C.) 813.

§§ 2, 3. Term.

The fact that an applicant for a patent assigned his right thereto to another before applying for and obtaining a foreign patent for the invention, which was issued before the one in this country, will not prevent the latter from being limited to the term of the foreign patent, under Rev. St. § 4887, as such section stood in 1885.—John R. Williams Co. v. Miller, DuBrul & Peters Mfg. Co. (C. C.) 526.

§ 4. Reissues.

The insertion in a reissued patent of claims for inventions which were described, but not protected, by the original patent, is unauthorized and void.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

A mistake as to the meaning of a disclaimer, limiting the scope of a patent, which is deliberately made to meet a requirement of the patent office, and which does meet such requirement, and thereby avoids an interference, is not a mistake or inadvertence, within the meaning of Rev. St. § 4916, which may be corrected by a reissue with such disclaimer omitted.—Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C.) 810.

The courts have power to review the action of the commissioner of patents in granting a reissue on the ground of inadvertence, accident, or mistake, where there is manifest error upon the record.—Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C.) 810.

§ 5. Construction and operation of letters patent.

In an action for infringement of a patent, parol evidence is admissible to show the state of the art and the application of the doctrine of mechanical equivalents.—Simplex Ry. Appliance Co. v. Wands (C. C. A.) 517.

A patentee is entitled to all the uses and advantages of his invention, whether he knew of them or not.—Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.) 886; P. P. Mast & Co. v. Same, Id.

§ 6. Title, conveyances, and contracts.

Act March 3, 1897 (29 Stat. 693, c. 391, § 5), which provides that, if an assignment of a patent is made before a notary public, his certificate shall be prima facie evidence of its execution, declares a rule of evidence applicable to all assignments so acknowledged, whether before or after the passage of the act.—Lanyon Zinc Co. v. Brown (C. C. A.) 150.

An instrument executed by a patentee construed, and *held* not to be an assignment, but a mere license, which vested the grantee with no title to the patent nor right to sue at law in his own name for its infringement.—Atwood Lock Co. v. Yale & Towne Mfg. Co. (C. C.) 332.

A contract by which the owner of a patent agreed that the second party should have a share of the "damages" recovered for infringement *held* not to include a sum recovered from an infringer as "profits."—Wooster v. Trowbridge (C. C.) 722.

Evidence considered, and *held* insufficient to sustain a claim to a fund recovered for infringement of a patent, based upon an alleged verbal assignment of the patent and the recovery, while the suit was pending, to a solicitor for the complainant therein.—Wooster v. Trowbridge (C. C.) 722.

§ 7. Infringement.

Mere changes in the form of a device or of some of the mechanical elements of a combination will not avoid infringement, where the principle or mode of operation of the invention is adopted.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

Where a suit for infringement is brought upon several patented claims, and complainants obtain relief on some, but fail on others, an equitable division of the costs should be made between the parties.—Ide v. Trorlicht, Duncker & Renard Carpet Co. (C. C. A.) 137.

A preliminary injunction against the use by defendant of machines which have been previously adjudged to infringe complainant's patent will not be denied, on the ground of public policy, because it will result in great loss to defendant and inconvenience to the public.—Lanyon Zinc Co. v. Brown (C. C. A.) 150.

The Sutton patent, No. 383,258, for a machine for plucking furs, claim 8, *held* infringed.—Cimiotti Unhairing Co. v. Nearseal Unhairing Co. (C. C. A.) 507; Same v. Derbohlaw (C. C. A.) 510.

Demurrer to a bill for infringement of a patent should not be sustained for dissimilarity, unless it appears that no evidence could be produced showing such similarity.—Simplex Ry. Appliance Co. v. Wands (C. C. A.) 517.

Showing *held* insufficient to warrant a preliminary injunction against infringement of the Pickard patent, No. 448,072, for construction of canals.—Aquarama Co. v. Old Mill Co. (C. C. A.) 806.

One does not escape liability for infringement by changing the form or dimensions of the parts of a patented combination, where such change does not break up, nor essentially vary, the principle or mode of operation pervading the original invention.—Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.) 886; P. P. Mast & Co. v. Same, Id.

Prior patents, relied on by a defendant in a suit for infringement as anticipation of the one in suit, must be pleaded; otherwise, they cannot be considered for that purpose, but only to show the state of the art and to limit the claims involved.—Jones v. Cyphers (C. C.) 324.

In a suit for infringement against a nonresident corporation, the question whether plaintiff has shown that the sale complained of was made by defendant within the district, so as to give the court jurisdiction, may properly be presented at the close of his proofs by a motion to dismiss.—Streat v. American Rubber Co. (C. C.) 634.

A patent issued to a single individual is prima facie evidence that he was the inventor of the device shown, and it can only be overthrown on the ground that the invention was joint by the clearest and most reliable evidence.—Hall Signal Co. v. Union Switch & Signal Co. (C. C.) 638.

Profits and damages recoverable for infringement of a patent for an air brake valve *held* not to include those arising from the sale by defendant of the entire equipment, of which the valve was but one element.—Westinghouse v. New York Air Brake Co. (C. C.) 645.

Profits and damages recoverable for infringement of a patent must be limited to those directly and naturally arising from the invasion of complainant's monopoly, and cannot be enhanced by the fact that the use of the infringing device as one element of a combination enabled defendant to sell the entire combination, which was not covered by the patent.—Westinghouse v. New York Air Brake Co. (C. C.) 645.

A decision sustaining the validity of a patent in a suit in which a single defense only was relied on will not warrant the granting of a preliminary injunction against infringement in another suit, where a different defense is presented and supported by a showing which renders it reasonably probable that it may be established on final hearing.—Brunswick-Balke-Collender Co. v. Koehler & Hinrichs (C. C.) 648.

