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---

CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 120.

JUDGES

OF THE

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

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<sup>1</sup> Appointed additional District Judge March 3, 1903, by Act Cong. Feb. 9, 1903.

<sup>2</sup> Resigned February 24, 1903.

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Hon. JAMES G. JENKINS, Circuit Judge.....	Milwaukee, Wis.

<sup>3</sup>Appointed February 25, 1903.

<sup>4</sup>Assigned to Third Circuit.

<sup>5</sup>Appointed Associate Justice United States Supreme Court February 25, 1903.

JUDGES OF THE COURTS.

V

Hon. PETER S. GROSSCUP, Circuit Judge .....Chicago, Ill.  
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 Hon. CHRISTIAN C. KOHLSAAT, District Judge, N. D. Illinois..... Chicago, Ill.  
 Hon. ALBERT B. ANDERSON, District Judge<sup>6</sup>.....Indianapolis, Ind.  
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 Hon. WILLIS VAN DEVANTER, Circuit Judge<sup>7</sup>.....Cheyenne, Wyo.  
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 Hon. CHARLES B. BELLINGER, District Judge, Oregon.....Portland, Or.  
 Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.

<sup>6</sup>Appointed December 8, 1902.

<sup>7</sup>Appointed additional Circuit Judge February 18, 1903.



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CASES  
ARGUED AND DETERMINED  
IN THE  
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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MILBY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1903.)

No. 1,046.

1. **CRIMINAL LAW—FRAUDULENT USE OF MAILS—STATUTES—CONSTRUCTION.**  
Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], provided that if any person, having devised any scheme or artifice to defraud, to be effected by correspondence with any persons by means of the post office of the United States, should, for the purpose of executing such scheme, place any letter in any post office of the United States, he should, on conviction, be punished, etc. By Act March 2, 1889 [page 3696], section 5480 was amended so as to read that if any person, having devised a scheme to defraud or to dispose of any counterfeit money, etc., to be effected by a correspondence through the mails, should place any letter in the post office, etc., he should be punished. *Held*, that the amendment was not intended to restrict the statute to schemes to defraud by the intended sale of counterfeit money, but was enacted to include such schemes within the prohibition of section 5480.
2. **SAME—INDICTMENT.**  
Where an indictment charged the use of the mails for the purpose of defrauding others unknown, by inducing the recipient of the letter deposited to place counterfeit money in circulation to such others, it contained a sufficient allegation of an intention to defraud, though the recipient of the letter could not have been defrauded.
3. **SAME—CONVICTION ON SEVERAL COUNTS.**  
Where a conviction is based on several counts in an indictment, it will not be reversed, if any of the counts are sufficient.
4. **SAME—INDICTMENT.**  
A count in an indictment, charging defendant with making use of the post office establishment in aid of a fraudulent scheme to sell counterfeit money, and that he did not in fact have or intend to sell any counterfeit money, and that when the letters of purchasers were returned to him he intended to convert the money therein sent and delivered through the postoffice to his own use, sufficiently charged a scheme to defraud, prohibited by Rev. St. § 5480, as amended by Act March 2, 1889 [U. S. Comp. St. 1901, p. 3696].

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¶ 1. Matter relating to frauds and counterfeiting as nonmailable, see note to *Timmons v. U. S.*, 30 C. C. A. 86.

¶ 3. See *Indictment and Information*, vol. 27, Cent. Dig. § 651, 120 F.—1

**5. SAME—TRIAL—INSTRUCTIONS—HARMLESS ERROR.**

Where, in a prosecution for using the mails with intent to defraud, the letter containing the scheme had been before the circuit court of appeals on a previous indictment, and a perusal of the letter clearly showed it to be a proposition to sell counterfeit money, an erroneous statement by the court, in a charge, that the letter had been adjudicated by the court in the former case as a proposition to sell counterfeit money, was without prejudice.

**6. SAME—EVIDENCE.**

In a prosecution for using the mails with intent to defraud by means of a letter offering to sell counterfeit money, evidence of the mailing of the letter, in which an answer was asked to be addressed to a person whose name was formed from the maiden name of defendant's wife, and that letters thus addressed were opened by defendant, and money taken therefrom and converted to his own use, was sufficient to justify submission of the case to the jury.

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

W. M. Smith, for plaintiff in error.

R. D. Hill, U. S. Atty.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. In a former case against the same defendant this court had occasion to consider the offense charged in the alleged fraudulent use of the mails of the United States in sending the letter set out in the present indictment. *Milby v. U. S.* 48 C. C. A. 574, 109 Fed. 638. In that case the only question for determination was as to the validity of the indictment. The letter which was the basis of the scheme for the fraudulent use of the mails is set forth in full in the statement of the case preceding the opinion of Judge Clark. It is a proposition to sell counterfeit money. It is written on a fac simile of a Confederate States note, which may afford plausibility to the defendant's claim that it had reference to Confederate money. The terms of the letter are such that it admits of but one interpretation. The defect in the former indictment was that there was no allegation of intent to defraud the persons directly dealt with or others who might obtain the counterfeit money. In that case the letter set out contained simply a proposal to send counterfeit money, without averring that it would not be sent as proposed, or alleging any intent to defraud others. It was held that no scheme to defraud within the meaning of the statute was described. After the decision in that case, a new indictment was found against Milby in the court below. Upon trial he was convicted and sentenced. This case is before us to review alleged errors in the proceedings.

The indictment contains ten counts, charging the fraudulent use of the mails of the United States in depositing in the post office the letter before referred to. The case was submitted to the jury upon six counts. It is claimed by the plaintiff in error that none of these counts describes an offense under the statute. The first count, after charging the scheme to defraud by means of the letter and the use of the post office, expressly charges the intention to defraud divers

persons unknown by enabling, causing, and inducing the postmaster to whom the letter was sent to put the counterfeit money in circulation among said persons as good money. The second count undertakes to bring the offense within the second section of the act of March 2, 1889 (25 Stat. 873; 3 U. S. Comp. St. 1901, p. 3698), making it unlawful to use or assume or request to be addressed by a false or fictitious name in carrying out the scheme to defraud, and contains allegations apt for the purpose. The third count, with the other essential averments, charges the defendant with making use of the post office establishment in aid of the fraudulent scheme described, to sell counterfeit money, when he did not in fact have or intend to sell any counterfeit money, and that when the letters came to the post office at Milby, of which the defendant was postmaster, in execution of the scheme to defraud, the defendant intended to take possession of and convert to his own use the sums of money thus sent and delivered through the post office. The fourth count, after essential allegations as to the fraudulent scheme set out in the third count, charges the use of a fictitious name within the purview of the act referred to. The fifth count is like the third count, with the additional averment that Milby intended to sell, instead of counterfeit money, Confederate money. The sixth count charges the use of a fictitious name in carrying out the scheme in the fifth count. Milby was convicted by a general verdict on all of the counts and received a single sentence, within the terms of the statute laid down for a single offense.

We have so recently had occasion to consider the extent and scope of section 5480 of the Revised Statutes, as amended March 2, 1889 [U. S. Comp. St. 1901, p. 3696], that an extended consideration of its construction and purpose is not now necessary. *Milby v. U. S.*, 48 C. C. A. 574, 109 Fed. 638; *Horman v. U. S.* (C. C. A.) 116 Fed. 350. As we said in the *Horman Case*, the gist of the offense is the criminal use of the mails of the United States. It is the purpose of this statute to prevent their use in aid of schemes having in view the defrauding of others of their money or property. The prime object of the statute is to prevent the post office from being perverted to the aid of fraudulent schemes. The indictment in the present case has remedied the defects pointed out in the former case. There is here a distinct allegation of the intent to defraud, within the meaning of the law in question. It is now objected that the present indictment charges a scheme to defraud by selling counterfeit money, whereas the statute was amended by act of March 2, 1889, making it an offense to use the postal facilities in aid of a scheme to sell counterfeit money. In its original form the statute was aimed at schemes to defraud, to be effected through the medium of the post office establishment. As amended, it is specifically enlarged, so as to include other schemes, as to the selling of counterfeit money, etc. The statute in its original form is contained in the following section, with the amendments in italics:

"If any person having devised or intending to devise any scheme or artifice to defraud or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use, any counterfeit or spurious

coin, bank notes, paper money or any obligation or security of the United States or of any state, territory, municipality, company, corporation, or person, or anything represented to be, or intimated or held out to be, such counterfeit, or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post-office establishment of the United States, or by inciting such other person, or any person, to open communication with the person so devising or intending, shall in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter or packet, writing, circular, pamphlet or advertisement, in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information or complaint may severally charge offenses to the number of three when committed in the same six months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device." 3 U. S. Comp. St. 1901, p. 3696.

We cannot agree with counsel for the plaintiff in error that this amendment was intended to curtail the operation of the statute as to the circulation of counterfeit money by use of the mail to the terms of the amendment. The original statute was not repealed. It was still an offense to devise a scheme or artifice to defraud, to be effected through the medium of the post office establishment, whether the subject-matter was counterfeit money or something else. It is true that a scheme to sell counterfeit money may be an offense under the amendment by its specific terms without proof of a scheme to defraud. The effect of the amendment is to extend the operation of the statute, and not to diminish the force of its original terms not in conflict with the amendment. *Culp v. U. S.*, 27 C. C. A. 294, 82 Fed. 990; *U. S. v. Jones (C. C.)* 10 Fed. 469. It is true, as was held in *Streep v. U. S.*, 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365, that the amendment applies to any person who devises a scheme to sell counterfeit money, the scheme to be effected by means of the mails; but this does not prevent punishment within the original terms of the statute of using the mail in aid of a scheme to defraud, the subject-matter of which is the disposition of counterfeit money.

It is further argued that the first count, which charges an intention to defraud persons unknown by subsequent circulation of the counterfeit money after its receipt by the persons to whom it was originally sent, is insufficient. It is urged that, as the person ordering counterfeit money would know what he was to get, he could not be defrauded. We think, however, that the allegation of the indictment as to defrauding others by the subsequent circulation of the counterfeit money brings it within the statute. It must always be borne in mind that the use of the mails in aid of schemes of spoliation is the thing sought to be prevented and punished. The

allegation of the indictment was distinct that there was an intention to defraud those whom it was intended should obtain the counterfeit money from the postmasters to whom it was sent. Such allegation, if true, was held to be sufficient in *Durland v. U. S.*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, and *U. S. v. Jones (C. C.)* 10 Fed. 469. It is to be remembered in this connection that the conviction of Milby was general, upon all the counts submitted; and it is settled law in the federal courts that, if any of the counts is good, the case will not be reversed in error, or a motion in arrest of judgment sustained, if the conviction can be sustained on any one of the counts. *Babcock v. U. S. (C. C.)* 34 Fed. 874; *U. S. v. Jensen (D. C.)* 15 Fed. 138; *U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *Bish. Cr. Proc.* 1015. One good count will support a conviction, when properly sustained, as well as more. Even if the contention of the plaintiff in error is sound, that where the subject-matter of the offense is the selling of counterfeit money, as distinguished from a scheme to defraud, it alone can be charged under the amended section, the first count of the indictment contains allegations sufficient to bring the charge within the meaning of the amended section. The indictment would not be invalidated because of the additional averment that this sale of counterfeit money was in aid of a scheme to defraud, as it contains all the essential elements required in the amended section as to a scheme to sell counterfeit money. As to the scheme to defraud, when it was charged in the third count of the indictment that the purpose was to offer for sale counterfeit money in the letter as set forth, with the design, when the money was received, not to send any counterfeit money in return, but to convert the money thus received to the use of the defendant, a scheme to defraud of a marked character is described. We think the indictment was sufficient, and that there can be no reversal on the grounds urged.

It is strongly argued that the court below erred in saying to the jury that the so-called "keep still" letter had been construed by this court in the former case (*Milby v. U. S.*, 48 C. C. A. 574, 109 Fed. 638) as a proposition to sell counterfeit money. There are expressions in the charge of the court informing the jury that the meaning of this letter had been adjudicated in the case referred to, and was no longer an open question; that it was held to be no more or less than a proposition to sell counterfeit money. While it is not technically accurate to say of the decision in the Milby Case that it was in any true sense *res judicata* of the meaning of the letter, as the case was decided upon other grounds, we cannot perceive that the plaintiff in error sustained injury by the instruction given. A perusal of the letter shows that it was clearly a proposition to sell counterfeit money, and no harm came from telling the jury that the court had so held. Plaintiff in error testified that it was not his purpose to sell counterfeit money, but Confederate money. It may be that this was a cunning reservation devised on his part; but the terms of the letter are clear, so that one reading it might understand counterfeit money would be furnished to persons who sent money in answer to this appeal.

It is argued that there was not sufficient testimony to warrant the submission of the case to the jury. It is hardly necessary to state that this court will not review the weight of the evidence. The only question we can consider on this branch of the case is whether there was sufficient testimony to warrant the submission of the case to the jury. A perusal of the record satisfies us that there was ample testimony for this purpose. The testimony as to the mailing of the letter was distinct and clear. The answer was asked to be addressed to "M. J. Hawks," a person other than the sender of the letter, the plaintiff in error,—a name which he seems to have obtained from the maiden name of his wife. The record contains testimony tending to establish that letters thus addressed were opened by the plaintiff in error, and the money taken therefrom converted to his own use.

Upon the whole record, we find no ground for reversal, and the judgment of the court below will be affirmed.

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THE JOHN A. BRIGGS.

BALCH v. 1,261,000 FEET OF LUMBER.

(Circuit Court of Appeals, Third Circuit. January 21, 1903.)

Nos. 19, 20.

1. SHIPPING—OWNER AND CHARTERER—RESPONSIBILITY FOR SHORTAGE OF CARGO.

Evidence considered, and *held* not to sustain the claim of a charterer for damages because the ship, which was chartered for the voyage for a lump sum, failed to take a cargo of lumber and timber to its full capacity, by reason of improper stowage by the master, but to show that the improper stowage, which was admitted, was due to the failure of the charterer to furnish lumber of the proper dimensions, at the proper times, to enable the master to load properly.

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

For opinion below, see 113 Fed. 948.

John F. Lewis, for appellant.

Theodore M. Etting, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The first of the above-entitled cases (No. 19, September term, 1902) was a suit in admiralty by the Pacific Pine Company against the ship John A. Briggs for the alleged breach of a charter party by the failure of the vessel to load and carry from two ports on Puget Sound (Port Gamble and Port Blakeley) to Philadelphia a full cargo of lumber. The second of the cases (No. 20, September term, 1902) was a suit in admiralty by the master of the ship against the cargo for demurrage. In the first-mentioned case the district court decreed in favor of the libelant, and awarded it damages in the sum of \$4,681.09, and in the latter case dismissed the libel; but in each case the court divided the costs of suit equally between the libelant and respondent.

By the terms of the charter party the whole vessel was chartered by the Pacific Pine Company for the carriage of a cargo of sawn lumber and timber, for the consideration of the lump sum of \$23,500. Clause B of the contract provided that the charterer should "furnish to said vessel, at designated loading place or places as herein provided, a full cargo of sawn lumber and timber, of such lengths and sizes as can be taken through vessel's present hatchways or bow or stern ports, if any, and on deck." Clause K provided: "Cargo to be stowed under the captain's supervision and direction, and the stevedore employed by the vessel to be mutually satisfactory to the captain and charterers or their agents."

The libel filed by the charterer avers that before the arrival of the vessel at Port Gamble, in the latter part of December, 1899, over 500,000 feet of the cargo had been cut and was piled upon the wharf, "subdivided into lots of large and small sizes, piled separately"; that the master was notified that certain small sizes thereof were intended for general stowage through the cargo to insure full shipment; that the 500,000 feet of lumber, "all of which was within easy reach of the vessel's tackles, and all of which was of such length and size as could be taken through the vessel's hatchways and bows," was promptly tendered to the master, but the loading was vexatiously delayed for several weeks; that in neglect of his duty to properly load the vessel the master placed a considerable portion of the smaller sizes of lumber, intended to be used for stowage, in the lower hold of the vessel, where other and larger lumber should have been laden, and the vessel, in consequence, was so badly laden as to be unfit to safely carry the full cargo contracted for, the total cargo shipped and carried to Philadelphia being 1,261,000 feet of lumber, which was 190,000 feet less than the vessel could and should have carried had she been properly laden.

The answer of the master of the vessel admits that prior to the arrival of the vessel at Port Gamble a quantity of lumber had been cut and was piled upon the wharf, but denies that "it was subdivided into lots of large and small sizes, piled separately"; admits that the master was notified that certain small sizes thereof were intended for general stowage; denies that the lumber on the wharf, at the time of the arrival of the vessel, was within easy reach of the vessel's tackles, and of such length and size as could be taken through the vessel's hatchways and bows; admits that the pile upon the wharf was tendered to the master, but avers that none of the lumber then accessible was of proper size and character for loading in the lower hold, and that much of it was of too large a size to be taken through the hatchways into the lower hold; avers that the master was requested to cut the beams of the lower hold to admit the taking in of such timbers, but refused to do so; admits that the loading of the cargo was delayed for several weeks, but denies that it was through any fault of the ship, and avers that the delay was altogether because of the failure of the charterer to provide a proper cargo; admits that a considerable portion of the smaller sizes of lumber intended to be used for general stowage was loaded in the lower hold, where other and larger lumber could have been laden, but avers that

the sole reason for this was the failure of the charterer to furnish a sufficient quantity of other proper cargo which could be stowed in the lower hold, and that because of such failure the master finally, much against his will, was compelled to put in the lower hold lumber intended for general stowage; and the answer avers that the "dead freight" spaces and the inability of the vessel to carry certain intended cargo were caused wholly by the failure of the charterer to furnish proper cargo for the lower hold at Port Gamble.

In his opinion the district judge says:

"The testimony is voluminous and conflicting, and will support the theory of either party. It has not been easy to reach a conclusion, but on the whole it seems to me that the weight of the evidence is against the ship. \* \* \* The determining facts are the owners' mistaken direction to the master to load the lower hold first, and the master's mistaken belief that he was not able to take on board the timber that for three weeks was always at his command."

The proofs constrain us to differ from this conclusion. We are convinced that the learned judge overlooked important evidence tending to refute the alleged "determining facts."

Capt. Morse, of San Francisco, a shipmaster of long experience in the carriage of all kinds of cargoes, including lumber, and a disinterested witness, in response to the question, "What part of the ship is it proper to load first?" answers, "The lower hold, always;" and to the question, "What is the effect of not filling the lower hold first?" answers, "It has every effect; not only the safety of the ship, but to properly load the ship. To do justice to the ship, you have to load the lower hold first to get in a proper cargo." This is corroborated by the testimony of other witnesses of great experience called by the respondent, and by the letter of Ames, assistant manager of the Puget Mill, hereinafter quoted. The evidence on the part of the charterer is not materially different. It does not go beyond this: that it is not uncommon to load lumber in the lower between-decks and in the lower hold simultaneously, although it is not the usual practice. Thus, the charterer's witness, Mr. Condon, the superintendent of the Puget Mill, testifies: "The usual manner of loading is to commence at the bottom of a vessel, and load up; but there are a great many cases where we load— Sometimes in our own vessels we load the hold, between-decks, and the decks at one time. The practice is governed by circumstances." Even upon the charterer's own proofs, the direction to load the lower hold first appears not to have been a mistaken direction. It accorded with the customary and approved method.

The allegation in the charterer's libel that the 500,000 feet of the cargo on the wharf at Port Gamble when the ship arrived was "subdivided into lots of large and small sizes, piled separately," is not sustained by the proofs. The averment indicates that it should have been so subdivided, but the proofs show that it was not. Capt. Balch, the master of the ship, testifies that when the vessel arrived this cargo was "one big pile of lumber. The stowage was a little on the side, separate from that, some lying on the timber. \* \* \* There was not a stick of timber or lumber that I could get at and put in the ship, except stowage, which was piled on a part of the



big timber. \* \* \* There were pieces in the pile that would go in the lower hold if we could get at them, but they were covered up; it was impossible to get to them." This testimony of Capt. Balch is convincingly corroborated. John Soder, the foreman stevedore, testifying to an examination he made with a view of getting ready to load, states: "I looked into the pile, and was figuring on seeing how many timbers there was in it, but it laid in such a way I could not get at it." And being asked "how the timbers were piled as regards their length and dimensions," he answered, "Well, they were all mixed, from the biggest to the smallest, right in the bunch there." The charterer's witness F. C. Talbot, being asked, "Was there any arrangement of the pile made by which different lengths were together, or were the timbers piled up regardless of the question of the lengths of one as compared to the length of its neighbor?" answered, "They were piled up regardless of lengths." Pope & Talbot were agents at San Francisco of the Puget Lumber Company, which furnished the cargo for the ship, and represented the charterer at Port Gamble. Edwin G. Ames was assistant general manager for the Puget Lumber Company at Port Gamble. Now, the letter (in evidence) dated January 5, 1900, written by Pope & Talbot to the Pacific Pine Company (the charterer) at San Francisco, and received by the charterer on January 6th, quotes as follows from a letter of Ames to Pope & Talbot, dated January 2, 1900:

"One difficulty now in loading the ship will be the fact that we have nearly 600M. feet of this cargo piled on the wharf, and it would be a very expensive and dangerous job to try to overhaul this pile of lumber to get out the smaller pieces to stow in the lower hold. \* \* \* In regard to what ought to be done if the charterers are in the wrong, of course you will have to furnish such lumber as the ship can take in the lower hold, and the lower hold will have to be filled before any quantity of lumber is taken in the between-decks. What kind of lumber will sell best in the markets to which the ship is going you are better judges than we are; but it would seem to me as though some changes would have to be made in the order, unless you can compel them to cut a great many beams out to admit of taking long enough timber in the lower hold to admit of proper stowage of the cargo."

There is another important piece of evidence tending to show that the master did not always have at his command proper cargo. After the ship began loading (on January 15, 1900) the Puget Mill, in order to complete the cargo, cut from 135,000 to 150,000 feet of the smaller and shorter sized timbers, which would go into the lower hold.

In this case nothing is clearer than Capt. Balch's earnest and honest opposition to putting the stowage lumber into the lower hold of the ship. How he was eventually induced to do so is plain enough by the proofs. On January 10, 1900, Pope & Talbot telegraphed Ames as follows:

"Ask Balch in off-hand manner why he don't load cargo? If he says he can't put in ship, ask him why he cannot load the small stuff. If he claims that you have denied his right to load it, that it must be kept for stowage, deny same, telling him it was only suggestions on your part; that he is the one to decide how the cargo shall be loaded. Our object is to get some lumber aboard vessel, if only a small amount. If captain finds he can load the

stowage first, we think he will commence taking cargo. Telegraph to us what he does. Do not put anything in writing."

Pope & Talbot, by letter to the charterer, sent on January 11th, and received on January 12th, informed the charterer of the sending of this telegram to Ames, the letter containing a copy of it. Ames carried out the instructions contained in the telegram, as his letter of January 12th to Pope & Talbot shows. On January 12th the ship-owners telegraphed from San Francisco to Captain Balch: "Charterers evidently changed tactics. Now claim three hundred and fifty thousand on dock small lumber. Demand it." This telegram was sent after a representation made by W. H. Talbot, a member of the firm of Pope & Talbot and a director of the Pacific Pine Company (the charterer), to one of the owners of the ship that there was at the dock small lumber which the ship could take in. The telegram to Ames and this communication to the shipowners indicate something more than a mere coincidence.

On January 13th, Capt. Balch addressed and delivered to the Puget Lumber Company a letter stating:

"By instructions from San Francisco, I demand any lumber or timber you may have on dock cut for the ship J. A. Briggs that will go in present ports and hatches. The 1x6, 12, 14, 16, and decking 3x6 and 4x6 was intended for broken stowage, which the ship needs for that purpose. It is also for charterer's interest. I do not think it is proper cargo to start lower hold with. I do not feel responsible for proper stowing if charterers do not give proper lumber for that purpose. \* \* \* Will be able to start first thing Monday morning, against my judgment."

Thereupon the Puget Lumber Company "instructed a tallyman to be on hand Monday morning, and to let them have anything they will take." The loading of the small lumber, originally intended for stowage, into the lower hold began on the morning of Monday, January 15th, and was continued from day to day until all was taken in. This was done with the knowledge and consent, and seeming approval, of the Puget Lumber Company, the charterer's agent at Port Gamble.

The charterer's protest of January 18th, addressed to the managing owner of the ship at San Francisco (even if good faith on the part of the charterer can be supposed), was too late. The bulk, if not all, of the small lumber had already been stowed in the lower hold of the ship. As early as January 12th the charterer had been informed of the telegram sent by Pope & Talbot to Ames. If that telegram was to be disavowed, the charterer was bound to act promptly. It could not delay full six days, and then attempt to undo what had been accomplished through Pope & Talbot.

If there was bad stowage, resulting in a shortage of cargo, the charterer is in no position to complain, in view of the circumstances disclosed by the proofs. It follows that the libel in the suit brought by the charterer against the ship should have been dismissed.

The oral argument on behalf of the ship was confined to the main case,—the suit by the charterer against the ship. The appellants' brief does not distinctly point out wherein the court erred in denying demurrage. As the case is presented, it is not clear to us that the court's finding upon the question of demurrage was wrong,

and we will not disturb the decree dismissing the ship's libel against the cargo.

The decree of the district court in No. 19, September term, 1902, the ship John A. Briggs, appellant, against the Pacific Pine Company, appellee, is reversed, with costs in this court to the appellant, and the cause is remanded to the district court, with direction to dismiss the libel, with costs of suit to the respondent.

The decree of the district court in No. 20, September term, 1902, the master of the ship John A. Briggs against the cargo of the ship and claimant, is affirmed, with costs in this court to appellees.

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ROYAL TRUST CO. et al. v. WASHBURN, B. & I. R. RY. CO.\*

JOHN O'BRIEN LUMBER CO. v. ROYAL TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 860.

**1. RECEIVERS—CERTIFICATES—VENDOR'S LIEN—PRIORITY.**

The seller of rails to a railroad company, reserving a valid lien thereon for their price, may not enforce the lien, as against the certificates of the receiver of the road, duly issued by the court in the administration and maintenance of the property.

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

Richard Sleight, for appellants.

M. F. Gallagher, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The appellees, the Royal Trust Company and Horace S. Oakley, are trustees under a mortgage given by the Washburn, Bayfield and Iron River Railway Company, a corporation of Wisconsin, to secure its bonds to the extent of five hundred and thirty-five thousand dollars. The mortgage covered the right of way, together with all grades, bridges, culverts, ties, rails, rolling stock, cars, engines, outfits, and property of every description, including privileges and franchises belonging, or appurtenant to the railroad. The appellee, A. C. Frost, is the Receiver of the road, appointed by the Circuit Court for the Western District of Wisconsin December 24th, 1898.

The appellant, the John O'Brien Lumber Company, a corporation of Wisconsin, is a creditor of the railroad company, to the extent of four thousand, five hundred and eighteen dollars and twenty-nine cents; three thousand, three hundred dollars of which was for rails sold to the railroad company, upon which it claims a specific vendor's lien.

\* Rehearing denied November 15, 1902.

† 1. Nature of receivers' certificates, see note to *Postal Tel. Cable Co. v. Vane*, 26 C. C. A. 350.

The main case, in which appellee intervened, was to foreclose the mortgage mentioned, for default in the payment of interest; and, pending foreclosure, for a receiver. The receiver appointed, as, above stated, took possession of the road December 24th, 1898, including in such possession, the rails purchased of appellant. The decree of the Circuit Court, entered July 5th, 1901, ordered that in default of the payment of the receiver's expenses, and of the principal and interest due on the bonds, the property of the railroad company be sold, and the funds arising therefrom, distributed as follows: first, the expenses of executing the decree, and of administration, including the receiver's certificates; then to the payment of the bonds. On the same day—July 5th, 1901—the intervening claims, including appellant's, as far as they sought a preference or lien, were denied and dismissed. From both decrees this appeal is prosecuted.

In the view we have taken of the case, it is unnecessary to consider many of the interesting questions argued. It is shown that the court, in the administration of the property through its receiver, has issued receiver's certificates, pledging for the payment thereof, the property and income of the railroad company, to the amount of two hundred and twenty thousand, five hundred and eighty-one dollars; and that the upset price fixed in the decree for the sale of the road, was two hundred and twenty-five thousand dollars; sufficient only to pay the receiver's certificates, and the costs of administration. It was admitted at the argument, that the road had not sold for more than this amount. The question that arises, therefore, is this: Will the vendor of rails to a railroad company, reserving to himself a valid lien upon the rails sold, be allowed to enforce that lien, not only against the railroad company, and its mortgagees, but also against the receiver's certificates duly issued by the court in the administration and maintenance of the property.

The certificates were issued, as the orders show, to procure funds for wages, operating expenses, maintenance and repairs, purchase of rolling stock and of rails, and for other purposes not specifically mentioned. The first were issued January 3rd, 1899, and the last April 9th, 1901.

The appellant became a party to the suit May 29th, 1899, after certificates to the amount of about one hundred and sixty-one thousand dollars had been issued. There is no proof in the record, that appellant had no notice from time to time of these orders. Nor is there any attack upon the orders, upon the ground, either that the money was not needed, or that it was improvidently expended, or that there should have been an earlier cessation of the operation of the road by the receiver. Standing thus unimpeached, the orders of the court carry the presumption that the money was needed, and was providently spent in execution of the court's duty toward the property in its possession.

The rails purchased of appellant, upon which the lien is claimed, had been laid originally upon spurs leading into the timber lands tapped by the road. The larger portion of the rails were on lands not belonging to the railroad right of way; but from time to time the rails were taken up from the lands tapped, many of them being

re-laid in the main line. There can be no question that the rails were a part of the property of the railroad company, and, as such, included within the receiver's possession, and within the description of the property pledged by order of the court to the payment of the receiver's certificates.

In *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, the Supreme Court said:

"Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public."

In view of the law laid down in that case, and of the fact that so far as this record discloses, the Circuit Court rightly felt itself obliged to continue operations, and make repairs—at least until full experience had shown the contrary—we do not see how we can hold otherwise than that the certificates thus issued are a first lien; prior to the bonds, and prior to any possible lien of a vendor for purchase price of rails. All claims against the railroad as debtor—whatever their priority as between creditors—became subordinated to the power of the court to operate the railroad property. As expenses of legitimate administration, the receiver's certificates must be met before question of priority among creditors is reached. *Kneeland v. Trust Co.*, 136 U. S. 98, 10 Sup. Ct. 950, 34 L. Ed. 379.

The decree of the Circuit Court will be affirmed.

## CARLETON DRY GOODS CO. v. ROGERS.

(Circuit Court of Appeals, Fifth Circuit. January 20, 1903.)

No. 1,193.

**1. BANKRUPTCY—PREFERENCE—OFFSET—NEW CREDIT.**

Where a bankrupt purchased a stock of goods, for a part of which the seller was indebted to defendant, and defendant refused to accept the bankrupt as its debtor and release the seller until \$1,000 had been paid on the seller's debt, whereupon the bankrupt paid such amount to defendant before bankruptcy, when the balance of the debt of the seller was charged against the bankrupt, the credit for the balance so given was not such as defendant was entitled to set off against a subsequent preference, under Bankr. Act, § 60, par. "c" [U. S. Comp. St. 1901, p. 3445] providing that, if a creditor is preferred, and afterwards extends to the debtor further credit, without security, for property which becomes a part of the debtor's estate, such new credit remaining unpaid may be set off against the amount which would otherwise be recoverable from him as a preference, since the property for which the credit was given was acquired by the bankrupt from his transferrer, and not from defendant.

**2. SAME.**

The credit was also not available as a set-off for the reason that it was given in consideration of a payment on the debt of the bankrupt's transferrer, and not for any property passing from defendant to the bankrupt.

Appeal from the District Court of the United States for the Western District of Texas.

James D. Williamson, for appellant.

Before PARDEE and SHELBY, Circuit Judges.

**PER CURIAM.** The case shows that four months prior to the adjudication in bankruptcy the appellant received a preference payment on account, and now claims to offset this preference payment by a credit of \$781 thereafter extended to the bankrupt under the following circumstances: Six months prior to the adjudication in bankruptcy the bankrupt's firm bought a large stock of goods, inventoried at \$8,547, from one B. F. Long, for which the firm agreed to pay the sum of \$1,100 and assume the indebtedness of the said Long, including a large indebtedness to the appellant. The \$1,100 was paid to Long at the time, and the bankrupt's firm took possession of the goods, and continued in possession of the same for about 30 days, when, having failed to pay for the stock of goods as agreed, and within 4 months preceding the bankruptcy, a new arrangement was made between the bankrupt's firm and Long, by which Long was permitted to take back about \$3,200 worth of the goods, the bankrupt's firm to retain the balance on condition that it should assume the indebtedness due the Carleton Dry Goods Company,—a sum of about \$1,781, then due. The appellant refused to take the assumption of the bankrupt's firm and release Long, or permit the stock of goods to be moved, until there should be first paid on the Long account the sum of \$1,000, leaving \$781 to be thereafter paid, as to which last-mentioned sum the bankrupt's firm would be accepted and Long released. At inter-

vals thereafter, and before the bankruptcy, the bankrupt's firm paid the sum of \$1,000, and thereupon, on the books of the appellant, was charged the balance of \$781, and it is this \$781 which is claimed to be a credit for property received, extended without security.

The appellant's demand for offset against the preference admitted to have been received is claimed under paragraph "c," § 60, of the bankrupt law of 1898 [U. S. Comp. St. 1901, p. 3445], and we concur with the district judge in refusing the demand, because the property was acquired by the bankrupt's firm from Long, and not from the appellant, and before the preference was given to appellant; and, even if this were not so, the credit given by appellant to the bankrupt's firm in accepting the bankrupt's firm instead of Long as a debtor was in consideration of \$1,000 paid on Long's debt, and not for any property passing from appellant to the bankrupt's firm.

The decree appealed from is affirmed.

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TEXAS & P. RY. CO. v. CAU.

(Circuit Court of Appeals, Fifth Circuit. January 27, 1903.)

No. 1,181.

**I. CARRIERS—STIPULATION EXEMPTING FROM LIABILITY FOR FIRE—AGREEMENT NOT TO ENFORCE—CONSIDERATION.**

Act of a consignor of cotton in giving up insurance thereon in his favor, and taking out a policy in favor of the carrier, fully protecting it from loss or destruction by fire, constituted a valuable consideration for a promise on the part of the carrier not to insist on a provision in the bill of lading exempting it from liability for loss or damage by fire.

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

N. W. Finley, W. W. Howe, W. B. Spencer, and C. P. Cocke, for plaintiff in error.

William S. Parkerson and Branch K. Miller, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The undisputed evidence shows that while the bills of lading contained a provision "that neither the Texas & Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damages to or the destructon of said cotton by fire," the owner and consignor, Cau, had taken out insurance which fully protected him in case of damage or destruction of said cotton by fire, and that in this state of the case, upon representation made by the company, through its authorized agent, that the company would be responsible for damages or destruction caused by fire, amounting, in substance, to a representation that the company would not insist upon exemption from liability as excepted in the bill of lading, and at the instance and request of the railway company, the owner and consignor gave up the insurance in his favor, and took out and paid for insurance in favor of the carrier company, fully protecting the carrier from loss

or destruction of the cotton by fire. The insurance in favor of the carrier was a valid, valuable consideration for the promise, if not contract, not to insist upon the exemption from loss or damage on account of destruction by fire, which was contained in the bill of lading, for it fully protected the carrier company from loss or damage by fire for which it was "legally liable," and this included liability resulting from the negligence of its own employes, and for which it was unquestionably liable to the consignor, notwithstanding the exemption contained in the bill of lading.

The judgment of the circuit court does substantial justice between the parties, and we affirm the same.

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WANAMAHER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 2, 1903.)

No. 10.

**1. CUSTOMS DUTIES—CLASSIFICATION—CORSETS TRIMMED WITH LACE.**

Women's corsets made of cotton, as the material of chief value, trimmed around the upper border with cotton lace edging, are dutiable under paragraph 339 of the tariff act of 1897 [U. S. Comp. St. 1901, p. 1662], as wearing apparel "made wholly or in part of lace," notwithstanding the small relative value of the lace.

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

Frank P. Prichard, for appellant.

James B. Holland and Wm. M. Stewart, Jr., for the United States.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The only question involved in this case was decided by the circuit court of appeals for the Second circuit in *U. S. v. Altman*, 46 C. C. A. 116, 107 Fed. 15; and the able argument by which the correctness of that decision has been challenged has failed to convince us that it should not be followed. Upon full and independent consideration of the subject, we concur in the conclusion which was there reached, and in the opinion by which that conclusion was supported.

The decree of the circuit court for the Eastern district of Pennsylvania, affirming the decision of the board of general appraisers, is affirmed.



MERRITT & CHAPMAN DERRICK & WRECKING CO. v.  
NORTH GERMAN LLOYD (three cases).

THE SAALE.

(District Court, S. D. New York. June 30, 1902.)

1. SALVAGE—SERVICES IN RAISING BEACHED STEAMSHIPS—NEGLIGENCE.

Where after a vessel, beached while on fire, was raised by a wrecking company under an agreement that the service should be compensated as salvage, she listed and sank again through the insufficiency of the precautions taken by the wrecking company, which was due partly to a reliance on misleading statements made by the owner in respect to her stability, in awarding salvage for the work the additional expense made necessary thereby will be divided between the owner and the wrecking company.

2. SAME—AMOUNT OF AWARD.

The amount earned as salvage by libellant, a wrecking company, in raising and clearing from bodies and wreckage the steamships Bremen, Main, and Saale after they had been beached following the fire on the Hoboken dock where they were partly burned, considered and determined.

3. SAME—SERVICES RENDERED TO BURNING SHIP.

Salvage compensation awarded to tugs for services in beaching the steamship Saale after she had taken fire at her dock at Hoboken, and in assisting in putting out the fire and saving the lives of persons on board.

In Admiralty. Suits to recover for salvage services.

Avery F. Cushman and R. D. Benedict, for Merritt & Chapman Derrick & Wrecking Co. and for the Champion and the Hustler.

Charles L. Guy, for the Eugene Grasselli.

Peter S. Carter, for the Westchester.

America J. Macklin, for the America, the Millard, and the Pulver.

Butler, Notman, Joline & Mynderse, for the Morgan, the De Veaux Powell, and the James D. Leary.

Carpenter & Park, for the McWilliams.

Wing, Putnam & Burlingham, for the Mutual, the Edward M. Timmins, and the Gracie.

John F. Foley, for the Eli B. Conine, the E. J. Kennedy, the M. D. Wheeler, the D. C. Ivins, the M. Moran, the George D. Kuper, and the C. W. Standart.

Shipman, Larocque & Choate, for respondent and claimant and for cargo.

ADAMS, District Judge. These are salvage actions brought by the libellants to recover for services in connection with three steamships, the Bremen, the Main and the Saale, and their cargoes. The necessity for the services arose out of the fire which occurred at the respondent's pier in Hoboken on the 30th day of June, 1900. This fire, with some of its consequences, has been fully described by Judge Brown in the case of *The Kaiser Wilhelm der Grosse* (D. C.) 106 Fed. 963, and *The Bremen*, 111 Fed. 228, and *The Main*, Id., to

¶ 2. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

which I refer for a general statement of the facts leading up to the present controversies. In those cases, there were awards to various salvors for services to the mentioned vessels. The Kaiser Wilhelm der Grosse was saved from the fire with little damage. The question of salvage in her case was then fully determined. The Bremen and the Main were seriously damaged by fire and it was necessary to beach them, which was done on the Weehawken flats. It remains to be determined what should be awarded as salvage for raising them. The Saale partly drifted and was partly towed down the river and was towed so that she took bottom on the Communipaw flats. Her case has not been heretofore considered in any aspect and it is necessary to determine what should be awarded as salvage for raising her, also what should be awarded for the salvage services of a number of tugs in pumping water on and into her and putting her into the position where the operations for raising her were carried on. These services were somewhat similar in character to those which have already been allowed in the cases of The Bremen and The Main, *supra*.

In each of the actions covering the Bremen and the Main, an order was made on the 10th of May, 1901, referring it to a commissioner to take evidence and report upon the following questions:

"1. The amount of actual disbursements made by the libellant in performing the service claimed for, including the value of materials reasonably used up or lost in the service.

"2. The amount of the value of the services rendered calculated at a fair and reasonable rate, as upon quantum meruit, without reference to salvage.

"3. The value of the libellant's plant employed in the service, or reasonably necessary therein."

A similar order was made in the action in personam, concerning the Saale, with an additional question, *viz.*: "The value of the property saved."

It has been agreed by the parties in the action against the Saale, her cargo, &c., that determinations of these questions relating to her, were necessary in such case, and that the method resorted to by the court of obtaining the aid of a commissioner's findings in the action in personam should be effectual in disposing of the questions, so far as they should be applicable, to the action in rem.

In each of the cases, the commissioner has made a report. In the Bremen, he found that he was unable to arrive at definite answers to the 1st and 2nd questions. To the 3rd question, he answered that he found the value of the plant owned by the libellant and used in the service to have been \$345,000, and of such as was not owned by it but used more or less, some of it very little, \$165,000. In the Main, he found, also, that he was unable to answer the 1st and 2nd questions. To the 3rd question, he answered that he found the value of the plant owned by libellant and used in the service to have been \$250,000, and of such as was not owned by it, but used more or less, some of it very little, \$163,000. In the Saale, he found, also, that he was unable to answer the 1st and 2nd questions. To the additional question, numbered as the 3rd, he answered that he found the value saved to have been \$55,536.27. To the remaining question, numbered

as the 4th, he answered that he found that the value of the plant owned by the libellant and used in the service to have been \$187,000 and of such as was not owned by it but used more or less, some of it very little, \$145,000.

All the findings with respect to the values of the plant owned by the libellant and used in the service, viz.: \$345,000 in the Bremen, \$250,000 in the Main, and \$187,000 in the Saale, have been excepted to by the respondent and claimant. The exceptions are general and do not point out the particular errors complained of, nor what the findings should have been. The Commander in Chief, 1 Wall. 43, 17 L. Ed. 609. I understand from the brief, however, that the principal complaints are: (1) because the commissioner has reported the values of the same vessels as against the different operations and (2) because he has included certain vessels in the plant, which the exceptant thought were useless, or comparatively so. There can be no doubt that the same plant—or parts of it—was used in the three different transactions, but that would not apparently be a good reason for diminishing the value to a third in each case, unless it appeared that the plant was actually divided into thirds for use at the same time in the different operations, which does not seem to have been the case. The wrecking vessels and appliances were of course shifted around from one sunken, or grounded, vessel to another while the operations were under way, so that perhaps at no one time, were all the elements constituting the plant engaged at work on any one vessel, but there can equally be no doubt that the whole plant was available at proper times for use in the different operations and that such value is the one to be considered, so far as the value may have any effect upon the final question. With respect to the inclusion of the value of the vessels said to have been useless, it has not been shown to me, by references to the testimony, that such was the case. It is not to be expected that a work of this kind could be carried on without some loss of time by a part of the plant or that just the kind of a vessel best adapted for a particular purpose could be supplied at the moment wanted. I am satisfied that the commissioner's findings are correct enough to meet the purposes for which they were designed, that is, to supply the court with a fairly accurate estimate of the value of the plant employed. The exceptions are overruled.

After the disaster, when the fires in the respective vessels had been extinguished and steps for the salvage of the property became necessary, some conversation took place between the representatives of the owners of the steamers and the wrecking company with respect to the latter taking charge of the work, and an agreement was reached and confirmed by letters between the parties as follows:

"New York, July 2nd, 1900.

"Merritt & Chapman Derrick & Wrecking Co., 27 William St., N. Y. City. Gentlemen:—We request you to take sole charge of all the operations on our steamers 'Bremen,' 'Saale' and 'Main' under the direction of our Superintendent, it being understood that if we cannot agree as to compensation for the services rendered, the Board of Underwriters shall act as umpire.

"We are, gentlemen,

"Yours very truly,

"Oelrichs & Co."

"New York, July 2nd, 1900.

"Messrs. Oelrichs & Co., Agents, North German Lloyd S. S. Co., 5 Broadway, New York City. Gentlemen:—

"S. S. 'Saale'—S. S. 'Bremen'—S. S. 'Main.'