Where the owner of a patent has established its validity in ably contested litigation, he is entitled to protection of the rights thus established, and should not be refused a preliminary injunction against another infringer merely because of voluminous or complicated matters of defense.—Westinghouse Electric & Mfg. Co. v. Royal Weaving Co. (C. C.) 733.

Decisions sustaining the validity of a patent should be accepted as controlling, on an application for a preliminary injunction against infringement in another circuit, unless it is shown, not only that new matters and new issues are presented, but that the new matter is such as might require a different decision.—Westinghouse Electric & Mfg. Co. v. Royal Weaving Co. (C. C.) 733.

On application for a preliminary injunction, the effect of a prior decision sustaining the patent is limited to the issues decided and the proofs on which it was based, and an injunction will not be granted where new issues and proofs leave the court in doubt either as to validity or infringement.—Western Electric Co. v. Keystone Tel. Co. (C. C.) 809.

PATENTS ENUMERATED.

ENGLISH.

1855.

352. Automatic lubricators 141

1856.

852. Automatic lubricators 141

1884.

6,311. Machine for cutting cigar wrappers 526

FRENCH.

155,471. Pea huller 627
161,564. Electro-magnetic motors 733, 734
168,172. Electro-magnetic motors 733, 734

UNITED STATES.

DESIGN.

30,518. Belt fastener plates..... 635
30,519. Belt fastener plates..... 635
30,520. Belt fastener plates.....635, 636

ORIGINAL.

24,914. Automatic lubricators 141
37,033. Plaiting and ruffling attachment for sewing machine..... 723
60,096. Grain drill 887
65,328. Automatic lubricators 142
78,895. Automatic lubricators 141
101,168. System of heating and ventilating 326
227,818. Ore-roasting furnace 150, 152
240,008. Burr wheel for knitting machines 527
246,258. Automatic lubricators 141
276,047. Automatic lubricators 145
283,479. Valve 511
299,731. Automatic lubricators 141
310,973. Wagon jack 493, 495
312,791. Grain drill 887
315,408. Machine for cutting cigar wrappers 526
321,726. Automatic lubricators 144
330,067. Switch boards 809
335,956. Hair clipper 638
347,982. Grain drill 886, 887
351,589. Electrical distributing system.... 810
359,832. Grain drill 888
364,217. Boot and shoe heel mold.....155, 156
376,837. Automatic brake 645
379,881. Cutting apparatus 638
381,968. Electro-magnetic motors 733
382,279. Electro-magnetic motors 733
382,280. Electro-magnetic motors 734
382,288. Hair clipping machine..... 637
383,258. Unhairing machine..498, 507, 510, 524
387,318. Pea huller 625, 632, 633
391,340. Band fastening 157
392,961. Valve 511, 512
394,251. Harvester cutters 638
395,871. Brick machine 738, 740
396,209. Automatic lubricators 144
397,293. Automatic lubricators 137, 140–143, 145–147, 149, 150
399,702. Pea huller 630, 631
399,844. Inkstand 333, 334
400,682. Automatic lubricators ...142, 144, 147
413,390. Inkstand 333, 335
421,244. Pea huller.....625, 627, 629–631, 633
424,314. Burr wheel for knitting machines 527
429,296. Brick machine 738, 739
448,072. Pleasure canal 806, 807
455,374. Brick machine 738, 739
463,599. Wagon jack 493
471,264. Ore-roasting furnace 150–152, 154, 155
473,087. Plane irons 813
488,622. Brick machine 739
491,640. Inkstand 337, 338
492,497. Paper board 328
497,489. Railway signaling apparatus..638, 639
499,397. Pea huller 625, 630
500,299. Pea huller 625, 631, 632
504,544. Ventilating system 326
523,013. Ore-roasting furnace 150, 151
527,621. Grain drill 886–888
535,158. Electrical apparatus 711
536,742. Unhairing machine 505
557,868. Grain drill 886–890
578,941. Grain drill 887, 889
586,088. Incubator 324
598,554. Brick machine 739
599,477. Bowling apparatus 648
599,892. Electrical apparatus 711
601,477. Grain drill 889
605,177. Inkstand 333, 337
613,853. Electrical apparatus 711
615,727. Grain drill 886, 902
655,440. Clutch mechanism 720

REISSUED.

11,730. Automatic lubricators 137, 146, 147, 150
11,836. Electrical distributing system.... 810

PENALTIES.

Accrual of action for, see "Limitation of Actions," § 2.
Actions for, see "Limitation of Actions," § 1.
For importing aliens under labor contracts, see "Aliens," § 2.
For inserting false notice of copyright, see "Copyrights," § 1.

PERSONAL INJURIES.

See "Negligence."
To employé, see "Master and Servant," § 1.
To licensee, see "Railroads," § 2.
To person on or near railroad tracks, see "Railroads," § 2.
To seamen, see "Seamen."
To trespasser, see "Railroads," § 2.

PETITION.

In bankruptcy, see "Bankruptcy," § 1.

PIERS.

See "Wharves."

PLEADING.

Bill of interpleader, see "Interpleader," § 2.

In particular actions or proceedings.

See "Equity," § 4.
For infringement of patent, see "Patents," § 7.
Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

§ 1. Replication or reply and subsequent pleadings.

Allegations of a reply *held* insufficient as denials of allegations of new matter in the answer.—Patterson v. Wade (C. C. A.) 770.

§ 2. Motions.

Under the Oregon Code when allegations of new matter in an answer supporting a plea of limitation are not specifically denied by the reply, defendant is entitled to judgment on the pleadings.—Patterson v. Wade (C. C. A.) 770.

PLEDGES.