"Your favor of even date at hand and contents noted. In answer thereto would say that according to verbal orders which you confirm therein, as to our taking charge of the operations on the above steamers, we are proceeding with the recovery of these ships and their cargoes.

"In reference to any understanding about compensation for our services, we desire to have it understood, whether you choose to consider it Salvage, or day's pay.

"In case of Salvage, our compensation is not to be limited, but decided either by disinterested arbitration, each choosing a representative and they choosing a third, if necessary—or Salvage to be awarded by the Courts.

"We are willing to proceed with the work at day's pay without a bonus, providing such pay is guaranteed to us and we are not obliged to look to the property recovered for it.

"In case you prefer us to look to the property for our compensation, we would expect, in addition to day's pay, a bonus for prompt and successful work; also on account of our taking the chances of values recovered.

"The bonus, in this instance, we are willing to leave to arbitration, either by the Board of Underwriters, or disinterested parties.

"We enclose herewith our schedule of Rates for Plant, &c., by the day.

"We are, gentlemen,

"Yours very truly,

"Merritt & Chapman Derrick & Wrecking Co.

"Isaac E. Chapman,

"Vice-President."

"New York, July 3rd, 1900.

"Merritt & Chapman Derrick & Wrecking Company, 27 William St., City. Gentlemen:—

"S. S. 'Saale'—S. S. 'Bremen'—S. S. 'Main.'

"We beg leave to acknowledge receipt of your valued favor of 2nd instant, and in reply would say that we prefer to treat the services that you may render in the matter of the above three steamers as salvage to be determined in a suit to be brought in the Southern District of New York, unless the amount is arrived at by agreement or arbitration to be hereafter agreed to.

"Trusting that this will be satisfactory, we are, gentlemen,

"Yours very truly,

"Oelrichs & Co."

"July 6, 1900.

"Messrs. Oelrichs & Co., Agents, North German Lloyd S. S. Co., 5 Broadway, City. Gentlemen:—

"S. S. 'Saale'—S. S. 'Bremen'—S. S. 'Main.'

"Answering your favor of July 3rd, we note that you have decided to have us treat the services rendered on the above three steamships as salvage, which is hereby accepted, to be determined by a suit in Admiralty, unless the amount is arrived at by agreement or arbitration, to be hereafter mutually agreed to.

"In reference to your letter of July 2nd, that our operations should be under the directions of your Superintendent, would say that we are pleased to have your Superintendent in touch with the work so our Superintendent can get information about the ships, their cargoes, etc., but should our men in charge think different that he in reference to the operations, we will certainly expect the judgment of our men to prevail.

"Yours truly,

"Merritt & Chapman Derrick & Wrecking Co."

The question of the application of the schedule rates of the wrecking company, mentioned in the letters, has been the subject of con-

siderable discussion in the matter. These rates are the ones often charged by the libellant for wrecking work in the harbor and frequently paid in the absence of a special agreement. It was, however, obviously the intention of the steamship company to avoid committing itself in any way to the schedule rates and to put the matter on a salvage basis, in which the result achieved would be a very material, if not the most important, element to be considered in making the awards. That was the final agreement of the parties and I shall, therefore, give no consideration to the schedule rates, excepting so far as they may have some bearing on quantum meruit in each case to be hereafter determined, as well as possible, as one of the elements in ascertaining a proper salvage award.

Further facts preliminary to the consideration of the awards in detail are not in much dispute. The situations of the vessels, the season of the year and the weather were favorable for the wrecking operations. The vessels were not entirely submerged and no great injury had been done by the fire to their hulls, so as to affect their buoyancy, when relieved of the accumulations of water. Pumping was the principal service to be rendered and to make this effective it was necessary to close all the openings of the vessels, consisting principally of port holes and some coal ports. It was also necessary to clear the rubbish out of them so that the pumps could work to the best advantage, and to remove from the Saale a large number of bodies of persons who had perished in the fire. This was very disagreeable work and in a measure dangerous to health as the weather was very hot at times and the stenches from the bodies and from putrid cargo were almost insufferable. The Main also had some cargo, which as a result of the disaster became spoiled and offensive to handle, with some danger to health. This also had to be removed. The plans of the ships had been burned so that work was carried on at a great disadvantage and experience and care were necessary. Altogether, it was a wrecking operation of unusual magnitude, requiring the use of a special and valuable plant, aided by outside resources, and necessarily to be conducted by experienced and competent persons, but not involving great risk or danger. The result was not much in doubt from the beginning and the wrecking company was reasonably sure of a fair compensation, if its efforts were prudently managed.

After the work was completed, the parties were not able to agree upon the amount of compensation to be paid for the services but the steamship company paid the wrecking company the sum of Forty thousand Dollars on account, for which a receipt was given as follows:

"Received from Messrs. Oelrichs & Co., Agents of the North German Lloyd, the sum of Forty thousand dollars (\$40,000) on account of services rendered in the raising of steamships 'Bremen,' 'Main,' and 'Saale,' it being understood, that this account payment in no way prejudices the right of Oelrichs & Co., Agents of the North German Lloyd, to object to the memorandums of days pay and bill of the Merritt & Chapman Derrick & Wrecking Company for the raising of these vessels, or to any item contained in the memorandums and bills.

"New York, September 28, 1900.

"Merritt & Chapman Derrick & Wrecking Co.  
"Isaac E. Chapman, Vice Pres."

The steamship company now claims that the sum paid is ample to cover all the services rendered by the wrecking company. The latter claims that quantum meruit in each case would be as follows: the Bremen, \$85,299.61 with interest; the Main, \$26,479.25, with interest; the Saale, \$16,688.72, with interest. It further claims that it is entitled to such sums, with proper additions in view of the salvage character of the contract, from which the \$40,000 paid should be deducted.

I will take up the claims in the order first named; also the additional claim for the services of the salving tugs in the last mentioned case.

#### THE BREMEN.

The saved value of the vessel was \$750,000 and of the cargo \$4,800. The vessel was 544 feet long over all and of 10,525 registered tonnage.

The operations commenced shortly after the 30th day of June, the time when the vessel was beached and on the 15th day of July following the vessel was raised and almost in a condition to be delivered to the owner, when an unfortunate accident occurred by which the vessel turned over on her beam ends and it became necessary that the operations should begin anew, with additional appliances, and it was the 1st day of September following when the vessel was finally raised and delivered to the owner. The principal controversy is with respect to this accident, the owner claiming that it happened through the negligence of the wrecking company, in failing to use proper methods, particularly with respect to ballast, and absence of due care, and the latter claiming that it took all the proper precautions, that the accident could not be anticipated and was the result, principally, of reliance placed upon assurances of the agents of the owner that the vessel would not need any ballast.

This vessel was larger than any which had been the subject of wrecking operations within the experience of any of the persons employed in the matter, but they went about it in the way which they had found successful in other cases, by putting a derrick alongside to correct an existing list as the vessel lay sunk and to overcome any which might develop in the raising. The respondent called some witnesses to show that the proper method was to use sand in bags as ballast but their experience was not such as to give their testimony much weight and I conclude that the use of the derrick was proper, particularly in view of the fact that the wrecking company was not assisted in any way by plans of the vessel, owing to their having been burned on board, and that assurances were given by the respondent's agents that ballast was not really needed owing to the stability of the vessel. I do not think, however, that the wrecking company was entitled to rely upon such assurances to the extent of neglecting altogether precautions which are necessary in the raising of any vessel and it is shown by the testimony of one of its experts that all submerged vessels, with a certain amount of water in them, cant one way or the other in leaving the bottom and it is necessary to hold them upright, which is usually done by employing a derrick to be used as a ballast log in one sense, that is in sustaining the vessel on the side to which the derrick may be fastened, and in another

sense to use her as a power, by means of her purchases, to prevent or correct a list either way. It is shown that up to a certain point, varying with the character of the vessel she is working upon, a derrick is ordinarily efficient to prevent any serious careening of the vessel during the raising and I have no doubt that the derrick used here, a powerful vessel, called the Monarch, with a lifting capacity of 260 tons, would have been quite capable, if properly used, of accomplishing that result. When the derrick first went to the Bremen, on the 1st day of July, it was found that the steamship had a considerable list to port, so that that side of the vessel was seven or eight feet lower than the starboard side. The derrick made fast to the port side near the bow and immediately went to work to endeavor to prevent any further list and to straighten the vessel up. To accomplish the latter purpose, wire slings were put in two of the steamer's chocks and fastened to the derrick. A strain was put on the steamer to the extent of about a third of the derrick's lifting power but nothing was accomplished in this way. The next day  $1\frac{7}{8}$  inch chains were put under the steamer for the purpose of sweeping her bottom, as it is called, and assisting in the lifting. The starboard water ballast tanks, which were empty, were filled and by using the purchases of the derrick on the chains, one of which was fastened on the steamer's foremast and the other on her starboard side and worked around drums on the derrick, the steamer was straightened up to some extent. The derrick then went to other work and returned on the 14th of July. The chains had remained on the steamer and the derrick made fast to them again. The ports were then about closed and the water had been kept down by pumping. Pumping then went on; a strain was put on the chains again by the derrick and shortly afterwards, with the rise of the tide, the steamer left the bottom and rose from her own buoyancy, so that she was five or six feet from the bottom. When she reached this point, about 7 o'clock in the evening of the next day, the steamer careened to port breaking both the chains, by which she was fastened to the derrick, and sunk to the bottom again, where she afterwards straightened up in about the position she first was. Subsequent measures to accomplish the purpose of raising were taken by means of a large quantity of stone ballast, the use of numerous pontoons and the derrick again this time mostly on the starboard side but pursuing substantially the same methods to raise the vessel, excepting the full power of the derrick was used with larger chains. The raising was finally accomplished on the 29th of August. All the work from the 17th of July to such time was the result of the failure to keep the vessel up when first raised. No substantial attempt is made by the wrecking company to account for the first failure. It was suggested in the testimony that the rolling over of the vessel might have been caused by the steamer's bilge keel catching on the sloping bank where she was lying or that her propeller blade might have caught in the mud but neither of the hypotheses seems to me to be tenable, especially as it is fairly established that the vessel was entirely free from the bottom when she turned over. I think it is probable that with an existing list and a great body of moving water

still in the vessel, with a tendency to the port side, and there being no counterbalancing ballast on the starboard side, that shortly after becoming entirely free from the bottom and without any support from it, the natural tendency of the steamship to turn over to the port was too great for the strength of the chains used to maintain her upright position, unless the greatest watchfulness and care should be exercised on the part of those superintending the operation. Expert testimony was taken by the wrecking company to show that when the vessel reached the height where she turned over, that the danger point had been passed but the fact of her turning over is too strong a contradiction of such a theory to permit it being entertained. Assuming that the appliances were reasonably sufficient to prevent the vessel from turning over, *res ipsa* would seem to condemn the manner of using the appliances. But a conclusion that there was an absence of proper precautions is not dependent upon a presumption. Although it appears from the libellant's testimony that it was usual and proper in operations of this kind to use the steam power of the derrick to check any listing and to keep the vessel upright, and that it was used successfully on the Main when a similar danger menaced her, yet I find no evidence that it was used here, notwithstanding there was warning and ample opportunity to bring it into requisition. When the operations were commenced, a method was devised of showing the extent of the list, and any variation, by means of a swinging bolt fastened to an old sette on the lower promenade deck. This was a primitive arrangement and it would seem that in an important operation of this kind it would have been prudent to use a clinometer for the purpose, as was done in the latter proceedings, but even this rough device, called a "Tell-tale," showed an increasing list some time before the strain was great enough to break the chains. The operation was then in charge of a superintendent, who was on board the steamer. A man left to watch the Tell-tale reported to him that the steamer had started to list, and he shortly went forward and stopped the pumps there. Finding the list still increasing, he stopped all the pumps. This superintendent estimated that there was a lapse of twenty-five minutes between receiving the information and finally stopping all the pumps. I infer that it was about the expiration of this estimated period of time that the chains parted. Thus it appears that considerable time passed, during which the steam power of the derrick might have been used for checking the increasing list and strain upon the chains and no recourse was had to it. The great usefulness of the *Monarch* in this kind of an operation was her ability to hold and check a listing vessel quickly. Her power and appliances were of course utterly inadequate to prevent a catastrophe of this kind, if they were not exercised diligently. Here, as I must find, the power was not used at all, with the result that the chains were thereby subjected to an undue strain. It is impossible for me to avoid the conclusion that there was negligence on the part of the wrecking company contributing to the wrecking expenses. With this conclusion, I must also find that the negligence of the wrecking company was partly induced by representations on the part of the steamship company that no ballast was needed and in sub-



stance, that not even the derrick would be necessary for the purpose of keeping the steamer upright as she rose from the bottom. Great pressure was being put upon the wrecking company by the steamship company to accomplish the work quickly and this doubtless in a measure led to the absence of precautions which otherwise would have been taken. Altogether, I think it is proper that the usual admiralty method of apportioning the loss in cases of joint negligence should be applied.

The next step is to determine what the damages were. I find in the testimony no satisfactory evidence by which I can, with any degree of accuracy, distinguish between the expenses before and after the first failure and I shall be obliged to consider all expenses, from the beginning to the end, as a part of an entire enterprise. The expenses in this case, as well as in the others which follow, have been the subject of great controversy. As has already been stated, the wrecking company here claims \$85,299.61, and interest, as a basis for the salvage award. It claims to have actually expended \$17,137.35 of such amount and that the whole claim is simply what it would have been entitled to for the use of the plant, including the hired part, the payments for which are covered in the said expenditures. The items of disbursements and charges for the plant are attacked in detail by the steamship company in all of the cases. The Commissioner, to whom the matter was referred in aid of the court, was unable to answer the questions concerning these features of the cases and I shall only do it in a general way. I find here that the disbursements were made substantially as claimed but that they should be subjected to reductions, which will let the amount stand, so far as it may be useful, at \$16,000. With respect to the remaining claim of \$68,162.26 for the use of the wrecking company's plant (making up the claimed quantum meruit \$85,299.61), I find that it should be reduced so that it will stand, so far as it may be useful, at \$59,000. With an allowance for interest and taking into consideration the saved value, the nature of the service, which entitles the salvor, when the saved value justifies it, to something beyond what would be paid him on quantum meruit and the wrecking company's maintenance of a large and expensive plant especially designed for this kind of business, I think that Ninety-one thousand Dollars (\$91,000) will be a reasonable total salvage award on the vessel and cargo. The wrecking company will be allowed one-half of this amount, to be divided between the vessel and cargo in proportion to their relative values.

#### THE MAIN.

The value of the vessel saved was \$275,000, and of the cargo \$14,096.45. The vessel was about 500 feet long over all and of 10,036 registered tonnage.

The raising operations on her also commenced shortly after the 30th day of June, and they were finished on the 30th day of July, when she was taken to Erie Basin, but she was not then free from cargo and it was necessary to continue operations for that purpose until the 17th day of August. It is contended by the steamship company that all the expense after July 30th should be charged to the

cargo but the circumstances would not justify such a course. The cargo was grain and a great part of it became spoiled and offensive in smell by reason of the sinking. As it was necessary to relieve the ship of the cargo, I must regard that expense as a part of the salvage operation.

The wrecking company claims to have expended on this vessel and cargo \$13,922.27. I find no reason to question the payments but I think some part of them might have been avoided by the exercise of economy and, as in the Bremen case, I reduce the amount so that it will stand, so far as it may be useful, at \$12,500. There is an additional claim of \$12,556.98 for use of the wrecking company's plant (making up the claimed quantum meruit of \$26,479.25). I find that it should be reduced so that it will stand, so far as it may be useful, at \$10,600. With an allowance for interest and considering the saved value, the nature of the services, the value of the wrecking plant engaged and its maintenance, as in the Bremen, I think that Twenty-seven thousand five hundred Dollars (\$27,500) will be a reasonable total salvage award to the wrecking company the vessel and cargo, to be divided between the vessel and cargo in proportion to their relative values.

#### THE SAALE.

The value of this vessel before the fire was \$300,000. The saved value of the vessel was \$55,356.27 and the saved value of the cargo about \$41,000. The vessel was 454 feet long over all and of 5,219 registered tonnage.

The first question to be determined is, what award should be made to the wrecking company for its services, and the second question is, what award should be made to the various tugs.

1. The wrecking operations commenced on the 1st day of July and were finished on the 16th day of July. They were of the same general character as those on the other vessels, but somewhat more difficult on account of the necessity of removing more than one hundred bodies of those who had perished in the fire. The cargo saved consisted principally of copper in bars valued at about \$33,000, and lubricating oil valued at about \$3,900. The remaining value was made up of miscellaneous cargo. The aggregate value of the salvaging vessels was about \$275,000.

The wrecking company claims to have expended on the vessel and cargo the sum of \$6,213.37. I think the payments were made but, as in the Main, should be reduced so that the amount will stand, so far as it may be useful, at \$5,700. There is an additional claim for the use of the wrecking company's plant of \$10,475.35 (making up the claimed quantum meruit of \$16,668.72). I think it should be reduced so that it will stand, so far as it may be useful, at \$8,800. Having in view the considerations mentioned in connection with the other vessels, I think that Seventeen thousand Dollars (\$17,000) will be a reasonable total salvage award to the wrecking company on the vessel and cargo, to be divided between them in proportion to their relative values.

2. Deducting such allowance from the saved total value, it leaves \$79,356.27 as a basis for allowances to the tugs. These actions were

consolidated under the title of The S. S. Saale, her cargo, freight, etc.

There is great conflict with respect to these claims. The steamship company contends that practically no services were rendered to the vessel or cargo but that she drifted, excepting so far as assisted by one of the fire boats, upon the flats, and that the tugs made no effort to save life but devoted their attention to the more profitable salvage prizes. On the other hand, it is contended that some of the tugs immediately went to the steamer's assistance as she drifted out from her pier and others shortly joined them and all poured water into her and guided her movements so as to beach her in the best available place, in the meantime directing their best efforts to the saving of life and with some success. This vessel was more exposed than the other vessels to the immediate effect of the fierce flames which broke out on the pier, and she became so enveloped that those on board of her who were fortunate enough to be in a situation to escape, were obliged to quickly abandon her and did so, excepting the captain who remained at his post on the bridge and perished there. The hawsers were first thrown off, however, and she shortly afterwards, through the effect of the wind and the ebb tide, drifted out into the river where the salving vessels went to her assistance. At this time there were a large number of persons confined below. Others who were on the decks jumped into the water, of whom some were saved. I find no reason whatever to believe the charges of inhumanity which have been advanced. The evidence on behalf of the steamship in this respect gives no definite information which would enable the tug men to refute the charges. While it is said, for example, that one of the tugs pulled her hose away when it was being used for the purpose of saving life, for fear it would be spoiled, the name of the tug is not given. The witness who testified to this, said he took no pains to ascertain the name of the tug or of the persons in charge of her. The story is inherently improbable and lacks credible corroboration. The same self laudatory witness said that while he was on board saving life, the tugs did not and would not come near the burning ship, but almost in the same breath he also said that when the fire boat Van Wyck came, she could not get to the ship because of the surrounding tugs and that she only succeeded by threatening to crush them. The evidence clearly shows that the tug men made every reasonable effort to relieve the sufferers who remained in the vessel and took serious chances for that purpose, without regard to any salvage award. Several of the tugs were injured by the heat and suffered loss from the destruction of the hose in use. One of the tugs, the Eugene Grasselli, was the subject of special commendation from the owner of the steamers, in a letter dated August 20th, 1900, directed to the master, James A. Cox, in which the following language was employed:

"We have reported the circumstances attending the saving of life by your vessel on the occasion of the catastrophe by which our piers and steamers in Hoboken were burned on June 30th last, to our Company, and are instructed by them to convey to you, and through you to your crew, their thanks for the prompt and effective aid in rescuing the lives of many men belonging to the steamers and the service of our Company from death by drowning or by fire, and to assure you that the readiness with which you

responded on that occasion, and in the well directed exertions you made for the saving of life, have been fully appreciated by our Company."

This is not a solitary instance of humane and successful work on the part of the tugs. Others were equally solicitous and efficient, with the result that many lives were saved through their efforts. On the question of a salvage award, however, which must be largely determined with reference to the amount of property saved, it is evident that little was accomplished by the tugs towards quenching the fire, excepting so far as their streams of water, assisted towards the end by those of the fire boat Van Wyck, tended to fill and bring about the sinking of the vessel, which finally caused the extinguishment of the interior fire. The flames on deck were kept down and finally subdued by the streams of water played upon them but everything inflammable was substantially consumed. This service was especially valuable in cooling the vessel and passage ways so that a number of the persons imprisoned below were enabled to escape. Probably 33-35 lives were saved in this way. The fire commenced about 4 o'clock and it was not until about 7 o'clock that the vessel was beached. There was no concert of action among the tugs so far as directing the movement of the vessel towards a proper beaching place was concerned, until the tugs Pulver, Millard and America went to her assistance. These tugs were specially employed by the superintendent of the steamship company, after they had assisted in the saving of the Kaiser Wilhelm, because he was familiar with the experience of the masters and crews in handling large vessels. When these tugs reached the vessel, there were numerous other tugs there which had and were rendering helpful aid in filling her with water but at that time she was in a part of the river where there was a depth of from 60 to 75 feet and if she had remained and sunk there, the probability is that the difficulty and expense of raising her would have been so great as to render the saving of any value doubtful. The named tugs, having first played water on the forward bitts of the steamer so as to cool them off, made a hawser fast on them and, going ahead of the steamer, proceeded to tow her towards the flats where they finally beached her in from twenty-six to twenty-eight feet of water. I find that this service was the most effective part of the salvage work but it was only of about an hour's duration.

The services of the remaining tugs can not be very well distinguished from each other. They were of the same general character of pumping water as already described. This is not a case where early arrivals led to such a saving of property that much difference can be made between the salving vessels in that respect. I have considered the saving of life by certain tugs, the values and sizes of the respective salving vessels, their risks, their pumping capacities and use thereof, and the quantity of and general effectiveness of services rendered. The important portion of the work was done between 4:30 and 7 o'clock. After that, there was some, but not an imperative, necessity for the attendance of a few vessels and several remained over night, pumping to some extent, and taking steamship people back and forth. All the services rendered from the beginning

until the wrecking company took charge for the purpose of raising the vessel have been included in a general summary of the matter.

I conclude that a total allowance of Nine thousand Dollars (\$9,000) will be a proper compensation to the salving vessels herein to be divided between the vessel and cargo in proportion to their relative values. This amount will be distributed as follows:

Millard .....	\$1,100 00
Pulver .....	1,100 00
America .....	800 00
Champion .....	625 00
Hustler .....	325 00
De Veaux Powell .....	175 00
James D. Leary .....	575 00
D. C. Ivins .....	525 00
M. D. Wheeler .....	280 00
George D. Kuper .....	225 00
M. Moran .....	425 00
C. W. Standart .....	240 00
Eli B. Conine .....	500 00
Eugene Grasselli .....	750 00
Mutual .....	450 00
Edward M. Timmins .....	250 00
Westchester .....	120 00
Gracie .....	100 00
McWilliams .....	315 00
E. J. Kennedy .....	120 00

In addition I allow the following sums to cover damages received while in the performance of the services: James D. Leary \$145; D. C. Ivins \$22.50; George D. Kuper \$65; M. Moran \$75; C. W. Standart \$53; McWilliams \$25; Emma J. Kennedy \$75.

I make no allowance for the claimed service of the Morgan. Testimony was given to show that the master sprang overboard from his boat with a 5 inch hawser and swam therewith a distance of 20 or 30 feet to the stern of the steamer where he took a turn with the hawser around the rudder post and then swam back with the end of the hawser to his own vessel, and, after making the hawser fast, started to tow the steamer down the river. The story is not a very probable one. It is testified by others that when he reached the steamer she was aground but assuming the truth of the account given, it is evident that such proceedings were detrimental rather than helpful. The saving of the steamer was finally accomplished by beaching her and if the Morgan was endeavoring to tow her by the stern down stream, while the leading tugs were endeavoring to swing her around from heading up stream so as to tow her bow on to the flats, the effect of the Morgan's towing was to present the vessel's broadside to the desired place and thus retard the towing. It is also claimed that the Morgan rendered services in pumping but as her capacity was very small—43 gallons per minute as compared with an average capacity of about 400 gallons per minute of the other vessels, excluding the Champion—and the time of the pumping limited to less than an hour, I can not find that she rendered any service for which she should be paid.

One third of the sums allowed for the salvage services is awarded to the masters and crews of the salving vessels, to be divided among

them in proportion to their wages, with a double portion to the master in each case, excepting as to the *Champion* and *Hustler*. Those vessels were a part of a wrecking plant, in which the crews were paid wages in view of the especial character of their services and are not entitled to participate in salvage awards.

The sum of \$40,000, already paid, will be deducted from the allowances to the wrecking company in the first three actions.

Costs will be allowed to the libellant in the first three actions. Disbursements will be allowed to each of the parties recovering in the last action and \$10, in lieu of a full docket fee, to those who filed libels before consolidation.

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UNITED STATES v. SMYTHE et al.

(Circuit Court, E. D. Louisiana. April 20, 1900.)

No. 12,329.

1. **BONDS OF UNITED STATES OFFICERS—LIABILITY FOR PUBLIC MONEYS.**  
The bond of an officer of the United States, charged with the receiving and safe-keeping, until legally withdrawn, of public moneys, creates an absolute liability in general for any of such moneys not accounted for, from which the officer and his sureties can only be relieved where the loss is shown to have occurred by an act of God or of a public enemy, and without fault on the part of the officer.
2. **SAME—SUPERINTENDENT OF MINT—NEGLIGENCE OF SUBORDINATE.**  
The superintendent of a mint is liable to the United States, on his bond, for currency officially received by him as public moneys, and which by the statute he was required to "safely keep until legally withdrawn," but which was destroyed by fire in a vault through the negligence of a subordinate in leaving it upon a box containing inflammable materials.
3. **SAME—ACTION ON BOND—DEFENSES.**  
In an action on the bond of a superintendent of a mint to recover for his failure to account for and pay over public moneys received, it is not a defense that such moneys consisted of treasury notes, and that they were accidentally burned, and the ashes and remnants were turned over to the United States, and therefore the government suffered no damage, since the defendant's obligation, secured by his bond, was not to indemnify the government against damage, but to "receive and safely keep, until legally withdrawn, all moneys. \* \* \*" Rev. St. § 3506 [U. S. Comp. St. 1901, p. 2341]. Having violated such obligation, the defendant cannot be permitted to raise the question whether the United States was damaged thereby.
4. **SAME.**  
Nor is the defendant in such action entitled to credit for such of the charred remnants of notes as were identified by the government expert; no claim therefor having been presented to and disallowed by the accounting officers of the treasury, as required by Rev. St. § 951 [U. S. Comp. St. 1901, p. 695], before it could be pleaded as a set-off.

Action on Bond of Defendant as Superintendent of the Mint at New Orleans. On direction of verdict for plaintiff.

For same case on appeal, see 107 Fed. 376.

PARLANGE, District Judge. The condition of Dr. Smythe's bond as superintendent of the United States mint at New Orleans is that

he "shall faithfully and diligently perform, execute and discharge, all and singular, the duties of said office according to the laws of the United States." Rev. St. U. S. § 3506 [U. S. Comp. St. 1901, p. 2341], provides "that the superintendent of each mint shall receive and safely keep until legally withdrawn all moneys or bullion which shall be for the use or the expenses of the mint." It may be well to also have in mind Rev. St. § 3501 [U. S. Comp. St. 1901, p. 2339], providing that superintendents of mints shall give bond, with one or more sureties, "for the faithful and diligent performance of the duties" of their office; also providing that "similar bonds may be required of the assistants or clerks, in such sums as the superintendent shall determine, with the approbation of the director of the mint; but the same shall not be construed to relieve the superintendent or other officers from liability to the United States for acts, omissions or negligence of their subordinates or employés." Rev. St. § 3500 [U. S. Comp. St. 1901, p. 2339], provides that "the superintendent of each mint shall have the control thereof, the superintendence of the officers and persons employed therein and the supervision of the business thereof, subject to the approval of the director of the mint." Rev. St. § 3504 [U. S. Comp. St. 1901, p. 2340], provides for certain accounts to be rendered and certain statements to be made by the superintendent, and for the appointment by him of assistants, clerks, and workmen.

It is perfectly clear that the federal courts have uniformly held that, on such a bond as Dr. Smythe's, the officer is virtually an insurer, and cannot be relieved, even against an unavoidable loss, except only when the loss occurs by an act of God or of the public enemy, and without any neglect or fault on the part of the officer. Of course, in the present cause, the loss was not unavoidable. Nay, more, it would seem to have been caused by the fault of persons for whom Dr. Smythe was responsible. But even if in this cause the loss had been shown to have resulted from an accidental or unavoidable cause (no act of God or of the public enemy being involved), Dr. Smythe would still be liable, under the clear and uniformly concordant decisions of the federal courts. The motives of high public policy which require that custodians of the public moneys be held to a strict accountability are well stated by Mr. Justice McLean in *U. S. v. Prescott*, 3 How. 578, 11 L. Ed. 734, and by Mr. Justice Strong in *Bevans v. U. S.*, 13 Wall. 62, 20 L. Ed. 531. So stringent is this accountability that the supreme court, in *U. S. v. Thomas*, 15 Wall. 337, 21 L. Ed. 89, seems to have experienced difficulty in relieving a custodian of public moneys from whom they had been taken by the Confederate forces without fault or neglect on his part. Three of the justices dissented, and Mr. Justice Miller, who was one of them, called attention to the fact that congress had, recognizing the former decisions of the supreme court on the subject, enacted a law to provide, in certain cases of great hardship, for the relief of custodians of public moneys who lose them without fault or neglect on their part. See Rev. St. § 1062 [U. S. Comp. St. 1901, p. 737]. Notice, also, act of May 9, 1888 (25 Stat. 135 [U. S. Comp. St. 1901, p. 2616]), allowing the postmaster general

to investigate certain losses by postmasters, occurring without fault on the part of the postmasters. Such statutes negative, of course, the idea (but the matter is absolutely clear without them) that in the absence of such statutes the officers could be relieved. Not long prior to the Thomas Case, the supreme court had held, in *Bevans v. U. S.*, 13 Wall. 56, 20 L. Ed. 531, that an officer from whom the Confederate forces had forcibly taken public moneys would not be relieved, because he was at fault; the fault being that, by not promptly paying over the moneys, he had exposed them to the seizure. See *U. S. v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319; *U. S. v. Prescott*, 3 How. 578, 11 L. Ed. 734; *Boyden v. U. S.*, 13 Wall. 17, 20 L. Ed. 527, in which loss by fire is mentioned; *U. S. v. Thomas*, 15 Wall. 337, 21 L. Ed. 89; *U. S. v. Freeman*, 1 Woodb. & M. 45, Fed. Cas. No. 15,163; *U. S. v. Keebler*, 9 Wall. 83, 19 L. Ed. 574; *Bosbyshell v. U. S.*, 23 C. C. A. 581, 77 Fed. 944, affirming *U. S. v. Bosbyshell* (D. C.) 73 Fed. 616; 2 Am. & Eng. Enc. Law (1st Ed.) verbo "Bonds," pp. 446l, 446m, and notes; *Id.*, p. 467b; 4 Am. & Eng. Enc. Law (2d Ed.) verbo "Bonds," p. 695, and notes; *Id.*, pp. 679, 680, and 681.

The warehouseman is held only to the exercise of due care. He is in no manner an insurer, and, if the goods intrusted to him are lost, he is relieved, provided the exercise of due care on his part is shown. 28 Am. & Eng. Enc. of Law (1st Ed.) verbo "Warehouseman," p. 642. After the evidence in the cause was closed, there was absolutely nothing for the jury, unless the liability of Dr. Smythe was to be held to be merely that of a warehouseman. Of course, the court could not take such a view of the law without disregarding totally all the federal adjudications on the subject. Even if Dr. Smythe had been a mere warehouseman, it is doubtful, to say the least, whether a trial court would have been justified, under the evidence in this cause, in allowing a verdict in favor of the defendants to stand. The government furnished a new and improved fireproof steel vault to Dr. Smythe, with a smaller vault on the inside; and yet his subordinates, without reason or justification, placed within the larger vault a box containing inflammable material, and then laid the currency on that box. Would even a warehouseman be excused under such circumstances?

The court was urged to charge the jury that if they found that the \$25,000 were contained in the bank box, in the form of United States treasury notes, and that all said moneys were destroyed by fire, and that the remnants and débris of the moneys were turned over to the government, then the government suffered no damages by the destruction of its own obligations, etc. This requested charge ignored the elementary distinction between obligations to indemnify and obligations to do specific things. As against the latter obligations, the plea, "Non est damnificatus," does not avail. It is, of course, beyond all question that the bond sued on was an obligation to perform certain duties,—to do certain things. It does not admit of doubt that it was the duty of Dr. Smythe to safely keep, and deliver to the government, or to his successor, the \$25,000 in dispute. That his bond was not merely an obligation to pay the moneys, but



to safely keep and deliver them as received, results plainly from the authorities above cited. Specially notice the language of Mr. Justice Bradley in *U. S. v. Thomas*, supra; *Bosbyshell v. U. S.* (C. C. A.) supra; 4 Am. & Eng. Enc. Law (2d Ed.) verbo "Bonds," pp. 694 and 695, and notes; also *Id.* p. 681, and notes; 2 Am. & Eng. Enc. Law (1st Ed.) verbo "Bonds," pp. 466l and 466m, and notes, and p. 467b; 3 Enc. Pl. & Prac. verbo "Bonds," p. 663. Notice *Johnson v. Risk*, 137 U. S. 308, 11 Sup. Ct. 111, 34 L. Ed. 683; *Mills v. Dow's Adm'r*, 133 U. S. 431, 10 Sup. Ct. 413, 33 L. Ed. 717; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752; *U. S. v. Gleason*, 175 U. S. 588, 20 Sup. Ct. 233, 44 L. Ed. 284 (Jan. 8, 1900). Specially notice the language of Mr. Justice Swayne in *Wicker v. Hoppock*, 6 Wall., on page 99, 18 L. Ed. 752.

Surely, an obligation to safely keep \$25,000 of the public moneys, which obligation clearly implies a safe delivery of them, cannot be satisfied by the turning over to the government of a box full of ashes claimed to be the remnants of the moneys; and, if it were the law that such an issue must be submitted to a jury, an easy way might be contrived to escape the strict accountability to which all the federal decisions hold custodians of public moneys.

As Mr. Justice McLean said in *U. S. v. Prescott*, supra:

"Public policy requires that every depository of public moneys should be held to a strict accountability—not only that he should exercise the highest degree of vigilance, but that 'he should safely keep' the moneys which came to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part."

So, as to the contention here made, if a custodian of public moneys may, in lieu of the moneys, produce ashes, and assert that the moneys were United States treasury notes, and were burnt, and this should be a legal defense, then, in practice, it would almost always prevail, because, in the nature of the matter, it would in nearly all cases be impossible for the government to overcome the testimony of the officer. In this cause, Dr. Smythe is estopped from raising the question whether the United States are damnified when United States treasury notes are destroyed by fire. To hold him, it is sufficient to say that he has violated the obligation of his bond to safely keep and deliver those notes, which were unquestionably "moneys" of the United States. The futility of the contention on this point was exposed when Dr. Smythe's counsel were driven, in argument, to admit that, under their view of the matter, no civil responsibility whatever would attach to any one for the destruction of United States treasury notes by an officer charged by law with their safe custody and delivery.

The court was urged to charge the jury to give credit for the \$1,182 which the government expert testified was the aggregate of all the moneys burned. Defendants were no more entitled to a credit for these \$1,182 than they were entitled to a credit of \$25,000 if the jury had been allowed to find, and had found, that \$25,000 were burned.

It may be that if the defendants pay the judgment, and thereupon obtain the ashes from the government, they may redeem the \$1,182, as any other person could do under similar circumstances. Or it

may be that they could have relief through the court of claims. Rev. St. § 1062 [U. S. Comp. St. 1901, p. 737]. But with those questions this court has no concern.

If the loss occurred through any wrongdoing or negligence on the part of any of Dr. Smythe's subordinates, then it would be nothing but plain, ordinary justice that Dr. Smythe and his bondsmen should make the loss good. If the loss occurred from an accidental fire, then Dr. Smythe and his bondsmen are held to have known the law at the time Dr. Smythe accepted the office of superintendent of the mint. No one is compelled to accept an office, and one accepting an office takes it cum onere. Dr. Smythe and his bondsmen are held to have known that, under the uniform decisions of the federal courts, a loss of the moneys by an accidental fire would fall upon them, and not upon the government, and that therefore the government need not insure against fire. Dr. Smythe could easily have protected himself against the wrongdoing of his subordinates by requiring bonds of them, and against fire by insuring. As to the cost of insuring, it was for him to decide, before accepting the office, whether the emoluments or salary of the office warranted him in taking insurance, if he wanted protection by insurance.

It may be of interest to notice Rev. St. U. S. § 951 [U. S. Comp. St. 1901, p. 695], as to requirements in pleading credits or set-offs against the government. Also, on this point, see *U. S. v. Thomas*, 15 Wall. 346, 21 L. Ed. 89; 2 Am. & Eng. Enc. Law (1st Ed.) verbo "Bonds," p. 466p. Of course, in this cause there was no claim or proof that any claim for credit or set-off was ever presented to the proper department and rejected.

In this cause there has been no charge or intimation that Dr. Smythe was personally at fault or blamable in any way. Such fault or negligence as may have been shown in the cause is attributable to his subordinates, and in no manner to him.

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In re WILLIAMS.

(District Court, E. D. Arkansas, W. D. February 12, 1903.)

**1. BANKRUPTCY—DISTRICT COURT—JURISDICTION—RESIDENCE OF DEBTOR—TRAVELING GAMBLER.**

Bankr. Act 1898, § 2 [U. S. Comp. St. 1901, p. 3420], confers jurisdiction on the district court to adjudge persons bankrupt who have had their principal place of business, residence, or domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof. *Held* that, where a traveling gambler had resided in a particular district for only two months prior to the filing of petition to have him declared a bankrupt, the court of that district had no jurisdiction thereof.

**2. SAME—COSTS.**

Where a petition to declare a debtor an involuntary bankrupt is dismissed for want of jurisdiction, the court cannot adjudge costs to the debtor.

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¶ 2. See Costs, vol. 13, Cent. Dig. § 16.

**8. SAME—COUNSEL FEES—EXPENSES.**

Bankr. Act § 3e [U. S. Comp. St. 1901, p. 3423], declares that whenever a petition is filed for the purpose of having another adjudicated a bankrupt, and an application is made to hold his property prior to the adjudication, the petitioner shall file a bond conditioned for the payment, in case the application is dismissed, of costs, expenses, and damages, and if such petition is dismissed the respondent shall be allowed costs, counsel fees, expenses, and damages occasioned, to be fixed by the court and paid by the obligors of the bond. *Held*, that where no seizure of the property of an alleged bankrupt was made, and no bond ordered or given, the fact that a temporary injunction was granted, restraining supposed debtors from paying money into the hands of an alleged bankrupt under the general equity powers of the court, did not justify an allowance for counsel fees and expenses on a dismissal of the proceedings for want of jurisdiction.

In Bankruptcy.

The debtor is a gambler, traveling from place to place plying his vocation. He arrived at Hot Springs, Ark., in this district, and had carried on his business there for two months prior to the filing of the petition to have him adjudicated a bankrupt, which was for a longer period than he has carried on his business or resided in any other district.

Greaves & Martin and H. W. Currey, for the creditors.  
Rose, Hemingway & Rose, for the bankrupt.

TRIEBER, District Judge. Has this court jurisdiction in bankruptcy when the party has not had his principal place of business, residence, or domicile within the district for more than three months preceding the filing of the petition in bankruptcy against him? Section 2 of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3420] confers jurisdiction on the district court to (1) "adjudge persons bankrupt who have had their principal place of business, residence, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof." It will thus be seen that, in order to adjudicate a debtor a bankrupt, such person must have had his principal place of business, residence, or domicile within that district for the preceding six months, or the greater portion thereof. The greater portion of what? There can be but one answer to this,—the greater portion of the six months preceding the filing of the petition. This is the conclusion reached by the United States circuit court of appeals for the Seventh circuit, in *Re Plotke*, 44 C. C. A. 282, 104 Fed. 964; *Collier*, Bankr. p. 18.

The decisions under the bankrupt act of 1867, which have been cited by learned counsel for the petitioning creditors, are wholly inapplicable to the present act. Under that act jurisdiction was granted "to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months." Section 5014, Rev. St. This has properly been construed to invest that court with jurisdiction in whose district the debtor has carried on business or resided for the longest period during that time, even if less than half of that period. But the present act only confers jurisdiction on the court of the district in which the

debtor has carried on business, resided, or had his domicile for the longest period of the six months preceding. It is true, as urged by counsel, that in cases of this kind, where the debtor belongs to that roving class which never remains but for a short time in one place, as is the case in this proceeding, there can be no adjudication of bankruptcy. These considerations, not without weight so far as the policy of legislation is concerned, are properly to be addressed to congress, but they cannot control the interpretation of the statute where its words are so plain and unambiguous as to exclude the consideration of extraneous circumstances. This court being without jurisdiction, the petition must be dismissed.

Counsel for the debtor ask for an assessment of damages, including costs, counsel fees, and expenses. This cannot be allowed.

1. The court having decided it was without jurisdiction, it can proceed no further in the case, except to dismiss the proceedings. Even costs cannot be allowed to the successful party, if the action is dismissed for want of jurisdiction. *Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Hornthall v. Keary*, 9 Wall. 560, 19 L. Ed. 560; *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; *Auer v. Lombard*, 19 C. C. A. 72, 72 Fed. 209. In *Citizens' Bank v. Cannon*, supra, costs and attorney's fees were awarded by the trial court, although a plea to the jurisdiction had been sustained. This was held to be error, the court saying: "Having dismissed the bill for want of jurisdiction, the court was without power to decree the payment of costs and penalties." 164 U. S. 324, 17 Sup. Ct. 99, 41 L. Ed. 451. Nor does it matter that on the face of the pleadings jurisdiction exists. *Blacklock v. Small*, 127 U. S. 105, 8 Sup. Ct. 1096, 32 L. Ed. 70; *Pentlarge v. Kirby* (C. C.) 20 Fed. 898.

2. This is not a proper case for the allowance of counsel fees and expenses under the bankrupt act. In the absence of a statute providing for the allowance of counsel fees and expenses, it is the settled rule of the national courts that none can be allowed. *Day v. Woodworth*, 13 How. 370, 14 L. Ed. 181; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Tulloch v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657. The only provision in the bankruptcy act for such an allowance is section 3e [U. S. Comp. St. 1901, p. 3423]. This section is as follows:

"Whenever a petition is filed by any person for the purpose of having another adjudicated a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

To entitle a debtor to damages under this section, the petitioning creditors must have made application for a seizure of the debtor's property prior to the adjudication, and the property of the debtor taken and detained. Such a proceeding is, in fact, an attachment of the debtor's property, and can only be granted upon the execution of a proper bond, as provided by that section of the act. If this is done, the petitioning creditors and the sureties on the bond are liable for the damages sustained by the debtor by reason of the wrongful seizure and detention of his property, and counsel fees and expenses incurred by the debtor are made by this section elements of damages to be awarded to him. When there is no seizure of the debtor's property, but merely a petition to have him adjudicated a bankrupt, the proceedings are treated like any other ordinary action. No bond is required of the creditors, and there can be no damages allowed to the successful debtor. The bankrupt act in relation to the subject of damages makes no new rules. It confers on the creditors the right to institute proceedings against insolvent or fraudulent debtors, in order that the estate may be administered by the bankruptcy court, and an equal distribution of the assets had. But, in order to prevent a fraudulent disposition of the property pending the proceedings, it permits a seizure of the assets before the hearing, upon certain allegations, and the execution of a bond to pay the damages which the debtor may sustain by reason of the seizure, if upon a final hearing it is adjudged that the same was wrongful, in the same manner as in ordinary cases when the same object is sought by a resort to proceedings by attachment. The only innovation to be found in the act is that attorney's fees and expenses incurred by the successful debtor are to be elements of the damages awarded to him, not for the wrongful proceedings to have him adjudged a bankrupt, but for the wrongful "seizure, taking, and detention" of his property. The language of the statute, "if such petition be dismissed," clearly applies only to the petition or application mentioned in subdivision "e" of section 3, of which it is a part. Evidently congress thought there was no reason why a greater burden should be placed by the statute on creditors in bankruptcy proceedings than in other actions, but if the contention of the debtor in this case is sustained that would be the natural effect. As there was no such seizure in this case, and no bond required of or executed by the creditors, this part of the section clearly does not apply.

The fact that a temporary injunction was granted by the court, restraining certain supposed debtors of the alleged bankrupt from paying any moneys in their hands belonging to the debtor over to him, does not make it a seizure, within the meaning of the bankrupt act, as the restraining order was granted without any bond, under the general equity powers conferred on the court by section 2 of the bankrupt act [U. S. Comp. St. 1901, p. 3420]. In equity cases, when an injunction is granted without a bond, only taxable costs can be allowed. *Tullock v. Mulvane*, 184 U. S. 497, 512, 22 Sup. Ct. 372, 46 L. Ed. 657; *Scheck v. Kelly* (C. C.) 95 Fed. 941.

The proceedings will be dismissed for want of jurisdiction, without costs or damages.

## In re WILLIAMS.

(District Court, E. D. Arkansas, W. D. February 14, 1903.)

## 1. BANKRUPTCY—COURTS—JURISDICTION.

Under Bankr. Act, § 2 [U. S. Comp. St. 1901, p. 3420], declaring that the courts of bankruptcy are invested within their respective territorial limits with such jurisdiction in law and equity as will enable them to exercise original jurisdiction in bankruptcy, and (subdivision 7) to cause the estates of bankrupts to be collected, reduced to money, and distributed, and (subdivision 15) to make such orders, issue such process, and enter such judgments in addition to those specifically provided as may be necessary for the enforcement of the provisions of the act, a district court of one district has no jurisdiction to grant an injunction restraining the payment of claims to an alleged bankrupt, where the bankruptcy proceedings are pending in another district.

## In Bankruptcy.

This is a petition filed by certain creditors of the bankrupt, alleging that they have instituted proceedings in involuntary bankruptcy against the bankrupt in the district court of the United States for the district of Colorado, of which district the bankrupt is a resident; that said proceedings are still pending in said court undetermined, the return day having been set for some day in the future; that the bankrupt has large sums of money due him from residents of this district, which sums of money petitioners allege are liable to be paid over to him, and by him secreted or otherwise fraudulently disposed of. They thereupon pray that this court, as auxiliary to the district court for the district of Colorado, grant an injunction restraining the parties having in their hands the moneys belonging to the bankrupt from paying them over to him or otherwise disposing of them until the said Williams has been adjudicated as a bankrupt by the district court of Colorado, and a trustee elected or receiver appointed to collect these moneys.

H. W. Currey, for petitioners.

TRIEBER, District Judge. Bankruptcy courts, like all other national courts, although not courts of inferior jurisdiction, are courts of limited jurisdiction. They are creatures of the statute, and possess no powers except those conferred upon them either expressly or by necessary implication. The jurisdiction of the district courts as courts of bankruptcy is to be found in section 2 of the bankruptcy act [U. S. Comp. St. 1901, p. 3420]. The provisions applicable to this case, and which are invoked by learned counsel, are as follows:

"That the courts of bankruptcy \* \* \* are hereby invested within their respective territorial limits \* \* \* with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to—"

And then enumerates 19 subjects, among them subdivision 7 [U. S. Comp. St. 1901, p. 3421], which is as follows:

"Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

And subdivision 15:

"Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

Does either of these provisions confer on a court of bankruptcy of one district the power to grant injunctions to prevent a loss of assets when the proceedings of bankruptcy are pending in the court of another district? The numerous decisions cited by counsel in cases which arose under the bankruptcy act of 1867 have no application to the present act, for the jurisdiction of the bankruptcy courts under that act was much greater than under the present. (These proceedings having been instituted prior to the enactment of the amendments to the bankruptcy act which became a law on February 5, 1903, those amendments cannot be considered in the case at bar, as that act provides that its provisions shall not apply to cases pending when it takes effect.) The act of 1867 conferred on bankruptcy courts jurisdiction:

"First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy. Second. To the collection of all the assets of the bankrupt. Third. To the ascertainment and liquidation of the liens and other specific claims thereto. Fourth. To the adjustment of the various priorities and conflicting interests of all parties. Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors. Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Section 4972, Rev. St.

And the courts uniformly held that the intention of congress under that act was to provide for the complete administration of the bankruptcy system in the national courts and through the instrumentality of federal officers. As stated by Mr. Justice Bradley in *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, that act conferred on the district courts jurisdiction of two distinct classes:

"First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets among the creditors, and the discharge or refusal of a discharge of the bankrupt; second, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him."

The present act confers no such jurisdiction on the district courts as is mentioned by Justice Bradley in the second subdivision. On the contrary, section 23 of the act of 1898 [U. S. Comp. St. 1901, p. 3431] vests jurisdiction over "all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants," in the circuit courts of the United States and the state courts.

And subdivision "b" of that section limits the jurisdiction of the circuit courts of the United States to such suits as the bankrupt might have brought or prosecuted in them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

The issues in this case are therefore reduced to the simple proposition whether a bankruptcy court of a district other than that in which the proceedings are pending has jurisdiction to grant an injunction to protect the assets of the bankrupt, and aid the bankruptcy court in which the proceedings are pending to obtain possession of them. In determining this matter the court must not be influenced by an appeal that unless it assumes jurisdiction great injustice may result from such refusal. Congress alone can grant the jurisdiction, and courts overstep their constitutional limits, whenever they attempt to remedy the real or imaginary defects of the statutes.

In my opinion, the bankruptcy act confers no such jurisdiction. It makes no provision for ancillary or auxiliary proceedings in district courts other than that in which the proceedings are pending. The remedy of petitioners, if they have any, is by a proceeding in the state courts, or if, as it appears is the case in this proceeding, the bankrupt could have maintained the action in the national courts if no proceedings in bankruptcy had been instituted against him, by a plenary proceeding in the circuit court for this district. The only case arising under the present bankruptcy act cited by learned counsel is *In re Schrom* (D. C.) 97 Fed. 760, decided by Judge Shiras, but there is nothing in that case to sustain the contention of counsel. All that was decided by Judge Shiras in that case was that in a case of this kind the court in which the bankruptcy proceedings are pending has no power to authorize its receiver to proceed for the recovery of assets belonging to the bankrupt and situated in another district, but that the proper course to pursue is for the petitioning creditors to take proceedings in the proper court, state or federal, in that state. That course is open to petitioners in this case. They may proceed either in the courts of this state or the circuit court for this district, setting up the proceedings now pending in bankruptcy in the Colorado court, and ask the court to protect the rights of the creditors in the property situated in this district, either by an injunction or the appointment of a receiver; but this court, sitting as a court of bankruptcy, has no such jurisdiction, and the petition must be denied.

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In re SARSAR et al.

(District Court, W. D. Tennessee. January 8, 1903.)

**1. BANKRUPTCY—INVOLUNTARY PETITION—WARRANT FOR SEIZURE OF PROPERTY PENDING PROCEEDINGS—PROOF—BOND—WAIVER.**

Bankr. Act 1898, § 69 [U. S. Comp. St. 1901, p. 3450], providing for the issuance of a warrant for the seizure of the property of an alleged bankrupt against whom an involuntary petition in bankruptcy is pending, on "satisfactory proof by affidavit" that the bankrupt has committed an act of bankruptcy, or has neglected his property and that it has thereby deteriorated in value, and on the applicants for the warrant giving a bond conditioned on their indemnifying the bankrupt, does not authorize the court to issue a warrant for the seizure of an alleged bankrupt's property, against whom an involuntary petition is pending, on the application of the petitioning creditors, merely supported by the affidavit of the bankrupt, averring that he waives proof showing that he has committed an act of



bankruptcy, that he has neglected his property and that it has thereby deteriorated in value, that he waives the giving of the required bond, and that he agrees that the warrant may issue.

L. & E. Lehman, for bankrupts.

HAMMOND, J. This is an involuntary petition for an adjudication in bankruptcy, pending which the petitioning creditors apply for a warrant of seizure under section 69 of the bankruptcy statutes [U. S. Comp. St. 1901, p. 3450]. They present a petition supported by the affidavits of the bankrupts, in which they state that they waive the affidavit required on the part of the petitioning creditors by section 69; that they waive any proof required by that section that they have committed an act of bankruptcy; that they waive any proof that they have neglected or are neglecting or are about to neglect their property, and that it has deteriorated and is thereby deteriorating in value; that they waive any bond required by the said section preliminary to the granting of the warrant of seizure; and further they agree that the warrant may issue.

This application must be refused, as the court cannot permit it to issue except upon compliance with the conditions of the statute. It is sufficient to say that the statute does not expressly authorize any waiver of the requirements of this section by the bankrupt, nor does it seem to contemplate that they may be waived. It is true that the statute, in terms, states that the condition of the bond shall be to indemnify the bankrupt for such damages as he shall sustain in the event the seizure shall prove to have been wrongfully obtained; but non constat that this bond may not inure to the benefit of any one interested in the property of the bankrupt which should be wrongfully seized, and that, at least in a court of equity, one so injured might be subrogated to the rights of the bankrupt in that behalf. It is to be observed that, by this affidavit and consent of the bankrupts, they do not admit that they have committed an act of bankruptcy, nor do they admit that they have neglected their property, nor that they are about to do the same, nor do they consent to any adjudication upon the petition; but they simply waive the required proof of these facts by the creditors as a preliminary condition to the issuance of the warrant of seizure, and then they waive the required bond. This leaves the petition still pending, and the controversy raised upon it still to be settled. It amounts to a surrender of their property to the marshal upon an agreement with certain of the creditors pending the litigation, and establishes a character of custody by the marshal not at all contemplated by the statute. If congress had intended to sanction such a surrender, express provisions would have been made for it.

A surrender like that contemplated by the application is not at all necessary, because, if the defendants should consent to an adjudication in bankruptcy, a surrender of their property can be made to the referee or receiver, under rule 2 of this court regulating that practice. 109 Fed. iii. Moreover, it is doubtful if the marshal would be responsible on his bond for the proper care and custody of property surrendered to him as contemplated by the application,

since such a surrender is so far outside of any direct provisions of the statute authorizing it. The court does not overlook the objection that a submission to an adjudication in bankruptcy under the involuntary petition would or might prejudice those whose dealings with them within the four months preceding may be affected by the date of the adjudication. But this consideration might be avoided, if desired by the bankrupts, by the simple process of filing a writing admitting their inability to pay their debts, and their willingness to be adjudged bankrupts on that ground, but not on the ground stated by the creditors in the involuntary petition, as provided in section 3 (5) of the bankruptcy statutes [U. S. Comp. St. 1901, p. 3422]. This would avoid any adjudication on the involuntary petition as against those who might be interested in a denial of the acts of bankruptcy stated in the petition, or who might have received preferences contrary to the statute, which would be invalidated by a date fixed by the adjudication upon the involuntary petition. Creditors interested in resisting the involuntary petition might also appear, plead, and make defense thereto under section 18 (b) [U. S. Comp. St. 1901, p. 3429] of the statute, and there is no obligation on the part of the bankrupts to protect such creditors by the proceeding contemplated on this application for a warrant of seizure. At all events, I am unwilling to establish the precedent of issuing warrants under section 69 [U. S. Comp. St. 1901, p. 3450], except upon strict compliance with the provisions of that section, and think it is dangerous to establish the practice of allowing the preliminary conditions to be waived,—especially that condition relating to the giving of the bond.

Application denied.

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In re CONLEY.

(District Court, N. D. Georgia, N. W. D. December 8, 1902.)

No. 49.

**1. BANKRUPTCY—RIGHT TO DISCHARGE—DESTRUCTION OF PARTNERSHIP BOOKS.**

The destruction by a bankrupt, at a time when he was contemplating the filing of a petition in bankruptcy, of the books of account of a firm of which he had formerly been a member, and which were material to a proper understanding of his financial condition, is ground for refusing him a discharge.

In Bankruptcy. On application for discharge.

Pritchard & Sizer, for objectors.

F. W. Copeland, for bankrupt.

NEWMAN, District Judge. This case is now before the court on objections to the discharge of the bankrupt, upon the following grounds: (1) That with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy he failed to keep any books of account or records from which his true financial condition might be ascertained; (2) that with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy he destroyed the books of the firm of Hall & Conley, of which he was a

member, and to the business of which he succeeded; (3) that while a bankrupt he concealed from his trustee property belonging to his estate in bankruptcy; and (4) that he had made false oaths in and in relation to his proceedings in bankruptcy.

The facts which are gathered from the examination of the bankrupt before the referee at a creditors' meeting are substantially these: For some time prior to August, 1899, the bankrupt had been in the grocery business in Chattanooga, Tenn., with W. F. Hall, under the firm name of Hall & Conley. During the early part of August, 1899, he purchased the interest of W. F. Hall in the business for \$725, and gave him therefor seven notes, one for \$125 and six for \$100 each, payable at intervals of 30 days after the sale. He also assumed and agreed to pay all of the indebtedness of the firm of Hall & Conley. The testimony of W. F. Hall is that all of the debts of the firm of Hall & Conley were paid at the time of the transfer, except one small debt, which was paid the day following. The bankrupt in his deposition denies this, and claims that there was quite a large sum still due by the firm of Hall & Conley; but on August 10, 1899, a few days after the transfer, he made a signed statement to the Mercantile Agency of R. G. Dun & Co. showing that he had a stock of goods worth \$3,000 cash valuation, accounts and bills receivable considered good amounting to \$800, and cash on hand and in bank amounting to \$300, and that he owed nothing except the notes to W. F. Hall, amounting to \$725; making his net worth at the time, over and above his liabilities, \$3,375. Between August 10 and September 5, 1899, the bankrupt bought new goods to the amount of about \$2,000, and also borrowed in money about \$1,300; \$500 from his aunt Mrs. Stovall, \$400 from the Chattanooga National Bank, and \$400 from a man named Waters. On September 5, 1899, he sold out his stock of goods to his father, J. R. Conley, for \$2,521 cash. A suit was brought by his creditors in the chancery court of Hamilton county, Tenn., to set aside this sale upon the ground of fraud. The sale was set aside, and the goods taken possession of and sold under order of the court, and the proceeds distributed to the creditors of the bankrupt. The facts show that the bankrupt borrowed in cash, as above stated, during the month of August, \$1,300, and received in cash from his father for the stock of goods \$2,521, and that he collected from accounts due the firm of Hall & Conley, according to his statement, \$300, making an aggregate of \$4,121. He claims that of this amount he repaid to his father \$1,450, paid to his aunt, Mrs. Stovall, \$510, lost \$200 in a drunken spree in Birmingham, and spent on hotel bills, etc., \$218.50, making a total of \$2,378.50. This leaves a balance of cash which he is shown to have received of about \$1,743, and of this amount he claims to have paid \$1,700 on the debts of Hall & Conley. He states that he carried the books of the firm of Hall & Conley from Chattanooga to his father's house at Rossville, Ga., and there destroyed them. He also acknowledged that at the time he destroyed the books he was contemplating filing a petition in bankruptcy.

It is claimed for the objectors that if the books of Hall & Conley were in existence they would either corroborate or disprove the statement of the bankrupt that he paid debts of the firm of Hall & Conley

to the amount of \$1,700 after the dissolution of the firm, and that the inference, therefore, is that the bankrupt destroyed the books for the purpose of concealing his true financial condition.

I think the above is a fair statement of the facts developed on the hearing before the referee, so far as material to the present question. The destruction of books of account with the intention of concealing the true financial condition of the bankrupt is a ground, under the bankruptcy act, for denying his discharge. Under this evidence it is conceded by the bankrupt that he destroyed the books of account of Hall & Conley. While these books were not the books of account of the bankrupt individually, they were the books of account of a firm of which the bankrupt was a member, which it seems fair to conclude from this evidence would have thrown light on his true financial condition. How much the bankrupt collected from accounts due the firm of Hall & Conley, and how much he paid out, or whether he paid anything or not, would have been important in determining whether he was making an honest and true statement of his financial condition in the present bankruptcy proceedings. I think this alone would be sufficient ground for denying the bankrupt's discharge.

It is unnecessary to pass upon the other grounds urged against a discharge. It will be denied upon the ground that the bankrupt willfully and intentionally, as shown by the evidence, destroyed books of account material to a proper understanding of his financial condition. The discharge is denied.

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THE MARY S. BLEES.

(District Court, S. D. Alabama. December 27, 1902.)

No. 973.

**1. COLLISION—STEAMER AND ANCHORED BARGE—DEFENSE OF INEVITABLE ACCIDENT.**

Evidence examined, and *held* not to sustain the defense of a steamer that her coming into collision with and sinking a barge moored in a proper place on the bank of a river, when the steamer was passing down the stream, was due to inevitable accident, but to show that the steamer was in fault for failing to exercise the foresight and precaution required of her under the circumstances, and for unnecessarily stopping and backing to "straighten up" before entering a narrow part of the channel, when in such a position that the wind and current carried her against the barge.

In Admiralty. Suit for collision.

Gregory L. & H. T. Smith, for libelants.

R. H. & N. R. Clarke, for claimant.

TOULMIN, District Judge. About noon on February 2, 1902, the libelants' barge was moored to the east bank of the Warrior river, at or near what was known as the "Government Lock No. 5" on said river. It was floating partly over what is the bank of the river in the ordinary stage of the water. About 360 feet below where the barge was lying, the channel of the river was somewhat narrowed by piling extending from the west bank a short distance into

the river, which piling had been driven and used in connection with the construction of said lock. The river was high. Its waters were out of its banks, except at the bluffs and other high points. The current was swift and strong. The wind was blowing in puffs from the northwest, and estimated by some of the witnesses at a velocity of 20 to 25 miles an hour. A short distance above where the barge was lying there is a bend in the river to the eastward. The steamboat *Blees* had been engaged in navigating up and down said river prior to the time of the collision complained of, and had several times passed the point where the barge was moored during the time it was moored there. Her officers well knew the location of the barge, and the manner in which it was tied to the bank. Her pilots were familiar with the river, its current and course, and its navigation. The machinery and steering apparatus of the *Blees* were in good order, and she had a full complement of officers and crew. Under these conditions, she was passing down the river, and collided with the barge, pressing her against the trees on the bank of the river. The barge was shortly thereafter found to be damaged, and it soon filled with water, and sank to the bottom of the river at or near the point where it was moored. It is not very clear from the evidence whether the *Blees* collided broadside, with her bow "head on," or quartering with the barge, and whether she struck the barge once or twice. I think the weight of evidence is that the barge was struck twice by the *Blees*,—once with her bow as she came down stream, and again broadside after she had swung around just below the barge, and had put her bow upstream, and was slowly proceeding in that direction.

It is well settled that a vessel in motion is bound to steer clear, if possible, of a vessel at anchor or properly moored. *The Minnie*, 40 C. C. A. 312, 100 Fed. 128; *The Oregon*, 158 U. S. 203, 15 Sup. Ct. 804, 39 L. Ed. 943. "When a moving vessel runs into a vessel anchored or moored in a lawful place, the presumptions are all against the moving vessel, and she is presumed to be at fault unless she exonerates herself. The presumptions against her are strong. Practically, her only defense is vis major or inevitable accident." *Hughes*, Adm. 261; *The Scotia*, 14 Wall. 170, 20 L. Ed. 822. The defense here is inevitable accident. This defense will not avail the colliding vessel unless she is shown to have been free from fault. *The Severn* (D. C.) 113 Fed. 578, and authorities therein cited. "The defense of inevitable accident cannot be sustained unless it appears that both parties have endeavored by all means in their power to prevent the collision; nor can the defense be maintained where a vessel voluntarily put itself in a situation where it receives the effect of natural forces, the result of which should have been foreseen, and might reasonably have been anticipated." *Spencer*, Marine Coll. § 195. In *The Mabey & Cooper*, 14 Wall. 215, 20 L. Ed. 473, the court said:

"'Inevitable accident' \* \* \* must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together."

The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113.

"By inevitable accident is not meant one which was absolutely a physical impossibility to have prevented, but one which could not have been avoided by that prudence and forethought which careful men would exercise under the circumstances." Spencer, Marine Coll., supra.

The evidence satisfies me that the barge was not in fault. It was tied to trees on the bank of the river, and near into the bank. It was out of the channel, and of the ordinary track of steamers navigating the river. It had been moored at that place for at least six weeks immediately prior to the accident, and during that period several different steamers had from time to time passed up and down the river without difficulty or interference. It was not an obstruction to navigation, and was, in my opinion, moored in a lawful and proper place.

The evidence for the Bles was, in substance, that she was coming down the river in full control of the officers navigating her; that when she got about abreast of the barge, and some 20 or 25 feet from her, she stopped her headway, and backed up the river to "straighten up," in order to make the opening by the obstructions (meaning the piling referred to); that when she stopped backing, and before she could straighten up and go ahead again, the wind and the current, which set in towards the east bank of the river, caused the pilot at the wheel to lose control of her, and she was carried by the wind and current against the barge. The pilot testified that he backed the Bles to straighten up in order to pass through the opening at the obstructions; that he did not do so sooner, and farther up the river, because he had not deemed it necessary. He further testified that, before the Bles could be straightened up, the wind took her, and he lost control of her. The witness Bartee, who testified on behalf of the Bles, was a pilot on her at the time of the collision, but was not then at the wheel, navigating her. He was shown to be a pilot of large experience on the Warrior river, and he testified that, had he been at the wheel, he would not have backed the Bles to straighten up at the time and place as was done, but that he would have gone ahead, and undertaken to have made the opening at the obstructions, and that, in his opinion, he could have safely done so. He further stated that, had he considered it necessary to back and straighten her up in order to get through said opening, he would have backed her before she got so near to the obstructions, and that he would have decided whether or not it was necessary to do so before she reached the point where she was stopped and backed up. It was the duty of the Bles to have shaped her course so as to avoid the collision with the barge. She should have kept her course down the river, having due regard to any special circumstances which may have existed at the time rendering a departure from her course necessary in order to avoid immediate danger to herself. The obligation is upon her to show that the departure from her course was necessary. I think the evidence tends to show that it was not necessary. However this may be, the evidence does not satisfy me that the conditions were such as to make the accident an in-

evitable one. On the contrary, it seems to me that those navigating the Blee, being well aware of the character and course of the current and of the wind prevailing at the time, failed to exercise the foresight and precaution to guard against them demanded by the circumstances; that backing the Blee to straighten her up at the time and place it was done was a fault of judgment; and that "voluntarily putting herself in a situation where she received the effect of natural forces, the result of which should have been foreseen, and might reasonably have been anticipated," was a lack of due caution and care.

My opinion is that the Blee is responsible for the damages, and that the libelants are entitled to recover the cost of the raising and repairing of the barge, and the reasonable value of its use during the detention for repairs,—for at least such time as the libelants would probably have used it. I ascertain such damages to be \$1,773.96. Let a decree be entered for that sum.

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**ABEL v. BOOK et al.**

(Circuit Court, D. Washington, W. D. February 5, 1903.)

**1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—JOINDER OF DEFENDANTS—WAIVER OF RIGHT.**

Where, in an action to annul certain conveyances against several defendants, there was no separable controversy, and one of the defendants originally entitled to remove the cause to the federal courts had waived his right by failing to exercise it within the time prescribed, a subsequent joint application for removal could not be granted.

In Equity. Suit to annul certain conveyances of real estate, alleged to be fraudulent as to creditors of the grantor. Heard on motion to remand the case to the state court in which it was commenced. Motion granted.

W. H. Abel, in pro. per.

J. C. Cross, for defendants.

HANFORD, District Judge. The defendants have attempted to remove this case from the state court in which it was commenced into this court by a joint petition for removal, filed after one of them had forfeited the right of removal by suffering the time within which he could exercise the right to elapse, and by defensive proceedings in the state court. The plaintiff now moves to remand the case on the ground that this court is without jurisdiction. There is no separable controversy which would entitle the other defendants to claim the right of removal, and there is no contention that the case was removed on the ground of a separable controversy. Hence it is necessary for all the defendants to unite in claiming the right of removal, and the question presented by the motion to remand is whether the case could be lawfully removed, after one of several defendants who might origi-

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Mineral Co.*, 35 C. C. A. 155.

nally have claimed the right has suffered the time within which he might have exercised his right to elapse, so as to bar him from filing a petition for removal if he were the sole defendant. It is my opinion that, since all the defendants are required to join in the petition for removal, the case is governed by the principle first laid down, in the opinion of the supreme court by Chief Justice Marshall, in the case of *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, that it is essential to federal jurisdiction, when claimed on the ground of diversity of citizenship of the parties, that:

"Each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts; that is, that, where the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued, in those courts."

See, also, *Ex parte Girard*, Fed. Cas. No. 5,457; *Roberts v. Navigation Co. (C. C.)* 104 Fed. 577.

The same principle was applied by the supreme court in the case of *Fletcher v. Hamlet*, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679. The concluding part of the opinion by Chief Justice Waite in that case might be paraphrased to fit the case under consideration exactly. It reads as follows:

"The cause of action is joint. There is no separable controversy in the case. There can be no removal by the defendants unless they all join, and all are citizens of different states from the plaintiffs. Confessedly, Wesenberg lost his right to a removal by failing to make the application in time; and, as Fletcher cannot take the case from the state court unless Wesenberg joins with him, it follows that he is subjected to Wesenberg's disability."

That decision is controlling, and it would be unnecessary for this court to take the pains to write an opinion merely to affirm what the supreme court has decided; but the statute of 1875 [U. S. Comp. St. 1901, p. 507] defining the jurisdiction of the United States circuit courts, which was in force at the time of the decision in *Fletcher v. Hamlet*, has been revised, and in part superseded, by the act of 1887 [U. S. Comp. St. 1901, p. 507], as amended by the act of 1888 [U. S. Comp. St. 1901, p. 507]; and it is necessary for this court to decide the question of jurisdiction in this case, and in making its decision apply the later statute. I do not find, however, that any such changes have been made in the law as to affect the jurisdiction of the United States circuit courts in cases involving no separable controversy, and where one or more of several defendants claim the right of removal, which would be a lawful right if he or they were not joined with other defendants not entitled to invoke federal court jurisdiction.

Motion to remand granted.



## MITCHELL TRANSP. CO. v. GREEN et al.

## GREEN v. MITCHELL TRANSP. CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1903.)

Nos. 1,086, 1,087.

## 1. COLLISION—STEAMER MEETING TOW IN CHANNEL—CARE REQUIRED.

A steamer passing free through a rather narrow channel, and meeting another vessel with tows, is bound to take into account the fact that such tows are likely to be somewhat unwieldy, and vary more or less in their several courses, and to guard against the danger, and keep out of the way, if she can without peril to herself.

## 2. SAME—EVIDENCE CONSIDERED.

The steamer Susan E. Peck met the steamer Folsom, with the barges Mitchell and Nelson in tow, when passing up through the "Lime Kiln Crossing" in the Detroit river, an artificial channel 440 feet wide. After safely passing the Folsom and Mitchell port to port, as agreed by signal, the Peck came into collision with the Nelson, which was sunk. *Held*, on conflicting testimony, that the Folsom and her tows were at all times to the westward of the middle of the channel, and that the collision was due solely to the fault of the Peck, which, after passing the Mitchell on a port helm, starboarded to such an effect that, being 240 feet long, she swung so far across the channel that her bow was caught by the cross-current, and she was unable to correct herself before striking the Nelson.

## 3. APPEAL—ASSIGNMENT OF ERRORS—DISREGARD OF RULES.

The circuit court of appeals will not, unless in exceptional cases, consider an assignment of errors in plain disregard of rule 11, which requires that it "shall set out separately and particularly each error asserted and intended to be urged," and when, in addition, the appellant's brief fails to comply with rule 24, requiring a reference to the pages of the record relied on to support each point.

Appeals from the District Court of the United States for the Eastern District of Michigan.

John C. Shaw, for Mitchell Transp. Co.

Harvey D. Goulder, for claimant Green.

F. H. Canfield, for underwriters.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. The case here presented under the two foregoing titles resulted from a collision between the propeller Susan E. Peck and the barge Nelson, occurring in the lower part of the Detroit river, whereby the Nelson was so greatly injured that she sank soon after, and the cargo was in large part destroyed. The collision occurred in a channel known as "Lime Kiln Crossing," an artificial cut opened by the government, 440 feet wide, about 2,500 feet long, and 19 or 20 feet deep. This channel is straight, running nearly north and south. Its central line makes an angle at either end of about two points, with the ranges on which the river is navigated above and below the cut. Two lighthouses, or "tripods" as they are called, one at the upper and one at the lower end of the cut, mark its western, or American, side. There are no distinctive marks defining its eastern, or Canadian, side. There are two ranges running through the channel,—one called the "Lime Kiln Crossing Range," having its lights below, and running through the center;

and the other called the "Duff & Gadfield Range," having its lights above, and running seventy (70) feet east of the central range. This Duff & Gadfield range was an old range, which had been used before the cut was widened from 300 feet to its present dimensions, and ran through the center of the old channel. The widening was made on the western side. On the morning of November 20, 1892, the propeller Susan E. Peck, a vessel 240 feet long, 38 feet beam, and having a draught of 15 feet 5 inches, laden with a cargo of coal, and on a voyage from Buffalo to Chicago, having left the waters of Lake Erie, was proceeding up the Detroit river; and, having passed along the east side of Bois Blanc Island, she straightened up into the channel of the Lime Kiln crossing. At about the time when the Peck was coming into the south end of the cut, the steamer A. Folsom, coming down, and having in tow the barges Mary B. Mitchell and the Nelson, in the order named, was entering the cut at the north end. The three vessels just named were each of nearly the same size, but not quite so large as the Peck. The steamers had already, while they were three-quarters of a mile or a mile apart, exchanged signals, by which they had indicated a purpose to pass port to port. The weather was clear. There was not much wind, and all the vessels were in sight of each other. As the steamers were coming into the cut, the Folsom repeated its signal of one blast, and the Peck responded with one. As the steamers approached, they were nearly head on. The Peck gave a blast. Each steamer turned somewhat to starboard, and they passed each other at a safe distance. As the Peck came by the Folsom, the Mitchell turned to starboard, and the Peck continued on her starboard course, passing the Mitchell at a considerably wider distance than that at which she had passed the Folsom, and then, turning to port, she advanced toward the Nelson until a collision became imminent, when her engine was reversed, and her helm put hard aport. This was too late, however. The stem of the Peck struck the side of the Nelson just abaft the port bow with such violence as to crush in her planking and timbers, and to roll her over to starboard. The Peck backed, turned out, and, passing under the stern of the Nelson, proceeded on her voyage, having received no substantial injury. Thus far there is no controversy about the facts; but within the limits of this general account there is considerable dispute about particulars,—that is to say, about the course of the Peck, of the Folsom, and the vessels in her tow, especially of the Nelson, the locations of the several vessels with reference to the sides of the channel, while on their courses, and the location of the place of collision. Many witnesses were examined, and the record is very full. The district judge found the Peck, the Folsom, and the Nelson all at fault, and condemned them to pay each a share of the damages to ship and cargo.

Ordinarily, this court would feel bound to pay much regard to the findings of fact by the judge in the lower court, when he has seen and heard the witnesses giving testimony; and would not disturb them except for clear error. But the reasons for that course are somewhat diminished in a case where, as here, the case was heard and determined years after the testimony was taken, and when original

impressions are likely to have been much faded, or altogether lost. Another thing which makes us pause in giving such weight to the findings of the lower court, proceeding doubtless from the circumstances just mentioned, is that the court fell into a misapprehension of the charge contained in the libel and of the trend of the libelant's proof in reference to the courses of the several vessels. In his opinion the learned judge says:

"The libel is framed upon the theory that the Peck, a steamer of 1,400 tons registered tonnage, 240 feet in length, 38 feet beam, and laden to a draught of 15 feet 5 inches, going up the river at a somewhat less speed than the tow was coming down, accomplished the feat of twice traversing diagonally two-thirds of the width of the channel, and came back at such an angle across the stream that she struck the stem on the bow of the Nelson while the latter was going straight down the river 300 feet at a somewhat higher speed than the Peck was going up; or, in other words, that the Peck, from abreast of the Mitchell's stem, ran the two sides of a triangular course, each about 250 feet long, across the cut, while the Nelson simultaneously moved straight down the river, at an equal or somewhat greater speed, 300 feet, on the third side of the triangle (i. e., half the distance between the Mitchell's stern and the Nelson's bow); that these evolutions were performed in about thirty seconds, the combined speed of the ascending and descending vessels being about thirteen miles an hour. This story needs no comment."

And again, in speaking of the libelant's proofs, he says:

"To bring about a collision in the manner depicted by the testimony of the libelant's witnesses would require not only an exceedingly quick handling vessel moving at double the speed of the tow, but the extreme throw of the wheel to starboard, and a change of course at fully eight points. Under the libelant's proofs, the vessels could not have come together unless the Peck approached the Nelson on a course which would take her nearly, if not quite, at right angles across the channel. The extravagance of libelant's proofs as to the movements of the Peck of necessity discredits their testimony as to another important feature of the collision, and that is the locality in the channel in which the vessels came together."

The libel reads as follows:

"The Peck came up at apparently full speed, and passed close on the port hand of the Folsom, then turned to the eastward some, so that she passed the Mary B. Mitchell, which was the first barge in the Folsom's tow, at a much greater distance away than she had passed the Folsom. After passing the Mitchell, the Susan E. Peck turned and wrongfully swung rapidly and broadly across the channel, and toward the westerly side thereof. The Nelson was well to the westerly side of the channel at the time, and her helm was put hard aport when the Peck swung to the westerly, as above shown. The Nelson thereupon worked further to the westward, and she was to the westward of the extreme westerly side of the cut or crossing (as the same is marked by the light boats) when the collision occurred."

The statement is that the Peck passed close to the Folsom, then turned to the eastward somewhat, passed the Mitchell at a much greater distance than she did the Folsom, and then "swung rapidly and broadly across the channel toward the western side thereof," where she struck the Nelson. To what extent the statement of the court in respect to the libelant's proofs corresponds with the fact, we shall have occasion to consider later on. The libelant complains—and, as we think, justly—that the court misapprehended the theory of the libel and the tendency of the libelant's proofs. Nothing so extravagant can be fairly said to be advanced by either. Upon its conclusion in regard to the testimony of the libelant respecting the courses,

run by the vessels the court held that its witnesses were necessarily discredited in their testimony in respect to another important feature of the case, namely, the locality in the channel at which the collision occurred; and we cannot doubt, from what ensued, that the court disregarded the testimony of those witnesses in reaching its conclusion upon the latter fact, which, as the court rightly considered, was an important one.

Upon the same consideration must have rested the court's finding that the Nelson, just before the collision, was sagging down and across the channel on a slackened towline. This also is a matter we shall consider later. No new parties had been brought in, and no cross-libel had then been filed. The court found the Peck at fault in not sooner reversing her engine, when the Nelson was seen too far to the eastward, and also found the Folsom and the Nelson both at fault,—the former because she did not correct the position of the Nelson in the channel, and did not recognize the Peck's right to a fair share in the channel, and in crowding her into collision with the Nelson; and the Nelson for failing to take reasonable precautions against the effect of the current (meaning the current deflected across the channel at the upper end of the cut), and because she was permitted to take leeway to such an extent as to obstruct the safe passage of the Peck; and condemned all three to pay each an equal share of the damages, and a reference to a commissioner was ordered to ascertain the damages. A decree was entered accordingly on June 14, 1898. While this reference was pending, and on April 30, 1900, John Green, the owner of the Peck, was granted leave to file a petition, reciting that he had already answered the libel, and thereupon proceeding to state the circumstances of the collision, the freedom from fault of the Peck, the decree which had been rendered charging the Peck as well as the Folsom and the Nelson, the interest of cargo owners and underwriters, asserting the responsibility of the libelant for collision and damages, and praying "that this honorable court will be pleased to issue such appropriate process, or make such appropriate order in the cause as shall require the said libelant to be and become a party in this cause, answerable to any interest for which the libelant may sue as trustee, for the whole or any part of the damage sustained by any such other party or interest, to the end that the final decree to be framed in this cause shall exclude the libelant as a party bound to respond in the cause in accordance with the judgment of the court upon the law and facts of the case." But the leave to file this petition was coupled with leave for libelant to move to strike it from the files. Such a motion was made and granted July 11, 1900. Meantime several insurance companies interested in the Nelson's cargo had filed intervening petitions praying for the execution of the decree against the Peck, the Folsom, and the Nelson. July 20, 1900, Green, without leave of the court, filed another petition containing similar charges to those in his former petition in respect to the collision, the filing of petitions by other parties interested, and praying that the damages be charged to the libelant, and that the petitioner be exonerated. Motion was made by the libelant to strike out this petition, but the court withheld its decision until some time later.

On May 11, 1901, the court confirmed the commissioner's report, and overruled the exceptions of the libelant to Green's petition. Finally, after all this, and more, a final decree was entered, following, in substance, the former decree, and making certain adjustments not necessary to be now considered. The action of the court in permitting the proceedings which ensued after the entry of the interlocutory decree was entered and before the commissioner's report was confirmed and final decree entered, forms the subject of several assignments of error; but, as they do not becloud the main subject upon which we propose to rest our decision, and the libelant has received no injury therefrom, we find it unnecessary to decide what ought to be done in regard to the practice and proceedings complained of, and we withhold all criticism upon that subject.

Recurring to the main subject, we are of opinion that the court did not err in holding the Peck to be in fault, but we cannot agree to the conclusion that the Folsom and the Nelson were likewise chargeable. Upon an attentive examination of the whole of the testimony in the record, we reach, without much difficulty, the following conclusions, beginning at the point where the parties are in dispute. We think, as the court below did, that the steamers were proceeding through the channel of the Lime Kiln crossing on parallel courses, not far from the center, each on its own side,—the Peck on the eastern and the Folsom on the western side. As they approached each other, their bearings were a little too close, and upon a signal from the Peck they each ported a little, and passed each other on parallel courses; whereupon the Mitchell, which had been in line with the Folsom, ported also to about the same extent as the Folsom had done. The Peck again ported somewhat, and passed the Mitchell at a considerably greater distance than she had passed the Folsom, and then, thinking she was going too far off her course, turned westward on a starboard helm to regain it. The Nelson, which had been very nearly in line with the Mitchell, was at that moment turning to the westward to follow in the wake of the Mitchell. The Peck held too long on her starboard helm, and, her head encountering the deflected current running westward in the channel, of which she had not taken account, she was carried too far to the westward, and was unable to correct herself before she struck the Nelson. When she saw that collision was imminent, she immediately reversed her engine, and turned her wheel hard apart. The stem of the Peck struck the Nelson a little behind her port bow. The angle of the vessels at the moment of collision was nearly four points. The heads of the vessels were at that time turned to the westward; probably the Peck was most so. The Nelson had just been turning somewhat to get out of reach, and the Peck had just turned to the right somewhat, under her wheel hard ported. Both vessels were moving at nearly equal speed, that of the Peck being at the moment rather the less from her effort to stop. The side of the Nelson was crushed in, and she was rolled over to starboard by the blow, but her towline was not broken. From these latter circumstances we gather the probability that she was not so much turned westward as was the Peck. The Peck carried the head of the Nelson to the westward, and by this re-

sistance and the reversal of her engine, the Peck was stopped. Thereupon she backed out, turned to the right, and again to the left around the Nelson, and then proceeded up the channel. The Nelson immediately began to sink. She was taken by the Folsom to the first convenient place, and there taken over a level sandy bottom, where she was beached. There is no substantial ground for criticism in her management after the collision.

The grounds for these conclusions will now be stated. We may premise generally that they best accord with the probabilities arising from indisputable facts, and they reconcile, as nearly as they can be reconciled, the conflicting evidence. Moreover, they are supported by the great preponderance of testimony given by those who were in the best position to know the facts about which they testify. The captains of the Folsom, the Mitchell, and of the Nelson,—all of them men of long experience on the lakes and connecting rivers,—testify to the incidents of the occurrence as observed by them while managing their vessels and watching the events. The captain of the Folsom testifies that as he was coming down on the Canadian range he met the steamer Vulcan about half a mile above the cut, which steamer he passed on the starboard hand; and about the time of passing, seeing the Peck about a mile below, he gave her one blast of his whistle, to which the Peck responded with one blast; that he had already checked his speed to  $4\frac{1}{2}$  or 5 miles an hour, going through the water, preparatory to going through the cut; that when he approached the cut, and had opened the tripods on the western bank nicely, he hauled down into the western part of the channel about 100 feet east of the upper tripod, and about the same time, seeing the Peck coming into the lower end of the cut, but not quite straightened up, he gave another blast of his whistle, which was answered by the Peck with one; that he kept on his course, having the lights of the central range open to the eastward, with good steerage headway; that he met the Peck about half way down the cut, coming up at about six miles an hour by the land; that she was heading pretty well onto him on the port bow; that the Peck blew a short toot, which he answered; that he ported a little, and the Peck also ported, and the vessels passed on parallel courses about 30 feet from each other; that as they passed the captain of the Peck halloed for more room, to which he replied: "What the —— do you want? You have got all the channel now;" and motioned with his hands to keep away, and himself starboarded some and steadied, and then went down the channel heading for the upper light of the central range; that, as the Peck passed the Folsom, she was headed toward the Mitchell; that the Mitchell kept up to the westward, turning on a port helm; that the Peck ran off to the eastward toward the Canadian side, but recovered herself, and came back, and had the appearance to him of going between the Mitchell and the Nelson; that, as the Peck started to come back, the Nelson, then on the western side of the channel, put her wheel to port, and came up quickly, and that the vessels collided near the upper tripod; that he saw the upper tripod while the vessels had their bows together right over the Nelson's bows forward of the foremast; that when he saw there

was going to be a collision he checked down and stopped; that he had not more than got checked before the vessels came together; that when the Nelson was struck she took a heavy roll to the westward, the Peck turned out and went on, and he started ahead as his towline came up. And he further stated that the Nelson's speed at the time she was struck was four or five miles an hour through the water, that she was a good steering vessel, and that she had no trouble in keeping up on her proper course.

We cannot, without going into too great length, exhibit all the testimony with so much particularity. It must suffice to say that, with some slight variations, mainly based on estimates, this narrative, with respect to the important facts, is confirmed by the testimony of the captains of the Mitchell and the Nelson, and by many other witnesses. The captain of the Mitchell states that he came down 60 or 80 feet from the upper tripod; that the Peck passed him 80 to 100 feet distant, and that while passing she starboarded, and went under the stern of the Mitchell; that he heard the order given on board the Peck, "Starboard, hard a starboard!" on which she turned westward; that when the vessels came together the Nelson's bow shut out the tripod from his view. The captain of the Nelson, who was 54 years old, and had sailed for 35 years (24 of which had been on these waters), states that he followed in the wake of the Mitchell all the way down, was in the western side of the channel, heard the passing signals given, but, not anticipating any trouble, did not notice the Peck particularly, until, when she had passed the Mitchell, he saw her crossing the channel as though on a starboard wheel; that he then put his own wheel hard aport, and went over to the westward; that the vessels came into collision near the upper tripod, some 60 to 75 feet distant, as he thought. When asked whether the tow was angling across the channel at and just before the collision, he answered:

"Well, I looked at the tow from where I was, and it looked as if the Folsom was a little more in the middle of the channel. She was the farthest in the middle of the channel of the three. The Mitchell was pretty near on a line with them, probably a little on the starboard quarter. I was also heading a little on his starboard quarter."