Where, on the transfer of bills receivable as security for a loan, the borrower opened a separate account of such bills on his books, and as fast as collected the proceeds were paid to the lender, and all questions of renewal and extension were referred to him, the trausfer was complete and effectual.—Young v. Upson (C. C.) 192.

POLICY.

Of insurance, see "Insurance."

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 6.
Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Account," § 1; "Assumpsit, Action of"; "Interpleader."

Particular proceedings in actions.

See "Abatement and Revival"; "Evidence"; "Execution"; "Judgment"; "Limitation of Actions"; "Pleading"; "Reference"; "Removal of Causes"; "Trial."

Particular remedies in or incident to actions.

See "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law," § 1.

Procedure in exercise of special jurisdictions.

In admiralty, see "Admiralty"; "Collision," § 8; "Shipping," § 5.
In bankruptcy, see "Bankruptcy," **§ 1.**
In equity, see "Equity."
In insolvency, see "Insolvency."

Procedure on review.

See "Appeal and Error."

PREFERENCES.

By debtor in compositions, see "Compositions with Creditors."
Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.
In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

PRINCIPAL AND AGENT.

See "Attorney and Client."
Admissions by agent, see "Evidence," § 3.
Corporate agents, see "Corporations," § 3.

§ 1. Mutual rights, duties, and liabilities.

There is no principle of general law upon which a principal can avoid liability to his agent for advances made in good faith on his request because the contract on which they were made was rendered illegal by the secret intention of the principal not to perform it in accordance with its terms.—Parker v. Moore (C. C. A.) 799.

PRINCIPAL AND SURETY.

See "Guaranty"; "Indemnity."
Liabilities of sureties on bonds in legal proceedings, see "Appeal and Error," § 5.

§ 1. Discharge of surety.

A surety for the performance of a building contract, which provides for changes by written agreement of the parties, is not discharged by modifications which are not so extensive as to radically change the contract.—United States v. Walsh (C. C. A.) 697.

§ 2. Rights and remedies of surety.

Under the Florida statute, which provides for the enforcement of contribution between sureties and gives a surety who has paid a judgment the right to control the same, such a surety, who pays a judgment after execution issued, may cause the same to be levied on property of a co-surety to enforce payment of his proportionate share.—Knight v. Weeks (C. C. A.) 970.

PRIORITIES.

Between judgment and conveyances, see "Judgment," § 4.
Of receivers' certificates, see "Receivers," § 1.
Of use of trade-mark, see "Trade-Marks and Trade-Names," § 1.

PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 1.

PRIZE.

Of war, see "War."

PROCESS.

Particular forms of writs or other process.

See "Execution"; "Injunction."

Process in special jurisdictions.

See "Admiralty," § 2.

PROPERTY.

See "Copyrights"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."
Constitutional guaranties of rights of property, see "Constitutional Law," § 1.
Taking for public use, see "Eminent Domain."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 1.

PROXIMATE CAUSE.

Of collision, see "Collision," § 1.

PUBLIC DEBT.

See "Municipal Corporations," § 3.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

QUANTUM MERUIT.

See "Assumpsit, Action of."

QUIETING TITLE.

§ 1. Right of action and defenses.

A federal court of equity is not given jurisdiction to try the title to a mining claim, where the bill does not show that complainant is without an adequate remedy at law, merely because an injunction is prayed for, to prevent alleged trespasses by defendant, an adverse claimant in removing one from the claim. —United States Min. Co. v. Lawson (C. C.) 1005.

RAILROADS.

As employers, see "Master and Servant," § 1. Carriage of goods and passengers, see "Carriers."

§ 1. Indebtedness, securities, liens, and mortgages.

A decree foreclosing a railroad mortgage and directing the distribution of the fund realized from the sale of the property construed, and *held* not to preclude the court from subsequently determining the priority of receiver's certificates issued for indebtedness contracted by order of the court.—Bank of Commerce v. Central Coal & Coke Co. (C. C. A.) 878.

Sand. & H. Dig. Ark. § 6251, giving a preferred lien on the property of a railroad for loss or damage to person or property, *held* not repealed by Act March 31, 1899, amending the same.—State Trust Co. v. Kansas City, P. & G. R. Co. (C. C.) 367.

§ 2. Operation.

A trespasser, who walked upon a railroad track on an embankment eight feet high, and was struck and killed by a passing train, was guilty of contributory negligence as matter of law.—Louisville & N. R. Co. v. McClish (C. C. A.) 268.

Where a fire is shown to have been started by a passing locomotive, undisputed evidence, in an action against the railroad company therefor, that the locomotive was properly constructed, equipped, inspected, and operated, is not sufficient, as a matter of law, to show that the company was not negligent in such respects.—Great Northern Ry. Co. v. Coats (C. C. A.) 452.

Where fire is shown to have started from a passing locomotive, the burden is on the company, in an action therefor, to show that the locomotive was properly constructed, equipped, and operated.—Great Northern Ry. Co. v. Coats (C. C. A.) 452.

A direction to railroad section men not to burn grass on plaintiff's lands *held* not to relieve the company from liability for a fire thereon set by its locomotive.—Great Northern Ry. Co. v. Coats (C. C. A.) 452.

Evidence in an action against a railroad company for fire set by its locomotive *held* not to show as a matter of law that the engine was properly operated.—Great Northern Ry. Co. v. Coats (C. C. A.) 452.

The modification of a requested instruction, in an action for fire set by a railroad company, *held* proper under the evidence.—Great Northern Ry. Co. v. Coats (C. C. A.) 452.

An instruction, in an action for fire started by a locomotive, that the velocity of the wind might be considered, is not erroneous, in failing to state how and in what manner the velocity of the wind may be considered.—Great Northern Ry. Co. v. Coats (C. C. A.) 452.