Some criticism is bestowed upon this witness because he did not pay more attention to the earlier movements of the Peck. But, as nothing had occurred to excite apprehension until the Peck started across the channel, and he was attending to his own duty, the criticism is hardly deserved. At all events, it is clear that, if he had attentively watched the Peck, there was nothing in her course to require any other course on his part than that he was pursuing, until the time when the Peck started over to the westward, and then he did what he could; but there was no escape. Other witnesses for the libellant were Lacquier, mate of the Folsom; Leach, the second mate of the Folsom; Elliot, the lookout; Hall, chief engineer; Burnett and Newell, wheelmen; and several others of the crews of the Folsom and the vessels in tow; and they give the same account. Not all testify about all the particulars, but the trend of their testimony corroborates the testimony of the officers. Several witnesses from

the shore were examined on each side, but the testimony of most of them is not very precise or reliable, mainly on account of the positions they occupied. One of them, however,—the keeper of the government range lights for this channel,—was on the tower of the upper light, and had a peculiar advantage for observation; but he is shown to have accommodated each side with previous statements not in harmony, and there are some parts of his testimony which we believe to be incorrect. Another witness was the keeper of the government light on Colchester Reef, who was standing at the time on the dock at Amherstburg below and looking up the cut. He states that he saw the steamers passing port to port; that, after passing the Folsom, the Peck headed over to the eastward more than she was doing before, so that he saw her starboard side; that, soon after, she was heading to the westward more, and showing her port side; that she was then on a heading which, if continued, would have carried her onto the western bank; and that he could see her hull and port side at or just before the collision. He further gives reasons, from subsequent examinations of the locality of an object which he saw at the time of the collision, for his statement that the Nelson was on the westerly side of the channel when she was struck. We have stated the main points of this witness' testimony, because he was in a favorable position, saw the vessels from the time the steamers were passing, was disinterested, and his narrative gives a strong impression of its truthfulness.

The captain of the Peck was naturally the principal witness for the respondent. He was 32 years of age; had been on the lakes and rivers 17 years (9 of which he had been an officer on steamers). He testified that on the day of the collision the Peck had a draught of 15 feet 5 inches, and was a good handling vessel; that he was in the pilot house, in charge of the vessel; that while below the cut he exchanged signals of one blast with the Folsom, then above the cut, and not long after straightened up into the cut on the Duff & Gadfield range, which he knew to be 70 feet east of the center line; that at that time, thinking the Folsom was so far to the east that she would pass close, he blew a signal of one blast to the Folsom, to which she answered with one; that after this signal the Folsom appeared to hold up a little to the westward; that he continued up on the Duff & Gadfield range, but before getting abreast of the Folsom he saw the Mitchell sagging off to the eastward, and crowding down on him, and he blew a blast to her; that the steamers passed each other at a safe distance, about 70 feet apart; that the tow continued coming down in the same position, crowding him; that he worked his vessel more to the eastward, so as to pass the Mitchell; that when he was abreast of the Folsom he called out to her captain to blow to his tow to keep it off, and give more room, and that the Folsom did blow; that he began edging to the eastward when he saw the consorts sagging over to the center and getting nearly abreast of him; that his order was to "port a little, a very little, let her work a little more to the starboard"; that, after the Folsom blew the blast as he had requested, he noticed that the Mitchell was working to the westward, as if she had ported her helm, so that he saw they were



going to pass clear; that, when he got abreast of her, he blew to the Nelson, who was passing off to the eastward of the ranges altogether; that he passed the Mitchell's quarter not less than one nor more than two widths of his vessel (from 40 to 80 feet); that when he was abreast of the Mitchell he felt his boat touching the bottom along the starboard bilge; that he was then just a little to the east of the Duff & Gadfield range; that the Nelson had commenced to swing, and he could see her swinging, and he thought there was no danger from her; that he then starboarded a little, so as to bring the Duff & Gadfield range almost ahead, having the lights just a trifle open to the eastward; that he steadied on that course, and noticed the Nelson all the time swinging to the westward on a port helm; that soon he could see she was not head-reaching, but was sagging down; that he then gave the order to put the helm hard aport, and signaled to stop, and back strong; that at the time of collision his boat was stopped; that the vessels came together at an angle of 2 to 3 points, —nearer 3 than 2,—and that the Nelson was driven to starboard; that the place of collision was 350 feet from the western side of the channel, and 800 feet below the upper end of the cut. The witness further stated that at the time of the collision the Nelson was to the westward of him, nearly ahead of him, "nearly at right angles." We presume he means just before the collision, as he had already given the angle at two to three points. He says he did not notice the tripod; that when he steadied on the Duff & Gadfield range, just before the collision, when he came back from the east, he headed for the place from which the Nelson was coming; that the Nelson had head-way of her own independently of the current; that when he struck her her bow was carried further westward, and more across the stream, and that he passed around her quarter without touching her. He also states that when he steadied on the Duff & Gadfield range, after coming by the Mitchell, the Nelson was off his port bow, her quarter bearing almost ahead, a "little bit to port," and that he "believed the way she was heading she was going way off clear of" him. The mate, the cook, and the two wheelmen of the Peck were sworn, and they gave some rather indefinite confirmation to her captain's narrative.

The opinion of the district court was that the steamers went through the cut, the Peck on the Duff & Gadfield range and the Folsom on the Central, or Government, range, which the court found was usual and prudent navigation. Perhaps this was true of the general course of the Peck up to the time when she came back after passing the Mitchell. But the decided preponderance of the evidence is that the Folsom and her tow were all the while somewhat west of the Central range, though we think their general course was not much west of it. The unmistakable facts tend strongly to support the case of the libellant. The account given by the captain of the Peck of his course up to the time he came to the westward on his starboard wheel need not be much criticised, though we think his speed was greater than he states, and we are of opinion it was too great for the navigation of a steamer in meeting a tow in a place requiring great prudence and circumspection. Being freehanded, she could easily

manage herself, and in doing this she was bound to consider that the steamer and tow she was meeting must, in the nature of things, be somewhat cumbersome and unwieldy, and that some variation in their several courses were likely to occur. Being master of her own motions, she was bound to guard against these, and keep out of the way if she could without peril to herself. The *George Presley*, 49 C. C. A. 438, 111 Fed. 555; The *Syracuse*, 9 Wall. 672, 675, 19 L. Ed. 783; The *Mayumba* (C. C.) 21 Fed. 476. We think there were no greater variations in the present instance than might reasonably be expected to occur. With respect to the sagging of the *Nelson*, the weight of the evidence is opposed to the charge; that is to say, it is opposed to the charge that there was any more sagging than would ordinarily result from her passing in tow through that portion of the cut in the usual way. If the currents there would produce some variation, it was to be anticipated, and no fault could be imputed unless she omitted to take precaution against an excessive departure, such as might endanger the safety of the vessel coming up the channel; and in such case she had a right to expect that the *Peck* would take account of the conditions there, and govern herself with reference to them. And it would seem reasonable to think the vessel and tow would have a fair claim to the larger portion of space for its movements. Moreover, the proof shows without contradiction that the *Folsom* kept her speed from the time she checked to go through the cut until the moment before the collision, when she stopped to ease the blow. It is not shown that the *Nelson* was faulty in handling, or that the proper measures were not taken to assure her prudent navigation. The captain of the *Peck* says that she seemed to be answering her helm, and to be coming up under it, so that he expected she would get clear off out of the way. There is grave improbability that with good steerageway on the part of the *Folsom*, pulling her down by the head and her helm put to port, she drifted down sidewise, and we must discard the suggestion as not proven. The account given by the captain of the *Peck* of what happened from the time he started to come back from his course to the eastward is hard to understand, and it is burdened with improbabilities. To begin with, we are doubtful about the suggestion that the *Peck* touched bottom, and that this warned her captain to go to the west. The vessel was drawing only 15 feet 5 inches and the channel had a clear depth of 19 feet. The eastern side was cut straight down, and the captain of the *Peck* rejects the idea that he went near enough to the bank to take a sheer. The presence of a rock out in the channel projecting high enough to strike the bottom of a vessel of the draught of the *Peck* in a channel so much frequented is surprising. No mention of such an incident is made in the answer of the *Peck*, and there is no proof that such a dangerous obstruction existed there. The captain says that after he came back, and got about on the *Duff & Gadfield* range, and steadied, he had the quarter of the *Nelson* a little on his port bow; that she was lying across the channel, but appeared to be coming up on her port helm; that he soon saw that she was not head-reaching; that he immediately reversed his engine, but struck the *Nelson* abreast of her fore rigging at an angle of

nearly 3 points at a place 350 feet from the western side of the channel. The Nelson was only 600 feet behind the Mitchell. There must have been some space between the Mitchell and the Peck when the latter steadied, and the Peck was 240 feet long. By this account the Peck was not much more than her length from the Nelson when she steadied on a course 150 feet from the eastern side of the channel, and came into a collision with the Nelson nearly 200 feet forward of her stern at a place 60 feet east of the Peck's course. The story sounds like one told in extremities, and is incredible. It deprives us of any substantial foundation on which to rest a valid defense.

The evidence shows that the steamers first signaled each other at a considerable distance from the crossing, indicating that they would pass to the right of each other, and that they repeated the signals as they came into the cut. The captain of the Folsom says that he inaugurated these signals. The captain of the Peck says that he gave the first signals. The district court, accepting the Folsom's statement in this regard, drew an inference that the Folsom's second signal was given because her tow was further to the eastward than usual, and was intended to notify the Peck that, notwithstanding the appearances, she intended to pass to the right. But we think this inference is not justifiable. To begin with, the signal would no more indicate an erroneous position of the tow than that the Peck was seen below entering too far to the west in the channel. But, aside from this, we think those second signals indicated merely the caution which the entrance upon a somewhat delicate period of navigation required. The first signals were preliminary, and, if not changed, might doubtless be relied upon. But they were subject to change if, before entering upon the final course, occasion should require. The rules of navigation respecting signals have a qualified application to vessels going on the frequently varying courses of rivers. Doubtless they should be followed as nearly as possible, and the obligation becomes still more imperative when they come upon the final course on which they intend to pass. By the twenty-third of the rules governing the navigation of the Great Lakes and connecting waters, it is declared that one blast means that "I am directing my course to starboard," and we must think that as the steamers approached each other in this strait the captains would naturally, in their anxiety to make sure of their understanding, signal their final purpose.

It is imputed to the Peck that she was a bad steering vessel, and there is evidence in the record bearing upon that subject. The district judge held that the charge was not made out, but we have not found it necessary to pass upon that question.

Guided by what we must regard as proven by the weight of the positive testimony, as well as the probabilities arising from facts about which there can be no dispute, we are unable to find any fault in the conduct of the Folsom upon which to rest a judgment against her. The grounds on which she was held by the district court were that she was responsible for the supposed faulty position of the Nelson, and that she did not give the Peck her fair share of the room, and crowded her into collision with the Nelson. The speed of the

Folsom, as being too fast or too slow, is not complained of. She maintained her speed, as she was bound to do, until the danger appeared, and then it was so imminent that nothing could be done except by checking down and stopping so as to mitigate the blow, and this she did. Her course down the channel was admitted by the district court, and, as we believe, to have been proper. Her tows were neither of them in the way of any proper navigation of the Peck, and there remains no other charge of fault. For like reasons, we are of opinion there is no valid ground for charging the Nelson. She was at all times in a position of safety, and would not have collided with the Peck if the latter had been properly handled. For the reasons heretofore stated, we think the Peck was clearly at fault, and that, but for such fault, the accident would not have happened. And upon this conclusion, if it were necessary to have regard to it for that purpose, the burden of the proof is cast upon the Peck to show by clear and indubitable testimony the fault of the other vessels which she seeks to draw in to share her responsibility. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Ludvig Holberg, 157 U. S. 60-71, 15 Sup. Ct. 477, 39 L. Ed. 620; The Iron Chief, 11 C. C. A. 196, 63 Fed. 289, 292.

The decree of the court below must be reversed as to the Folsom and the Nelson, and modified as to the Peck, so as to hold her alone responsible.

#### Supplemental Opinion.

(February 14, 1903.)

PER CURIAM. The original opinion of this court in this cause overlooked an assignment of error alleged by the appellant the Mitchell Transportation Company, to which our attention has been called and which reads as follows:

"The court erred in not sustaining the first, second, third, fourth, fifth, seventh, eighth, ninth, and tenth of libelant's exceptions to the report of the commissioner filed in said cause."

These several exceptions were taken to the disallowance by the commissioner of each of several items of damage alleged by the libelant against the Peck. The above stated assignment is in plain disregard of the eleventh rule of this court (31 C. C. A. cxlvi, 90 Fed. cxlvi), which requires that the assignment of errors "shall set out separately and particularly each error asserted and intended to be urged," and further declares that, "when this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned."

Rule 24 (31 C. C. A. cxiv, 90 Fed. cxiv) also requires that the brief of counsel shall exhibit "a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record \* \* \* relied upon in support of each point." The references to the record in the brief of the libelant to the pages of the record, which consists of more than 900 pages, are meager and wholly insufficient to present the questions to which the exceptions referred to relate. The task is imposed upon the court of a laborious search of the record to

gather the materials necessary to an intelligent consideration of the points presented. The assignment of errors above quoted is therefore not sustained.

The decree of the district court will be modified only to the extent necessary to conform to the opinion of this court, and interest will be allowed from the date of the said decree as therein allowed.

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PENNSYLVANIA CO. v. LENHART.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 910.

1. CARRIERS—EJECTION OF PASSENGER—BREACH OF CONTRACT.

Plaintiff held a mileage ticket, good on defendant's railroad, which provided that it must be presented at the ticket office at the starting point, where the agent would issue a mileage exchange ticket for the desired trip in exchange for coupons from the book. It also provided that conductors might issue such exchange tickets, where the holder took the train at a station where there was no ticket office, or where such office was closed. Plaintiff presented his book to the agent at a station, and desired an exchange ticket, but the agent was not supplied with such tickets, and promised to explain such fact to the conductor. Plaintiff got on board, and presented his book to the conductor, who refused to give him an exchange ticket, and on plaintiff's refusal to pay fare ejected him at the next station. The ticket office there was closed, and plaintiff called the conductor's attention to such fact, and desired to again enter the train, but was refused. *Held*, that such action was a breach of the contract on the part of defendant, which rendered it liable in damages for plaintiff's wrongful ejection.

2. SAME—DUTY TO PAY FARE TO PREVENT THREATENED WRONGFUL EJECTION.

Plaintiff was not required to pay his fare when demanded and trust to its recovery by suit for the purpose of saving defendant from the consequences of its threatened breach of contract if he did not, but, having presented a legal ticket, was entitled to stand upon his rights under the contract.

3. SAME—ACTION FOR DAMAGES—EVIDENCE.

In an action to recover damages for such breach of contract and wrongful ejection it was error to permit plaintiff to testify to transactions and conversations between him and a ticket agent after his ejection or between him and the conductor of the succeeding train, such evidence not being relevant to the issues.

4. SAME.

A railroad company is liable in damages, without notice or demand, for the action of a conductor in wrongfully ejecting a passenger, where the conductor acted without malice, and in an action to recover such damages evidence of negotiations between the parties for a settlement is not admissible on the theory that it shows a ratification by the company of the conductor's action.

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

Lenhart brought this action to recover damages for ejection from a train and for refusal to allow him to re-enter. He was the holder of a mileage book issued by the Pennsylvania and other railroad companies jointly. The second clause of the mutual contract between Lenhart and the railroad companies read as follows: "That this ticket is not good for passage on trains, but must be presented at ticket office at starting point, where the agent will issue in exchange for mileage coupons a mileage exchange ticket, good only for continuous passage on train to be designated

thereon, commencing on date stamped on back thereof, and will detach in consecutive order one coupon for each mile or fraction thereof, except that for any distance less than five miles not less than five coupons will be detached. Conductors of trains may issue such exchange tickets upon surrender of coupons from this mileage ticket when the owner of the mileage ticket takes a train at a station where there is no ticket office, or where the ticket office is closed; or will detach and accept mileage coupons to the terminal point of his run only, without issuing exchange ticket; and it will then be necessary for owner of mileage ticket to obtain exchange ticket of ticket agent at said point as provided for above, otherwise this ticket will not be accepted for passage from point referred to on that trip." October 8, 1897, Lenhart desired to ride on the Pennsylvania Railroad from Tiffin to Toledo, Ohio. The agent at Tiffin had no exchange tickets. August 21, 1897, the Pennsylvania Company had instructed all its agents that a change had been made in the form of mileage tickets issued by it; and the agent at Tiffin, by inadvertence, had sent to the proper general office of the company not only all the exchange tickets of the company's own form, but also those applicable to joint mileage books like Lenhart's. Down to October 8, 1897, the company had failed to supply the agent at Tiffin with the necessary exchange tickets. Lenhart presented his mileage book, containing sufficient coupons, and asked for an exchange ticket to Toledo. The agent was unable to furnish it, and explained why. Lenhart thereupon claimed the right to ride by surrendering coupons on the train conformably to clause 2 of the contract, and requested the agent to explain the situation to the conductor when the train arrived. This the agent agreed to do. Lenhart testified that he saw the agent speak to the conductor, but did not hear what was said, except the agent's remark, "That is the man," as he pointed out Lenhart to the conductor; and that he got upon the train in their presence without objection. The agent and conductor testified that all that took place between them was that the agent asked the conductor if he had exchange tickets for joint mileage, and the conductor answered, "Yes." On the train the conductor refused to accept mileage coupons, and gave as his reason, "I got positive instructions only a few days ago not to accept any mileage on trains." Lenhart then read to the conductor clause 2 of the contract, stated that the company had failed to provide him with an exchange ticket at Tiffin, and insisted upon his right to be carried as a passenger. The conductor thereupon telegraphed the "ticket receiver" (his superior officer, with authority to act for the company), and was instructed to have Lenhart pay his fare and take up the matter later with the passenger department for adjustment. Lenhart refused to pay, and the conductor said, "Then we will have to put you off." Thereupon Lenhart, under protest, left the train at Gibsonberg, a regular station. Lenhart at once went to the ticket office, and found it closed. He then came back to the conductor, called his attention to the fact that the ticket office was closed, and demanded that he be permitted to re-enter the train and ride. The conductor refused. Lenhart proceeded to Toledo, his original destination, by the next regular passenger train, paying his fare in cash. Under its assignments, the company's principal contentions are that the conductor was right in ejecting Lenhart, and that Lenhart, after seeing that the conductor would not accept mileage coupons, should have paid a cash fare, and then have sued for its recovery, if it was unlawfully exacted. Other questions are strongly urged concerning the admission of evidence, the facts in relation to which are sufficiently stated in the opinion.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

Geo. Willard, for plaintiff in error.

E. A. Shurburne, for defendant in error.

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

Lenhart paid for and received a binding contract to be carried 5,000 miles if he complied with the conditions on his part. By

clause 2 he agreed not to present mileage coupons for passage on trains unless he embarked at a station where there was no ticket office, or where the ticket office was closed. On its part the company covenanted that it either would maintain a ticket office at every station, and have that ticket office open a proper length of time before each train, and ready to supply him with exchange tickets for mileage coupons, or would accept the coupons on the trains. The agent at Tiffin had inadvertently returned to headquarters his supply of exchange tickets. But for eight weeks his superior officer had failed to send them back or supply others. This is not a case where the ticket agent furnishes an intending passenger with the wrong ticket, which the passenger carelessly accepts, and then demands that the conductor shall take his explanation as paramount to the company's rules. By its contract the company had agreed that coupons should or should not be good on trains, depending on the existence or non-existence of certain facts when the holder of the coupons duly presented them at the station. To the conductor was delegated the authority to ascertain the facts for the company. He was not a mere automaton. He was as much bound to exercise his intelligence and judgment in determining Lenhart's right to be on the train as in deciding whether money tendered him was counterfeit, or a seemingly regular ticket was forged. The company could not withdraw that authority, and command the conductor "not to accept any mileage on trains," and then justify its ejection on the ground that the conductor was simply obeying instructions. But the conductor did not rest upon his general instructions. He communicated with his superior officer, and was directed to eject Lenhart unless he paid a cash fare. The breach of the contract did not arise at Tiffin. Nothing occurred there except the establishment of the facts on which accrued Lenhart's right to have coupons accepted on the train. After Lenhart was rightfully on the train, the breach was committed. The company, therefore, is liable for ejecting Lenhart at Gibsonberg, and for refusing to permit him to re-enter the train. *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Railroad Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822; *Railroad Co. v. Pauson*, 17 L. R. A. 287, 70 Fed. 585, 30 L. R. A. 730.

Lenhart paid for and presented a legal ticket. To the proposition that he could not stand upon his rights, but was compelled, for the sake of saving the company from the consequences of its threatened breach of contract, to pay his fare again in cash, if he had it, and then sue for its recovery, we do not yield our assent. After a breach of contract has been committed, the injured party is not allowed to aggravate his damages, and is required to use reasonable diligence to minimize them. But beforehand one is not forced to abandon his legal right under a contract, and waive the damages that may arise from its breach, in order to induce his adversary not to proceed as he wrongfully claims is his right.

Lenhart was permitted, over the company's objection, to detail occurrences between him and the ticket agent at Gibsonberg after the train from which he had been ejected had departed. Lenhart presented his mileage book to the agent and demanded an exchange

ticket. The agent had none. Lenhart then read to the agent clause 2 of the contract, and requested him to have the conductor of the next train issue an exchange ticket. The agent declined to take up the matter with the conductor. Lenhart was also allowed to testify to his differences with the conductor of the next train, how he tendered coupons and insisted upon his right to be carried, how the conductor refused to accept coupons, and demanded a cash fare, and how Lenhart paid it under protest. The transactions counted on in the declaration were complete when the first train left Gibsonberg. Lenhart's subsequent controversies with the ticket agent at Gibsonberg and with the conductor of the second train were incompetent. This evidence might have supported an action for the recovery of the cash fare paid under protest, but was utterly irrelevant to the causes of action pleaded and proven. It is impossible to determine from the record how influential this evidence was in getting the jury to return the verdict they did.

It was also prejudicial error to permit Lenhart to testify, over the company's objection, to the oral negotiations between himself and the officers of the company looking to a settlement. The ruling is sought to be upheld on the ground that the evidence tended to sustain an allegation in the declaration that the company, after full notice of the conductor's intentionally malicious acts, ratified and adopted them. But there was no evidence that the conductor acted maliciously. Lenhart himself testified that he had no reason to believe that the conductor was not acting in good faith. For what the conductor did without actual malice, and within the scope of his employment, the company was liable without notice, and subject to an action without demand. Along the same line Lenhart was permitted to introduce in evidence a series of letters between himself and officers of the company on the matter of a compromise. If this were the only error assigned, it might be doubtful, on account of the uncertainty of the record with respect to the company's objections and exceptions thereto, whether the judgment should be reversed.

Further error was committed in allowing Lenhart to give hearsay in regard to losing a sale at Toledo.

The judgment is reversed, with the direction to order a new trial.

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In re GALT.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1908.)

No. 906.

**1. BAILMENTS—CONSTRUCTION OF CONTRACT—BAILMENT OR CONDITIONAL SALE.**

Whether a contract by which one party agrees to send to the other goods to be sold by him constitutes a bailment or a conditional sale depends on whether the sender has the right to compel a return of the thing sent, or whether the receiver has the option to pay for the same in money.

**2. SAME—CONTRACT CONSTRUED.**

A manufacturing corporation entered into a contract by which it appointed a man its agent for the sale of its wagons at a place named. It



agreed to furnish him with wagons at certain discounts from the list prices; the wagons to be sold by him, and accounted for as sold in cash or purchasers notes. All notes taken were to be indorsed by the agent and sent to the company, and, in case they should be for a greater amount than the price of the wagons to be accounted for, the "surplus of commission" contained therein was to be paid to the agent when and in proportion to the amount collected. All wagons not sold within 12 months were, at the option of the company, to be paid for by the other party in cash or by note, or to be turned over to the company. The contract further provided that the ownership of all wagons, or their proceeds, should remain in the company until settlement should be made therefor, and that the money and effects received in the course of the business of the agency should "in no case or under any circumstances be appropriated to the private use of the party of the second part." It also provided that the company might revoke the appointment at its pleasure, and at any time take possession of all or any part of the property. *Held*, that such contract was one of bailment, and not of conditional sale, and that on the bankruptcy of the agent the company was entitled to reclaim the goods remaining in his possession.

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

On February 25, 1902, Frank Galt filed in the district court a voluntary petition in bankruptcy, and was adjudged a bankrupt February 28th, and thereafter I. L. Weaver was duly appointed his trustee. On March 12, 1902, the Mitchell & Lewis Company, Limited, a corporation of the state of Wisconsin, located at Racine, in that state, filed its petition in the bankruptcy proceedings, representing that on April 26, 1901, the petitioner appointed Frank Galt, the bankrupt, its agent at Sterling, Ill., for the sale of its manufacture under which certain goods were consigned to Galt for sale, of which, at the time of the filing of the petition in bankruptcy, Galt had on hand goods of the value of \$987.85, which were taken possession of by the trustee in the bankruptcy proceeding, and which he refused to deliver to the petitioner. The contract under which the goods were consigned, as claimed, is as follows:

"This agreement, made and entered into in duplicate this 26th day of April, 1901, by and between Mitchell & Lewis Co., Limited, of the city of Racine and state of Wisconsin, party of the first part, and Frank Galt, of Sterling, county of Whiteside, state of Illinois, party of the second part, witnesseth, that the said Mitchell & Lewis Co., Limited, for and in consideration of the covenants and agreements hereinafter named, do hereby appoint said party of the second part their agent for the sale of their farm wagons from the date hereof until January 1, 1902, in and for the following territory, to wit: Sterling and vicinity, in the state of Illinois, and in no other place or places, except as herein provided, without special permission in writing. The said Mitchell & Lewis Co., Limited, agree to furnish the said party of the second part, on board cars at Racine, Wis., the wagons this day ordered, as described on order blank hereto attached, at the following prices: Farm wagons with regular wheels, regular tire, seats, and brakes, 40 per cent. discount from their list prices in catalogue No. 50, page 43-65. Extra charge for wider or thicker tire, 40 per cent. discount from their list price in catalogue No. 50, page 43, 66, 67. Farm wagons extras for repairs, 40 per cent. discount from their list prices in catalogue No. 50, pages 73-78. In lieu of discount from list prices, all wagons are to be settled for at net prices named on order blank hereto attached, or such prices as are named on other side of this sheet. The same to be sold, and accounted for to the said Mitchell and Lewis Co., Limited, in cash or purchasers' notes, as follows: All notes taken for said wagons are to be on the blanks furnished by Mitchell & Lewis Co., Limited; are to bear seven per cent. interest per annum from date until paid, and not running over six months from date of sale, made payable at the nearest bank or express office, with the post-office address of the purchaser distinctly written thereon.

As an inducement to make sales for cash only, said Mitchell and Lewis Co., Limited, agree to allow said party of the second part the sum of five per cent. on all cash sales; the cash to be remitted to said Mitchell & Lewis Co., Limited, as hereinafter stated. It is agreed that, after the first shipment under this contract, the prices on all future shipments of wagons shall be subject to such change as may be occasioned by the advance or decline in material or labor. The said Mitchell & Lewis Co., Limited, warrant all their wagons as per printed form of warranty in catalogue. The said party of the second part agrees to receive, store, pay freight, and keep under cover, in good condition and fully insured, at his own expense, all wagons sent him, until sold or ordered away by the party of the first part as herein provided; to pay all the taxes on wagons on hand, should any assessment be made; to make all reasonable efforts to sell said wagons; and not to sell or assist in the sale of any other wagon or wagons, except those furnished by the party of the first part under this contract; to settle for all wagons sold by him as such agent, make all sales and take all evidence of indebtedness therefor, for and in the name of said party of the first part, upon such blanks as the party of the first part shall furnish, and remit the cash and notes received for said wagons to the party of the first part in the following manner: The cash to be remitted as early as the day following the date of sale, by draft on Chicago or New York, payable to the order of Mitchell & Lewis Co., Limited, and the notes to be transmitted every thirty days, or as much oftener as said second party may desire; each remittance of notes to be accompanied by a statement showing the number and kind of wagons on hand and unsold. All notes so transmitted are to be indorsed and payment guaranteed by the said party of the second part in the following form, viz.: 'For value received, the undersigned guaranty the payment of the within note, and hereby waive notice of protest, demand, and nonpayment thereof.' The party of the second part agrees that all notes or obligations indorsed or guaranteed by him, if not paid in two months after maturity, he will take up the same, and pay the cash to said party of the first part. In case all the sales should be for notes, and the notes so returned to Mitchell & Lewis Co., Limited, should be for a greater amount than the price of wagons to be accounted for as herein stated, the surplus of commission contained in said note or notes will be paid to the party of the second part, when and in proportion to the amount collected. The party of the second part further agrees to sell all wagons shipped him under the within agreement within twelve months from date of shipment, and, in case of any failure or neglect to do so, agrees to settle at the expiration of that time, or at any time thereafter when called upon to do so, for all wagons and parts of wagons remaining on hand unsold, at prices hereinbefore stated in the following manner, to wit: At the option of the Mitchell & Lewis Co., Limited, to either pay the cash for said wagons, or give his note, due in four months, with seven per cent. interest after maturity, payable to Mitchell & Lewis Co., Limited, or order, or to store said wagons in good order, free of charge, subject to the order of said Mitchell & Lewis Co., Limited. If the said party of the second part at any time during the continuance of the within contract sell or close out his business, he agrees to purchase all wagons remaining on hand unsold, paying cash therefor, or transfer same to his successors on such terms as will be satisfactory to the party of the first part, without cost to said party of the first part. If the terms of contract are complied with, and the said party of the first part should order one or more or the whole of said wagons reshipped or turned over to other parties, the party of the second part will be entitled to the actual freight and drayage only, that he may have paid out on each of said wagons, which is to be in full of all charges; but if, from any violation of the contract, the said party of the first part conclude they want possession of such wagons and parts of wagons as are on hand with the said party of the second part, it is agreed that all such wagons and parts of wagons on hand are to be transferred to the said party of the first part free of all charges for freight and drayage that may have been paid on same by the said party of the second part. It is further agreed by and between the parties hereto that the ownership of all wagons furnished under this or any previous contract, or

their proceeds, shall remain in the Mitchell & Lewis Co., Limited, until settlement shall have been made for them by the said party of the second part as provided in the contract under which they were shipped, and that the money and effects received in the course of the business of this agency shall in no case or under any circumstances be appropriated to the private use of the party of the second part. If, from any cause whatever, the said Mitchell & Lewis Co., Limited, are unable to furnish the wagons ordered, they shall not be held liable for any commission or damage whatsoever; and it is further agreed that this appointment be, and the same is hereby, made revocable at the pleasure of the said party of the first part. No verbal agreement pertaining to the within contract, other than as specified herein, will be recognized.

"Witness our hands the day and year first above mentioned.

"Mitchell & Lewis Co., Limited,  
"By H. S. Fairbanks, Agent.  
"Frank Galt.

"Taken by H. S. Fairbanks, Agent.

"Subject to the approval of Mitchell & Lewis Co., Limited.

"Approved.

"Racine, Wis., July 22, 1901.

"F. L. Mitchell, Secy."

The referee to whom the matter was referred reported to the court in favor of denying the petition upon the ground that the contract was a contract of conditional sale, and not of agency, was not recorded, and that the title to the property claimed passed to the trustee for the benefit of the creditors, discharged of any claim or lien of the Mitchell & Lewis Company. Exceptions were filed to that report. The district court on May 19, 1902, sustained the exceptions, and directed the trustee to surrender to the petitioner the property. Thereupon the trustee of the bankrupt brings this latter decree, by appeal, to this court for review.

Aaron A. Wolfersperger, for appellant.

Martin J. Gillen, for appellee.

Argued before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). The questions suggested by the record are (1) whether the contract is one of bailment or of conditional sale; (2) whether, if the latter, a trustee in bankruptcy of the vendee in such sale may retain the property, as against the vendor, and in right of general creditors; the law of the state holding conditional sales void as to bona fide purchasers and attaching or execution creditors.

The law of the state of Illinois with respect to conditional sales, as expounded by its supreme court, runs counter to the great weight of authority, but has become a rule of property in that state, and we are bound to observe it. *Harkness v. Russell*, 118 U. S. 663, 678, 7 Sup. Ct. 51, 30 L. Ed. 285. It is to the effect that a bona fide purchaser or an execution creditor of the vendee is protected against the claim of the vendor. *Western Union Cold Storage Co. v. Bankers' Nat. Bank*, 176 Ill. 260, 266, 52 N. E. 30.

The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Union*

*Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 7 C. C. A. 660, 59 Fed. 49. The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale. The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?

Carefully analyzing the agreement in hand, we think it must be held that the contract of the parties was one of bailment, and not of conditional sale. The Mitchell & Lewis Company thereby appoints Galt its agent for the sale of its manufacture in the limited territory stated, and in no other place or places; agrees to furnish the goods to the agent at 40 per cent. discount from list prices; they to be sold by him, and accounted for to the company in cash or notes of the purchaser drawn upon blanks furnished by the company, running not more than six months, with interest, and made payable to the company; their payment being guaranteed by Galt. As an inducement to making sales for cash only, an allowance of 5 per cent. on such sales is allowed by the company. All cash is to be remitted not later than the day following the sale; notes to be transmitted every 30 days. If all sales should be upon time, and the notes returned to the company should aggregate more than the prices of the wagons to be accounted for, the surplus is to be returned to Galt when and in proportion to the amount collected. He agrees to sell all wagons within twelve months from date of shipment, and upon failure so to do, at the option of the company, to (1) pay cash for wagons on hand, at the prices stated; or (2) give his note therefor; or (3) store the wagons subject to the order of the company; the ownership of all wagons furnished to remain in the company until settlement as provided; the money and effects received by Galt in the business of the agency in no case to be appropriated to his private use. Galt agrees to store and keep under cover and in good condition all wagons received; to keep them fully insured at his own expense until sold or ordered away by the company; to pay taxes upon them, if any should be assessed; and he is not to sell or assist in the sale of any other wagons than those manufactured by the company.

Applying to this contract the test stated, it is clear that here was a bailment, and not a conditional sale. It was not contemplated that Galt should ever own these wagons. He was to sell them to others for the company; his commissions to be the amount which he might receive over the prices stated in the contract. The proceeds, whether in cash or in notes of the purchaser, were to be immediately returned to the company; the notes being guaranteed by Galt. This was a *del credere* commission, and not a sale. The company could compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within the 12 months, the option for their return or payment

was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale.

It is claimed that the agreement is a conditional sale, within the doctrine of *Chickering v. Bastress*, 130 Ill. 207, 22 N. E. 542, 17 Am. St. Rep. 309, and *Manufacturing Co. v. Lyons*, 153 Ill. 427, 38 N. E. 661. But in each of those cases the party receiving the goods gave to the other his notes, evidencing a contract to pay absolutely; the proceeds of the sales to be applied upon the notes. The case is like to that of *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567, where an agreement similar to the one in hand was held to be a bailment, and not a sale. The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash, or to store, subject to the order of the company, the goods not sold within 12 months, is probably the strongest clause in the contract to indicate a sale; but, as suggested by the supreme court of Illinois in *Lenz v. Harrison*, supra, while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell, and report sales within the time stated. The cases in Illinois are carefully distinguished in *Manufacturing Co. v. Lyons*, supra, and fully sustain our holding that the contract in question constitutes a bailment, and not a sale. Such construction accords with the decisions elsewhere upon like contracts. *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119; *State v. Leicham*, 41 Wis. 565, 578; *Manufacturing Co. v. Jones*, 96 Wis. 619, 624, 72 N. W. 44; *Walker v. Butterick*, 105 Mass. 237.

This conclusion renders unnecessary the consideration of the second question suggested by the record.

The decree is affirmed.

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CHICKERING et al. v. CHICKERING & SONS.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 921.

1. UNFAIR COMPETITION—IDENTITY OF NAMES.

While every man has the right to use his own name honestly and fairly in his own business, and, so using it, is not responsible for resulting confusion with the goods of another of the same name, on the other hand he must so use his name as not to unnecessarily injure another, nor produce greater confusion than would naturally result from the mere similarity or identity of name. He may not dress his goods in a manner calculated to enable them to be palmed off on purchasers as those of another.

2. PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

Where the ex parte proofs produced by the parties on the hearing of a motion for a preliminary injunction are conflicting, the case will not be reviewed on the merits on an appeal from the order entered, but such order will be affirmed unless it clearly appears that the court below improperly exercised its discretion.

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¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

### 3. UNFAIR COMPETITION—PRELIMINARY INJUNCTION—GROUNDS.

Complainant and its predecessors in interest since 1823 have manufactured pianos at Boston, Mass., which, since 1840, have been marked "Chickering," and have become widely known by that name, and as the product of such makers. For 50 years such pianos have been made by a firm and succeeding corporations under the name of "Chickering & Sons." Defendants, whose name was Chickering, in 1898 organized a corporation under the name of "Chickering Bros.," and engaged in the manufacture of pianos in Chicago, which were marked on the fall board with the name "Chickering Bros." in letters similar to those used on complainant's instruments. They also issued advertising matter, which, while containing no untruthful statement, dwelt upon the fact that they were the sole living male representatives of the family which originated the Chickering pianos, and which tended to convey to the public the idea that their pianos were the same as those which had long been known by that name. *Held*, that such facts were sufficient to warrant the granting of a preliminary injunction against the continuance of such acts as unfair competition.

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

In the year 1823, Jonas Chickering, at Boston, Mass., commenced the manufacture of pianos. As early as 1844 he adopted the word "Chickering" as the distinguishing name of pianos of his manufacture, and from that time to the present pianos manufactured by him and by those associated in business with him and by his successors in business have been continuously marked on the fall board of the piano with the name "Chickering" in the old English style of lettering, surrounded by scroll work, with the words underneath in clear type, "Boston, U. S. A."; and the name "Chickering" has become associated in the public mind as the name of the piano made at the factory in Boston, and the name has acquired a secondary signification indicating that particular make of piano, and the name is of great value. In the year 1852 his three sons, Thomas E., C. Frank, and George H. Chickering, became associated with him in business under the firm name of Chickering & Sons. Jonas Chickering died in December, 1853. The business was continued by the surviving members of the firm under the same name. One of the sons died in 1871, and the surviving sons in the year 1886 incorporated the business according to the laws of New York under the corporate name of Chickering & Sons. This incorporation was had under the laws of the state of New York, because it was desired to preserve the name "Chickering & Sons," and under the law of Massachusetts, as then existing, that name could not be taken by a corporation. The business and manufacture, however, have always been located at Boston. Of this corporation one son became president and the other treasurer, and so continued until the year 1891, when one of the sons died. The survivor, George H. Chickering, thereupon became president of the company, and a Mr. Foster the treasurer; Mr. Chickering having \$300,000 and Mr. Foster \$50,000 of the total capital of \$600,000. How much of the capital stock continued to be held by the estate of the deceased son does not appear. Mr. George H. Chickering died in the year 1899, and was succeeded as president of the corporation by Mr. Foster, the former holdings of Mr. George H. Chickering being held by trustees for the benefit of the family. In 1901, under an act of the Commonwealth of Massachusetts, then recently passed, the parties in interest formed a corporation under the laws of that state under the corporate name of "Chickering & Sons," which corporation took over the business from the New York corporation, and has since continued it. The factory building now occupied by the complainant is the same factory building used since the year 1853, and was occupied by the Chickering family without interruption until the formation of the corporation, which continued to occupy it and now occupies it, employing 400 men in the manufacture of pianos, the annual output being 3,500 in number. In the year 1867, the firm of Chickering & Sons was awarded by the French government the first prize for pianos exhibited at the World's Exposition of that year in Paris, and the cross of the Legion of

Honor was granted as a reward of merit. This cross had on one side an eagle and on the reverse side the head of Napoleon surrounded with a chaplet of laurel. Chickering & Sons, firm and corporation, have, since the conferring of the cross, displayed a representation of it in their business. In 1897 it was registered by them under the laws of the United States as a trademark for use in connection with the manufacture and sale of pianos. It has since been affixed to the pianos manufactured by them, and been used in their letter heads and general publications. The appellants, Clifford C. and Frederick W. Chickering, are great-nephews of Jonas Chickering, and were employed by the firm of Chickering & Sons in different ways between the years 1883 and 1890. In 1892 they started business in Chicago under the firm name of "Chickering Bros.," engaging in the piano business, and sold pianos, the parts for which, at the beginning of the business, were made by other concerns and assembled by Chickering Bros. The business conducted was a small one, and in 1895 Frederick W. Chickering withdrew because the business was insufficient to support the two brothers, Clifford C. continuing the business alone under the name of Chickering Bros. until 1902, just prior to the commencement of this suit, when Clifford C. Chickering, Frederick W. Chickering, and L. P. Chickering (the last-named being the wife of Clifford C. Chickering), incorporated under the name of "Chickering Bros." for the purpose of continuing the manufacture of pianos. Their pianos were marked upon the fall board "Chickering Bros." in old English style of lettering, the word "Chicago" underneath. Their letter heads and certain of their advertising matter had the impress of a Maltese cross, with a head in the center, and in some of them the Maltese cross had an eagle in the center. When that was adopted does not definitely appear. The letter heads also contained underneath the cross the words, "Manufacturers of Chickering Bros. 'Clifford' Pianos." Whether, prior to the death of Mr. George H. Chickering, in 1899, the appellants made or sold pianos otherwise than as "Clifford," does not definitely appear by the record. Their sale as "Clifford" pianos was discontinued in the year 1898. On the back of their piano, in a recessed place, was posted a notice as follows:

"Special Notice: In order to prevent confusion, and possible misrepresentation, we wish to state that the firm of Chickering Bros. has no connection whatever in a business sense with the eastern company of the same name. Our pianos are made in Chicago, after our own scales, patterns, and methods of construction, and we place them on the market with confidence, relying on the discernment of the public and the trade to accord them that pre-eminence which their merits deserve."

After the death of Mr. George H. Chickering, in 1899, they put forth in their catalogues and other printed matter statements that they were not only related to the Boston Chickering's, but were the nearest of kin in the male line; that they received 10 years' practical training in their factory, and "that since the death of George H. Chickering (the last of the firm of Chickering & Sons) we are now the only Chickering's making a piano." They also put out a booklet giving "a sketch of the Chickering family and their famous piano," which contains a sketch of both branches of the Chickering family, a history of the career of Jonas Chickering, and of the appellants' connection with that business before they engaged in business in Chicago, and concluding with the statement: "Jonas Chickering and his sons have made the name 'Chickering' famous in connection with the manufacture of pianos. By right of purchase this name will continue to be used on the Boston piano, but by reason of their kinship, and because of their long practical training under the 'Chickering System,' the fact is properly advanced that 'the only piano made by a Chickering' is now made in Chicago by Chickering Bros." The expression, "The only piano made by a Chickering" is also conspicuously cast into the frame of their piano, and is displayed on the front and back and most of the pages of their catalogue. These changes took place in 1900, subsequent to the death of George H. Chickering.

The cause came before the court below upon the motion for a preliminary injunction, and at the hearing a large number of affidavits were presented

on each side with reference to false statements put forth by those who had for sale pianos of the appellants, representing them to be the original Chickering pianos of Boston; and there was much dispute with respect to the responsibility of the appellants therefor, as well as upon the question of actual deception. The court entered an order restraining and enjoining the appellants as follows: "(1) From using as the name of a piano the word 'Chickering,' either alone or in connection with other words or letters. (2) From using the name 'Chickering Bros.,' or the name 'Chickering' alone, or with any other word or words or letters, to designate the name of a corporation manufacturing or dealing in pianos. (3) From using on pianos the word 'Chickering' alone, or with other words or letters, to designate the maker or makers thereof, without displaying in connection therewith, plainly and in a prominent manner, a statement that the defendants are in no way connected with Chickering & Sons, of Boston, Mass., and that the defendants' pianos are not the 'original Chickering' pianos, or by some other means advise the ordinary observer of the fact that pianos of the defendants' manufacture are not the product of the complainant. (4) From using in connection with the manufacture or sale of pianos in any form or manner, whether in circulars, catalogues, letter heads, advertisements, labels, or otherwise the name 'Chickering' alone, or with other words or letters to designate the maker or makers of such pianos, without displaying in connection therewith plainly and in a prominent manner a statement that the defendants are in no way connected with Chickering & Sons of Boston, Mass., and that the defendants' pianos are not the 'original Chickering' pianos, or by some other means advise the ordinary observer of the fact that pianos of the defendants' manufacture are not the product of the complainant. (5) From making use of on or in connection with the manufacture or sale of pianos the statement, 'The only piano made by a Chickering,' or any statement similar thereto, or from stamping, stenciling, or impressing upon their said pianos said statement, or any statement similar thereto. (6) From using in connection with the manufacture or sale of pianos the maltese cross known as the 'Cross of the Legion of Honor,' in any form or manner, whether by marks upon their said pianos or in circulars, catalogues, letter heads, advertisements, labels, or otherwise. (7) From exhibiting or distributing the booklet or pamphlet entitled 'A sketch of the Chickering Family and Their Famous Piano,' a copy of which is 'Exhibit F' of the bill of complaint filed herein. (8) From doing any and all acts and from making any and all representations which are calculated to induce the public to believe that the pianos manufactured or sold by the defendants, or any of them, are genuine Chickering pianos, or the product of the original Chickering Piano Manufacturing Concern, or that the defendants, or any of them, are in any way or manner the successors to or connected with the original Chickering Piano Manufacturing Concern."

The appellants assign for error: "(1) That the court erred in holding that the defendants were engaged in unfair and fraudulent competition in trade with complainant as alleged in the bill of complaint; (2) in holding that defendants were infringing any valid trade-mark of complainant; (3) in granting the injunction order appealed from against defendants; (4) in granting any injunction order or other relief against defendants; (5) in not overruling complainant's motion for a preliminary injunction against defendants." The restraining order is brought here for review.

Edward Rector, for appellant.

Robert S. Gorham and George A. Carpenter, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). Undoubtedly, one cannot have a technical trade-mark in his own name, or acquire exclusive property right in it as against others of the same name. Undoubtedly, every man has the right to use his own name honestly and fairly in his own business, and, so using it, is not respon-



sible for resulting confusion with the goods of another of the same name, nor liable for any damage resulting from such confusion. On the other hand, every man must so use his name as not unnecessarily to injure another, nor produce greater confusion than would naturally result from mere similarity or identity of name. He may not dress his goods in a way calculated to confuse them with, and enable them to be palmed off as, the goods of another. *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Meyer v. Medicine Co.*, 58 Fed. 884, 7 C. C. A. 558; *Pillsbury v. Flour Mills Co.*, 64 Fed. 841, 12 C. C. A. 432; *Flour Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Stuart v. F. G. Stewart Co.*, 91 Fed. 243, 33 C. C. A. 480; *Chas. E. Hires Co. v. Consumers Co.*, 100 Fed. 809, 41 C. C. A. 71; *Peck Brothers & Co. v. Peck Bros. Co.*, 113 Fed. 291, 51 C. C. A. 251.

The question for consideration is whether the court below improperly exercised its discretionary power in respect of issuing an injunction pendente lite. Unless it clearly appears that it has so done, the order should be affirmed. It is not desirable—if it be entirely proper—that we should at this time review the merits of this controversy. The conflicting ex parte statements produced by the parties leave the case in some doubt with respect to the responsibility of the appellants for false representation by the sales agents of the appellants. It is better to reserve judgment upon disputed questions of fact until the cause shall come again to us upon the final hearing, when the evidence may be scrutinized in the light of intelligent cross-examination. We content ourselves, therefore, for the present, with a consideration of the case upon certain undisputed facts. The Chickering piano, as the product of the Boston factory, had become known certainly throughout the United States, if not in foreign lands. It had attained a high reputation for excellence. It was known by the name "Chickering," and that name was to the public an assurance of excellence in tone and in manufacture. The appellants had a right to associate themselves in business under the name of "Chickering Bros." They had also the right to engage in the manufacture of pianos. But, well knowing of the existence of the Chickering piano, it was their duty so to indicate the piano made by them that it should not be mistaken for the "Chickering" piano known to the world. They have not done this. They have used the same old English style of lettering upon the fall board that is used upon the "Chickering" piano. It is no excuse to say that most manufactures of pianos use that style of lettering. The duty was upon them, under the circumstances, to distinguish their pianos from the "Chickering" pianos, and they cannot plead, in avoidance of that duty, that others of different names used that style of lettering. Their duty was to distinguish, not to imitate; and the use of the word "Chickering" in the same style of lettering tends to deceive. The assertion of the appellants in their publications that they "make the only piano made by a Chickering" is also deceiving, and its adoption immediately after

the death of Mr. George H. Chickering might well induce the belief that its use was intentionally designed to deceive, and to acquire for themselves the trade and good will of the appellee. While the truth of the statement may be conceded, it is, as stated, only a half truth, conveying to the public the idea that the "Chickering" piano known to the public was made by the appellants, and not by the appellee. It is not needful at present to pursue the subject. We prefer to reserve judgment until the coming in of proofs. For the present we cannot say that the discretion of the court below was improperly exercised in restraining the acts complained of. It may be that the order is in some respects too broad in its terms, particularly the second paragraph of it; but the assignment of errors goes to the whole order, and not to any particular paragraph of it, so that we are not called upon to scrutinize language unchallenged by the parties complaining. It is within the power of the court below at any time to modify the order if any of its restraints be unwarranted.

The order is affirmed.

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**A. BAUER & CO. v. LA SOCIÉTÉ ANONYME DE LA DISTILLERIE DE LA LIQUEUR BÉNÉDICTINE DE L'ABBAYE DE FÉCAMP.**

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 892.

**1. UNFAIR COMPETITION—IMITATION OF PACKAGES—INTENT.**

While no manufacturer of an article has a monopoly of form of package, or of color or of shape of letters, or of geographical names, he is yet entitled to protection against one who imitates his packages in any or all of such matters with the intent to deceive purchasers into buying his goods as those so imitated in dress, and in such manner as to render such deceit probable.

**2. TRADE-MARKS—"BÉNÉDICTINE"—UNFAIR COMPETITION.**

"Bénédictine" is a cordial made for 300 years by the Bénédictine Monks at their monastery at Fécamp in Normandy, France. Their monastery having been destroyed and the monks driven out during the French Revolution, the recipe for the cordial, which was secret, descended by inheritance to one who in 1863 commenced its manufacture and sale commercially on a part of lands formerly held by the monks, then giving it the name of Bénédictine, by which it has become well known and attained a large sale. It has been put up since that time in a peculiar shaped bottle, having thereon distinctive labels and seals. The name was registered as a trade-mark in the United States in 1876, as were also the labels. Such person afterward organized the complainant corporation, to which he transferred the business and in which he became the principal stockholder. Defendant about 1893 placed on the market a cordial in bottles of the same sizes and of nearly the exact shape of those of complainant, having labels and seals similarly placed thereon and of similar appearance, having printed thereon the name "Liqueur de St. Benedict" and the word "St. Benedict" blown in the bottle in the place of the word "Bénédictine" in complainant's bottles. The printed matter on the labels was not the same, but was in French, although the article was made in Chicago. *Held*, that it was evidently defendant's intention to palm off its goods as those of complainant, and

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¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

that complainant was entitled to an injunction restraining the use of the word "St. Benedict" as an infringement of its trade-mark, and of the bottles and labels described.

3. SAME—NECESSITY OF SHOWING ASSIGNMENT.

The name "Bénédictine" as applied to an article so ancient and of such unchanging quality has come to designate the quality and place of manufacture rather than the name of the manufacturer, and it is unnecessary for complainant, in order to be entitled to the protection of the trade-mark, to indicate in connection with its use that it claims as assignee, there having been no change in the place of manufacture or in the formula, and substantially none in the manufacturer.

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

"Bénédictine is a cordial or liqueur resembling Chartreuse, distilled at Fécamp in Normandy. It was originally prepared by the Bénédictine Monks, but since the French Revolution has been made by a secular company." Cent. Dict. An historical account of the origin of this cordial is given by Judge Taft in the case of Société Anonyme De La Distillerie De La Bénédictine v. Micalovitch, Fletcher & Co., 36 Alb. Law J. 364, as follows: "At Fécamp in Normandy, France, the Bénédictine Monks had a monastery for several centuries before the French Revolution. They invented a liqueur or cordial made from cognac and a decoction of an herb growing wild in that country, and other ingredients, and made it for their own use. They preserved the recipe as a secret in a book of recipes. In 1792 the abbey of Fécamp was destroyed and the monks driven out. A. Legrand, Senior of Fécamp, one of whose ancestors was an attorney general of the abbey, came into possession of the book of recipes by inheritance. In 1863 he began the manufacture of the liqueur in question on an estate which was formerly part of the lands of the abbey, and where now is situated a museum of relics of the abbey. The recipe of the monks was followed exactly in the manufacture of the liqueur. The recipe is preserved as a secret known only to Legrand Aine, and two sons in business with him. In 1863 the liqueur first became an article of commerce, and then for the first time was it given the name 'Bénédictine.'" M. Legrand Aine continued the business from 1863 until 1876, when he made over to the complainant corporation then formed by him the plant, business, and good will. The fact is stated in the case above referred to as follows: "In 1876 he (Legrand) organized a corporation which was called the 'Société Anonyme de la Distillerie de la Bénédictine Liqueur de l'Abbaye de Fécamp,' to which he conveyed all the property used for the manufacture of this liqueur, together with his trade-marks, business assets, and good will, and received therefor 4,500 shares out of the 5,000 shares of the company. He became sole director of the company." This corporation has since continued and now carries on the business at the same place and with the same plant. The article is widely known and sold throughout Europe and the United States, Canada, and South America; its sale in the United States amounting to from five to seven thousand cases annually, and in the state of Illinois to about seven hundred and forty cases annually. In 1863 M. Legrand selected a peculiarly shaped bottle to contain the cordial, a black glass bottle of ungainly shape, having a bowl-shaped body and long neck, which is peculiar to this business and has become familiarly known to the trade as a container of this cordial. They come in two sizes, quarts and pints. On one face of the bottle is blown the word "Bénédictine," with a cross at either end. Below it is placed a light brown label with the following printing thereon: "Toutes les Bouteilles de Bénédictine, Liqueur de l'Ancienne Abbaye de Fécamp doivent avoir au bas une étiquette portant le fac-simile de la signature de A. Legrand Aine. La plus large ligature de plomb qui entoure le col doit porter les marques et inscriptions suivantes: Veritable Bénédictine. Le bouchon devra être marqué tout autour de: Véritable Liqueur Bénédictine. Enfin le dessous du bouchon portera: D. O. M.†" Upon bottles exported to the United States and Canada underneath the label noted is an oblong label with blue ground, having thereon the words

"Sole Agent for the United States of America and Canada. Henry E. Gourd, New York"; the words "Henry E. Gourd" being in gold letters, the others being in white letters. On the reverse face of the bottle on the shoulder is blown a figure somewhat like a horseshoe, within which is a seal of wax of the color of a bright vermilion, and upon it there is a mitre with a crosier, and, below, three mitres. Below this, and upon the face of the bottle, is a circular light brown label having thereon the letters "D. O. M.," below which is a cross, and beneath that the words "Le Directeur, A. L." Beneath this label is another label of similar color, having thereon the inscription "Véritable Liqueur Bénédicte, Marques déposées en France et à l'Etranger," and below this a fac-simile of the signature of A. Legrand Aine. Upon the neck of the bottle are two labels of like color with the others, one containing the words "Liquor. Monachorum Benedictinorum. Abbatiae Fiscanensis"; the other placed immediately below has thereon the words, in English, "Imported from Fécamp (France)." The cork and mouth of the bottle are covered with a tan leather-skin capsule upon which is pasted a label of like color with the others, bearing the words "Registered Trade-Marks"; a wax seal of like color with the other seal being upon this capsule and over the mouth of the bottle. A leaden band passes around the neck of the bottle and over the capsule, and is attached under the seal on the shoulder of the bottle. The trade-mark "Bénédicte" was registered by M. Legrand in September, 1876, in the United States patent office pursuant to the act of congress, as were also the other labels which have been described. The appellant, A. Bauer & Co., is a corporation of the state of Illinois, engaged in the general wholesale and retail liquor business in the city of Chicago. Prior to the filing of the bill it placed on the market at the city of Chicago and sold a cordial in bottles of the precise sizes and nearly the exact shape of the bottle of the appellee, having the imitation of a horseshoe blown in the bottle upon its shoulder as in the appellee's bottle, and a red seal of wax therein resembling the seal of the complainant, with the letters around it "Liqueur De St. Benedict." Below it is a circular label of like color and form to that of the appellee's label, having thereon the words and letters across the face of it "A. B. C. Liqueur de St. Benedict," and upon the label a red cross. Beneath that label is another label of like color, having the words printed thereon "Liqueur De St. Benedict." Around the neck of the bottle are two labels of like color with the appellee's labels, the upper one having the inscription "Toutes les Bouteilles de Liqueur St. Benedict doivent avoir au bas une etiquette portant le facsimile de la signature de Monsieur," with the fac-simile signature "The Tucker Hardy Co.," the latter being the department name given to a branch of A. Bauer & Co. Underneath that label is a smaller label of like color, having thereon the words "Fabriqué en Etats Unis." Upon appellant's bottle there is a band of lead underneath the rim of the neck, stretching across the cork. The cork is covered by a capsule made of paper, and, in place of the leaden ligature in the appellee's bottle, a substitute ribbon of leaden color passes over the capsule and is attached under the seal on the shoulder of the bottle. The mouth of the bottle is also covered with a wax seal of similar color to that of the appellee's, and the name "St. Benedict" is blown upon the face of the bottle. The court below decreed for the complainant, appellee here, enjoining the use of the term "Liqueur St. Benedict" or "St. Benedict," and the use of the bottles and of the marks on the labels specified; which decree is brought here by appeal for review.

F. H. Trude (John Stuart Roberts, of counsel), for appellant.  
Francis M. Charlton and William M. Copeland, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). We have so often spoken to the subject of trade-mark and of unfair trade, and to the principle by which courts of equity are guided in restraining one from palming off his goods as the goods of another,

that it is quite unnecessary at this time to go over the ground at length. It is true that no one has a monopoly of form, nor has he a monopoly of color, of the shape of the letters, or geographical names, or of his own name, but one may not, by means lawful in themselves when devoted to a lawful end, perpetrate a fraud upon the public, or infringe the rights of another. *Charles E. Hires Co. v. Consumers' Co.*, 41 C. C. A. 71, 100 Fed. 809. It would be impeachment of intelligence to say that here there was not design to market the appellant's goods as the goods of the appellee. There is such marked similarity in the shape of the peculiar bottle, in the character and arrangement of the labels, the letterpress, the use of the French language of the letterpress upon an article manufactured in the city of Chicago, in the wax seals, in the capsules covering the corks and the means of fastening them, in the name "Bénédictine" and "St. Benedict" blown in the bottles, that it is clear not only that there was design to deceive but also that deception is most probable. The trade-mark "Bénédictine" has been sustained in able and elaborate opinions in 1887 by Judge Taft, when upon the bench of the superior court of Cincinnati, in *Société Anonyme De La Distillerie De La Bénédictine v. Micalovitch, Fletcher & Co.*, 36 Alb. Law J. 364, and in 1890 by Judge Thayer in *Société Anonyme De La Distillerie De La Liqueur Bénédictine De L'Abbaye De Fécamp v. Western Distilling Co.* (C. C.) 43 Fed. 416. There can be no question of the right of the appellee to the use of the garb with which it has clothed its product, nor of the design of the appellant to pirate that right and to sell its goods as the goods of the appellee.

It is urged that the appellee claims as the assignee or purchaser of the business from M. Legrand; that in the use of the trade-marks so purchased it should indicate that it is the assignee or purchaser, and that, failing therein, it cannot be protected in their use. This contention is predicated upon the case of *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706. There the complainant was the manufacturer of a certain medicine known as "Atwood's Vegetable Physical Jaundice Bitters," and claimed as its trade-mark that designation, with the accompanying labels; the right being derived from one Moses Atwood, the designation mentioned being blown in the glass, and the labels attached stating that the article was manufactured by Moses Atwood, Georgetown, Mass., while the medicine was in fact manufactured by the complainant in the city of New York. The court, by Mr. Justice Field, lays down the principle declared in the following language:

"The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public, and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the

form of a circular or label attached to an article, that it is manufactured in a particular place by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance."

It will be observed that in that case the labels contained the assertions that the article was manufactured by a certain person and at a certain place, both of which assertions were untrue, and that the decision proceeded upon the theory that such statements were not honest, and worked a deception upon the public in attempting to pass upon them goods as possessing a quality and merit which another's skill had given to a similar article. The trade-mark and labels upon the bottles of the appellee contain no direct assertion of the maker. It may rather be said that the association of the name with the article indicates the place, or process, or quality of manufacture. Here the place of manufacture remains the same, the secret process is unaltered. There would seem to have been no substantial change of ownership. The manufacture continued at the same place and substantially under the direction of the same person. The cordial made from the recipe of Bénédictine Monks has been known for nearly 400 years. Its reputation rests upon its quality. Its excellence is assured by the fact that it is made in accordance with the original formula, and at the place where it alone has from the beginning been made, and where the herb of which it is a decoction grows wild. The name, as applied to a cordial so ancient and in quality so unchanging, has by association become the designation of place of manufacture and of quality, rather than that of the manufacturer. There is here no false statement. There is no deception upon the public. In such case the reason of the rule fails, and the rule itself, proper in appropriate cases, should not here be permitted to work a wrong. The question was elaborately considered by Judge Taft and by Judge Thayer in the cases referred to, and their reasoning meets with our approval. See, also, *Pillsbury v. Flour Mills Co.*, 64 Fed. 841, 850, 12 C. C. A. 432, 441; *Stone Co. v. Wallace* (C. C.) 52 Fed. 431, 437; *Cuervo v. Landauer* (C. C.) 63 Fed. 1003; *Feder v. Benkert*, 18 C. C. A. 549, 70 Fed. 613; *Tarrant & Co. v. Johann Hoff*, 22 C. C. A. 644, 76 Fed. 959; *Hoxie v. Chaney*, 143 Mass. 952, 10 N. E. 713, 58 Am. Rep. 149; *Carmichael v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

The decree is affirmed.

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**A. BAUER & CO. v. ORDER OF CARTHUSIAN MONKS, CONVENT LA GRANDE CHARTREUSE.**

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 893.

**1. UNFAIR COMPETITION—IMITATION OF PACKAGES—INTENT.**

Defendant held chargeable with unfair competition in imitating the bottles and labels in which complainant's cordial known as "Chartreuse" has for many years been placed on the market,—the bottles being of

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¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

peculiar shape, not known to be made or used for any other purpose, and of two different colors, to denote the strength of the cordial,—and by falsely indicating by its labels that its product is made in France, whereas it is made in Chicago.

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

Chartreuse is "a highly esteemed tonic cordial obtained by the distillation of various aromatic plants, especially nettles, growing on the Alps. It derives its name from the celebrated monastery of the Grand Chartreuse in France, where it is made." Cent. Diet. The Order of Carthusian Monks has its monastery at La Grande, at or near Voiron, in the department of Isere, in the Republic of France. The order was instituted several centuries ago, and for 400 years has been engaged in the manufacture of this cordial, presumably at first for the use of the monks and for those in ill health. Afterward there grew up a large business in its manufacture and general sale. At some time, it does not appear definitely when, but over 50 years ago, the order of monks was incorporated under the laws of France, under the corporate name of "The Order of Carthusian Monks, Convent La Grande Chartreuse," the appellee here. The business of the manufacture and sale of this cordial is conducted in a section of the convent proper, under the supervision of an officer known as the "Pere Procureur," who is one of the monks of the order. The liqueur is made of different degrees of strength, indicated by the color given to it,—green or yellow. It is contained in glass bottles, colored according to the color of the cordial contained in it. This bottle is of peculiar shape, containing a litre of fluid, and is a round and tall bottle with a peculiar bulging neck, and so far as the record discloses, until the acts of the appellant complained of here, of a shape that was never used except for this cordial. There is blown in the glass near the base of the neck of the bottle the trade-mark "Chartreuse," in combination with the letters "Gde," and seven stars surrounding a globe, surmounted by a cross. The labels are of green or yellow color, corresponding to the character and color of the cordial contained in the bottle. They are attached to the face of the bottle below the trade-name blown therein, and printed thereon are the words:

"LIQUEUR  
"A LA Gde

FABRIQUEE  
CHARTREUSE."

Below each of these columns appears what purports to be a fac simile of a signature, "L. Garnier," above each imprint of the name being a small globe surmounted by a cross, and underneath the words "Déposé 1-7-69"; beneath these the words in the centre, "France," and beneath that the words "Agents for United States H. A. Batjer & Co. Broadway, 45, New York. Trade Mark No. 3989. Registered Sep. 12th, 1876, in the United States Patent Office at Washington, D. C." There is also a round-shaped label having a green or yellow ground corresponding with the color of the liqueur in the bottle, and of the same size as the top of the cork, and placed over the top of the cork, having thereon, around the circumference, the words "Grande Chartreuse. L. Garnier." The top of the neck of the bottle is also coated with wax of a reddish brown color. So identified, this liqueur has become celebrated in every country of the world, its annual sales in the United States of America amounting to 4,000 cases annually, in the state of Illinois 500 cases annually, and in the city of Chicago about 400 cases annually. The appellant in the year 1897 or 1898, a year or two before the filing of this bill, being familiar with the article Chartreuse, procured glass bottles to be made of the same color and almost identical in shape with the bottles of the appellee, and placed upon the market in these bottles a cordial, in the green bottles a cordial of green color, in the yellow bottles a cordial of yellow color, precisely as did the appellee. It placed upon the bottle containing the yellow liqueur a yellow label, and upon the bottle containing the green liqueur a green label, of the like shape with the label of the appellee, and having thereon the words:

"GRANDE  
"LIQUEURE.

DES  
CHASSEURS."

Underneath each of these was a device surmounted by a crown, and underneath it in the scroll an eagle upon an ermine cape, and crossing it diagonally two staves similar to a bishop's staff, and underneath that the words, "Agent por les Etats Unis," and underneath that in script "Angelique Bouchard & Rochelle." The top of the neck of the bottle is covered with wax of a color apparently darker than that upon the appellee's bottle, but it is impossible to tell from the exhibit what, if anything, is impressed thereon, and there is no description of it in the record. The bill is filed for an injunction and for an accounting, and the decree to that effect is brought here for review.

F. H. Trude, for appellant.

F. M. Charlton and W. M. Copeland, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The name "Chartreuse" was applied to this cordial because it was invented and made at the monastery of the Grande Chartreuse, and made by the Carthusian Monks. So that, as held by the French courts, the name at once designates the inventor, the maker, and the place of manufacture, and constitutes in each of these particulars a distinctive mark which could not truthfully be applied by others to a similar or analogous product. *Garnier v. Berthe*, 4 *Annales*, 119; *Garnier v. Rivoire*, 4 *Annales*, 155; *Garnier v. Lindiere*, 14 *Annales*, 225; *Garnier v. Garnier*, 14 *Annales*, 252; *Garnier v. Garnier*, 17 *Annales*, 241, 257; *Browne, Trademarks*, §§ 407-411, 582. There can be no question of the design of the appellant to pirate the trade-names of the appellee, to clothe its product in the dress adopted by the appellee, and to palm off its goods on the public as the goods of the appellee. It procured bottles to contain its cordial to be made in the same ungainly shape as the bottles used by the appellee. The glass was colored to correspond with the color of the cordial contained therein, precisely as was done by the appellee. Its labels correspond also in color with those of the appellee, and the arrangement of the lettering thereon corresponds with that upon the labels of the appellee. It substituted the word "Chasseurs" for "Chartreuse,"—a word not dissimilar in sound and in appearance, and likely to delude a purchaser. It placed upon its labels pasted upon the bottles containing its cordial the untruthful statement that Angelique Bouchard & Rochelle were agents "por les Etats Unis," putting forth a false suggestion that the article was imported from France, when in fact it was made in the city of Chicago. We have little patience with such schemes. Bauer, the president of the appellant, by his evidence appears to suppose that, by differentiating the label in any respect, there ceases to be imitation. He is uninformed in the law of unfair trade. In one of the French cases referred to, the court decreed the confiscation of all the spurious liqueurs and elixirs, the destruction of the false labels and marks, a fine of five hundred francs, six months' imprisonment, and the publication of the facts in the public journals. The officers of the appellant company have reason to congratulate themselves that they reside without the Republic of France. In the case of *A. Bauer & Company v. La Société Anonyme de la Distillerie de la Liqueur Bénédictine de l'Abbaye de Fécamp* (herewith decided) 120 Fed. 74, we have said all needful to be said



touching the law applicable to the case in hand. The claim is urged here, as it was urged there, that the appellee is not entitled to the aid of a court of equity because it is an assignee of the owner of the original business and trade-mark and good will, and puts forth its goods without a statement thereof. There is no foundation in fact for the claim. The order of Carthusian Monks, which has existed for centuries, is the order which was incorporated and which to-day is carrying on the business. The pere procureur appointed to manage this secular business is selected from the monks of the religious order, and is succeeded upon his death or retirement by some other monk. There is no change, and has been none, in the conduct of the business. The property and good will belong, as they have always belonged, to the order of Carthusian Monks, and there is no need of any statement of a change of the individual who fills for the time being the office of manager.

The decree is affirmed.

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A. BAUER & CO. v. SIEGERT et al.

(Circuit Court of Appeals, Seventh Circuit. January 9, 1903.)

No. 891.

1. TRADE-MARKS—GEOGRAPHICAL NAME—ANGOSTURA BITTERS.

The word "Angostura," adopted in 1830 as a name for bitters then manufactured in Angostura, Venezuela, and continuously used since, although the name of the town was changed in 1846, and by which name the bitters have become widely known over the world, and which was registered as a trade-mark in the United States in 1881, is a valid trade-mark.

2. SAME—UNFAIR COMPETITION—IMITATION OF PACKAGES.

Evidence considered, and held to establish unfair competition by defendant, by appropriating the name and imitating the bottles in which Angostura Bitters were sold, and the labels thereon, and in some cases using the bottles which originally contained such bitters as the name and dress of bitters made in Chicago, with the evident purpose of selling such imitation as the genuine bitters made in Port of Spain, Trinidad, and known to the trade by that name since 1830.

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

In the year 1824 Dr. Johannes G. B. Siegert, a physician and ex-surgeon general of the army of the republic of Venezuela, and the father of the appellees, and then resident of the town of Angostura, on the Orinoco river, in the republic of Venezuela, established a business in the preparation and sale of certain bitters originally named "Aromatic Bitters," but for a long time known to commerce as "Angostura Bitters." The business was continued by him during his lifetime. In 1864 he took his son Carlos, one of the appellees, into partnership, continuing the business under the same name until the year 1867, when the firm name was changed to "Dr. J. G. B. Siegert &

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¶ 1. Use of geographical names as trade-names, see notes to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657, 31 L. R. A. 44; Illinois Watch Case Co. v. Elgin Nat. Watch Co., 35 C. C. A. 242.

¶ 2. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

Hijos." In the year 1846 the name of the town Angostura was changed by decree of state to that of Ciudad Bolivar, since which time the name "Angostura," as the name of a town, has officially ceased to exist, and gradually, as matter of fact, has ceased to be used. The business continued to be carried on by Dr. Siegert and his son Carlos at Ciudad Bolivar until the death of the father at that place in the year 1870. The firm, however, had done their shipping through the firm of Gerold & Ulrich from Port of Spain, in the island of Trinidad. Carlos D. Siegert, the surviving partner, continued the business under the old firm name at Ciudad Bolivar until the year 1872, when his brother, Alfredo C. Siegert, was admitted to the partnership, and the firm name was changed to Dr. J. G. B. Siegert & Hijos. They continued the business, and in 1875 removed their factory to Port of Spain, Trinidad, where the business has since been, and is now, conducted. In 1876 Luis B. C. Siegert, a brother, was admitted to the firm, which has since been, and is now, constituted of the three brothers. These bitters are compounded according to a secret formula known only to the Siegert family, and are sold in every continent; the sales in the United States being in amount between 10,000 and 15,000 cases a year. One thousand to 1,500 cases are sold annually in the state of Illinois, of which Chicago consumes from 500 to 1,000 cases. The name "Angostura" was first applied by the public to these bitters from the name of the town at which they were made. This name was accepted by Dr. Siegert in the year 1830, and employed by him and his successors as the distinctive name for the bitters. It has been printed on the labels and used upon business cards and stationery and in advertising the goods, and was registered in the patent office at Washington as a trade-mark or trade-name on the 14th day of June, 1881, upon application filed May 21, 1881. The bitters are put up in glass bottles of two sizes,—whole and half bottles. These are of a peculiar form, and of a dark greenish tint, with the name "Dr. J. G. B. Siegert & Hijos" blown in the shoulder and neck and also in the bottom of the bottles. Around the neck of the bottle since the year 1884, upon goods imported into the United States, is a label in the similitude of a revenue stamp of the United States theretofore existing, with rounded corners, about 2½ inches long and 1½ inches wide, in the middle of which is a stamp-shaped cut or figure in yellow, having in its center a representation of the head and bust of Dr. J. G. B. Siegert, surrounded by an oval border, upon which are arranged the words: "Angostura Bitters. Dr. J. G. B. Siegert." About the border are arranged scrolls, upon one of which is printed the figures "1830," and upon the other is printed the words "The Only Genuine." A plain oblong border incloses the picture described. On either side of the picture are arranged two concentric circles, on one of which is inscribed the words "J. W. Wupperman, New York, Sole Agent of," and upon the other the words "Dr. J. G. B. Siegert & Sons, Port of Spain, Trinidad, B. W. I." The label upon the body of the bottle is about 10⅞ inches long and 6⅞ inches wide, upon which is printed in black ink, in the English, German, French, and Spanish languages, a description of the properties and qualities of the bitters, with the trade-name "Angostura Bitters," and a fac-simile signature of Dr. J. G. B. Siegert printed lengthwise between the obverse and reverse sides of a medal,—one at the top and one at the bottom,—on an oblong white strip, about 1 inch wide, running vertically from the middle of the top of the label to the narrow strip of printing in French, 1¼ inches wide, and extending entirely across the bottom of the label, which inscription in French, when the label is pasted upon the bottle, is folded entirely around and over the bottom of the bottle and can only be read by unfolding it. The English, German, and Spanish descriptions are printed in columns of the same length as, and running parallel with, the white strip bearing the fac-simile signature and medal. The guaranty or caution in English, German, French, and Spanish languages, bearing index hands, is printed on a strip running parallel with the white strip containing the fac-simile signature and medal. The bottles are sealed with reddish brown sealing wax. The goods have always been put up in this form and manner, except that the original label has been slightly altered in matters of detail; the general form, style, and substance being preserved. The name "Angostura Bitters" is placed on every box containing these goods shipped from Port of Spain, and has been employed in

advertising the goods, and is the exclusive name used to designate and distinguish these bitters.

The appellant, a corporation located at the city of Chicago, in the state of Illinois, and of which Alexander Bauer is the president, well knowing of the bitters made by the appellees, and the character of the packages which contained them, and the labels thereon, lately placed upon the market a bitters of its own, in a bottle of nearly the same size and shape as the bottle of the appellees, with a neck label of substantially the length and width of the neck label of the appellees, in the middle of which is a stamp-shaped cut or figure of substantially the size and shape and of the same color as appellees', in the center of which is a monogram "T. H. Co."; being the initials of the name of the Tucker-Hardy Company, under which name a department of the appellant's business is conducted. These occupy the same relative position as do the head and bust of Dr. Siegert on the neck label of the appellees, inclosed by an oval border of substantially the same size, shape, and color as the appellees', upon which are arranged the words "Tucker-Hardy Company" in white letters, and in the same relative position as the words "Angostura Bitters, Dr. J. G. B. Siegert," in the neck label of the appellees. At either side of the stamp-shaped figure are arranged two half circles, on one of which is printed the word "Angostura," and on the other the words "Bark Bitters." The body label is of the same shape as that of the appellees, having a white background, and printed thereon in black ink a description of the supposed qualities and properties of the bitters in the English, German, and Bohemian languages, together with the name "Angostura Bitters," and the signature in script, "The Tucker-Hardy Company," of the same general appearance and in the same relative position as upon the body label of the appellees, and printed lengthwise between two cuts or figures, one at the top and one at the bottom of an oblong strip about 1 inch wide, like to that of the appellees, running vertically from the middle of the top of the label to the bottom thereof; the English, German, and Bohemian description being printed in columns of the same length, and running parallel with the white strip bearing the fac-simile signature. There are two cuts, in imitation of and in the same relative position as the appellees', in substantially the same style, form, and arrangement of type, lettering, cut, design, figures, and marks, upon the like character of paper, with the guaranty caution in the English, German, and Bohemian languages, bearing index hands, printed in substantially the same form, arrangement, lettering, cut, design, figures, and marks as in that of the appellees. This body label, as in the case of the appellees', covers the body of the bottle. These bottles are also sealed with a reddish brown sealing wax. Prior to the commencement of the suit the appellant purchased bottles which had contained the bitters of the appellees, and in which were blown the name "Dr. J. G. B. Siegert & Hijos," and to some extent put up and sold their bitters in those bottles; claiming, however, that the appellant first knew it was using such bottles when this suit was instituted.

The bill was filed to enjoin the appellant from selling its goods thus clothed, from palming off its product as that of the appellees, and from the use of the word "Angostura" in connection with the article of bitters. A decree was passed fully enjoining the appellant from the use of the dress described, and from the use of the word "Angostura," from which decree an appeal is taken to this court.

James A. Fullenwider and John Stuart, for appellant.  
Wm. M. Copeland, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). This is to us a plain case. The dress employed by the appellant, the character and color of the bottle, the character and color of the neck label, the character, color, and arrangement of letterpress on the body label, and the unusual covering of the bottom of the bottle with

the label, renders it clear that the appellant sought to, and did, palm off its goods as those of the appellees. If confirmation were needed, it is found in the use by the appellant of the bottles which had contained the bitters of the appellees. We cannot credit the assertion of the appellant that the use of the old bottles upon which was blown the name "Dr. J. G. B. Siegert & Hijos" was inadvertent. The resemblances in every feature of the dress are too marked to permit us to place faith in the statement. The design is so evident that it challenges belief in the assertion of ignorance or inadvertence. It is not necessary to consume time upon so flagrant an imitation and so manifest a design.

It is alleged that the word "Angostura" is not the subject of a trade-mark or a trade-name. We cannot sustain the contention. For upwards of half a century no town has existed by that name; and, even if the old town of Angostura were still known by that name, the appellant would not be permitted by fraudulent imitation to deceive the public and wrong the appellees by palming off its goods as their goods. The bitters of the appellant are made in the city of Chicago. The name "Angostura Bitters" had acquired, long before the appellant commenced the manufacture of its goods, a world-wide celebrity. The appellant cannot be permitted to usurp that name, and dress its goods like those of the appellees, and thereby defraud the public. *Pillsbury v. Flour Mills Co.*, 64 Fed. 841, 12 C. C. A. 432; *Flour Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Siegert v. Findlater*, 7 Ch. Div. 801.

The objection that the product of the appellees is not shown to have medicinal properties, and that they were guilty of fraud in publishing to the world that it has medicinal properties, and that therefore they can have no standing in a court of equity, cannot be sustained. No such fraud is charged in the answer, and no such fraud is proven. It is not to be presumed, to enable the appellant to perpetrate its own fraud.

The decree is affirmed.

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#### CUMMINGS v. SYNNOTT.

(Circuit Court of Appeals, Third Circuit. February 2, 1903.)

No. 25.

#### 1. ASSUMPSIT—GROUNDS TO SUPPORT ACTION—IMPLIED PROMISE.

Plaintiff and defendant, who with another owned all the stock of a corporation, on behalf of themselves and such other entered into a contract for the sale of said stock. On the same date defendant and the purchaser made a secret agreement by which defendant was to be paid a further sum for his interest, in consideration of which he also gave an option on other property owned by him. Both the agreements were carried out. *Held*, that whatever might be defendant's liability in an action for deceit or a suit in equity for an accounting, plaintiff could not maintain an action in assumpsit to recover a definitive part of the

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¶ 1. See Assumpsit, Action of. vol. 5. Cent. Dig. § 1.

amount so received by defendant, and claimed as his own, there being neither an express nor implied promise to support such action.

Gray, Circuit Judge, dissenting.

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

For opinion below, see 116 Fed. 40.

C. V. D. Joline and F. P. Prichard, for plaintiff in error.

M. Hampton Todd and D. J. Pancoast, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This was an action at law. The plaintiff (defendant here) declared in assumpsit, and the declaration stated his cause of action to be "that the said defendant, \* \* \* as the agent of said plaintiff, sold shares of stock of the plaintiff in the Atlantic Match Company \* \* \* for a large sum of money, to wit, \$100,000, which money he received, and neglected and failed to pay to the plaintiff." Hence it appears that the promise specially averred is not an express one, but one to be implied by law from the alleged fact that the defendant had, as the agent of the plaintiff, received \$100,000 in payment for shares of stock which belonged to the plaintiff. We have no doubt of the legal sufficiency of this count; but, in our opinion, neither it, nor any of the common counts with which it was joined, was sustained by the proofs.

There seems to have been no dispute as to the material facts. At all events, they were conclusively established, and for the present purpose may be briefly stated. The Atlantic Match Company was a corporation having a stock capital of \$2,000,000, of which John E. Cummings (defendant below) owned 37½ per centum, Thomas Synnott (plaintiff below) owned 37½ per centum, and a certain Charles H. Graham owned 25 per centum. In July, 1901, Frederick C. Eaton, on behalf of the National Match Company, proposed to purchase all the stock of the Atlantic Match Company. His negotiations were conducted with Cummings and Synnott, the latter acting on behalf of Graham as well as of himself. On July 18, 1901, Eaton addressed a letter to Synnott, in which he said:

"I will take over the entire capital stock of the Atlantic Match Company, giving in exchange therefor five hundred thousand shares of preferred stock and two hundred fifty thousand shares of the common stock of the National Match Company."

Upon the following day an agreement in writing was made between Eaton and Cummings, as follows:

"July 19, 1901.

"Memo. of agreement between J. E. Cummings of the Atlantic Match Co. and F. C. Eaton, of the National Match Co. J. E. Cummings agrees to sell the entire capital stock of the Atlantic Match Co. to F. C. Eaton upon the following terms: Eaton gives in exchange for said stock \$500,000 of the Preferred stock of National Match Co. \$250,000 of Common stock of said Co. and \$200,000 in cash. The Atlantic Match Co. stock is to be delivered to the Standard Trust Co. of New York who will issue temporary receipt or certificate therefor which shall be exchanged for certificates of stock of National Match Co. as soon as issued as above stated. The cash payments are to be \$20,000 upon signing of contract for sale \$80,000 on August 5, and

\$100,000 on September 5. The National Match Co. to guaranty Eaton's purchase. The entire bond subscription of the Atlantic Match Co. is to be canceled.

Possession is to be given August 1st.

Thos. W. Synnott and J. E. Cummings are to be elected directors of the National Match Co. and J. E. Cummings is to remain in the business in employ of National Match Co.

"Correct: F. C. E.

"J. E. C.

"Approved: Jos. Swift."

Joseph Swift, who approved this agreement, was the president of the National Match Company. Neither Synnott nor Graham were informed of it, and all knowledge of it was withheld from them because Cummings desired to keep them in ignorance of its provision for the payment of \$200,000 in cash, which sum it was understood between him and Eaton was to be paid solely to Cummings, if he would give to Eaton the option to purchase the interest of Cummings in the Safe Harbor Match Company, and would assume certain other obligations, to be presently more particularly referred to. Upon July 23, 1901, a contract of sale was executed by Eaton, Synnott, and Cummings, and at the same time a separate agreement was, without the knowledge of Synnott, entered into between Eaton and Cummings.

The agreement first mentioned is as follows:

"This agreement made this 23d day of July, A. D. 1901, between Thomas W. Synnott and J. E. Cummings of the city of Philadelphia, parties of the first part, and F. C. Eaton of the city of New York, party of the second part, witnesseth:

"Parties of the first part in consideration of the sum of one dollar, to them in hand paid by party of the second part, do hereby sell, assign, and transfer to said second party, the entire capital stock of the Atlantic Match Company, a corporation duly organized under the laws of the state of New Jersey; said capital stock consisting of seven hundred and fifty thousand (\$750,000) dollars preferred stock, and two million (\$2,000,000) dollars of common stock.

"The first parties agree that the bond issue of the Atlantic Match Company, which has been underwritten, to wit: two hundred and fifty thousand (\$250,000) dollars, shall be canceled; party of second part, in consideration of above transfer of said Atlantic Match Company's stock, hereby sells, assigns, and transfers to said first parties or their assigns, five hundred thousand (\$500,000) dollars of preferred stock and two hundred and fifty thousand (\$250,000) dollars of common stock of the National Match Company, a corporation duly organized under the laws of the state of New Jersey.

"The parties of the first part agree to deposit said Atlantic Match Company's stock with the Standard Trust Company of New York for account of second party, and second party hereby authorizes said Standard Trust Company to give in exchange therefor certificates of stock of the National Match Company, as above provided. In witness thereof the parties have set their hands the day and year above written.

"F. C. Eaton.

"T. W. Synnott.

"J. E. Cummings.

Indorsed: "National Match Co. has 1,000,000 of preferred 6% noncumulative stock and \$1,500,000 of common stock of which 1,000,000 preferred stock and 500,000 of common stock has been subscribed for on terms of subscribers agreement, leaving 1,000,000 of common stock to be used for future purposes. The liabilities of the Atlantic Match Co., consisting of notes, &c., to the amount of about 94,000, are to be paid by the National Match Co.

between date hereof and Jan. 1, 1902, at which time the bonds of the Atlantic Match Co. will be canceled. F. C. Eaton."

The private agreement between Cummings and Eaton is as follows:

"[Across top margin] Approved. Jos. Swift, Frank Tilford, F. C. Eaton. "This agreement, made this 23d day of July, A. D. 1901, between J. E. Cummings, of the city of Philadelphia of the first part, and F. C. Eaton of the city of New York, of the second part, witnesseth: Party of first part, in consideration of the sum of two hundred thousand (\$200,000) dollars, sells, assigns and transfers all his right, title and interest, in and to the stock of the Atlantic Match Company, a corporation duly organized under the laws of the state of New Jersey, to second party. Party of second part agrees to pay said sum of two hundred thousand (\$200,000) dollars, in the following manner to first party: Twenty thousand (\$20,000) dollars on or before July 27th; eighty thousand (\$80,000) dollars on or before August 5th, and one hundred thousand (\$100,000) dollars on or before September 5th. Party of the first part covenants and agrees that possession of the Atlantic Match Company's business shall be turned over to second party on the fifth day of August, 1901; party of first part further agrees that in consideration of one dollar to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, that second party shall have the option to purchase first party's interest in the property and business of the Safe Harbor Match Company, which said property is located at Safe Harbor, Pennsylvania, at a price to be determined by examination of books, said price not to exceed the actual cash paid in to said company. This option to cover a period of six months from date hereof. First party also agrees to use every means to secure balance of Safe Harbor Match Co. on terms above set forth. The first party also covenants and agrees with second party that during the period of this option, second party shall have the entire output of the Safe Harbor factory at factory cost of goods. This contract is made part of contract of even date between Thomas W. Synnott, J. E. Cummings and F. C. Eaton. In witness whereof the parties hereto have set their hands and seals the day and year first above written.

"J. E. Cummings. [L. S.]  
"F. C. Eaton. [L. S.]"

Cummings was paid \$200,000 under the agreement between him and Eaton; but that he did not actually receive this money or any part of it as the agent of Synnott, or make any express promise to pay him any portion of it, is manifest, and nothing appears from which, in our opinion, such a promise could, by implication or imposition of law, be imputed to him. This agreement, in pursuance of the understanding before alluded to, conferred upon Eaton an option to purchase the interest of Cummings in the property and business of the Safe Harbor Match Company, and contained an undertaking on his part that during the term of that option the National Match Company should have the entire output of the Safe Harbor factory at factory cost; and by the agreement of July 19, 1901, it had already been stipulated that Cummings would remain in the employ of the National Match Company. In none of these matters had either Synnott or Graham any share, and while it may well be that an action of deceit by Synnott, or a suit in equity by him and Graham, for an accounting, etc., could have been maintained, we are constrained to hold that this action of assumpsit, in which Synnott alone claimed a definitive part of the gross amount which Cummings had received individually, lacked the essential requisite of a promise, either express or implied, to support it. We are therefore of opinion that the instruction which was given to the jury to find for the plaintiff was erroneous, and that the request of the de-

defendant for binding instructions in his favor ought to have been granted, and accordingly the judgment of the circuit court is reversed.