An employé of a contractor who is building a bridge pier in railroad yards, while unloading a car load of material, is as well entitled to safety from any unusual danger in being near the car as a consignee unloading freight at a depot. —Ryan v. New York, N. H. & H. R. Co. (C. C.) 197.

In an action against a railroad company for injury to one employed in unloading a car, caused by a door which was suspended by a hook falling, evidence considered, and *held*, that the question as to whether the hook was defective was for the jury.—Ryan v. New York, N. H. & H. R. Co. (C. C.) 197.

RECEIVERS.

§ 1. Management and disposition of property.

It is an unwarranted exercise of power for a court to authorize its receiver to complete an unfinished railroad, and issue certificates, to be a first lien, without giving existing lienholders an opportunity to be heard.—Bibber-White Co. v. White River Val. Electric R. Co. (C. C. A.) 786.

Where only one-third of a railroad was built at the time of the appointment of a receiver, and its value does not exceed the amount of liens against it, the court is not warranted in authorizing its completion by the receiver and the issuance of certificates in payment, to constitute a first lien on the property, against the objection of existing lien holders.—Bibber-White Co. v. White River Val. Electric R. Co. (C. C. A.) 786.

Receiver's certificates, issued in payment of indebtedness contracted by order of the court in the administration of railroad property in a foreclosure suit, represent an indebtedness of the court, and are entitled to priority of payment over other certificates issued for preferential debts of the railroad company.—Bank of Commerce v. Central Coal & Coke Co. (C. C. A.) 878.

Receivers for a railroad company cannot legally obligate themselves as such to pay a liability incurred by the corporation prior to their appointment.—Platt v. Philadelphia & R. R. Co. (C. C.) 842.

RECORDS.

Of assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.
Transcript on appeal or writ of error, see "Appeal and Error," § 3.

REDEMPTION.

From sale on execution, see "Execution," § 2.

REFERENCE.

To master or commissioner in equity, see "Equity," § 5.

§ 1. Report and findings.

Under a stipulation for the reference of an action at law to a referee, and providing that his findings of fact should have the same force and effect as the verdict of a jury, the court cannot modify such findings, nor review the same, except in so far as to determine whether they are supported by any evidence.—United States Projectile Co. v. Sharpless (D. C.) 996.

REISSUE.

Of patent, see "Patents," § 4.

RELEASE.

See "Compositions with Creditors."
Of charge on property, see "Wills," § 1.

§ 1. Pleading, evidence, trial, and review.

In an action for injuries for which a release had been given, an averment that plaintiff was induced to execute the release by misrepresentations as to his condition and by feigned promises of employment *held* not sustained by the proof.—Shook v. Illinois Cent. R. Co. (C. C. A.) 57.

In an action for injuries for which a release had been executed, evidence *held* to present a question for the jury on the issues of insanity at the time of executing the release, and, if mentally sound, whether the injuries to the employé's brain were in contemplation of the parties.—Shook v. Illinois Cent. R. Co. (C. C. A.) 57.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.

REMAND.

Of cause removed from state court, see "Removal of Causes," § 4.

REMOVAL OF CAUSES.

§ 1. Power to remove and right of removal in general.

A corporation of one state, doing business in another state under license, cannot by the laws of the latter state be deprived of the right to remove to the federal courts actions against it commenced in the courts of the latter state.—Ashe v. Union Cent. Life Ins. Co. (C. C.) 234.

§ 2. Citizenship or alienage of parties.

Where a bill filed in a state court alleges facts which would authorize a court of equity to grant relief, the right to remove the cause, where the requisite diversity of citizenship exists, does not depend upon whether the defendants are actually controverting or disputing the right to such relief.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

Defendants, sued by fictitious names, will be regarded as merely formal parties, whose presence does not affect proceedings for the removal of the cause.—Loop v. Winters' Estate (C. C.) 362.

The right of removal by nonresident defendants is not affected because one named as a defendant in the capacity of executor, and who is a citizen of the same state as plaintiff, joins in the petition for removal, where the petition shows that he is not in fact executor and is not therefore before the court as a party.—Loop v. Winters' Estate (C. C.) 362.

The joinder as defendant of the estate of a deceased person and the executor of his will is ineffectual, and will not prevent a removal by other defendants, where the petition for removal alleges that the person named as executor has not qualified as such, and that no letters testamentary or of administration have been issued on the estate.—Loop v. Winters' Estate (C. C.) 362.

§ 3. Proceedings to procure and effect of removal.

A federal court has no right to review an order of removal of an action on the ground of diversity of citizenship, made by a judge of a state court, and decide whether he had a right to sign the order, especially as the order was unnecessary; the cause being removed ipso facto on filing the petition and bond.—Ashe v. Union Cent. Life Ins. Co. (C. C.) 234.

Where, in an action commenced in a state court, a petition and bond for removal to the United States circuit court exclusively on the ground of diversity of citizenship are filed, no notice of the application for removal is required to be given to the plaintiff.—Ashe v. Union Cent. Life Ins. Co. (C. C.) 234.

A seal is not essential to the validity of a removal bond, where the use of a seal is declared unnecessary by the statutes of the state.—Loop v. Winters' Estate (C. C.) 362.

It is not essential to the removal of a cause that an order therefor should be made by the state court. The filing of a sufficient petition and bond effects the removal, without any action of the court.—Loop v. Winters' Estate (C. C.) 362.

§ 4. Remand or dismissal of cause.

Where, on an application for removal of an action from a state to a federal court, the bond was executed by the attorney of defendant, who then had no power of attorney so to do, and, before a motion to remand on the ground that the bond was void, a power of attorney ratifying

such act was filed, the motion should be denied.—Ashe v. Union Cent. Life Ins. Co. (C. C.) 234.