GRAY, Circuit Judge, dissents from this judgment.

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SOUTH AFRICAN REDUCTION CO. v. PECK.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 837.

1. DAMAGES—BREACH OF CONTRACT—NECESSITY OF CERTAINTY OF PROOF.

Plaintiff corporation, pursuant to a contract, issued to defendant all but \$500 of its \$1,000,000 of stock, and also gave him its obligation to pay him \$65,000 from its first net profits. In consideration thereof defendant assigned to plaintiff all rights in the Transvaal, South Africa, to certain inventions patented by him in the United States relating to a plant for the reduction of ores. He also agreed to construct a plant in the Transvaal embodying such inventions within a specified time, at his own cost and expense. The contract contained no provision as to who should own such plant when constructed. It was not built, and plaintiff never owned any mine, ore, or other property or engaged in any business. *Held* that, conceding that plaintiff was to own the plant, it could not recover substantial damages for defendant's breach of the contract, in the absence of evidence showing the cost or value of the plant, or that the obligation given therefor was of any value, the profits which plaintiff might have made had the plant been constructed being purely speculative.

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

The plaintiff in error, plaintiff below, was incorporated May 28, 1895, with a capital stock not exceeding \$1,000,000, in shares of \$100 each. On May 31, 1895, it entered into the following contract with Orrin B. Peck and with Charles V. Peck:

"Whereas, Orrin B. Peck, of Chicago, Illinois, is the inventor of certain inventions, improvements, processes, and machinery for the centrifugal concentration of ores, tailings, slimes, and other substances for which letters patent of the United States have been issued; and whereas, said Orrin B. Peck is the owner of the title to said inventions, improvements, processes, and machinery for the territory known as the Transvaal, South Africa, said Orrin B. Peck holding said title for himself and for Charles V. Peck; and whereas, the South African Reduction Company, a corporation organized under the laws of the state of West Virginia, wishes to purchase said inventions, improvements, processes, and machinery, and the right to apply for letters patent therefor, in and for the territory of the Transvaal, South Africa; and whereas, said company is willing to pay therefor to said Orrin B. Peck and Charles V. Peck nine thousand nine hundred and ninety-five (9,995) full paid and nonassessable shares of stock of said company, and also sixty-five thousand dollars (\$65,000), as hereinafter set forth: Now, therefore, in consideration of the mutual agreements herein and one dollar (\$1) paid by each of the parties hereto to the other, and other valuable considerations moving from each of the parties to the other, receipt of all of which is hereby acknowledged, said Orrin B. Peck and Charles V. Peck, parties of the first part, agree with said South African Reduction Company, party of the second part as follows: (1) Said Orrin B. Peck and Charles V. Peck have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over, unto the said South African Reduction Company, all the right, title, and interest which said Orrin B. Peck and Charles



V. Peck have in and to said inventions, improvements, processes, and machinery for, within, and throughout the said territory of the Transvaal, South Africa, which inventions, improvements, processes, and machinery are more fully described in certain letters patent, and applications for letters patent, in the United States, as follows: (Here follows a list of thirty-seven patents.) To have and to hold the same to the said South African Reduction Company, its successors and assigns, for its and their own use and behoof, to the full end of the term for which letters patent may hereafter be issued in said Transvaal, South Africa, as fully and entirely as the same could or would have been held and enjoyed by said Orrin B. Peck and Charles V. Peck had this assignment not been made. (2) Said Orrin B. Peck and Charles V. Peck represent and guarantee jointly and severally that they hold full title for said inventions, improvements, and processes for said territory of the Transvaal, South Africa. (3) Said Orrin B. Peck agrees to construct and complete and put in operation in the Transvaal, South Africa, all at his own expense, within four months from the date hereof, one centrifugal reduction or concentrating plant constructed in accordance with said invention, improvement, processes, and machinery, so far as the same are embodied in the present machine in operation at Eureka Mill, Virginia City, Nevada (with such additional improvements as may be considered advantageous), the said plant to be so put in operation in the Transvaal to be of the capacity of not less than three hundred tons per twenty-four hours. Delays due to fires, accidents, or strikes, or other unavoidable causes, shall extend said four months to that extent. (4) The said South African Reduction Company agrees to deliver to said Orrin B. Peck and Charles V. Peck upon the execution and delivery of this contract nine thousand nine hundred and ninety-five full paid and nonassessable shares of stock of said company, of the par value of one hundred dollars each. (5) Said South African Reduction Company also agrees upon the execution and delivery of this contract to deliver to said Orrin B. Peck an instrument in writing, signed by said company, whereby said company agrees to pay to said Orrin B. Peck or order sixty-five thousand dollars (\$65,000), with interest at the rate of six per cent. per annum, said payment, however, to be made only out of the net earnings of said company, and said payment to be made out of the first net earnings of said company. Said company also agrees, at any time that when said instrument in writing is presented to it by any person to whom it has passed by assignment, to issue a new instrument in writing to said assignee, similar in terms to the original instrument issued to said Orrin B. Peck and in lieu thereof. In witness whereof the parties of the first part have signed their names hereto, and the party of the second part has caused its name to be signed hereto by its president, and its seal to be attached by its secretary, this 31st day of May, 1895.

"Orrin B. Peck.

"Charles V. Peck.

"South African Reduction Company,

"By Harry F. Hawkins, President.

"Attest: Chas. P. Bruch, Secy.

"[Seal of Company.]

"Witness: Edward C. Platt, Joseph J. Cardona."

On the same day stock to the amount of 9,995 shares was issued to Orrin B. Peck and Charles V. Peck, and the company delivered its obligation for sixty-five thousand dollars, as follows:

"Jersey City, N. J., May 31, 1895.

"The South African Reduction Company hereby promises to pay to the order of Orrin B. Peck and Charles V. Peck sixty-five thousand dollars (\$65,000), with interest at the rate of six per cent. (6%) per annum, such payment to be made out of the first net profits of this company, and is to be made forthwith in partial payments as fast as such net profits are received. No lien shall be put on this company's property and assets ahead of this debt, but this debt shall constitute a first lien thereon.

"South African Reduction Company,

"By Harry F. Hawkins, President.

"Chas. P. Bruch, Secy. & Treasr."

The action is brought against Orrin B. Peck for nonperformance of the contract for failure to construct or put in operation in the Transvaal the plant described in the contract, although the time limited therefor had then long since expired. The declaration averred with respect to damages for the breach: "By means whereof plaintiff says that it has been deprived of said plant and the value thereof, and of the cost of putting said plant in operation in said territory of the Transvaal in South Africa, and has lost divers gains and profits which would have accrued to it from the construction and operation of said plant in accordance with the provisions of said contract, and has sustained damage amounting in all to the sum of eighty thousand dollars."

The testimony produced by the plaintiff and preserved in the bill of exceptions proves beyond contention that the defendant utterly failed to perform his contract with respect to the construction of and putting in operation the centrifugal reduction or concentrating plant. The only showing upon the question of damages consisted of statements with respect to a conversation prior to the incorporation of the plaintiff, but presumably in anticipation of a projected incorporation, had by the defendant with two witnesses who subsequently became the owners by purchase from the defendant of a large portion of the capital stock of the plaintiff and also of the obligation of the corporation for \$65,000. They stated that the defendant said to them that he estimated that it would cost \$65,000 to construct, transfer, and set up such a plant in the Transvaal, which estimate one of them pronounced extravagant. This witness testified: "It is difficult to state the entire amount that has been actually lost by reason of Peck's failure to carry out the contract, because if they had started with machinery at that time it would have been a very valuable plant; and so we supposed that the company certainly lost \$65,000 and interest, and also lost whatever profits it might have made by the carrying out of the contract; and the witness is satisfied that it would have been a great success if Peck had gone at it as first proposed, and not only would it have been a great success, but they could have sold it for a large sum of money. I cannot estimate what it would have been worth." He also testified that the stock of the plaintiff company is of no value whatever, and that the company has no property and is not doing any business; that the company has been abandoned by reason of Peck's failure to carry out his contract. At the close of the plaintiff's case the defendant declined to present any evidence, but moved the court to find and adjudge that the plaintiff is entitled to nominal damages only, and that a judgment be entered in favor of the plaintiff and for nominal damages. The court sustained the motion, and assessed the plaintiff's damages at one cent; to which ruling the plaintiff excepted, and the judgment thereupon entered for the plaintiff for nominal damages is brought by writ of error to this court for review.

Horace K. Tenney, for plaintiff in error.

Thomas A. Banning, for defendant in error.

Argued before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). It is clear that the plaintiff company was formed to exploit in the Transvaal the Peck inventions. It acquired the right to them within that territory, they being then unpatented there. For them it paid all of its capital stock of \$1,000,000, except to the amount of \$500. It had no other property. It owned no mine or real estate in South Africa, or ores, tailings, or slimes, the product of mines. There is nothing to indicate an intention or ability to purchase or operate mines, or to use the plant to be set up and put in operation, otherwise than as a demonstration of the value of the inventions in the treatment of ores. The contract

in some respects is a remarkable one. Its omissions, if casual, indicate neglect upon the part of its writer; if designed, they throw a flood of light upon the subsequent sale of the worthless stock and obligation of the company. It is difficult to say if the obligation for \$65,000, payable out of the net earnings of the company, was given as part consideration for the inventions, or for the plant which the defendant agreed to construct. The preamble of the contract would imply the former; the latter may be inferred from the fact that the inventions were purchased from Orrin B. and Charles V. Peck, and the stock was to be and was issued to them jointly, while the defendant alone contracted for the construction and putting in operation of the plant. The obligation for \$65,000 was to be made payable to and to be delivered to him individually, and the amount corresponds with the estimate of the cost made by the defendant prior to the contract. And yet the obligation was in fact made payable to both the defendant and to Charles V. Peck.

Some curious questions arise upon the face of this contract. Who was to own the plant when constructed? Where in the Transvaal was it to be set up, and who was to determine where? Who was to furnish work for it to do? Who was to operate it, and, if the defendant, how long was it to be operated by him? Any longer than to determine its capacity? Did the contract contemplate that land or a mine was to be purchased that the plant might be operated, and by whom to be purchased, and where was it to be located? If the obligation for \$65,000 was for the purchase price of the plant, some of these questions could be solved; if otherwise, the questions remain at large, unsolved upon the face of the contract. In the view we are constrained to take upon the subject of the measure of damages in the light of the evidence, we need not undertake their solution.

Damages are awarded for breach of contract in compensation, as an equivalent in money for actual loss suffered from the breach, "the value in money of what is lost or withheld. The vendee is, if possible, to be placed in the same situation with respect to damages as if the contract had been performed, so far as that can be done by pecuniary compensation." *Robinson v. Harman*, 1 Exch. 855. Ordinarily the vendee of an article sold and not delivered agreeably to contract, and who has not paid in advance the contract price, has sustained no loss unless the article has risen in value, because he must pay the price, and would therefore gain nothing by its delivery. If he has paid for the article in advance of delivery, the measure of damages may be the price paid, although that is not conclusive (*Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139), or the cost of supplying the article if obtainable in the market. With respect of a breach of contract for delivery of articles for special purposes, known to the person or party contracting, compensation may be awarded for such loss as might reasonably be supposed to have been in the contemplation of both parties as the result of nonperformance, if capable of ascertainment. If the article be not procurable in the market, the parties must be presumed to have contracted with reference to the declared purpose for which that article was to have been furnished,

and that purpose should be considered in estimating the damages. *Manufacturing Co. v. Gray*, 129 N. C. 438, 40 S. E. 178, 57 L. R. A. 193. But in all cases there must be adequate proof of the resulting loss. The loss must be one which springs directly from the nonfulfillment of the contract. It must not rest in conjecture. It must be ascertainable and established by evidence to a reasonable degree of certainty.

Applying these principles to the case in hand, what loss is shown to have been incurred by the plaintiff? The venture was a purely speculative one, the plant to be constructed being manifestly designed to demonstrate the supposed usefulness of the new method for the centrifugal concentration of ores, tailings, etc., with a view to the selling of rights to be patented in South Africa. Assuming, what would seem to be the most favorable construction of the contract for the plaintiff, that the obligation of the company for \$65,000 was given to the defendant as the price of the plant, the value of that obligation would be the amount paid in advance for the plant to be constructed, and would seem to be, in the absence of proof of other direct injury, a proper measure of damages. That obligation was payable out of the net earnings of the company; its value rested in speculation; it was contingent and uncertain; and there is no evidence here that it is worth anything. The testimony of the purchaser of it is that it is worth nothing. The value of the machine is not proven. We cannot think that the defendant's estimate of its cost, protested against as extravagant by the interested parties who were to and who did purchase the stock and the obligation, should furnish a criterion of its value. The cost might or might not bear relation to the value of the plant. When transported to and put up in South Africa it might or might not be worth more than old iron. That would be dependent upon many contingencies. It might prove to be valuable if the patents to be obtained should cover desirable inventions, and the mine owners of that country could be induced to believe it; but the cost of the manufacture of the plant and of its transportation and setting up somewhere in the vast territory of the Transvaal, even if we accept the estimate of the defendant, would furnish no proper criterion of the value of the plant at the place of delivery.

The difficulty with the case is the utter absence of testimony proving loss. The plaintiff did not upon default of the defendant furnish itself with such a plant. There is no evidence of the value of that which it is claimed was given for the plant. There is no evidence of loss sustained. The expected profits which were to arise from the sale of the right to the inventions when patents should be issued are purely speculative, uncertain, and no standard can be furnished by which to measure them. In such a case as the present, where the damages resulting are so purely speculative, it is allowable to the parties contracting to liquidate damages in anticipation of the breach. Failing so to do, it is incumbent upon the party complaining of the breach to prove the resulting loss. There being no such proof here, we find no error in the ruling of the court below.

The judgment will be affirmed.

## In re J. C. WINSHIP CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 924.

**1. BANKRUPTCY—CLAIMANT OF PROPERTY—EFFECT OF COMPOSITION WITH CREDITORS.**

A corporation against which a petition in involuntary bankruptcy had been filed, on which a receiver was appointed, effected a composition with its creditors, which was confirmed by the court, and carried out, leaving in the custody of the court certain personal property, which was in controversy between the receiver and one claiming the same as a lessor of the corporation under a lease which the receiver claimed was void as against creditors under the state statute as a secret lien. No adjudication of bankruptcy was made, or trustee appointed. *Held* that, whatever the rights of the lessor petitioner, as against creditors, it was entitled to the property on the consummation of the composition, leaving no other claimant except the alleged bankrupt, which could not assert the rights of its creditors whose claims had been extinguished.

**2. SAME—RIGHT TO PROPERTY IN CUSTODY OF COURT—PROCEEDINGS TO DETERMINE.**

The question of the right to property or funds in custodia legis is one which the bankruptcy court may summarily determine without the formality of technical pleadings.

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

A petition in involuntary bankruptcy against the J. C. Winship Company, a corporation, was filed November 1, 1901, and on the same day a receiver was appointed, who took possession of the property of the bankrupt, including three printing presses, the subject of contention here. On November 7, 1901, Walter Scott & Co., the present appellant, petitioned the court that the receiver return to it the three printing presses which had been delivered by it into the possession of the J. C. Winship Company under a lease between the petitioner and the bankrupt, dated August 1, 1899, by which they let and hired for use to the bankrupt the three printing presses mentioned for the term of 51 months, commencing October 25, 1899, and ending January 25, 1904, upon the rental for the term stated of \$10,100, which was the full value of the presses at the time, and was payable in certain installments stated, and for which the notes of the lessee were taken; the right of the lessor being preserved, in case of default in payment of any of the installments, to re-enter into the possession of the printing presses, which were not to be removed by the lessee from its place of business without the written consent of the lessor. The lease provided for surrender of the property at the end of the term, the presses to be insured by the lessee, the policies being payable to the lessor, and deposited with it. The lease provided in terms that it was not to be, and in fact it was not, recorded. The return was demanded upon a showing of failure to pay certain installments of rent specified in the lease. The receiver answered the petition to the effect that the instrument of lease was executed for the purpose of creating and preserving a secret lien upon the property in favor of Walter Scott & Co. and in fraud of the creditors of the bankrupt; that the transaction was in fact a sale to the bankrupt; that the instrument of lease is, in effect, a chattel mortgage, and void, and that the J. C. Winship Company had been in the open and notorious possession of the presses from the date of delivery to it. The matter of the intervening petition was referred to a master, who heard testimony thereon, and reported on December 14, 1901, that the lease, so called, was given with a design on the part of the parties thereto to give a secret lien to the petitioner, which is not countenanced by the laws of the state of Illinois; that it was not a lease in fact, but was, in effect, a chattel mortgage, and was void as to creditors. On December 14, 1901, the court entered an order overruling the exceptions filed to the master's report; from which an appeal was taken by the petitioner to this court, where the appea-

was dismissed as premature, the order overruling the exceptions being held to be interlocutory, and not final. *Walter Scott & Co. v. Wilson* (C. C. A.) 115 Fed. 284. On December 4, 1901, the court entered an order in the bankruptcy proceeding directing the receiver to advertise for sale all the right, title, and interest of the receiver in the assets of the bankrupt then in his possession, the bids to be submitted to the court on the 14th of December following. The special master to whom was referred the matter of the bids and the sale thereunder, on December 16, 1901, reported the appraised value of the plant to be \$18,180.01; that the three presses in controversy here were included in that appraisement; that the best bid which he had received was from one Frederick S. Hebard for the assets included in the appraisement, the sum of \$15,500, \$10,500 of which to be paid absolutely, and \$4,500 to be deposited with the receiver in payment of the three Scott presses in controversy, to be refunded by the receiver in the event the three presses should be determined on appeal not to be the property of the receiver; and he thereupon made sale to Hebard of the assets upon the terms stated, subject to the approval of the court. On December 16, 1901, the court confirmed the sale as stated, and entered an order that if, upon final appeal, the prayer of the petitioner *Walter Scott & Co.* should be granted, the purchaser should return the three presses described in the petition to the receiver, or to the trustee thereafter to be chosen, and the sum of \$4,500 paid therefor should be returned to the purchaser, which sum was ordered to be held to await the determination of such appeal by *Walter Scott & Co.* Afterward, on April 22, 1902, a composition offered by the bankrupt was accepted by a majority in number of its creditors whose claims had been allowed, and of such allowed claims, and the amount of money required by law to be deposited was deposited as designated by the judge of the court, and subject to his order, and it was decreed that the composition be confirmed. The composition was carried into effect, and the creditors whose claims had been filed and allowed were paid according to the terms of the composition; and on April 30, 1902, upon a showing to that effect, the bankruptcy court ordered that the clerk return the balance of the composition fund remaining in his hands to the bankrupt. On May 12, 1902, the court ordered that the \$4,500 so held by the receiver be retained by him, and not paid over to the bankrupt. On the 13th of May, 1902, the mandate of this court dismissing the appeal of *Walter Scott & Co.* was filed in the bankruptcy court, and thereupon *Walter Scott & Co.* asked leave to file a supplemental petition for an order vacating the order of December 14, 1901, overruling the exceptions to the referee's report upon the original petition, and for a rehearing of the matter, upon the ground that the bankrupt had compounded with his creditors with the approval of the court, and they had been satisfied; that certain of the funds paid in by the bankrupt to effect the composition had been ordered returned to it; that the sale of the bankrupt's assets had not been consummated with respect to the printing presses claimed by petitioner, and that they were still subject to the order of the court; and that, as against all parties at present interested in the subject-matter, the petitioner was legally and equitably entitled to immediate return of the possession and control of the property mentioned; and that neither the receiver nor the bankrupt, as against the petitioner, had any claim whatever to the possession and control of the printing presses. On July 30, 1902, the court denied leave to file the supplemental petition, overruled the petition for a rehearing of the original order, and decreed the dismissal of the original intervening petition. No adjudication of bankruptcy was made in the cause, and no trustee appointed. From the decree of July 30, 1902, *Walter Scott & Co.* appeal to this court.

James F. Hutchinson and John A. Henry, for appellant.  
Geo. H. Peaks, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The questions argued at the bar or suggested by the record are interesting, and of moment to the profession and to the administra-

tion of the bankruptcy law. These are: (1) Whether the lease, so called, of the printing presses, can be impugned, and shown to be in effect but a chattel mortgage. (2) Whether, if to be considered a chattel mortgage, and void as to creditors for failure to record it, the transaction may be attacked by any one other than a purchaser in good faith or an execution or attaching creditor. (3) Whether an adjudication of bankruptcy is such a sequestration of the property of the bankrupt that it clothes the trustee and general creditors with the rights of execution or attaching creditors or of a bona fide purchaser; and therein, incidentally, whether the trustee could avoid the instrument in favor of the general creditors, or only of execution or attaching creditors. (4) Whether the filing of a petition in bankruptcy in the absence of adjudication and appointment of trustee works such sequestration, so that a receiver can assert the rights either of general or of execution or attaching creditors.

The considerations which constrain our judgment render unnecessary, at this time, a determination of the important questions suggested. The property in dispute passed to the possession of the receiver. It is in custodia legis. The court, whether one of common law, of equity, of admiralty, or of bankruptcy, having such possession, has the right, and it is its duty, to restore that possession to whomsoever it lawfully belongs. No determination of that question was made by the court below until this decree of July 30, 1902. Prior to that time a sale had been made by the receiver under the order of the court of the property of the alleged bankrupt, as recited in the statements of facts, which authorized the sale of "the right, title, and interest of the receiver" in the three printing presses, subject, however, to the final determination by this court of their ownership. The purchaser bought with knowledge of the situation, and was carefully protected against loss by provision in the order confirming the sale that he should return the presses if so directed, and receive from the court the amount of his bid, which was and is retained by the court. Prior, also, to this decree of July 30, 1902, the alleged bankrupt compounded with his creditors as provided by the act (30 Stat. c. 541, § 12 [U. S. Comp. St. 1901, p. 3426]). The composition was confirmed by the bankruptcy court, which act discharged the debts (30 Stat. c. 541, § 14c [U. S. Comp. St. 1901, p. 3427]), and all creditors who had proved their claims received the amount to which they were entitled. There was then no one before the court but the receiver, the appellant, and the alleged bankrupt. The property remaining, with the exception of the three printing presses, or the amount bid therefor, had, by order of the court, been returned to the alleged bankrupt. The creditors had ceased to have any interest in the estate, and the question remaining for determination by the court was with respect to the disposition by the receiver of the three printing presses, or the amount bid for them. Either the appellant or the alleged bankrupt was entitled. The receiver had no interest. He was a mere care-taker. He had no title. "If in any sense a trustee, he is trustee for the bankrupt, in whom is the title to the property until it passes by operation of law, as of the date of adjudication, to the trustee selected by the creditors." Bank v.

Blakey, 47 C. C. A. 43, 48, 107 Fed. 891. There was here no adjudication of bankruptcy, no passing of title by operation of law. The title remained in the alleged bankrupt, the possession of the property in the court. The contention here for the possession of this property is manifestly between the appellant and the alleged bankrupt. Beyond all controversy, as between these two parties the appellant is entitled to the property. The instrument in question, whether it be deemed a lease or a chattel mortgage, placed the title to the printing presses in the appellant. Assuming—but not deciding—that it could have been avoided by general creditors, it was valid between the parties. It would be mockery of justice to say that the alleged bankrupt may claim through and in the right of creditors whose debts have been paid and discharged; that he may avoid a transaction, valid as to himself but voidable as to creditors, in the right of nonexistent creditors. The court below proceeded upon the theory that the appellant could not avail itself of the fact of composition with creditors, and is only entitled to be placed in the position it would have occupied had the decree dismissing the original petition been entered at the time of the overruling of the exceptions to the master's report. Therein we think the court erred. Having this property in possession, with no claim upon it except that of the appellant and the alleged bankrupt, the question arose as to its disposition by the court at the time the decree was actually entered; not what the rights of the appellant might have been at the time of the report of the referee, when there were creditors before the court. The question is not one of technical pleading. It is one concerning the disposition of property in custodia legis, taken for the benefit of creditors, and which it was no longer necessary to hold for them. It is a question whether the alleged bankrupt, having compounded with its other creditors, should be permitted to assert their rights to enable it to defraud the appellant out of property held under an instrument valid as between the parties thereto. It is a matter to be determined by a summary showing of the situation, and no technicality should be permitted to intervene to prevent a just determination of that question. The court of bankruptcy is a court of equity. It should have acted sua sponte, the facts being manifest upon its record. If formality was essential, the supplemental intervening petition of the appellant setting forth the facts apparent upon the record should have been allowed to be filed, and should have been effectual to prevent the entry of the final decree dismissing the original intervening petition.

It is suggested by the receiver that the appellant could not determine the lease after default by the lessee, and be entitled to take possession of the property without a tender of the notes representing the rental for the presses. If this be matter of which the receiver can avail himself, it is sufficient to say that by the composition the debt represented by the notes is discharged, or, if otherwise, that the court below, in carrying into effect the mandate of this court, can, as a condition of the return of the printing presses to the appellant, require the surrender of such of the notes as in amount are in excess of the rental accrued and accruing to the date of the final decree to be rendered in pursuance of the mandate.



The decree is reversed, and the cause is remanded, with a direction to the court below to enter a decree, at the election of the appellant, that the three printing presses be returned to it, and that the \$4,500 in the registry of the court be returned to the bidder at the sale; or that the appellant, if it shall elect to confirm the sale, be paid the \$4,500.

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WILMINGTON STEAMBOAT CO. v. WALKER et ux.

(Circuit Court of Appeals, Third Circuit. February 2, 1903.)

No. 40.

**I. CARRIERS—ACTION FOR INJURY TO PASSENGERS—QUESTIONS FOR JURY.**

In an action for the personal injury of a passenger on defendant's steamboat, due to a failure of a part of the boat's machinery to operate, where it was shown that certain nuts were loose, and needed frequent attention, and the evidence as a whole presented a substantial question as to whether, if they had been properly examined before the disaster, it might not have been avoided, the question of defendant's negligence was properly submitted to the jury.

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

John H. Backes and A. E. Peterson, for plaintiff in error.

Eugene Raymond, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This writ of error has brought up the record in an action by the defendants in error, Andrew C. Walker and Martha Walker, his wife, against the plaintiff in error, the Wilmington Steamboat Company, to recover for personal injuries sustained by Martha Walker while she was a passenger on a steamboat operated by the said steamboat company, and for losses and expenses suffered and incurred by Andrew C. Walker in consequence thereof. The court below was requested to instruct the jury to find for the defendant, and the only specification which seems to be insisted upon or which merits consideration is to the effect that the learned judge erred in refusing that request.

It was conclusively shown that Mrs. Walker was a passenger on the steamboat, and that the accident which occasioned her injury was caused by the failure of a part of its machinery to operate; and thereupon the burden was cast upon the defendant to prove that this failure was not due to any lack of due care on its part. That this burden was not sustained to the satisfaction of the jury is shown by its general verdict, and also by its special findings. But the verdict is not reviewable here, and therefore that considerable portion of the plaintiff's brief which invokes our consideration of the weight or preponderance of the evidence is not pertinently directed. The true and only question now for decision is, was there any evidence upon which the verdict which was rendered could reasonably have been founded? And upon that question we have no doubt. It was testified by the defendant's engineer that the immediate cause of the accident was the failure

of the port reversing cylinder to reverse the port engine, and the only point upon which there could have been or was any real controversy was as to whether this failure of the cylinder to act as it should have acted did or did not result from a condition which could have been foreseen, and ought to have been prevented. The theory of the defendant was that the difficulty arose from a small piece of rubber packing having become lodged in a certain valve, and that this was a latent and hidden source of mischief, which could not have been provided against. There was some testimony tending to support this theory, but the engineer himself stated that a certain jam nut had been slack, and that such nuts needed to be examined once or twice a day; and the evidence as a whole presented a substantial question as to whether, if they had been properly examined before the happening of the disaster, it might not have been avoided. That question was certainly for decision by the jury, and therefore was, of course, rightly referred to it. The judgment is affirmed.

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**MULLIGAN v. UNITED STATES.**

(Circuit Court of Appeals, Eighth Circuit. February 2, 1903.)

No. 1,638.

**1. CRIMINAL LAW—VARIANCE.**

The fact that a person belongs to both the class specified in an indictment and to another class does not constitute a fatal variance between pleading and proof.

**2. SELLING LIQUOR TO AN INDIAN ALLOTTEE OR PATENTEE IS AN OFFENSE.**

The sale of liquor to an Indian who has an allotment or patent to land which the United States holds in trust for him under the act of March 2, 1889 (25 Stat. c. 405, § 11, p. 891), is a public offense under the act of January 30, 1897 (29 Stat. c. 109, p. 506).

(Syllabus by the Court.)

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

Alfred L. Redden, Edwin D. McKeever, and Richard F. Hayden, for plaintiff in error.

J. S. Dean, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The act of Congress of January 30, 1897 (29 Stat. c. 109, p. 506), provides that any person who shall sell any malt, spirituous, or vinous liquor "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under the charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government through its departments exercises guardianship," shall be punished by imprisonment for not less than 60 days and by a fine of not less than \$100. The plaintiff in error, Edward Mulligan, was indicted and convicted under this act of selling liquors to one Pat Ko-Shuck, "being," as the indict-

ment declares, "then and there an Indian, and a member of the prairie band of Pottawatomie Indians, and a ward of the Government, under the charge of W. R. Honnell, an Indian agent." The proof was that Pat Ko-Shuck was an Indian of the prairie band of Pottawatomie Indians, and a ward of the Government, under the charge of W. R. Honnell, an Indian agent, and that he was also an Indian to whom an allotment of land had been made the title to which was held in trust by the Government under the act of March 2, 1889 (25 Stat. c. 405, § 11, p. 891).

The plaintiff in error assails the judgment of conviction on two grounds: (1) That there was a variance between the pleading and the proof; and (2) that the sale of liquors to an Indian who has received an allotment and become a citizen is not an offense.

It is insisted that there is a variance between the pleading and the proof because the statute declares that it shall be an offense to sell liquors (1) "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government," or (2) "to any Indian a ward of the Government under charge of an Indian superintendent or agent," and the indictment charged that Pat Ko-Shuck, to whom the liquor was sold, was an Indian of the latter class, when the proof showed that he belonged to both classes. But this constitutes no variance. The purpose of an indictment is to inform the defendant of the offense with which he is charged. The charge in this pleading did not fail to accomplish this purpose. It truthfully described the Indian to whom the liquor was sold, and the proof perfectly corresponded with the allegation. A variance is an essential difference between the pleading and the proof. There was no such difference between the charge in the indictment and the evidence in this case. The fact that the Indian fell in two classes of persons to whom the plaintiff in error was prohibited from selling liquor in no way relieved him from his liability for selling it to him as a member of the class described in the indictment and in the statute.

The second objection to this conviction is that under the act of February 8, 1887 (24 Stat. 388), the Indian became a citizen of the United States when he received his allotment and patent under the act of March 2, 1889 (25 Stat. c. 405, § 11, p. 891), and that it was not in the power of Congress by the act of 1897 to prohibit the sale of liquor to him, and thus to deprive him of one of the privileges and immunities of citizenship. The question here presented was thoughtfully considered by this court in *Farrell v. United States*, 110 Fed. 942, 49 C. C. A. 183, where it was held that the privilege of buying whisky at all times and in all places is not one of the rights, privileges, or immunities of citizenship within the meaning of the Constitution of the United States, and that the act of 1897, prohibiting the sale of liquor to Indian allottees or patentees while the United States holds the title to their lands in trust for them, is constitutional and valid. The argument of counsel for the plaintiff in error in this case presents nothing of importance which was not considered in that case, and we adhere to the conclusion there reached.

The judgment below is affirmed.

In re BUTLER.

(District Court, N. D. Georgia. October 22, 1902.)

No. 895.

**1. BANKRUPTCY—EXEMPTIONS—ALLOWANCE FROM PROPERTY NOT PAID FOR.**

A bankrupt cannot be denied his right to claim property as exempt under the laws of Georgia because the same has not been paid for, where the claim of the creditor has not been reduced to judgment, and no steps have been taken to fix a lien on the property for the purchase money, except by asking in the objections to the allowance of the exemption that such lien be established.

In Bankruptcy. On question certified by referee.

J. Z. Foster and E. P. Green, for objector.  
Mosley & Weaver, for bankrupt.

NEWMAN, District Judge. In this case G. D. Anderson, referee in bankruptcy, certifies to the court a case which is substantially as follows: The bankrupt was a merchant, and bought from a creditor, J. Regenstein, a bill of goods, a month or more before the commencement of the proceedings in bankruptcy. The bankrupt claimed the exemption allowed by the constitution and laws of Georgia out of the stock of goods, making an itemized list of the articles which he desired to have set apart by the trustee. Some of these items were identified by a representative of the creditor, J. Regenstein, as goods sold by his firm to the bankrupt. Objection was then made to the allowance of the homestead on this ground. The creditor has simply an open account against the bankrupt, which has never been reduced to judgment. He proved his debt in bankruptcy. The creditor objects to the exemption being set apart, so far as it embraces goods sold by him to the bankrupt. He has not taken out an attachment for purchase money, or endeavored, through the bankruptcy proceedings, to fix such a lien on the goods identified. He objected originally to the allowance of the exemption in the goods sold by him on the ground that none of the purchase money had been paid, and asked that the goods be delivered to him. By amendment recently filed he claims that the purchase money is due, and asks that he be given a purchase money lien, and that the exemption be denied.

I think the referee correctly decided that no case was made which justified him in denying the exemption. In a recent case (*Graham v. Richerson* [Ga.] 42 S. E. 374) the supreme court of Georgia has decided this: "If there be no judgment and execution, the question whether or not the exemption is subject for the purchase money cannot arise,"—citing *Hoskins v. Wall*, 77 N. C. 249.

It is unnecessary to decide whether in a proceeding in bankruptcy a person selling goods to the bankrupt, and who has purchase money due him on part of the stock, can, by some suitable proceeding, establish a lien for purchase money analogous to an ordinary attachment in the state court for purchase money. No such proceeding was attempted in this case. All that was done was by amendment to the objections to the allowance of the exemption in which it is said that the

purchase money is due, and asking that a lien be set up. It is not under oath, and is made by way of objection to the allowance of the exemption, and is, to my mind, not sufficient, even if it comes in time, which is doubtful, and even if such a lien can be established in bankruptcy at all, which is not determined.

The action of the referee is approved.

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In re STONE.

(Circuit Court, N. D. Georgia, N. W. D. June 7, 1902.)

1. FEDERAL COURTS—HABEAS CORPUS—DISCHARGE OF STATE PRISONER.

It is the settled rule that a federal court will not discharge a prisoner convicted in a state court, by writ of habeas corpus, on the ground that his conviction was in violation of the constitution of the United States, except in cases of emergency where some special reason exists, but will leave him to prosecute his remedy by writ of error.

On Petition for Writ of Habeas Corpus.

R. T. Wright, for petitioner.

J. S. James, for respondent.

NEWMAN, District Judge. The petitioner in this case must be remanded to the custody of the state court. He was convicted in the state court for the offense of peddling without a license, and on conviction he was sentenced to pay a fine of \$25, or be imprisoned for three months. He asks to be discharged on habeas corpus, because his conviction was in violation of the interstate commerce clause of the constitution of the United States.

The last case decided by the supreme court of the United States (Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 640), as well as the preceding cases on the subject, cited in the opinion, are absolutely controlling in this matter. The rule on the subject stated in the case of Minnesota v. Brundage, which is but a reaffirmance of many former decisions, is this:

"But the power of the federal court upon habeas corpus to discharge one held in custody by state officers or tribunals in violation of the constitution of the United States ought not to be exercised in every case immediately upon application being made for the writ. Except in cases of emergency, such as are above defined, the applicant should be required to exhaust such remedies as the state gives to test the question of the legality, under the constitution of the United States, of his detention in custody."

In a former case of Markuson v. Boucher, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124, the syllabus is:

"It is again held that judgments of the state courts in criminal cases should not be reviewed by federal courts through writs of habeas corpus, but the proper remedy in such case, when it is claimed that some right under the constitution of the United States has been denied the person convicted, is by writ of error."

It is thereupon ordered that the petitioner, A. S. Stone, be remanded to the custody of the sheriff of Polk county.

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¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. § 44.  
Jurisdiction of federal courts in habeas corpus proceedings, see note to In re Huse, 25 C. C. A. 4.

## UNION PAC. R. CO. v. RUEF et al.

(Circuit Court, D. Nebraska. November 8, 1902.)

No. 36.

1. **INJUNCTION—LABOR STRIKE—ACTS OF VIOLENCE AND INTIMIDATION.**  
The action of labor organizations whose members are engaged in a strike, in undertaking to prevent the employer from carrying on its business by preventing other men from entering or remaining in its service by assaulting them or intimidating them by means of picketing, or by threatening them or their families to such an extent that such employes are afraid to go to or from their place of work, is an illegal invasion of both the property rights of the employer and the personal rights of its workmen, which a court of equity will enjoin where there is no adequate remedy at law.
2. **SAME—PROTECTING RIGHT OF CONTRACT.**  
The law upholds and will protect the right of freedom of contract between employer and employe; the right of every person or corporation to hire and discharge men at pleasure, subject to liability for damages for breach of contract, and the right of every man to work or to quit work at his pleasure, subject to the same liability, making no distinction between union and nonunion workmen.
3. **SAME—PICKETING.**  
Picketing by a labor organization whose members are engaged in a strike, in and of itself, where properly conducted, is lawful; but when accompanied by violence, or any manner of coercion or intimidation, to prevent others from entering or remaining in the service of their employer, it is unlawful.
4. **SAME—EQUITY JURISDICTION—VIOLATION OF CRIMINAL LAW.**  
That assaults committed and threats of violence made by strikers may be subject to punishment under the criminal laws does not deprive a court of equity of jurisdiction to enjoin their continuance, when necessary to protect the complainant's property or business from civil injury.
5. **SAME—ACTS OF LABOR UNIONS—LIABILITY OF MEMBERS.**  
Where a labor organization whose members are engaged in a strike institutes a system of picketing around the works of the former employer, which results in acts of violence, and the use of threats and abusive language toward those working for such employer, some of such acts being committed by the pickets and others by their sympathizers, the effect of which, as intended, is to intimidate some of those against whom they are directed, and to prevent them from continuing in the employment, all members who participate in the establishment and maintenance of such picket, as well as those who personally participate in the unlawful acts, must be held chargeable with the results which experience has shown almost universally follow the maintenance of such system. Nor can such responsibility be escaped by merely instructing the pickets that they shall not commit any such unlawful acts, where the officers and members know that they are in fact committed, and take no steps to punish the guilty persons, or to discontinue the picketing, or even to exclude such persons from further service as pickets.
6. **SAME—ILLEGAL ACTS—EVIDENCE CONSIDERED.**  
Complainant, a railroad company, engaged in carrying interstate commerce and the mails, maintained a machine shop for the repair of its engines, cars, and equipment. A number of workmen, in different branches of service in such shop, including some of defendants, engaged in a strike, and left the employment. The organizations or unions to which the strikers severally belonged, acting in concert, instituted a system of picketing around the shop, and in the vicinity of its entrances, which was maintained for two months, and until the commencement of

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¶ 1. See Injunction, vol. 27, Cent. Dig. §§ 174, 175, 177.

the suit to enjoin the same. During that time upwards of 20 assaults were made upon persons working in the shop, in one instance resulting in the death of the person assaulted within a very few minutes. Threats and abusive language accompanied the assaults and were also used toward other workmen. The wives of some workmen were notified that their husbands would be injured if they did not quit work, and threats were made that they had been or would be photographed for future identification. As a consequence several of complainant's employes quit work, and it was compelled to keep and board others on its premises, and to maintain guards to protect its property. Some of the assaults were committed by strikers, others by sympathizers, and others by persons not identified. There was no evidence that any action was taken by either of the unions disapproving of the unlawful acts of its members, but, on the contrary, one striker, shown to have instigated and participated in a number of the assaults, was subsequently placed in charge of the pickets as captain. *Held*, that such facts established an unlawful conspiracy, and entitled complainant to an injunction against such defendants as were members of the unions which instituted and maintained the pickets, and such others as were shown to have participated in any of the unlawful acts of violence or intimidation.

**7. SAME—PARTIES NAMED IN DECREE—DISMISSAL AS TO INNOCENT DEFENDANTS.**

A court will not include, in its decree awarding an injunction against unlawful acts of striking employes of complainant and others acting with them, the names of defendants who were not in complainant's employ, and are not shown by the evidence to have participated in, or to have aided, abetted, or counseled, any of the unlawful acts complained of, but as to them the suit will be dismissed, although they will be held chargeable with knowledge of the terms of the injunction and bound by the same.

In Equity. Suit for injunction.

John N. Baldwin and Edson Rich, for complainant.  
C. J. Smyth and E. P. Smith, for defendants.

Before MUNGER and McPHERSON, District Judges.

McPHERSON, District Judge. This is a bill in equity brought against the defendants asking that they be enjoined from in any manner interfering with complainant's property, its business, or with its employes. The complainant is a corporation of the state of Utah. The defendants are all citizens of the state of Nebraska, excepting three, one of whom is a citizen of Wyoming, one of Illinois, and one of the state of Ohio. But, these three having entered a general appearance, the court must enter such decree as the pleadings and evidence require. The complainant is engaged in the operation of a railway extending from in Iowa, through Nebraska, with lines extending in or through five other states.

The material allegations of the bill are that at Omaha the complainant for many years has maintained shops for the repair of its engines, cars, and equipment. To keep said shops going, as well as the road, it is now, and for a long time has been, necessary to employ in said shops various classes of employes, such as boiler makers, blacksmiths, machinists, car repairers, car wheelmen, painters, helpers, and others. In June, 1902, or about that date, a large number of the boiler makers, machinists, and blacksmiths, theretofore in the employ of the company at its various shops, went out on what is commonly called a "strike." Thereupon it became necessary to

employ others to take the places of those on a "strike" to do the work in the shops as aforesaid. That the defendants, comprising in part the parties formerly at work in the shops in Omaha, together with others, since going out on said strike, have carried on a system of attack on complainant, and upon the parties at work in the shops, which attacks have been so persistent that the company has been compelled to employ guards at its own expense, endeavoring to protect its property and its employés in the shops. It is also alleged that the defendants, with others, have conspired to intimidate and terrorize those now in the service in the shops, to prevent them from working, and thereby prevent the motive power from being kept in condition to perform sufficient service, and particularly prevent the engines from being repaired, so that the company cannot get its freight, passenger, and mail trains over the road as required for proper and efficient service. And, to intimidate and terrorize the employés, a picket line is established at and near the said shops. Those now in its employment are cursed and reviled, and all manner of indecent language is hurled at them. The wives and children of the present shopmen are subjected to indecent language, and are threatened with bodily harm to those still in the shops at work. The pickets will follow the workmen as they leave the shops, and assault and knock down those now at work. These and other indecencies and brutalities are charged against those now on the strike and confederates towards those who seek to work in the shops, but they need not now be stated more in detail. But it is alleged that many of the employés have been so terrorized that they have quit work, and that the company has not only been put to great, and otherwise unnecessary, expense on account thereof, but that complainant's trains carrying freight and passengers, and particularly trains carrying the United States mails and interstate business, have been impeded and delayed, and its business hampered, damaged, and its service materially interfered with; and it is alleged that these things are to continue, as threatened by defendants and their confederates.

A restraining order as prayed was issued. The case was set down for hearing at an early day, as to whether a temporary injunction should issue. It was then ordered that the evidence should be taken before examiners, the same to be taken in shorthand and then transcribed. All this has been done, and the case fully argued.

The impression seems to prevail among many men, otherwise informed, that the issuance of injunctions is confined to the federal courts, while the state courts do not recognize "government by injunction" as it is termed. There is no other fallacy so generally entertained by a reading people, and occasionally by lawyers. But if all cases similar to this were presented with the high purpose that has been displayed by counsel on both sides in the case at bar we would have but little denunciation of the courts, and hear less about "government by injunction." Although counsel have so nearly agreed as to what the law is, thereby making substantial controverted questions in the case at bar questions of fact, it is incumbent upon us to each state both the law and the facts of the case as we understand them.