The jurisdictional facts set out in a petition for removal must be presumed to be true on a motion to remand, unless evidence is introduced to contradict them or the record shows something to the contrary.—Loop v. Winters' Estate (C. C.) 362.

§ 5. Proceedings in cause after removal.

Where a state court had jurisdiction to administer a trust in lands, some of which were in each division of a federal district, a federal court of one division, into which the cause was removed, has equal jurisdiction as to the lands in the other division.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

REMOVAL OF CLOUD.

See "Quieting Title."

REPLICATION.

See "Pleading," § 1.

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See "Pleading," § 1.

RESCISSION.

Of contract for sale of goods, see "Sales," § 2.

RES GESTÆ.

In civil actions, see "Evidence," § 2.

RES JUDICATA.

See "Judgment," §§ 2, 3.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

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See "Customs Duties"; "Internal Revenue."

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See "Appeal and Error"; "Criminal Law," § 2.

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Of action, see "Abatement and Revival," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 1.
Within insurance policy, see "Insurance," § 7.

ROADS.

Streets in cities, see "Municipal Corporations," § 2.

ROBBERY.

There is no substantial variance between an indictment for robbery, which describes the property taken as "pieces of paper money of the dominion of Canada" of stated denominations and value, and evidence showing that the bills taken were issued either by the dominion of Canada or by banks chartered by the Canadian government circulating as money in the dominion.—Allen v. United States (C. C. A.) 3.

SALES.

See "Vendor and Purchaser."
On execution, see "Execution," § 2.
On foreclosure of mortgage, see "Mortgages," § 2.
Of property of infant under order of court, see "Guardian and Ward," § 1.

§ 1. Construction of contract.

A contract for the sale of cement construed, and *held* to bind the seller to furnish the quantity required for the construction of a building.—Wolff v. Wells, Fargo & Co. (C. C. A.) 32.

§ 2. Modification or rescission of contract.

Breach of an implied condition in a contract to supply plaintiffs with barrels for their business not to order more barrels than was necessary *held* to entitle defendant to rescind.—H. D. Williams Cooperage Co. v. Scofield (C. C. A.) 119.

§ 3. Remedies of buyer.

Want of knowledge by a defendant of facts entitling him to rescind the contract at the time of rescission *held* not to deprive him of the benefit thereof as a defense in an action for breach.—H. D. Williams Cooperage Co. v. Scofield (C. C. A.) 119.

In an action for breach of a contract to supply plaintiff with barrels for his own use, a defense that plaintiffs sold barrels to others *held* not availing, unless the sale was in bad faith for the purpose of speculation.—H. D. Williams Cooperage Co. v. Scofield (C. C. A.) 119.

SALVAGE.

§ 1. Amount and apportionment.

Service rendered by a tug in towing a leaking schooner into port for repairs *held* to be a salvage, and not merely a towage, service.—Hume v. J. D. Spreckels & Bros. Co. (C. C. A.) 51.

A sale by an agent of the ship of lumber jettisoned, and subsequently rafted and salved by others, at private sale and without advertisement, does not fix its value for the purpose of determining the compensation to which the salvors are entitled.—The Thomas L. James (D. C.) 566.

Salvors of a stranded schooner *held* to have rendered services of high merit, and their com-

pensation determined.—The Thomas L. James (D. C.) 566.

§ 2. Lien and recovery.

The amount awarded by the trial court for salvage services will not be reduced by an appellate court, unless for violation of just principles, or for clear and palpable mistake, or gross overallowance. — Hume v. J. D. Spreckels & Bros. Co. (C. C. A.) 51.

SATISFACTION.

See "Release."

SEALS.

Necessity of seal on removal bond, see "Removal of Causes," § 3.

SEAMEN.

A seaman *held* to have forfeited his wages by desertion at sea.—The Mermaid (C. C. A.) 13.

Shipping articles *held* sufficiently definite in describing the nature of the voyage to be valid, under Rev. St. § 4511.—The Mermaid (C. C. A.) 13.

The master of a vessel *held* not liable in damages for the imprisonment of seamen while in port, where it appeared that such imprisonment was not by his direction.—Johnston v. Mowatt (D. C.) 844.

The master of a ship, while on board, is the agent of the owners in respect to all matters which come within the scope of his duty, and the owners and ship are liable in damages to a seaman, not only for the unwarranted ill-treatment of such seaman by the master himself, but for his failure to perform his duty to protect the seaman from assaults and ill-treatment by other officers.—The Lizzie Burrill (D. C.) 1015.

SETTLEMENT.

See "Release."

By executor or administrator, see "Executors and Administrators," § 2.

SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Towage"; "Wharves,"

Liability of shipowner for injuries to servant, see "Master and Servant," § 1.

§ 1. Charters.

Measure of damages stated for breach of a charter party by the owner of a ship by reason of a delay caused by unseaworthiness, through which a perishable cargo sustained damage.—The Georg Dumois (C. C. A.) 65.

A provision of a time charter giving the owner a lien on all subfreights for the charter hire is valid and enforceable against a cargo owner to the extent of the freight stipulated for in the bill of lading.—American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (C. C. A.) 669.

It is competent for a charterer, though taking a demise of the vessel, to pledge the freights to be earned by her for payment of the charter hire by a provision of the charter; and such provision gives the owner a lien as of the date of the charter, and subrogates him to all remedies of the charterer to enforce payment of the freight, including in a proper case a proceeding against the cargo.—American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (C. C. A.) 669.

A charter construed as to the length of the term in a suit by the charterer to recover damages for its breach.—The Helios (C. C. A.) 705.

A finding that the master of a vessel violated a charter by abandoning a wrecking expedition before completion of the work or expiration of the charter, without sufficient cause, affirmed. —The Helios (C. C. A.) 705.

The fact that charter hire was in default did not absolve the owner from completing the voyage commenced, where he made no demand for payment nor claim of forfeiture.—The Donald (D. C.) 744.

Evidence considered, and *held* to establish a contract between the charterer and owner of a ship, by which her destination was to be changed en route and she was to take her cargo to a different port from that originally contemplated, which agreement was broken by the owner.—The Donald (D. C.) 744.

A ship chartered for a voyage by the owner, who afterwards agreed with the charterer to change the port of destination, is liable in rem for a breach of such agreement by the refusal of the master to obey the directions of the charterer, given in accordance therewith.—The Donald (D. C.) 744.

The existence of a time charter, which had not expired, but which was treated by the parties as forfeited, *held* not to preclude the owner from contracting with another with respect to a charter for a voyage to which the time charterer made no objection.—The Donald (D. C.) 744.

A hirer of scows which went adrift by reason of the insufficiency of the lines with which they were equipped by the owner, if negligent in failing to make an effort to recover the vessels or to promptly notify the owner of their loss, is liable for damages approximately resulting from such negligence or delay, but the contract of hiring cannot be considered as remaining in force thereafter.—International Contracting Co. v. Walsh (D. C.) 851.

An injury to scows, while being towed by a hirer, through the parting of their lines, is presumably due to improper equipment, and the loss is that of the owner, unless he shows negligence in the handling of the tow, or an assumption of such risk by the hirer by his contract.—International Contracting Co. v. Walsh (D. C.) 851.

§ 2. Master.
It is the duty of the master of a ship which is at sea to protect his crew from violence and brutal treatment by other officers under his command.—The Lizzie Burrill (D. C.) 1015.

§ 3. Carriage of goods.
A lien reserved on subfreights in a charter will be given preference over a right of set-off existing in favor of a shipper against the charterer, where the equities are equal and the shipowner's right is prior in time.—American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (C. C. A.) 669.

A cargo owner, who pays a portion of the freight to the charterer in good faith, will be protected in such payment as against a lien on the freight reserved by the shipowner in the charter, of which he had no notice.—American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (C. C. A.) 669.

Bills of lading *held* not sufficient, under the other facts shown, to prove delivery of the goods to the carrier.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

A general clause in a bill of lading exempting a shipowner from liability for loss by thieves is not rendered void by the Harter act, but is enforceable, unless it is shown that the negligence or fault of the company contributed to the loss.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

Evidence considered, and *held* insufficient to warrant an instruction that, as a matter of law, a steamship company had received goods for carriage and was liable for their nondelivery.—Cunard S. S. Co. v. Kelley (C. C. A.) 678.

A finding affirmed that damage to cargo by water, which leaked from one of the ship's ballast tanks by reason of the breaking and straining of rivets during heavy weather, was due to excepted perils of the sea, and not to unseaworthiness of the ship at the beginning of the voyage.—Grubnan v. The Ontario (C. C. A.) 769.

Evidence considered, and *held* insufficient to establish the unseaworthiness of a ship in respect to its fittings for cattle, or improper loading, but to show that a loss of cattle during the voyage was due to perils of the sea.—The Tjomo (D. C.) 919.

A bill of lading for cattle, stipulating against liability for loss from any cause, and that the fittings and fastenings of the ship are accepted as satisfactory, does not relieve the carrier from liability for a loss resulting from its negligence in respect to the fittings or in the manner of stowage; but the burden rests on the shipper to prove such negligence affirmatively, where the ship encountered marine perils which were sufficient to have caused the loss.—The Tjomo (D. C.) 919.

Where a bill of lading for live stock stipulates that the fittings and fastenings of the ship are accepted as satisfactory, the burden rests upon the shipper to prove the carrier's negligence to entitle him to recover for a loss of the stock during the voyage, on the ground that the fittings were insufficient.—The Tjomo (D. C.) 919.

§ 4. Demurrage.
A clause of a bill of lading providing for special demurrage in case the vessel, after arrival, was not given precedence in discharging over vessels arriving later, construed, and *held* not applicable under the facts of the particular case.—Continental Coal Co. v. Bowne (C. C. A.) 945; Bowne v. Continental Coal Co., Id.

§ 5. Limitation of owner's liability.
Under Rev. St. § 4282, to charge a shipowner with liability for goods lost by fire while in shipment, it must be affirmatively shown that the fire was "caused by the design or neglect of such owner."—In re Old Dominion S. S. Co. (D. C.) 845.

In a proceeding by a shipowner in a district court for limitation of liability, the question whether a fire by which cargo was destroyed was caused by the design or neglect of such shipowner, so as to deprive it of the exemption from liability given by Rev. St. § 4282, if not previously adjudicated, will be determined by the court, and will not be left open to be determined by a jury, in an action brought by the cargo owner for the purpose.—In re Old Dominion S. S. Co. (D. C.) 845.

A finding by a jury in a state court that goods lost by fire while in shipment were destroyed through the negligence of the steamship company will be given effect, as conclusively establishing the negligence and liability of the company in proceedings subsequently instituted by it in a court of admiralty for a limitation of liability; but it does not necessarily establish that the loss was incurred with its "privity or knowledge" so as to deprive it of the right to a limitation of liability.—In re Old Dominion S. S. Co. (D. C.) 845.

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See "Statutes," § 1.

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STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 2.
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§ 1. General and special or local laws.
Under Const. Kan. art. 2, § 17, prohibiting the enactment of a special law when a general law can be made applicable, as construed by the supreme court of the state, it is the province of the legislature, and not of the courts, to determine when a special law is necessary.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

§ 2. Construction and operation.
The primary object of a proviso is to except something out of a statute which would otherwise be within it.—Deitch v. Staub (C. C. A.) 309.