And this duty is the more obligatory because counsel have agreed that this hearing shall result in a final decree. The right to the great writ of injunction is precisely the same in the federal court as in the state court. But this court, before it can exercise jurisdiction, must have a case between parties of diverse citizenship, or this court must have a case presenting a "federal question." A federal question is presented in this case, because of the allegations that it is the purpose of defendants to impair the powers of the complainant to serve the public in carrying interstate commerce and in carrying the United States mail. And in both instances the amount involved must be in excess of \$2,000. But under the stipulations of the parties, and the undisputed evidence, this court takes jurisdiction on both grounds, and, the jurisdictional amount being involved, the question of how this case should be considered, and how decided, is precisely the same, whether in one court or another.

The following are some of the cases by the federal judges on the circuit in which the writ of injunction has been issued, some in cases of physical violence to employés, some in cases of injury to property, and others were cases of intimidation to and terrorizing of employés, but without actual physical violence, and some of the cases were those of habeas corpus, where the only question was as to the power to have issued the injunction. Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 730, 19 L. R. A. 387, by Judge Taft; Cœur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner (C. C.) 51 Fed. 260, 19 L. R. A. 382, by Judge Beatty; U. S. v. Elliott (C. C.) 64 Fed. 27, by Judge Phillips; Casey v. Typographical Union (C. C.) 45 Fed. 135, 12 L. R. A. 193, by Judge Sage; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C.) 90 Fed. 608, by Judge Hammond; U. S. v. Sweeney (C. C.) 95 Fed. 434, by Judge Rogers; Otis Steel Co. v. Local Union No. 218, of Cleveland, Ohio, of Iron Molders' Union of North America (C. C.) 110 Fed. 698, by Judge Wing; Blindell v. Hagan (C. C.) 54 Fed. 40, by Judge Billings; U. S. v. Workingmen's Amalgamated Council (C. C.) 54 Fed. 994, 26 L. R. A. 158, by Judge Billings; Elder v. Whitesides (C. C.) 72 Fed. 724, by Judge Parlange; Wire Co. v. Murray (C. C.) 80 Fed. 811, by Judge Sage; Mackall v. Ratchford (C. C.) 82 Fed. 41, by Judge Goff; Southern R. Co. v. Machinists' Local Union No. 14 (C. C.) 111 Fed. 49, by Judge Hammond; U. S. v. Haggerty (C. C.) 116 Fed. 510, by Judge Jackson; Allis Chalmers Co. v. Reliable Lodge (C. C.) 111 Fed. 264, by Judge Kohlsaat; U. S. v. Weber (C. C.) 114 Fed. 950, by Judges Simonton and McDowell; U. S. v. Agler (C. C.) 62 Fed. 824, by Judge Baker; U. S. v. Kane (C. C.) 23 Fed. 748, by Judge Brewer; In re Reese (C. C.) 98 Fed. 984, by Judge Thayer; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 60 Fed. 803, by Judge Jenkins.

And the following are some of the decisions of the federal appellate courts on the different phases of injunctions against "strikers" and "boycotters": Hopkins v. Stave Co., 28 C. C. A. 99, 83 Fed. 912, Eighth circuit appeals, Judge Caldwell dissenting; Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414, Seventh cir-

cuit appeals; *Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696, Fifth circuit appeals; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *In re Reese*, 47 C. C. A. 87, 107 Fed. 942.

And the following are some of the decisions of the state courts involving like questions, and questions akin to them, although some of them were not injunction cases: *Com. v. Shelton*, 11 Va. Law J. 324; *In re Crump's Case*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106; *Beck v. Protective Union (Mich.)* 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

In the Michigan case just cited a long list of state cases are cited. It is not necessary to set them forth again in detail, as the opinion in that case gives them. See, also, *Murdock v. Walker*, 25 Atl. 492, 152 Pa. 595, 34 Am. St. Rep. 678; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Barr v. Trades Council*, 30 Atl. 881, 53 N. J. Eq. 111.

The English decisions are all cited in the opinions in the foregoing cited cases, as are the text-books by Story, Eddy, Moses, Pomeroy, and others.

I have cited these authorities as being in part those which sustain the authority and the duty to issue writs of injunction against violence to persons, against violence to property, against interference to business, against intimidation, and against the rights of contract and liberty. These authorities cannot be reviewed within the limits of an opinion of reasonable length. The rules to be deduced, with but a single exception, cannot be in doubt, and the authorities are not in conflict. And it does not matter whether we turn to the English cases, or to the federal cases decided on the circuit, to the decisions of the appellate courts of the United States, to the supreme courts of the several states, or to the text-books, old, or modern, we find a uniformity so remarkable as seldom to be found in other branches of our jurisprudence. They are all in favor of the rights of contract, of freedom, of the rights of property, and that no man or combination of men shall be allowed to interfere with another man, partnership, or corporation. The courts cannot hope to entirely foreclose discussion of these questions. But discussion is already nearly at an end by the courts, and by those having the slightest knowledge of jurisprudence. And capitalists and employers of labor and employes alike must understand that they must go elsewhere than to the courts for other results. And if they cannot go with confidence to the courts it is because they desire to go without conscience, and knowing they have a controversy without merit. Many of the questions of economy are not yet settled. But some day, when parties cannot be prevailed upon to agree, their disputes will be adjudicated by a court of chancery in a way satisfactory to all fair-minded men. If parties cannot agree they must arbitrate by agreement, and if they will not arbitrate they must have compulsory arbitration. And compulsory arbitration is neither more nor less than some proceeding,

in some judicial tribunal, compelling the party in the wrong to submit to a decree of that which is found to be for the right.

Capital or labor may in one case or in another case dominate the other; but in the end right and justice will dominate both, and what is right, and what is justice, will be decreed by a tribunal, by whatsoever name, having chancery powers. The liberty of contract and property rights will not be destroyed, and labor will not be reduced to slavery, and the public will not be ridden down for want of a tribunal; and that tribunal may be called by one name or by another, and it may be presided over by a man called "judge," or a "chancellor," or an "arbitrator," but such a tribunal will have chancery powers, and with all the powers developed by the growth of equity jurisprudence for the last 200 years, and the growth yet to come.

The foregoing authorities are in point in the case at bar, although some of them are what are called "boycott" cases, and some "habeas corpus" cases, and some are strike cases with physical violence, and others "picketing" cases.

As illustrative to them all I shall call attention to a few of them. In *Allis Chalmers Co. v. Reliable Lodge (C. C.)* 111 Fed. 264, it was said by Judge Kohlsaet:

"Where labor organizations whose members are engaged in a strike undertake to prevent the employer from carrying on its business by preventing other men from remaining in or entering its service, by systematically maintaining pickets around and about the entrances to its premises, virtually placing them in a state of siege, and it is shown that strikers and others incited by them have committed assaults upon workmen employed therein, and have employed threats and intimidation against such workmen to such an extent that the latter do not dare to leave their works through fear of bodily injury, and their employer is compelled to provide board and lodging for them within the premises, and other workmen are from the same reason prevented from entering its employment, to its irreparable injury, such state of facts clearly justifies the conclusion that the defendant organization and its members have not confined themselves to lawful methods of persuasion and argument, and they are engaged in a conspiracy to stop the business of the employer by intimidation and violence, which entitles the employer to protection by injunction against and continuance of such unlawful acts."

In the *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C.)* 90 Fed. 608-614, the defense was that, if there was no violence by the strikers, then the writ of injunction should not issue. But the court disposed of that by showing that there can be intimidation of those who want to work, by strikers, in many ways other than by assaults. The mere fact that the shops are picketed can only be intended for intimidation.

The fact that a line of pickets is immediately in front of the shops, or a few blocks away, is a difference of degree only. Judge Hammond in the case just cited said:

"The whole fallacy of the defense against this bill and the proof offered to sustain it lies in a convenient apprehension or a necessary misunderstanding of the character of that force or violence which all agree is not permitted in the conduct of a strike. It seems to be the idea of the defendants that it consists entirely of physical battery and assaults, and that if these appear in the proof, and they can be justified, as they might be, on a criminal indictment or in a police court, that ends the objection, and the justified as-

saults and batteries will not support an injunction. The truth is that the most potential and unlawful force or violence may exist without lifting a finger against any man or uttering a word of threat against him. The very plan of campaign adopted here was the most substantial exhibition of force, by always keeping near the mill large bodies of men, massed and controlled by the leaders, so as to be used for obstruction if required. A willing wire worker, but a timid man, would be deterred by the mere knowledge of that fact from going to the mill when he desired to go, or had agreed to go, or, being already at work, feared to return through the streets where the men were congregated, or, having started, would turn back, fearing the trouble that might come of the attempt. Such a force would be violence, within the prohibition of the law; and its exhibition should be enjoined, as violating the property rights of the plaintiffs in the streets, their liberty of contracting for substituted labor, and the liberty of the substitutes to work if they wished to accept the lowered wages, and to pass through the streets to their work."

In the case of *U. S. v. Elliott* (C. C.) 64 Fed. 27-31, it was said by Judge Phillips:

"It is argued by counsel for defendants that courts of equity will not interpose by injunction to prevent the commission of an act which, when done, would be a crime penally punishable. This is an 'old saw.' It is a general rule of equity jurisprudence that courts of chancery will not interpose where there is adequate remedy at law, nor will they ordinarily interpose to prevent the commission of a crime. A well and long established exception to this rule is that where parties threaten to commit a criminal offense which, if executed against private property, would destroy it, and occasion irreparable injury to the owner, and especially where such destruction would occasion a multiplicity of suits to redress the wrong if committed, courts of equity may interpose by injunction to restrain the threatened injury. The law, it does seem to me, would be very imperfect, and indeed impotent, if a number of irresponsible men could conspire and confederate together to destroy my property, to demolish or burn down my house, that I should be remitted alone to the criminal statutes for their prosecution after my property was destroyed. It certainly presents a case that most strongly appeals to the strong arm of a court of equity to reach forth to prevent great injury and loss, as the only means of conserving the rights of private property. It is now a well-recognized office of a court of equity to conserve and preserve the rights of private property in advance of its molestation and appropriation, where, from the peculiar circumstances, the remedy at law might be of doubtful restitution."

In the case of *Barr v. Trades Counsel*, 53 N. J. Eq. 101-111, 30 Atl. 881, 884, it was said:

"No unprejudiced person at this day wishes to place any obstacle in the way of labor organizations conducting their operations within lawful limits. It is unfortunate that, despite the warning and counsel of accredited leaders, the reckless and revengeful among the members, with the vicious and lawless always to be found among the idle, so often take advantage of labor demonstrations to commit acts of violence against persons and property, and thus weaken the sympathy of the public with the system. Yet every one must acknowledge that organization has accomplished much in the past for the benefit of the workingman, and recognize its possibilities to secure to him, in the future, the enjoyment of other privileges. But, while engaged in this laudable purpose, those who give direction to affairs should not attempt to secure their ends by infringing the lawful rights of others. When they are accused of so doing, it is the province of the courts, when the question is properly presented, to define and protect the rights of those brought within their jurisdiction. In discharging this duty, judges can only decide on established rules, and are not empowered to create rights or initiate new powers or privileges. That is a legislative, not a judicial, function. It would seem to be unnecessary to state such elementary truths were it not that other views appear to be entertained by some."

Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19, was decided in the year 1885 by the supreme court of that state. It was a case relating to the sale of intoxicating liquors. Statutes were in force in Iowa making it a crime to sell intoxicating liquors, or to keep them for sale, even though no sales were made. Such parties were indictable, and subject to a fine of \$1,000. In addition to the fines imposed on conviction under indictment, the statute provides for a writ of injunction in an action in equity, by any citizen of the county, whether such person can show any injury or not. And for every violation of the injunction there should be imposed a fine of not less than \$500 nor more than \$1,000, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment, in the discretion of the court. The Iowa constitution provides "that the right of trial by jury shall remain inviolate." Article I, § 9. In the case just cited it was urged by eminent counsel that the statute was unconstitutional, in that the defendant could not be deprived of his liberty, and suffer long imprisonment, excepting after conviction by a jury. But the Iowa supreme court brushed away such cobweb arguments, and showed by argument, and by a long list of authorities, both English and American, that courts of equity from time immemorial restrained the doing of wrongful acts; and the fair and conservative and the great state of Iowa has been "governed by injunction," to the dismay of no one but law-breakers.

In the case of Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, the supreme court of that state, in the year 1895, in terms most unmistakable pronounced the law of cases like the one at bar. It was a "strike case." Parties desired to work and were at work for the shoe company. Other parties had been at work, but went out on a "strike." The strikers and others concluded that, to coerce the company, they would picket the shops; would intimidate the frail, the timid, and those who were opposed to violence, of those who dared to remain with the company, and thereby earn a livelihood for themselves and families. The contention in that case was made, and it usually is made in all these cases, that defendants cannot be enjoined by the writ of injunction, in an action in equity, from doing unlawful acts, or from committing crimes; and in that case the strikers most earnestly contended that they would have the right to trial by jury. The supreme court of Missouri in deciding the case adopted this language, which should be followed by all who imagine that the way to redress their own grievances, supposed or real, is to tyrannize over others, including those who have never done them wrong:

"Equity will not interfere when there is an adequate remedy at law. But what remedy does the law afford and what would be adequate to the plaintiff's injury? How would their damages be estimated? How compensated? The defendant's learned counsel cites us to the criminal statutes, but how will that remedy the plaintiff's injury? A criminal prosecution does not propose to remedy a private wrong. And, even if there was a statute giving a legal remedy to plaintiff, it would not oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. What a humiliating thought it would be if these defendants were really at-

tempting to do what the amended petition charges, and what their demurrer confesses; that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys, and girls, who are earning their livings in plaintiff's employ, to quit their work against their will, and yet there is no law in the land to protect them! The injunction in this case does not hinder the defendants doing anything that they claim they have the right to do. They are free men, and have the right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own. And they have a right to use fair persuasion to induce others to join them in their quitting. But when fair persuasion is exhausted they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy the freedom and rights of others. The same law which guaranties the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure also guaranties the other employés the right to remain at their will and pleasure. These defendants are their own masters, but they are not the masters of other employés; and not only are they not the masters of the other employés, but they are not even their guardians. There is a maxim of our law to the effect that one may exercise his own right as he pleases, provided that he does not thereby prevent another exercising his right as he pleases. This maxim or rule of law comes nearer than any other rule in our law to the Golden Rule of divine authority: "That which you would have another do unto you, do ye even so unto them." Whilst the strict enforcement of the Golden Rule is beyond the mandate of a human tribunal, yet courts of equity, by injunction, do restrain men who are so disposed from exercising their own rights as to destroy the rights of others."

It is claimed by some that the Missouri supreme court has recently overruled or modified the foregoing opinion. But it is not so. That court did recently refuse to enjoin libelous publications, on the ground that the constitution of the state gives freedom to the press, holding the publisher liable for an abuse thereof,—a very different question from that decided in the case of *Shoe Co. v. Saxey*.

That all agreements cannot be regarded as valid contracts is conceded by all. They may be tainted with corruption, or an immorality, and the courts will not enforce them or give damages for their breach. Other agreements in conflict with good government, or of a sound and wise public policy, will not be enforced. There are others which if carried out would or might impair the health of the public, or of an individual, and will not be enforced, and legislation against such a contract will be upheld. Such a case was that of *Holden v. Hardy*, 169 U. S. 366-380, 18 Sup. Ct. 383, 42 L. Ed. 780.

Contracts for personal labor will not be enforced, and the laborer can terminate his contract at will, being responsible only in damages for not fulfilling his contract. If this were not so, then a person could sell himself into servitude for a period of years, or even for life, and in whole or in part lose dominion over himself; and this is so abhorrent that courts will not recognize such contracts. The only exception I know to this is in case of a seaman, where cargoes and lives are endangered by the perils of the seas.

The supreme court recently held in *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715, that, if a seaman makes a contract for his personal services for a definite, but reasonable, time, he can be coerced into carrying it out, and can be arrested and de-

tained in prison for a violation of his contract. But the force of that opinion is, in my judgment, much weakened by the dissenting opinion.

But there are two cases absolutely binding upon this court on every important phase of the case at bar. The one is the case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. The language of Judge Brewer is so pertinent, so apt, and so strong that, though often quoted, it is worthy of repetition in full. It is so full of patriotism and good sense, and with the principles of our government, and of good government, that it is commended to all pessimists and those who believe this country is going wrong. Space forbids its repetition here. But those who believe in the powers of our government, and that those powers are for the good of all, and that those powers are executed by the different agencies, among which are the courts, find much comfort in reading this opinion, unanimously concurred in, by the supreme court of the United States; and those who are predetermined to believe in the heresies of force, and intimidation, and violence, and a reign of terror, will regret the promulgation of that opinion.

The other case is that of *Hopkins v. Stave Co.*, decided by the circuit court of appeals for this circuit, and reported in 28 C. C. A. 99, 83 Fed. 912. The decisions of that court being binding upon this court, if there were no other authority it is our duty to follow it. Judge Thayer, in the course of the opinion, said:

"While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract (*Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414), yet they have generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation, and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. A conspiracy to compel a manufacturer to abandon the use of a valuable invention bears no resemblance to a combination among laborers to withdraw from a given employment as a means of obtaining better pay. Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory, but they have no right to dictate to an employer what kind of implements he shall use or whom he shall employ. Many courts of the highest character and ability have held that a combination such as the one in question is admitted to have been is an unlawful conspiracy, at common law, and that an action will lie to recover the damages which one has sustained as a direct result of such conspiracy; also that a suit in equity may be maintained to prevent the persons concerned in such a combination from carrying the same into effect when the damages would be irreparable, or when such a proceeding is necessary to prevent a multiplicity of suits."

Judge Caldwell dissented. But he dissented not so much that he did not agree to the above statements by Judge Thayer as to the law, but rather he did not believe the facts warranted an injunction.

The constitution of the United States provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." Amend. art. 6. And by another provision: "In suits at common law, where the value in the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Amend. art. 7. And the constitution of the state of Nebraska (article 1, § 6), the same as in Iowa, provides that "the right of trial by jury shall remain inviolate."

By reason of these and similar constitutional provisions, there has been within the last few years a great deal of inflammatory public speech and literature, all proclaiming that in no proceeding other than by jury trial can any person be subjected to a fine or imprisonment; and it is no wonder that so many persons have been deceived, and made to believe that the courts are usurping authority in dealing by injunction with those who interfere with the rights of others. If any case, English or American, federal or state, could be found upholding such a claim, it could be said to be debatable. But no such case exists. When these constitutions were adopted courts of equity existed, and equity jurisprudence was recognized. And as plain as are these constitutional provisions, they are continuously misunderstood, because they are not correctly read. The provision above quoted from the United States constitution does not say that in all cases the right of trial by jury shall exist. But in the one case it shall exist in all criminal prosecutions, and in the other the right of trial by jury in common-law actions shall be preserved.

In the Nebraska constitution (article 1, § 6) the provision is "the right of trial by jury shall remain inviolate." In neither case is the right to be enlarged. In the one case it shall be preserved, and in the other remain, as it was. And whether to be preserved or remain as at common law, or as of the date of the adoption of the constitutional provisions, is not now material. But the cases cited have to all lawyers and all courts forever put these matters at rest.

All the cases are in harmony with no single exception save and excepting on one point not involved in this case; and that is, some of the courts hold that if the act complained of were done by one person only, and such act of itself would not be unlawful, then similar acts done in concert by many would not be unlawful. And this seems to me to be the reasonable holding. I cannot understand how two lawful acts, or the lawful act by each of two persons, can make an unlawful act, any more than I can believe that two ciphers can make a unit. And Judge Holmes, now of the supreme court, is often cited as giving expression to the correct rule in his dissenting opinions in the Massachusetts case hereinbefore referred to, and excerpts from his opinions are often found. But aside from the partial quotations from his opinions, and aside from the one exception stated, strikers guilty of threats, violence, or intimidation by pickets or otherwise can find no comfort by reading in its entirety his dissent in the case of *Vegeahn v. Guntner*. And in line with that part of the



dissent of Judge Holmes, referred to, is the bill now pending in congress, which has already passed the house, commonly called the "Hoar Bill," with which I agree, as already being the law.

The fifth amendment to the constitution of the United States provides that "no person shall be deprived of life, liberty or property without due process of law"; thereby meaning that neither congress nor any other governmental agency shall ever deprive any person of either liberty or property excepting by due process of law. And the fourteenth amendment to the constitution of the United States provides that "no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the word "person" means also a corporation, as many times decided by the United States supreme court.

And that one's business is his or its property is likewise elementary, and is conceded by all. And that liberty means the right to do as he pleases, when he interferes with the rights of no other person, and the right to make contracts with all persons upon all subjects-matter, save and excepting with reference to immoral and unlawful matters, is also conceded by all who know anything of the propositions. And as to what the rights of property mean, and of what liberty of contract consists, of all that has been written upon these all-important and most vital questions there is no paper of greater ability, evidencing more learning, than the very recent opinion of the supreme court of Wisconsin in the case of *State v. Kreutzberg*, 90 N. W. 1098.

I believe, and that without a doubt, that, in so far as propositions are involved in this case, the law is as follows:

(1) The defendants acted within their right when they went out on a strike. Whether with good cause, or without any cause or reason, they had the right to quit work for the Union Pacific Railroad Company, and their reasons for quitting work were reasons they need not give to any one. And that they all went out in a body, by agreement or preconcerted arrangement, does not militate against them or affect this case in any way.

(2) Such rights are reciprocal, and the company had the right to discharge any or all of the defendants, with or without cause, and it cannot be inquired into as to what the cause was.

(3) It is immaterial whether the defendants are not now in the service of the company because of a strike or a lockout.

(4) The defendants have the right to combine and work together in whatsoever way they believe will increase their earnings, shorten their hours, lessen their labor, or better their condition, and it is for them, and they only, to say whether they will work by the day or by piece work. All such is part of their liberty. And they can so conclude as individuals, or as organizations, or as unions.

(5) And the right is also reciprocal. The railroad company has the right to have its work done by the premium or piece system, without molestation or interference by defendants or others. This is liberty for the company, and the company alone has the right to determine as to that matter.

(6) When the defendants went on a strike, or when put out on a lockout, their relations with the company were at an end; they were no longer employés of the company; and the places they once occupied in the shops were no longer their places, and never can be again, excepting by mutual agreement between the defendants and the company.

(7) No one of the defendants can be compelled by any law, or by any order of any court, to again work for the company on any terms or under any conditions.

(8) The company cannot be compelled to employ again any of defendants, or any other person, by any law, or by any order of any court, on any terms, or under any conditions.

(9) Each, all, and every of the foregoing matters between the company and the defendants are precisely the same, whether applied to the company or to the defendants.

(10) The company has the right to employ others to take the places once filled by defendants; and in employing others the defendants are not to be consulted, and it is of no lawful concern to them, and they can make no lawful complaint by reason thereof. And it makes no difference whether such new employés are citizens of Omaha or of some other city or state. A citizen of Chicago, or from any state in the Union, has the same rights as to work in Omaha as has a citizen of Omaha.

(11) Defendants have the right to argue or discuss with the new employés the question whether the new employés should work for the company. They have the right to persuade them if they can. But in presenting the matter they have no right to use force or violence. They have no right to terrorize or intimidate the new employés. The new employés have the right to come and go as they please, without fear or molestation, and without being compelled to discuss this or any other question, and without being guarded or picketed; and persistent and continued and objectionable persuasion by numbers is of itself intimidating, and not allowable.

(12) Picketing in proximity to the shops or elsewhere on the streets of the city, if in fact it annoys or intimidates the new employés, is not allowable. The streets are for public use, and the new employé has the same right, neither more nor less, to go back and forth, freely and without molestation, and without being harassed by so-called arguments, and without being picketed, as has a defendant or other person. In short, the rights of all parties are one and the same.

It remains to examine the evidence, and ascertain whether any of the foregoing matters and things and rights have been trampled upon by the defendants, and, if so, by whom, and who are responsible.

The complainant, with its thousands of miles of railroad, has shops at various places, and a large one at Omaha, where much work is done on its cars, engines, and other appliances. Most of the defendants were employés in the Omaha shops. About May 12, 1902, certain shopmen, through committees, presented to the company what they claimed were grievances. Conferences were held, but without result. About that time the company determined to carry on

the work in its shops, and pay by the piece or by premium. The argument for the company is, I assume to be, that all employés would get at least a minimum price per day. And those of experience, and the sober and industrious, and skilled and rapid, would get such additional price as might thus be earned by the piece or premium, thereby giving recognition to merit and efficiency, while those who were without experience, and not sober, and not industrious, and not rapid, and the laggard, would get the minimum only per day.

On the other hand, I assume that the strikers make the argument that it is better that the less capable and less efficient, as well as the best, be paid the same sum per day, and that labor would thereby be elevated, and be for the common good of laboring men. But it resulted, as some say in a strike, and as others call it a lockout. Notices were given and posted by the company that the outgoing employés must return at once to their work. They did not return, but from that time on they all continued on the strike, and the strike is still on. The company employed many new men for the shops, some of them citizens of Omaha, and some from other states, to take the places once occupied by the strikers. The strikers have almost daily had meetings in a hall. A system of pickets from their own number was organized. These pickets were officered by captains and lieutenants, to place the pickets and command them. These pickets were sometimes placed singly, but generally in squads. They were placed in close proximity to the shops, and more particularly at the gates leading to the shops. Sometimes they would be on the streets some blocks away from the gates, but at points where it was known the present employés must, or probably would, pass.

The officers of the pickets gave orders that the pickets must reason and argue with the new men, and those refusing to go on the strike, and try and persuade them that they were fighting labor, and in working for the company they were in hostility to the interests of the laboring men, and that they ought to quit. The defendants' position is, as they admit in evidence, that, if they could take from the company all men from the shops, the engines would not be repaired, and that the motive power would be destroyed. Such is their avowed purpose. Then the company would either be compelled to cease carrying passengers, freights, and mail, or, if it continued in business, would be compelled to re-employ the strikers on the terms named by the strikers.

The question of fact in this case is this: Have the methods to destroy the motive power of the company been by argument and persuasion and by peaceable methods? If so, the writ of injunction, under the law as evidenced by the authorities cited, should be denied. Or have the methods to destroy the motive power of the company been attended with assaults and violence and intimidations and terrorizing? It is undisputed that, so far as known at least, the orders of the lodges, and by the officers, were to use none but peaceful methods, by argument and persuasion. Directions were given that all pickets must not drink liquor, and to wholly refrain from all improper

conduct, under penalties of discipline, including fines. The evidence shows that many of defendants are peaceable and orderly men, and that many of them in person have committed no assaults, nor have they been guilty of any acts of violence or intimidation. And many of defendants named in the bill, in my judgment, should not be named in the permanent injunction to be issued herein, for the reason there is no evidence to warrant such holding against them. It is contended that the writ should issue, even though the evidence is meager or wholly lacking. And statements to that effect can be found in some of the cases of the federal trial courts; "that the writ of injunction can do no harm to a law-abiding man, even though not warranted by the evidence." I do not so believe. I would resist such an application for two reasons. (1) I should not be mulcted in the costs. (2) I should not be humiliated by having an injunction run against me, when there is no evidence that I have done, or, so far as the evidence shows, am not likely to do, any of the things complained of, and am not acquiescing, by silence or otherwise, in what my co-laborers, or men in a class of which I belong, are doing. There must either be evidence against such parties, or the evidence must show that such parties belong to the class or to the organization of those to be enjoined.

Certain parties, to be mentioned in the decree, will be dismissed from the case. But they will be held to have knowledge of this opinion and of the decree herein. And those in any way related in a business way to the other defendants; those who are servants, agents, or employés of the defendants who are enjoined; and those who are fellows or companions of defendants, who are strikers,—are and will be bound by the writ of injunction issued herein, to the same extent and as fully as if named in the writ. In *re* Reese, 47 C. C. A. 87, 107 Fed. 942; *Ex parte* Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110. And any action by those dismissed from the case, as well as all others, in any way in conflict or in violation of the writ of injunction, will subject themselves to the same penalties as though they were named in the writ of injunction. So that the order of injunction herein will not include by name those against whom there is no evidence, yet the writ will include, in effect, all those who quit the company's service, and are engaged in the strike, with the purpose of compelling the company to re-employ them by attempting to impair the motive power of the company or otherwise cripple its service. In other words, the class of men will be controlled by the injunction, and the class of men above alluded to will not violate the writ, excepting at their peril.

And the writ of injunction will be read by all in the light of this opinion. Some of the defendants, as the evidence shows, have been guilty of most inexcusable offenses, and some of conduct the most outrageous and brutal, in carrying on the general design of destroying the motive power of the road by preventing its repair or replacement. In some instances those guilty of misconduct and intimidation and terrorizing and brutalities were not identified, and it cannot be said that all were done by the strikers, because part of it was done by sympathizers.

Much of the intimidation was by language so low and coarse and brutal and vulgar and obscene that no one of the counsel in this case would excuse me if I were to repeat it. Suffice it to say that never before have I been compelled to read anything so villainously vulgar and obscene as in this case. And this vulgarity was invariably prefixed with the most execrable oaths. More than this cannot be said as to the language of intimidation, unless I should recite the language itself. The evidence is in the record of the case, and can be read by those who desire to do so. This language was used by a limited number of defendants, and invariably, or at least generally so, in the presence of part of the other defendants. Some of the pickets at times were under the influence of liquor. But it is a fact to be regretted that, of the many acts of drunkenness, vile language, and assaults, not in a single instance, so far as the evidence shows, was a party thus guilty informed against before the municipal authorities by any striker, or was he subjected to any kind of discipline by the lodges or officers of the strikers. It is one thing to advise peace and good order and gentlemanly conduct. But talking about and advising peace and good order and gentlemanly conduct, and then taking no action against violence and drunkenness and assaults and blackguardism and profanity, to me do not square themselves.

Many of defendants were witnesses in their own behalf, and they testified to the orders as to the way the strike should be conducted, and that they, with few exceptions, saw no violence, and heard no improper language. Others, not of the strikers, testified that they saw and heard nothing wrong. Some of those who did see acts of violence mitigate them, and in some cases justify them. And in some few instances the assaults as alleged have been disproved. And in some cases where acts of violence were testified to by apparently credible witnesses they were not even denied by those of defendants charged to be guilty. And of the many things, including murder, charged and established, a great many are referred to as "scraps," "mixups," and "fights."

Before the strike the employés in the shops were in no way guarded. There were watchmen to keep off trespassers, but not to protect the employés. The watchmen have been more than doubled in number, and some are now armed. Before the strike they were not armed. Before the strike every employé boarded at his own home or the boarding house of his own choice. Since the strike the greater part of the employés have felt compelled to eat and sleep and remain inside the shops. For that purpose the company has been compelled to fit out and maintain at great expense these inside boarding houses, so that the men can eat and sleep without molestation. A large number of cooks are employed by the company to serve in the improvised kitchens of the shops. For the men, or many of the men, who desired to leave the shops and go into the city during non-working hours, guards have been employed to accompany them, and protect them from harm, and which at times were unsuccessful efforts. Sometimes men in the city called on policemen to act as escorts back to the shops. For that they are called cowards, forgetful that

it is not always the coward, but generally the law-abiding man, that seeks protection. Many employes have been assaulted: Michael Cronin, who recognized four strikers as his assailants. Cronin has been a resident of Omaha for nearly 40 years. Fred Wyss was struck in the head, hit with a club, and kicked in the head when down. Henry Guinotte was struck in the eye, knocked down, struck twice more, kicked in head, and laid up two weeks. L. Frank was struck on the head and ran away. Came back later, and was struck again, and was laid up 14 days, his face swollen and discolored. He identified a striker by the name of Richilieu, who figures in more assaults and indecencies than any other one man. It is a marvel that so far he has kept out of the penitentiary. Another man was assaulted, his spectacles broken. One of the strikers pulled something from under his coat, struck the man, and knocked him down. He vomited as a result of his injuries, and was bloody. The spectacles were exhibited to us in court. The frames were twisted out of shape, one glass fractured, and the other gone. Another man was surrounded by strikers, who tore open the bundle of clothing he had, and went through his pockets. Another man was kicked by a striker. Upon another occasion men inside the shop were stoned from the outside. A Mr. Sweeney was assaulted by strikers headed by Richilieu. Upon another occasion he was again assaulted and struck in the face. There are 10 other assaults, some less severe and some more severe than those above mentioned. And they were all committed since the commencement of the "picketing." In most instances the assailants were recognized as pickets, and in many cases the particular individual or individuals were recognized, and in a large number of cases no denial made by evidence. Bad as is the foregoing, it is not all. Threats were made by pickets towards the men employed. Vile names were applied to them. The very common salutation was that of "you scab," and generally prefixed with profanity and vulgarity as coarse as can come from the tongue. The same man Cronin was told that it would be made disagreeable for him, and that his wife would be made a widow. Buckley had his life threatened if he went inside the gates to the shops. Another man was warned to not go to the shops again, and was told that he would be thrown into the river if he did. A lady wanted to go into the shops to see her husband, but was denied the privilege, and was driven back by the pickets. Another lady was called on at her house by a man, and was told her husband must quit work, saying he knew the rules of the strikers, and that she would find out what would be done. Another man was cursed in the presence of his mother, and was told that he must either stay inside or out of the shops. Men were stopped on the streets, and compelled to listen to arguments by "persuasion" as to whether they were doing right in taking the places of the strikers. There are many instances in addition to the foregoing wherein threats were made if they did not cease to work. Vulgarity such as I have attempted to describe without reciting it was used on a very great number of occasions. A Mrs. Albertson, wife of an employe, received a letter by due course of mail, of which the following is a copy:

"Omaha Lodge, No. 31, Omaha, Nebraska.

"International Association of Machinists.

"Omaha Lodge No. 31.

"Office of Recording Secretary, Postoffice Box 702.

"Omaha, Nebraska, August 11th, 1902.

"Mrs. E. P. Albertson—Dear Madam: It has come to the notice of this body that your husband has taken a striker's place at Columbus, Nebraska, in the Union Pacific penitentiary. He has only left the car twice to come up town, and then in the company of guards. We hope you will see the humiliating position it places you in, for your husband will be recognized wherever he goes from the picture and description which we take of every scab in the employ of the Company. It will be very humiliating for you, if you should be on the street with him, to have him pointed out as a scab. You have the right to demand the honor and esteem promised at the marriage altar, and we hope you will see the justice of our appeal, and bring all possible pressure to bear upon him, and save him from the scorn and hatred of his fellows.

"Very respectfully,

George Smith, President.  
"George Lamb, Secretary."

The writing of this letter or the signatures were not established, and for that reason was objected to. But the astounding fact exists that one of the men whose name purports to be signed to the letter was called as a witness for defendants, and he made no denial of this letter. By reason of the letter, the lady begged her husband to quit work.

Three instances were testified to in which the pickets searched the employés, when to avoid trouble they denied their occupation, to ascertain if they carried pass books or time checks, and in another instance such evidence was demanded. Employés were photographed by kodaks, with the remark "we can identify you now."

More than a dozen of the pickets were identified. In other cases they were identified as strikers or pickets. In other cases the assailants and violators of the rules of decency were not known. But no man who has read the 1,186 pages of evidence which I have read can have the slightest doubt but that these assaults, and these acts of violence, and these threats, and these blasphemous denunciations would not have occurred but for this picketing. Many of the defendants took no part in them, being honorable men. No doubt whatever is there in my mind but that a great many of the defendants deprecate it. But deprecation ought to be accompanied by words of denunciation. But both deprecation and denunciation ought to be accompanied by some affirmative acts to stop it, or at least to cut loose from such men.

Picketing, as evidenced by the facts in this case, is wrong, and cannot be countenanced by law-abiding men, and such picketing cannot but be condemned by any court. As said before, the rights and duties and obligations of employer and employé are reciprocal and the same in requiring fair treatment. And, if one unfairly treats the other, such other cannot retaliate by some other unlawful act. Suppose the company would arm all of its employés in the shops, and with the guards would go to assaulting and threatening and villifying and intimidating the pickets; would any self-respecting man in-dorse it? Would we not then surely have a reign of terror in Omaha?

Suppose the company would place pickets in front of the residences of the strikers, and on the streets they pass, to and from their homes; would any one indorse it? Omaha, I assume, has an efficient police force of the usual number. The chief of police testifies that the company asked him for a detail of 25 policemen for protection. But 15 was all he could furnish. But after this the pickets were stationed over the streets farther away, and the policemen and guards did not, because they could not, bring these things to an end. These pickets by turn, or allotment, were on the streets, and in front of the shops, during and generally until 11 o'clock at night, but never later, until the occasion now to be mentioned.

On Monday morning, September 15, 1902, the restraining order herein was signed. Two days prior, or on the morning of Saturday, September 13th, it was ordered that pickets be and remain all night at their accustomed places. Why this was ordered has not been made to appear. Nothing unusual in the shops or in relation to the strike had occurred. No one believes that the great body of strikers anticipated coming events. But the order for picketing all of that Saturday night was made. A few minutes after midnight two men by the names of Caldwell and Ball, workmen, were returning to the shops for the night, where they were lodged and boarded. At the intersection of Cass and Twelfth streets, which was a block from the gates to the shops, and a less distance from the company's tracks, was an electric light. Men could be easily identified. As Caldwell and Ball approached the point named they saw five or six men. Most of them they recognized as strikers. Ball believed there was to be trouble, but Caldwell thought not. The pickets stopped them, and asked them where they were going. Caldwell said, "To the shops." Then Caldwell said, "I tell you, boys, we don't want any trouble. Now, I just come last Thursday, and as soon as I get money enough I will go back to Chicago." Immediately Caldwell was struck in the jaw, knocking him into the ditch. Ball started to assist Caldwell, when two men jumped on him. He got loose, and started to run, and fell down, when he was hit with a club. He finally got away, and threatened to shoot the assailants, but ran away, and then he was stoned. After Caldwell was down, he was either struck or struck at with a club. Caldwell got up, walked inside the gates, and in a few minutes was dead; murdered. This generally is the evidence of Ball. George L. Perkins, a striker, testified that Ball and Caldwell were going to the shops. The pickets headed Ball and Caldwell off two or three times as they would turn from one side of the street to the other. He says Caldwell said: "It is just like this boys, we come from New York, without knowing there was a strike, and our baggage is in there, and I swear to God that we will go in there and come out tomorrow and bring our baggage out with us." Caldwell was begging for his life. He had been in the shops, and was not from New York. He was from Chicago. This witness says there were five of them, in addition to Ball and Caldwell. Some of the evidence is to the effect that there were six. He says that this is all that was said. Then Caldwell was knocked into the ditch a foot and a half deep. The men present were as follows: George L.



Perkins, a striker; Henry Spellman, a striker; John Spellman, not a striker, but a son of Michael Spellman; R. Chadwick, a striker; John McKenna, not a striker, but evidently a sympathizer. Ball says that Charles Pospisil, a striker, was present. This Pospisil denied. It was John Spellman who knocked Caldwell into the ditch. Who struck Caldwell afterwards, the witnesses differ. John Spellman at the time was working for an independent contractor, who had a contract for building for the railroad company. But he was not in the employ of the company. He without doubt was in sympathy with his father, a striker, and his fellows. Be all this as it may, Caldwell was murdered, and murdered because he wanted to work in a place vacated, and murdered as a result of picketing. John Spellman is under arrest for the crime.

The defendants claim to have the belief that physical violence alone is to be condemned. But all persons know that intimidation by words, by menaces, by numbers, by position, and by many things is just as effective as by using clubs or brass knuckles or knives. Aggressive or daring employés would be deterred by none of the unlawful acts. But there are two classes of employés who are deterred. One class is the frail and the timid. And they are entitled to protection. Another class, comprising the greater part of men of this country, the law-abiding peaceable men, those who do not engage in brawls, and who never fight excepting when driven to the wall. They are entitled to the protection of the law, and the complainant has the right to have them protected.

This "picketing" has been condemned by every court having the matter under consideration. It is a pretense for "persuasion," but is intended for intimidation. Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion. Intimidation cannot be defined. Neither can fraud be defined. But every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating. And the courts, when the facts are presented, adjudge accordingly. And so in this case. And this court retains jurisdiction of this case, and, should the necessity require, will from time to time adjudge whether the acts of defendants, or any of them, are of an intimidating character, and any man who respects the rights of others will have no fear of the result; and those, should there be any, who do not respect the rights of his fellow man, will be controlled by the injunction.

Are all the foregoing facts, supplemented with the brutal murder, evidence of intimidation and terrorizing? If not, what can be? In some instances the employés were drunk and quarrelsome. But very few of the assaults were provoked or brought on by the employés. It is the system of picketing that did it, and it is unlawful, and must be enjoined.

The restraining order prohibits the strikers from "following" the employés to their homes or on the streets. It is contended that one man has the right to walk on the streets in the same direction an-

other man is going. But that is not "following," as every one understands what "following" means. No striker can fail to understand what it means. But, to avoid criticism, the injunction will be so worded as to be understood by all. And the writ of permanent injunction will issue, and the unlawful picketing and the wrongful interference with the rights of others will be brought to an end.

MUNGER, District Judge. Complainant in its bill alleges it is a corporation organized under the laws of Utah, and a citizen of said state, and engaged in the operation of a railroad in different states of the Union. That in the operation of its road it is engaged in the carriage of interstate commerce and the United States mail. That the respondent P. J. Conlon is a resident and citizen of the state of Ohio, the respondent George Mulberry is a resident and citizen of the state of Illinois, the respondent Thomas L. Wilson a resident and citizen of the state of Wyoming, and that each and all of the other respondents are residents and citizens of the state of Nebraska. That it is absolutely necessary and essential to enable it to conduct its operations and carry on its business as a carrier of freight, passengers, and the United States mail to maintain and operate its shops at Omaha, Neb. That on or about July 1, 1902, a large number of the boiler makers, machinists, and blacksmiths theretofore in its employ at its shops left its service, and went out on what is commonly known as a "strike." That thereupon it became and was essentially and vitally necessary that it should employ other boiler makers, machinists, blacksmiths, and mechanics to carry on the necessary work at its shops. That the respondents, constituting a number of said parties formerly in its service, and others, soon after they went out upon said strike, instituted and have ever since carried on a system of attack not only upon complainant, but also upon the parties employed by it in its shops at Omaha. That all the respondents conspiring, confederating, and colluding together for the purpose of destroying complainant's property, and for the purpose of terrorizing and intimidating its employes, have been and are committing depredations upon and invaded its property and premises, surrounded its cars occupied by passengers, and hurl vile and indecent epithets against its employes and guards, kick, strike, bruise, and assault its employes and guards, and by different and various means intimidate and terrorize its employes, and have so done to an extent that a number have quit and left its service. That they tell the wives of its employes that they will kill their husbands unless they leave and quit its service. That they have established what are called "picket lines" and pickets, who congregate about and near the premises of complainant, and by their conduct, acts, oaths, threats, and epithets have created and are carrying on a reign of terror at and about the premises of complainant, and thereby intimidate and prevent persons and employes from entering or continuing in its employ, and prevent the free access of its employes to its shops and premises. That complainant has constructed and maintains a fence surrounding its property and premises at Omaha, with gates or entrances. That the respondents congregate at and

near the gates and entrances, and have so intimidated and terrorized drivers of teams and wagons that they refuse to deliver goods at the shops and premises of complainant. That by reason of the aforesaid acts complainant has been compelled to employ a large number of guards to protect its property and the persons of its employes, at an expense of several thousand dollars therefor. That respondents follow its employes through the streets of Omaha, and assault, strike, maim, and seriously injure them. That said acts seriously impede and interfere with complainant in the conduct and management of its business. The bill prayed for an injunction restraining respondents from further committing the unlawful acts complained of. A restraining order was granted as prayed, and a time fixed for hearing the application for a temporary order of injunction.

Respondents have filed a joint answer, admitting the citizenship of the parties; the corporate character of complainant; that it operates a line of railroad and maintains shops at Omaha, as stated; that on or about July 1, 1902, a large number of the boiler makers and blacksmiths left complainant's service on what is generally known as a strike; that complainant has contracts with the United States government for transporting the United States mail, and is liable to fines and penalties for a failure to transport the mails in accordance with such contracts; that unless the complainant is able to employ and keep in its service workmen in its shops to keep its engines and cars in repair it will be unable to transfer such mail and discharge its obligations to the government; that the impairment of its mechanical powers will result in the impairment of its motive power, and interfere with the comfort and convenience of the general public. They deny all other allegations of the bill.