An act authorizing a township to issue bonds, and providing that it should take effect "from and after its publication," was in effect during the whole day of such publication, so as to render valid bonds issued thereunder and bearing that date, in the absence of proof of the hour when the publication was made and when the bonds were signed.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

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TELEGRAPHS AND TELEPHONES.

§ 1. Regulation and operation.

A fee of $100, which an ordinance provides a telephone company shall pay for occupying streets, *held* a tax, and not a license.—Sunset Telephone & Telegraph Co. v. City of Medford (C. C.) 202.

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Of patents, see "Patents," §§ 2, 3.

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TOWAGE.

See "Salvage," § 1.
Collisions with tugs and vessels in tow, see "Collision," § 4.

A tug in towage service is bound only to be reasonably adequate to the service, and that those in charge shall possess and exercise the skill and care ordinarily exercised by those having experience in the same service.—The Startle (C. C.) 555.

The fact that a tug did not report for service in taking out a tow at the time agreed upon will not support an action for an injury to the tow on the voyage, where the owner accepted the service of the tug after her arrival, and the tow was then taken out with his consent.—The Startle (C. C.) 555.

Delay by a tug in proceeding with its tow, or other errors in navigation, although negligent, will not render it liable for an injury to the tow, caused by the breaking away and loss of some of the boats while anchored, where there was no direct causal connection between such acts and the loss, which resulted directly from intervening causes.—The Startle (C. C.) 555.

A pilot furnished to a tug by the owner of a fishing fleet in tow *held* to have been his agent, and not the agent of the tug, which was not responsible for grounding through his incompetence.—The Startle (C. C.) 555.

Evidence considered, and *held* not to establish a charge of negligence on the part of a tug which rendered it liable for the loss of a part of a fishing fleet in tow, which broke away from others of the boats while anchored at night, when the weather was not stormy and from a cause not appearing.—The Startle (C. C.) 555.

Evidence *held* to show that the grounding of a canal boat in tow was primarily due to the fault of her master in understating her draft to the master of the tug, and that the tug was not in fault nor liable for her subsequent injury.—The Coney Island (D. C.) 751.

TOWNS.

See "Municipal Corporations."

§ 1. Fiscal management, public debt, securities, and taxation.

Under an act authorizing a township to issue bonds payable 20 years after their date, or which at the option of the township could be called in and paid at any time after 10 years, the bonds are not invalid because made payable a few months less than 20 years from their date.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

Under an act authorizing and directing a township board to issue bonds, it is not essential to their validity that they should be signed by all the members of the board.—Board of Com'rs of Kearny County v. Vandriss (C. C. A.) 866.

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

The registration of the name "Liebig's Extract of Meat" as a trade-mark in the United States by a foreign manufacturer could confer no exclusive right, where the article was previously known and sold in this country under such name as a generic designation, and where, moreover, such manufacturer had no trade-mark rights in the name in its own country.—Liebig's Extract of Meat Co. v. Walker (C. C.) 822.

§ 2. Title, conveyances, and contracts.

The formation of a partnership by the owner of a trade-mark for the manufacture of the article designated does not pass title to the trade-mark to the partnership, except by express agreement.—Greacen v. Bell (C. C.) 553.

Liebig's Extract of Meat Company, Limited, of London, has no common-law trade-mark rights in the name "Liebig," as prefixed to the words "Extract of Meat."—Liebig's Extract of Meat Co. v. Walker (C. C.) 822.

§ 3. Infringement and unfair competition.

In an action for the illegal use of a trade-name, evidence *held* insufficient to entitle complainant to damages other than nominal.—Baker v. Baker (C. C. A.) 297.

A manufacturer *held* entitled to protection from a competitor in the circumscribed use of his name, which had been accorded to him by a court of equity.—Baker v. Baker (C. C. A.) 297.

In an action for the illegal use of a trade-name, the complainant *held* not entitled to relief, where he had nothing to complain of except the lawful use of a corporate name.—Baker v. Baker (C. C. A.) 297.

The use of the compound name "Lithia-Vichy" on artificial mineral waters will not be restrained as an imitation of plaintiff's natural Vichy.—La Republique Francaise v. Carl H. Schultz (C. C.) 196.

A court of equity cannot, at suit of a rival dealer, enjoin the use of a descriptive name to designate a product, on the ground merely that the article is not in fact that which the name denotes.—Liebig's Extract of Meat Co. v. Walker (C. C.) 822.

Defendant *held* guilty of unfair competition by the simulation of complainant's dress and labels.—Liebig's Extract of Meat Co. v. Walker (C. C.) 822.

TRESPASS.

Injuries to trespassers, see "Railroads," § 2.

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For damages from fire caused by operation of railroad, see "Railroads," § 2.

On gaming contract, see "Gaming," § 1.

§ 1. Instructions to jury.

An instruction that circumstantial evidence, "if complete," may be as conclusive and convincing as direct or positive evidence of eyewitnesses, is not so far erroneous or misleading, as against the party relying upon such evidence, as to warrant a reversal of the judgment.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

A trial judge is not required, on request of a party, to call attention in his charge to a newspaper article published during the trial and containing statements calculated to influence the jury, and to caution the jury to disregard the same, unless advised in some authentic manner that the article had been seen or read by some member of the jury.—Union Cent. Life Ins. Co. v. Skipper (C. C. A.) 69.

Where those in charge of an engine, which it was alleged struck and killed a person on the track, were witnesses on the trial of an action for his death, it was not error for the court, in its charge, to call attention to a statute which made them guilty of a felony in case they omitted certain precautions in the running of the train, and a death resulted, as showing their interest and affecting the weight to be given to their testimony.—Louisville & N. R. Co. v. McClish (C. C. A.) 268.

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Trust deeds, see "Mortgages."

§ 1. Creation, existence, and validity.

Bill *held* to be for the recovery of personal property and for the enforcement of a constructive trust.—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 112.

§ 2. Establishment and enforcement of trust.

In a suit to administer a trust, a court of equity acts in personam, and, where it has acquired full jurisdiction of the trustee and all other necessary parties, it may direct the administration of the trust, although a part of the property consists of land not within its territorial jurisdiction.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

A court of equity has jurisdiction of a bill to administer a trust in lands, filed by one of the beneficiaries in behalf of all, where it is alleged that there are obstacles to the carrying out of the trust by the trustee which the court can remove.—Memphis Sav. Bank v. Houchens (C. C. A.) 96.

Complainant, in a suit to recover goods fraudulently purchased, which were sold, pending suit, at an advance over the purchase price, *held* entitled to the amount for which the goods were sold.—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 112.

Seller of goods *held* not required to be a judgment or lien creditor in order to enforce a constructive trust of goods alleged to have been sold and delivered in consequence of fraud.—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 112.

TUGS.

See "Towage."

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 3.

UNITED STATES.

See "Customs Duties."

Courts, see "Courts," §§ 2–7; "Removal of Causes."

VALUE.

Limits of jurisdiction, see "Courts," § 5.

VENDOR AND PURCHASER.

See "Sales."

Rights of purchasers at guardian's sale, see "Guardian and Ward," § 1.

§ 1. Rights and liabilities of parties.

A bona fide purchaser of land for full value from the holder of the legal title cannot be affected by an agreement made by his grantor to hold the land in trust for another, of which he had no actual notice, and which was not recorded until after his purchase.—Mears v. Lockhart (C. C. A.) 865.

An assignee of an executory contract giving an option to purchase lands does not occupy the position of an innocent purchaser, but takes only the rights of his assignor, either as against the vendor or third parties.—Trice v. Comstock (C. C.) 765.

VERDICT.

Review on appeal or writ of error, see "Appeal and Error," § 4.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 1.

WAGERS.

See "Gaming," § 1.

WAIVER.

See "Estoppel."

Of defects in contract, see "Contracts," § 3.

Of rights or remedies.

See "Insurance," § 6.

Exemption from execution, see "Exemptions," § 1.

WAR.

Republication of monition ordered in a suit for the adjudication of a naval prize and the claims of the captors for bounty, where it appeared necessary to bring notice to all those interested.—The Santo Domingo (D. C.) 446.

WARDS.

See "Guardian and Ward."

WARRANTY.

By insured, see "Insurance," § 5.

WATERS AND WATER COURSES.

§ 1. Appropriation and prescription.

The posting of a notice of intention to appropriate water from a stream, as required by the California statute, does not constitute an appropriation, which is only perfected by the completion of the works and the diversion of the water to place of intended use, until which time the claimant has no right or title which will support an action for the diversion of the water by another.—Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 543.

A bill by a riparian owner on a stream to enjoin the diversion of all of the waters of such stream by defendants *held* sufficient.—Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 543.

WAYS.

Public ways, see "Municipal Corporations," § 2.

WHARVES.

Evidence *held* to raise a presumption that the falling of a vessel in a dry dock resulted from negligence in her blocking or handling by the owner of the dock, which was not overcome by the evidence for defendant.—Haffner v. Crane (D. C.) 404.

A float used as a receptacle for oysters unloaded from other boats, which has the form of a boat and is navigable, is subject to a charge for wharfage.—Braisted v. Denton (D. C.) 428.

Vessels using a private slip or basin provided with a dock for the accommodation of vessels therein cannot escape the payment of wharfage by disregarding the dock and anchoring or tying up to a dock owned by another, which has no right as to such slip.—Braisted v. Denton (D. C.) 428.

The penalty of double wharfage rates, imposed by Laws N. Y. 1897, c. 378, § 859, on a vessel leaving a wharf or slip without paying the dues therein fixed, when the same are demanded, does not apply to vessels in the clam or oyster trade, which are separately provided for by section 860.—Braisted v. Denton (D. C.) 428.

WILLS.

See "Executors and Administrators."
Construction and execution of trusts, see "Trusts."

§ 1. **Rights and liabilities of devisees and legatees.**

Where land was regularly condemned for railroad purposes at a time when the legal title was in the executor and trustees of a testator, who were made parties and to whom the compensation was paid, such land was released from liability for a legacy which was made by the testator a charge upon his estate generally.—Ohio River R. Co. v. Fisher (C. C. A.) 929.

WITNESSES.

See "Evidence."
Experts, see "Evidence," § 7.

Particular writs.

§ 1. **Examination.**

It is prejudicial error to permit a defendant, charged with a criminal offense, to be cross-examined as to his previous conduct, character, and habits, having no relevancy to any issue in the case, for the sole purpose of degrading him in the eyes of the jury.—Allen v. United States (C. C. A.) 3.

To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the constitution.—McKnight v. United States (C. C. A.) 972.

Act Cong. Feb. 11, 1893, granting immunity to witnesses testifying before the interstate commerce commission, applies to the witness personally.—In re Pooling Freights (D. C.) 588.

§ 2. **Credibility, impeachment, contradiction, and corroboration.**

The fact that the testimony of a witness is contradicted by that of other witnesses does not render admissible proof of his general good reputation for truth and veracity.—Louisville & N. R. Co. v. McClish (C. C. A.) 268.

WRITS.

See "Execution"; "Injunction."
Writ of error, see "Appeal and Error."

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