The evidence, at the request of parties, was taken before a stenographer, and parties have submitted the case to the court upon a stipulation that the hearing should be a final one, upon the pleadings and proofs thus taken.

As to 56 of the respondents, who will be named in the decree to be entered in this case, there being no evidence that they, or any of them, were ever in the employ of complainant; that they in any manner participated in, counseled, advised, or had knowledge of the strike, or any of the acts of violence, threats, or intimidation; and there being no evidence that they were at or near the premises of complainant during any of the times mentioned in the bill of complaint,—the action as to them should be dismissed.

The evidence in the case shows the following facts: That complainant has machine shops located at the city of Omaha, in the state of Nebraska, and that early in May last representatives of the International Machinists made a request upon complainant for an increase of pay and the modification of certain rules of complainant company. Negotiations were had with respect thereto until June 30th, when, no agreement having been reached, the machinists belonging to the union in the employ of complainant at its shops in Omaha went out on a strike. Negotiations also were had between a committee of the Boiler Makers' Union and officials of complainant for the purpose of obtaining an increase in pay and modification of cer-

tain rules. No agreement having been reached, the boiler makers belonging to the union struck on June 21st. The blacksmiths working at complainant's shops struck and left complainant's employ on July 5th. After the strike the three organizations, to wit, the machinists, the boiler makers, and the blacksmiths, in conjunction, established pickets at and near the several entrances to complainant's premises in said city. After the establishment of said pickets, and between July 14th and September 13th, upwards of 20 assaults were made upon parties who had entered the employ of complainant to take the place of strikers, in one instance resulting in the death of the party assaulted within a very few moments after the assault. The assaults were almost invariably accompanied by threats and abusive language. On many occasions after said strike, up to the time of the granting of the restraining order in this case, threats and abusive language, unaccompanied by assaults, were made to the new employés of complainant. The wives of some of the employés were notified that their husbands would be injured unless they left the complainant's employ. Threats were made that the photographs of employés had been and would be taken that they might be identified in the future. Several employés quit work through fear and many remained on the premises. As a result of such action complainant established upon its premises a hotel for the purpose of boarding and lodging its new employés, to avoid their coming in contact with the strikers, and employed a large number of extra guards to protect its property and premises from injury and trespasses. Some of the assaults were made by strikers and some by parties not identified. Many of the strikers who did picket duty did not commit any acts of violence or use any abusive or threatening language. This state of affairs continued until September 15th, when complainant filed its bill in this case.

It is stipulated between the parties that the respondents in the action are financially irresponsible for any damage which the complainant may have sustained or may sustain in future by reason of the acts complained of.

In the determination of this case the following principles of law are to be considered and applied to the facts, as shown by the evidence:

The mere fact that respondents, or some of them, struck and left the employ of complainant was not of itself unlawful. Any person has a perfect right to quit the employ of another when the compensation or conditions and regulations under which the service is rendered is unsatisfactory, if by so doing he violates no contract obligation. On the other hand, it is equally the right of any person to engage in any lawful employment at such compensation and under such rules and regulations as may to him be satisfactory.

Picketing, in and of itself, when properly conducted, is not unlawful; but when accompanied by violence, or any manner of coercion or intimidation, to prevent persons from engaging in the service of an employer, it is unlawful.

A court of equity has jurisdiction to restrain, on the application of an employer, parties from interfering with the free and unre-

stricted conduct of any lawful business on the part of such employer, and also to restrain parties who by violence, threats, or intimidation prevent or attempt to prevent persons from entering into or remaining in the employ of such employer, when such employer has no proper and adequate remedy at law.

These propositions have been so long and so often recognized and enunciated by the courts of the states and nation that they may be regarded as maxims of the law. Their correctness is in no manner controverted by counsel for respondents, their contention being that the evidence in this case does not warrant their application in a manner that will entitle complainant to the relief asked. It is argued on behalf of respondents that the bill should be dismissed, as complainant has an adequate remedy at law, in that it may invoke the power of the state to punish, under the provisions of the criminal code, violations thereof, such as the assaults and threats of violence shown by the evidence in the case to have been made. This proposition was fully answered by the court in *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n of U. S. and Canada* (N. J. Ch.) 46 Atl. 208, 210, as follows:

"The defense insists that the bill sets out a series of trespasses or crimes, and that this court is asked to enjoin the commission of further similar trespasses or crimes. The jurisdiction of the court of chancery to enjoin a continuing trespass or injury to property, although it may involve a crime, is entirely settled. The court ignores the crime, and protects the complainant's property or business from civil injury."

In *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, it was said:

"Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime."

The same rule was announced in *Barr v. Traders' Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

It is strenuously argued, and the main contention on the part of the respondents is, that as the evidence shows that but a very small number of the strikers engaged in any assaults or threats made, or committed any unlawful acts, that as to those who did not commit any unlawful act the injunction should be denied; that the action is based upon a conspiracy entered into on the part of respondents, and that the evidence does not warrant any finding of conspiracy as to them.

Mr. George Smith, one of the striking machinists, testified that since the strike he had been present at nearly every meeting of the machinists and their helpers that had been held, and presided thereat. That meetings were held daily. That the blacksmiths, boiler makers, and their helpers also held daily meetings at the same building.

"These meetings thus composed have placed pickets in the streets where they would meet men passing in and out of the shop. The duties of these pickets was discussed at our meetings. The object of the picketing was to get all the machinists that would come in there and take our places to stop work, so that the company would not have men to do its work unless it came to the International Union. The pickets were instructed on seeing men passing in or out of the yards to inform them there was a strike, and that they would not be loyal to fellow workmen if they took the work under those conditions; and they were further instructed by them, if possible, not to accept a job while the strike was on. They have succeeded in persuading a great many not to do so. A great many men have been shipped in here who did not know that a strike was on. It was our aim to inform them of the strike, and to persuade them not to go to work. The pickets were further instructed that if they committed any acts of violence their strike benefits would be stopped, and that we would not allow anything of the kind. They were instructed not to use vile words, blasphemy or abuse, sauce, or anything of the kind. They were told nothing could be gained by improper conduct, and that it would only bring us into disrepute."

Had all the respondents fully adhered to the instructions thus given, it is quite probable that this court would not have been called upon by complainant for relief. But the directions thus given, the evidence abundantly shows, were not heeded. Assaults were frequently made upon those endeavoring to work, and vile, threatening, and opprobrious epithets continuously applied to them by numerous of the respondents, as well as by others who had not been in the employ of the complainant, and who did not belong to the unions. The evidence does not disclose that any of these unlawful acts and acts of violence were ever disapproved of by respondents, that the guilty ones were remonstrated with, that their strike benefits had been stopped, or any protest had been made against such unlawful acts. On the contrary, the evidence shows that William Richilieu, who appears not only to have been an instigator, but an actual participant, in several assaults, was thereafter placed in charge of the pickets as captain.

In Eddy, Comb'ns, § 539, it is said:

"A picket is the agent of a combination. \* \* \* In determining the object of the combination the courts will probe deeper than resolutions and mere professions of good will and lawful intentions. It unfortunately happens that there is seldom a case where a picket is maintained that the members of the picket or their hangers on do not resort to acts of violence, and to jeers, cries, epithets, and threats calculated and intended to intimidate workmen who are not members of the combination. So true is this that the very term 'picket' has come to mean in the popular mind threats, violence, and intimidation. It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket, under the most favorable consideration, means an interference between employer seeking employés and men seeking employment."

From *Allis Chalmers Co. v. Reliable Lodge (C. C.)* 111 Fed. 267, we quote:

"Probably to some extent the acts of violence complained of have been done by persons not members of the union, and not connected in any manner with the striking workmen, but in some of the cases the evidence is so specific that it cannot be overlooked. It is true that at such times, when excitement runs high, the public mind is inflammable, at least among such persons as usually attach themselves to strikers. It is also true that the criminal classes take advantage of such occasions to commit, under cover of honest men, dastardly and cowardly acts. These facts, applied to this case, make it apparent that the conduct of defendants was calculated to work a serious wrong to complainant. In the judgment of the court, the pickets were in some cases themselves guilty of intimidating complainant's workmen, and were the indirect, if not the direct, inspiration of like acts and of violence by others. It is conceded that these pickets were appointed and directed by officers and members of defendant lodges. That a conspiracy existed among a number of these officers and members to stop, and thereby injure, the business of complainant, by intimidation and violence, is evident. In a conspiracy of this character, where it is difficult to even learn the names of the individual members of the lodges, the active co-operation of the individual members in the conspiracy is difficult to establish by direct proofs; but their acquiescence in, and connivance at, the methods pursued by their officers and leaders, is easily established by the results sought and accomplished."

The same question was presented to the court in *Southern R. Co. v. Machinists' Local Union No. 14 (C. C.)* 111 Fed. 49. It was said:

"There was no protest by this labor union when Williams was assaulted, beaten, locked in a box car, and shipped out of town on another railroad, nor when Ridge was assaulted and beaten. No steps were taken to expel from the union these violators of the law and of the personal liberty of the 'scabs' and their employers, nor to censure them, nor to discover them to the police. Absolutely nothing was done in this way to disown these acts, and now the only reliance is that the original minutes of the union counseled and directed there should be no violence. \* \* \* Enough has been said to show that the court is of the opinion that the defendants are responsible for the assaults upon and the beating of Williams and Ridge, the ugly details of which need not be given. If we were trying the defendants upon indictments or as a police magistrate, possibly the proof would fall short of conviction, upon the ground of a reasonable doubt, though even that may be questionable. But, whether any of the named defendants made those assaults or not, they were made in their behalf and for their benefit, and in aid of their strike. That is sufficient. If the picketing, the climbing of the adjacent telephone poles, the climbing upon the fences, the watching of the shops, the assemblies in the streets and at the entrances, and the constant and unceasing surveillance, had been confined to obtaining information and to unobjectionable social intercourse, for the purpose of begging and entreating not to work, there could be no injunction. But the thrusting themselves upon unwilling 'scabs' to 'argue'; 'persuading,' picketing, climbing poles and fences, as an exhibition of force and threats, accompanied by such assaults as have been mentioned; violent, abusive, and threatening messages sent to 'scabs' inside, and the like, as shown in this proof,—come clearly within the decisions against such conduct."

In *Farley v. Peebles*, 50 Neb. 723, 733, 70 N. W. 231, 234, it is said:

"In short, we conceive the rules to be that a conspiracy may be established by circumstantial evidence, including overt acts in pursuance thereof by individual conspirators, the others not being present or participating in such acts."

In the light of these authorities, it seems clear that all of the respondents who were members of the various organizations which

established and maintained the picket line, as well as those who are shown by the evidence to have personally participated in the assaults and various acts of intimidation, must in this action be held chargeable with the results naturally flowing therefrom. I am fully convinced that the majority of the strikers in this case are upright, honorable men, worthy and well-disposed citizens, but they voluntarily put into operation a system of espionage which history shows is almost universally accompanied by intimidation, force, and violence. Can it be doubted for a moment that, had there been no strike and no picketing, there would have been no assaults, no threats, and no intimidation? It is not to be inferred from this that strikes and picketing are either necessarily wrong or harmful. As before stated, to strike and quit work when no contract obligation is violated is not unlawful. No person is required to perform labor except upon terms and upon conditions satisfactory to himself. On the other hand, any person has a right to labor unmolested upon terms and under conditions which are satisfactory to himself. When picketing interferes with this right to labor, it becomes unlawful. If picketing is only done to obtain information, to reason with and peacefully persuade a fellow being to cease his employment it is not unlawful; but when, as shown by the evidence in this case, it is extended to coercion by violence, threats, and intimidation, it is unlawful, and all parties who participate in the maintenance of the picket after it has become unlawful, and while it is so unlawfully conducted, cannot relieve themselves from civil liability by showing that at its inception it was intended to be conducted lawfully.

The notion seems to prevail among a large number of the laboring class that, if they quit work because of unsatisfactory conditions, those who take the places vacated are doing a wrong, an injustice, to the families and persons of those who quit. Whatever force there may be, if any, to this proposition from the ethical standpoint of the laborer, it has no legal support. If A., for the welfare of himself and family, leaves an employment, and B., seeking the welfare of himself and family, takes the place voluntarily vacated by A., no legal wrong has been done A. by B.; and the court, being no respecter of persons, will protect the rights of B. as fully as those of A.

Labor unions, when lawfully conducted to promote the welfare of the individual members, are not only commendable, but should be encouraged. It must, however, be remembered that every man has a right to decide his own course, and no body of men have a right to force their rules or their desires upon another against his wish. The union laborers on account of being in a majority have no more right to direct the action and conduct of the nonunion laborer than the nonunion, if in the majority, to dictate that of the members of the union. Combinations of labor and of capital are not inherently evil. Combination means association, and when conducted simply to advance the legitimate interests of those belonging to the combination it is difficult to perceive how evil can result therefrom, but when conducted in a manner to interfere with individual liberty or as a menace to the public peace and welfare they place themselves without the protecting shield of the law.



A decree will be entered for complainant as follows:

It is ordered, adjudged, and decreed that each and all of the respondents not dismissed as aforesaid, and any and all other persons associated with them in committing the acts and grievances complained of in said bill, be, and they are hereby, ordered and commanded to desist and refrain from in any manner interfering with the free use and occupation by complainant of any and all of its property or premises of every kind and character; and from entering upon the grounds or premises of complainant for the purpose of interfering with, hindering, or obstructing its business; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employés of complainant to refuse or fail to perform their duties as such employés; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employés of complainant to leave the service of complainant; and from preventing, or attempting to prevent, any person or persons, by threats, intimidation, force, or violence, from entering the service of complainant; or from preventing, by violence or in any manner of intimidation, any person or persons from going to or upon the premises of complainant for any lawful purpose whatever, or from aiding, assisting, or abetting any person or persons to commit any or either of the acts aforesaid; and the said respondents, each and all of them, are forbidden and restrained from congregating at or near the premises of complainant for the purpose of intimidating its employés or coercing said employés, or preventing them from rendering their service to said complainant; and from inducing, by intimidation, coercion, or threats, any employé to leave the employment of said complainant, or from attacking, assaulting, threatening, or by use of abusive language, or in any manner of intimidation, at any place within the city of Omaha, attempting to prevent any of the employés of complainant from continuing in its service, or any person or persons from engaging in the service of complainant; and each and all of them are enjoined and restrained from going, either singly or collectively, to the homes of complainant's employés, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employment of complainant, or from entering complainant's employ, and as well from intimidating or threatening in any manner the wives and families of said employés for the purpose of preventing any employé from remaining in the service of complainant.

It is impossible, as well as impracticable, for the court in advance to specify all the acts and things which shall or may constitute intimidation or coercion. This must be left to the wisdom and intelligence of respondents. Any violation of the order will, however, be done at the party's peril.

## Ex parte McLEOD.

(District Court, N. D. Alabama, S. D. February 13, 1903.)

## 1. CONTEMPT—ASSAULT ON OFFICER OF COURT.

AS courts can exercise judicial functions only through their judicial officers, an assault upon a judicial officer because he has discharged a judicial duty is necessarily an attack upon the court, for what it has done in the administration of justice.

## 2. SAME.

It is vital to the welfare of society that courts which pass upon the life, liberty, and property of the citizen be free to exercise their reason and conscience unawed by fear or violence; and the highest considerations of the public good demand that the courts protect their officers against revenges induced in consequence of the performance of their duties, as well as violence while engaged in the actual discharge of duty.

## 3. SAME.

It is a high contempt of court to seek to punish a judicial officer for his official acts, elsewhere than before a constituted tribunal of impeachment, and the offense culminates in its malignity toward the court when its officer is assaulted for judicial acts by one who has been arraigned before him.

## 4. SAME—WHAT CONSTITUTES.

An assault upon a United States commissioner because of past discharge of duty is a contempt of the authority of the court, whose officer the commissioner is, in the administration of criminal laws, although no proceeding against the offender was then pending, and the commissioner was not at the time in the performance of any duty.

## 5. SAME—POWER TO PUNISH.

Legislation on this subject reviewed. Section 725 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 533] held to take away the common-law power of federal courts to punish criticism of judicial acts, or publications which amount to no more than libels upon their officers, but not to deprive those courts of the power to punish summarily, as for a contempt, an assault upon a court officer while yet in office, induced by his performance of duty in a past case.

## 6. SAME.

Courts will punish contempts of their authority only when the ends of justice will be best subserved thereby.

(Syllabus by the Court.)

## On Rule to Show Cause against Punishment for Contempt.

A. N. McLeod was indicted on the 15th of March, 1902, under section 5399 of the Revised Statutes [U. S. Comp. St. 1901, p. 3656]. The indictment charged, in substance, that McLeod, after examination, upon a charge of violating section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], before Commissioner Randolph, was on the 20th day of June, 1900, held to answer before the next circuit and district courts of the United States for this division and district, and that on the 30th day of October, 1900, McLeod, "well knowing that Randolph was such commissioner," etc., "went upon the highway, and unlawfully did threaten and assault the said G. B. Randolph, the said officer as aforesaid, for the reason that the said Randolph, as such officer, had required the said McLeod to execute bond for his appearance," etc. The next sitting of the grand jury, after the assault, was on the first Monday in March, 1901. It adjourned without taking action. This indictment was found a year afterwards, and more than 16 months after the assault. The case came on for trial at the September term, 1902, when the defendant interposed demurrers on the ground that the offense charged was not indictable under the laws of the United States. During the argument the district attorney stated that, if the demurrers were sustained, he would ask a rule requiring the defendant to show cause why he should not be punished

for contempt, and the court replied that it would determine in that event whether the offense charged constituted a contempt. The demurrers having been sustained (United States v. McLeod [C. C.] 119 Fed. 416), the court announced its conclusion as to the contempt feature at a subsequent day of the term.

Thos. R. Roulhac, U. S. Dist. Atty., for U. S.  
Knox, Blackman & Acker, opposed.

JONES, District Judge (after stating the facts as above). The evil example of the offender, and the improper inferences the lawless may draw from the inability to punish him by indictment, make it a duty to inquire whether the assault upon the commissioner because of past discharge of duty constitutes a contempt of the authority of the court, which should be punished, to prevent a repetition of such offenses in the future. A right understanding of the things which lie at the root of this matter is so vital to the good of society that full discussion cannot be out of place.

Civilized society abhors the arbitrament of private or interested force. It sets up its own tribunals to determine whether there is any reason for exerting the forces of society in the settlement of disputes, and, if so, in whose favor, and to what extent. The reason and conscience of officers called "judges" wield and direct the awful power of administering justice, which in so many ways controls the destinies of men. Violence to punish the free exercise of the reason and conscience of such tribunals is a blow at all order, and strikes at the very existence of justice. Separated from its officers, the court "is invisible, intangible, and exists only in contemplation of law." It "lives and moves and has its being," only in the acts and personality of living men. The ideal thing called the "court" is beyond the reach of force or fear or fraud. Bearing in mind what the court is, and how it is constituted, it is unreasonable, in the extreme, in seeking the principle for ascertaining and preventing obstructions to the justice the tribunal administers, to insist that this legal abstraction, which can neither breathe nor stir save in the bodies of living men, can be dissevered, for any practical purpose, in a matter of this kind, from the only personality in which it can exist as a living force. What reasoning being can deny that assaults upon court officers, because they discharge or have discharged their duty, are subversive of the independence of courts, and destructive of their authority and usefulness? Why are officers protected, if not to safeguard the administration of justice? There is generally no reason for protecting an officer as to the discharge of duty, which does not apply with equal force as well after it is done as while it is being performed. What a man fears may happen to him in the future because of doing his duty, if contemplated at the time the duty is being considered, may, and generally does, influence the discharge of that duty. The desire for vengeance frequently arises only after the duty is performed, because of its performance, creating greater need for protection to the officer than while he is executing the duty. In Divine and human laws the effective means relied on to restrain the acts of men is to hold up before their eyes the consequences which may result from their acts. Will the ordinary officer discharge his duty, fearlessly and unawed,

against the powerful, the vicious, and the desperate, when he knows that, the moment the duty is done, the power he serves will withdraw its protection, and leave him naked to the vengeance his act arouses? Will the lawbreaker dread to give loose rein to his passion, when he feels that the court cannot or will not punish assaults upon its officers because of past discharge of duty?

So firmly is recognition of the truth imbedded in our jurisprudence, that officers should be protected from improper consequences of discharge of duty, that it has always shielded judicial officers, on the highest considerations of the public good, from being called in question in civil actions for things done in a judicial capacity, even when corruptly performed. *Hamilton v. Williams*, 26 Ala. 529; *Busteed v. Parsons*, 54 Ala. 403, 25 Am. Rep. 688. The reason is nowhere as well stated as by Chief Justice Kent in the memorable case of *Yates v. Lansing*, 5 Johns. 282, where he says:

"Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible, and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have heretofore been deemed the best guardians of civil liberty."

Greater still must be the sweep of the evil, if judicial officers can with impunity be subjected, without resort to any court, to responsibility for judicial acts, and punished therefor by private vengeance, administered by persons who in the past have come in harsh contact with their power. Who would have any respect for the authority of a court whose judge, the moment he left the courthouse, could be subjected, with impunity, to insult and assault because of acts done in his judicial capacity while on the bench? Is it in the power of any person, by insulting or assaulting the judge because of official acts, if only the assailant restrains his passion until the judge leaves the court building, to compel the judge to forfeit either his own self-respect and the regard of the people by tame submission to the indignity, or else set in his own person the evil example of punishing the insult by taking the law into his own hands? If he forbear for the time, and resort to the criminal law, the remedy is hardly better than the wrong, since then he must become a private prosecutor in some other court, and depend on it to vindicate the independence of his own court. Unless the court, whose officer he is, can and will punish such conduct and acts towards the person of the judge, when past discharge of duty is the motive for the indignity, the judge must submit to some of these alternatives; and any of them degrade his office, and bring the administration of justice into scandal. No high-minded, manly man would hold judicial office under such conditions. Justice would depend not alone on the learning and integrity of the judge. His ability and will to fight unto death, even in a street brawl, would be equally, if not more, important. Are not these things of grave concern to the court, which can exercise its functions of administering justice only through the judge who is thus badgered, assaulted, and intimidated because of judicial acts?

When the duty and power of the court to deal with such evils are

considered in the light of principle and reason, the real question is not where the indignity occurred, but whether it related to the discharge of duty, and has the evil consequences in the administration of justice to which we have adverted. If these results follow, it is not at all material, so long as the judge is assailed for official acts, where the judge is at the time of the assault, nor whether he is then engaged in the discharge of any duty, nor whether the court is then sitting, nor whether the assault was with reference to a past, instead of a pending, case. These things are not of the essence of the offense and evil. Viewing the offense on principle, the sitting of the court is material only in determining when its power can be put in motion against the offender. The evil is that the judge has been held to accountability for his judicial acts, and punished, contrary to the law, because he has performed them. That acts like this, which degrade the judicial office, unfit judicial officers for calm deliberation, awe them in the exercise of their functions, and undermine their independence, must recoil fearfully on the orderly and decent administration of justice, cannot be denied. It is therefore a high contempt of court for any one to seek to punish the judge for his judicial acts, elsewhere than before a constituted tribunal of impeachment. The offense culminates in its malignity toward the court when the judge is actually punished for judicial acts, by personal violence at the hands of one who has been arraigned before him.

After diligent search, no reported case has been found in this country which covers the precise question here involved. There is a very learned and thorough discussion, to which little can be added, of the general principles which govern cases of this sort, by the general court of Virginia, in *Commonwealth v. Dandridge*, 2 Va. Cas. 408. That case and this differ, however, in some important features. There the judge was insulted about a suit against Dandridge's surety, which was still pending before the court. The hour had arrived for its sitting, and the judge was on his way to the courtroom, and near there, to take his place on the bench, when Dandridge denounced him for past conduct in the case, at a former term. Here, no proceeding whatever in which McLeod was interested was pending either before the commissioner, or the circuit or district court, at the time McLeod assaulted the commissioner. The latter was not then in the discharge of any duty, as was the judge in the Virginia court. In *re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. In Dandridge's Case there was insult only by words and manner. Here there was an attempt to do personal violence. Judge Dade, who delivered the main opinion in Dandridge's Case, said:

"The reason why such indignities put upon the persons of judges when off the bench were punished summarily as contempts was, to use the language of Blackstone, 'because they demonstrate that gross want of regard and respect which, when courts of justice are once deprived of, their authority so necessary to the good of the kingdom is entirely lost among the people.'"

Immediately following, Judge Dade further says:

"Nor, in this particular, and for this end, is it of the least importance whether the contumely is used in open court, at the moment the occasion occurs, or at the moment afterwards, when the crier has proclaimed the adjournment, as the judge descends the steps of the bench, or those at the

courthouse door. The only real question in either case is whether it is his official conduct for which he is challenged and insulted."

He then adds:

"It was, however, very necessary for the defendant to draw this distinction, for which his counsel contended, if possible, because it was foreseen that there was no reason for protecting from insult the person of the judge in court on account of his official conduct which did not equally apply to protection out of court on the same account. It would have been shifting the ground to maintain that the insult in court was punishable because it interrupted the business of the court, because, besides its being sometimes of such a sort as not to produce this effect, it is referable in that respect to another head of attachment, viz., that for obstructing the power of the court."

Judges White and Parker rendered concurring opinions to the same effect. Judge Parker said:

"If any of the officers of justice are so threatened and insulted for their conduct as to make it apparent that such attacks, if permitted, would have influence on the general administration of the law, the offender is obnoxious to punishment on every principle of justice and expediency."

The conclusion that Dandridge was guilty of a contempt was unanimous, the ten judges concurring in the judgment. Commonwealth v. Dandridge, *supra*, is cited approvingly on the general doctrine of contempts, though not as to this precise point, by the supreme court of the United States, in *Ex parte Terry*, 128 U. S. 304, 9 Sup. Ct. 77, 32 L. Ed. 405.

It is said that punishment, as for a contempt, of an assault upon the officer because of past discharge of duty, is inconsistent with the spirit of our institutions; that such an assault is nothing more than an assault upon a private person, and can only be dealt with as such; that punishment under the contempt power of the court of such an offense invests the person of the judge with privileges at war with the spirit of equality between citizens which our form of government maintains; and that it is, therefore, without the power of the courts in this country to treat any assault upon the officer, no matter what the motive, when he is not actually engaged in the discharge of any duty, as a contempt of court. The necessities of government require, in many instances, that a difference be made between public servants and private citizens. For instance, it is for the public good that a representative shall not be questioned, elsewhere than in the house of which he is a member, for words spoken in debate. Such a privilege is the prerogative of the whole people; but it can only be made effective by giving protection to the individual who represents them, when it would not be accorded under like circumstances if he were acting in a mere private capacity. So it is of many statutory and constitutional privileges which are created for the public good, and not for the sake of the individuals who hold official positions. An assault upon a judicial officer which grows out of official conduct necessarily differs from an assault upon a private individual about a private matter. The consequences to society are not the same. One affects the administration of justice. The other does not. The motive of the assault, under every system of laws, determines the gravity of the offense. An assault upon one who is a judge, about a matter dis-

connected from his official duties, is not of concern to the court, for it does not affect the administration of justice, and does not differ in any wise or in any degree, in its legal aspects, at least, from an assault upon any other individual. It would be a bald usurpation of authority for the court to attempt to pervert the contempt power to punishing an act which in no way concerns the administration of justice. The case here grows out of an assault upon a judicial officer because of past discharge of duty,—a thing which gravely affects the administration of justice. Justification of punishment in such a case, as for a contempt, is found in the consideration that an assault upon a judicial officer for such a reason attacks the great prerogative of the people, to have and enforce the fearless administration of justice.

It is vital to the enjoyment of civic rights and free institutions that tribunals which pass upon the life, liberty, and property of the citizen, and his relations to government, and its power over him, shall be and remain uncorrupted, unawed, and independent. Hence the power to punish summarily contempts of their authority, to use the language of Blackstone, "is an inseparable attendant of every superior court." From time immemorial, in the mother country, the courts have exerted the power not only to compel obedience to their commands, and to preserve order and decorum in their presence, but also to crush unlawful influences of any kind which tended to undermine their authority, or to corrupt or awe their officers in the discharge of duty, or assailed in any way those under the immediate protection of the court. This power was exerted to put down evils which tended to scandalize the general administration of justice, as well as acts which affected particular cases before the court. Courts allowed no violent intermeddling with persons concerned in the administration of justice, whether the force was brought to bear upon them while in office, and discharging their duties, or when out of office, because they had discharged their duties. "Instances," to use the language of a learned judge, "were frequent where men have been fined and imprisoned for menacing and assaulting their adversaries for suing them, the counsel or attorney for bringing suit, the witness for his testimony, the juror for his verdict, and even the jailer for keeping him in custody." Courts uniformly regarded these things quite as vicious as assaults upon officials while actually engaged in the discharge of duty. They punished such "misbehavior" in order to curb an evil which, if let alone, weakened or threatened fidelity to trust of every person who then assisted or might thereafter assist in the administration of justice. This was the settled rule in the courts of the mother country. When the colonists came to our shores they brought with them the heritage of the Magna Charta, the writ of habeas corpus and the right of trial by jury. They also brought with them the principle of administering justice by courts armed with ample power summarily to suppress all manner of evils which threatened their independence, or assailed the freedom and impartiality of their officers in the administration of justice. These attributes, at the common law, followed the courts set up here, and inhered in their very constitution. At the common law, it was a contempt to publish criticisms of the acts of the court, and still more so to assail their officers by

physical force because of the past performance of official duties. When, upon the separation from the mother country, the colonists set up freer institutions, based on the inalienable right of the people to govern themselves, and the conviction that the people could be safely trusted with all their own powers; when it was declared that treason against the United States shall consist only in levying war against them, or in adhering to their enemies and in giving them aid and comfort; and when congress was prohibited from making any law abridging the freedom of speech or the liberty of the press, or the right of the people to peaceably assemble and petition for redress or grievances,—it followed inevitably, though not readily acknowledged at first, that government could not suppress or regulate these rights to the extent practiced in less enlightened ages in the mother country, and in the earlier periods of the government here, and that all powers of government, whether exerted by the legislative, judicial, or executive department, to suppress criticism or even libels upon the government, were hostile to the spirit of our free institutions. Profound distrust of the ability of the people to govern themselves, alone, made it possible to enact the alien and sedition laws, which expired by their own limitations, and were ever afterwards condemned by the aggressive power of a dominant public opinion, which proclaimed as a maxim of government that greater danger to liberty and free institutions lurked in any power to curb the right of free speech and liberty of the press, than from any abuses which might result from leaving them untrammelled. This public opinion, which has been acquiesced in by all departments of the government and gone unchallenged for a century past, has pronounced a construction of the constitution in this respect which has silently incorporated itself into that instrument. The purpose of the constitutional command as to “a speedy and public trial, by an impartial jury” would fail of fruition unless what is done in the courts is made known to the people, and, when improperly done, is held up for their condemnation. The right of a court to punish, as for contempts, criticisms of its acts, or even libels upon its officers, not going to the extent, by improper publications, of influencing a pending trial and usurping direction and control of the issue, would not only be dangerous to the rights of the people, but its exercise would drag down the dignity and moral influence of these tribunals. Such criticism is the right of the citizen, and essential not only to the proper administration of justice, but to the public tranquillity and contentment. Withdrawing power from courts to summarily interfere with such exercise of the right of the press and freedom of speech deprives them of no useful power. Liberty of the press and freedom of speech are not more favored than the right of the citizen to an impartial trial in the courts of the land. These are correlative rights, and the freedom of the press cannot be perverted to frustrate the right to a fair and impartial trial. According to the prevailing and better opinion in the state courts, exercise of the liberty of the press, when it goes to the unlawful extent of injecting its influence into the trial of a particular case, so as to affect the issue, may still be punished as a contempt, notwithstanding provisions found in several state constitutions which are the equivalent, in this respect,



of the commands of the constitution of the United States regarding the liberty of the press and freedom of speech.

The independence of the judiciary is a cherished principle in our plan of government. Courts in this country strike down legislation and restrain executive acts affecting the life, liberty, and property of the citizen to an extent unknown in monarchical countries, where courts have less authority and play a humbler part in protecting the citizen against the aggressions of government. There is not, therefore, and cannot be, any incompatibility between our institutions and the possession by the courts of the fullest power to vindicate their authority and preserve their independence against physical assaults, directed against their officers because of past discharge of their duties. Liberty of the press and freedom of speech regarding government do not include the right to resort to violence against its officers.

Whether or not section 725 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 583] deprives federal courts of the power to punish, as for contempt, improper publications made to influence the trial of a pending case, and coerce or control the judgment of those intrusted with the duty, is not at all involved in the question before the court. It is to be borne in mind that this section of the Revised Statutes was induced by the acquittal of District Judge Peck, who was impeached for imprisoning an attorney for a criticism of one of his decisions, after the case had ended in his court. The acquittal was largely due to the consideration that the common law authorized the judge to treat such criticism as a contempt of court, and that there was not sufficient evidence in other respects to show that the judge had acted corruptly or maliciously. Public opinion, which had not forgotten the passions aroused by the alien and sedition laws, and the partisanship of judges in their enforcement, looked upon the act of Judge Peck as an attempt of the judiciary to revive the principles of these obnoxious laws, and to assert common-law powers which were inconsistent with our constitution and institutions. Congress intended by this statute to put an end to the power of any federal court to prevent, by punishment as for contempt, criticism of judicial acts or decisions, or even mere libels on individuals concerned in the administration of justice. The statute was drawn by Mr. Buchanan, one of the managers of the impeachment, who afterwards became president. It is doubtful, to say the least of it, whether any of the eminent lawyers in the congress which adopted this provision, taken from a similar statute in Pennsylvania, had in mind anything more than to prevent the punishment, as for a contempt, of exercises of the right of free speech and liberty of the press in criticising and denouncing judicial acts. It is questionable, to say the least of it, whether congress intended to take away from the courts the existing common-law power to punish, as for a contempt, improper efforts, in the guise of published statements or comments, pending the trial of a particular case, to secure judgment therein, in obedience to the dictates of passion or prejudice, or to thrust other ulterior considerations before the tribunal, against which justice and the law seeks to guard judge and jury in the trial and decision of causes. The changes to which we have adverted in no way touch

the power of the courts, under their contempt power, to deal with physical assaults upon their officers in resentment of their official acts. This power remains as at the common law, unless withdrawn by some statute of the United States. Whatever may be the power of congress to regulate this matter as regards the supreme court, which is created by the constitution, it is not doubted that it may regulate the exercise of the power by inferior courts.

Is the power to punish this "misbehavior" as a contempt taken away by any statute of the United States? The judiciary act of September 24, 1789, invested the courts of the United States with "power to punish by fine or imprisonment all contempts of authority, in any cause or hearing before the same." Of this statute the supreme court, in *Re Savin*, 131 U. S. 274, 9 Sup. Ct. 699, 33 L. Ed. 150, observed:

"The question whether a particular act constitutes a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation. The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishment to certain specified cases, among which was misbehavior in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205."

It is as true of the later statute, as of the first, that the question whether a particular misbehavior "in the presence of the court, or so near thereto as to obstruct the administration of justice," constitutes a contempt, "is left to be determined," as before, by the court. The later statute does not in any way attempt to define a contempt, save by the definition, so far as concerns this case, that it must be "misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice." Neither does the statute of March 2, 1831, "declaratory of the law concerning contempts of court," which, in its second section, creates the criminal offense "of corruptly, or by threats or force, obstructing or endeavoring to obstruct the due administration of justice therein," define what things amount to an obstruction to justice. So the questions of what "misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice," constitutes a contempt, and what constitutes an obstruction to the "administration of justice," are left, just as before, to be ascertained by the court; and, if such misbehavior fall within the definition above, it may still be punished summarily by the court as a contempt.

As we have seen, the chief purpose of the statute "declaratory of the law of contempts of court," approved March 2, 1831, which is now codified in section 725 of the Revised Statutes [U. S. Comp. St. 1901, p. 583], was to prevent the punishment, as for contempt, of what were really only the exercise of free speech and liberty of the press in criticising judicial officers and acts, and chronicling the doings of the courts. The inherent existing power which this act regulated included not only the means of doing harm in the respect stated, but also the means of doing good in other respects, by preventing acts subversive of the authority and independence of the courts, which weakened the administration of justice and brought it into scandal. In view of the beneficent purpose for which the power was used in

the latter respect, we cannot, in the absence of words forcing that conclusion, impute any design to congress, in dealing with an evil exercise of the power, to destroy also the existing right to exert this power for good, in upholding the purity and independence of the courts. The words do not demand such a construction, and to give them effect would deny powers very essential to courts in "the administration of justice."

It may have been thought by some that congress, having provided the punishment of obstructions to justice, in the second section of the act "declaratory of the law of contempts of court," now section 5399 of the Revised Statutes [U. S. Comp. St. 1901, p. 3656], intended that such acts should not fall within the "misbehavior" which can be summarily punished under the contempt power. The supreme court has held that the fact that such an offense is punishable by indictment does not "make that mode exclusive, if the offense is committed under such circumstances as to bring it within the power of the court under section 725 [U. S. Comp. St. 1901, p. 583],—when, for instance, the offender is guilty of misbehavior in its presence, or of misbehavior so near thereto as to obstruct the administration of justice." In *re Savin*, supra.

In one respect the act of March 2, 1831, is broader than the judicial act of September 24, 1789. The act of 1789, in its words, at least, confined the contempt power of the court "to contempts thereof" in "any case or hearing before the same." Under that act, to bring the "misbehavior" within the power of the court, when it did not occur in the presence of the court, the misconduct must relate to a "case or hearing before the same." The case must be pending "before" the court, not a case which is no longer "before" it, in consequence of having been decided or dismissed. The first section of the act of 1831 (now section 725) omits the words "contempts thereof" in "any case or hearing before the same," found in the act of 1789, and authorizes the punishment of "contempts of their authority" in "the presence of the court, or so near thereto as to obstruct the administration of justice." Under section 1 of the act of 1831 (now section 725 of the Revised Statutes), it is immaterial that the case is no longer "before" the court, if the misbehavior concerning it is "in the presence of the court, or so near thereto as to obstruct the administration of justice." It is only in this second section of the act of 1831, now constituting section 5399 of the Revised Statutes, that we find the words "therein," or "in any court of the United States," which are not contained in the first section, which regulates the contempt power only. The words "obstruct the administration of justice" are found in both sections. Why, when regulating the existing contempt power, in this carefully drawn statute, did congress, in the first section, dealing with the contempt power only, use the words "obstruct the administration of justice," and then, in the next section, which does not regulate the contempt power, and only defines crime, avoid the use of the general term "administration of justice," or, rather, qualify it by preceding the term with the word "due," and following it by the word "therein," so as to read, "obstruct the due administration of justice therein"? The words "obstruct the due ad-

ministration of justice therein," used in a penal enactment, necessarily limit the offense there denounced to cases "therein,"—in the court, still "before the same,"—and exclude past cases. They do not cover "misbehavior," which, though not directed to a particular case, affects all cases alike in the general administration of justice. The words "obstruct the administration of justice," in the first section, which is not penal, regarding a power to preserve the purity and independence of the courts, and thereby promote the dispensation of justice, are broad enough to include not only improper acts in particular cases, but those which undermine the general administration of justice, as well.

In view of the history of this statute, and its studied discrimination in the use of words in the different sections, we cannot presume that congress, in regulating, in the first section, an existing power, the possession of which is of such vital importance to the objects for which courts are created, regarding misbehavior "so near to the court as to obstruct the administration of justice," used the term "administration of justice" in the same narrow sense in which it is employed in the subsequent section, creating an indictable offense against the administration of justice, which offense, by the use of the qualifying word "therein," is confined to misbehavior in particular cases pending in the court, and therefore does not include acts which tend to subvert the purity and independence of courts or scandalize justice, unless done in relation to a particular pending case. The ruling on the indictment in this case sharply illustrates the distinction. The assault here is a blow at the fearlessness and independence of judicial officers, and scandalizes the general administration of justice; yet it could not be punished by indictment under this second section of the act of 1831 (section 5399 of the Revised Statutes), because it did not relate to any pending case in court,—“therein.”

Bearing in mind that congress, in the present statute, liberated the power so that it may deal with contempts—"misbehavior"—with reference to past as well as pending cases, if they fall within the contingencies prescribed, and presuming, as we must, that congress was desirous that the inherent power the courts then possessed, to preserve their purity and independence in the general administration of justice, should not be unduly shackled, there can be little doubt that congress deliberately rejected the employment of the word "therein," after the words "obstruct the administration of justice," in the first section, in order to avoid striking down the power to prevent evils which attack the administration of justice itself, and, by undermining the security and independence of its officials, bring it under suspicion and scandalize it in the face of the people, although, as here, the misbehavior does not obstruct justice in any particular case. The assault here was clearly an offense of that character. Violence done to the judge because of the discharge of duty may undermine his independence and constrain his judgment, and affect every subsequent case which comes before his court. The judicial mind which once yields and pronounces judgment according to the dictates of force or fear, is degraded and impure. It will weaken again under the same influence, and successful exertion of the influence in one case will

beget other unlawful endeavors, with like results. Such a mind is not a fit source from which to seek justice in any case. So it is that such acts become obstructions to justice, which affect judicial fearlessness and independence in every case before the court. They thus fight against justice in the particular cases, as well as in its general administration.

What is meant by the words "so near thereto" has not been defined by judicial decision. In view of the evil intended to be suppressed, they mean not the place where the "misbehavior" is committed, but the power of the "misbehavior" to harm the administration of justice. If the force put in motion by the "misbehavior," at whatever place it is committed, assails or threatens the authority and independence of the court, then the "misbehavior" is "so near thereto" as to be punishable under this section. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638. In *Savin, Petitioner*, 131 U. S. 269, 9 Sup. Ct. 699, 33 L. Ed. 150, the matter came under discussion; but the supreme court declined to decide whether the words "so near thereto as to obstruct the administration of justice" refer "only to cases of misbehavior outside of the courtroom, or, in the vicinity of the court building, causing such open or violent disturbance of the quiet and order of the court while in session as to actually interrupt the transaction of its business." In that case *Savin* attempted to bribe a witness in the witness' room while he was waiting to be called into the courtroom. His offense took place out of sight and hearing of the court, though the trial in which the witness was to testify was then going on. The judge did not know what transpired at the time, yet *Savin* was held to be guilty of "misbehavior in the presence of the court." In his opinion, Justice Harlan quotes approvingly Bacon's *Essay on the Judicature*, No. 57, where he says:

"The place of justice is an hallowed place, and therefore not only the bench, but the footpace, and the purprise thereof, ought to be preserved against scandal and corruption."

Justice Harlan adds:

"We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses, and misbehavior anywhere in such a place is misbehavior in the presence of the court."

If the inanimate things which are devoted to the use of justice are hallowed in the eyes of the law, at least when the court is in session, how much more so, in principle, must be the security against assaults, because of discharge of duty, of the person of the officer who orders and controls the administration of justice therein, no matter where he is. Is not the judge "so near" to the court that whatever unlawfully influences him unlawfully influences the court?

No useful purpose would be subserved by discussion of the distinction between contempts in *faciæ curiæ*, and constructive contempts which may be punished summarily by the court. There is a learned and instructive opinion on this subject, by Judge Hammond, in *The United States v. Anonymous* (C. C.) 21 Fed. 761. He says:

"It is quite clear that it is a mistake that all contempts not committed in the presence of the court are constructive only. The mere place of the oc-

currence may not be an absolute test of the question. It may depend on the character of the particular act in other respects, besides the place where it happened. When it takes the form of an assault upon the officer, as when he was beaten and made to eat the process of the court and its seal, as in *Williams v. Johns*, 2 *Dickens*, 477, the impediment to the even administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to bar and dragged the judge from the bench and beaten him."

If the people of a distant locality, frenzied by opposition to a particular law, should band together to prevent a United States commissioner being stationed among them, and drive him away by force, the place of the occurrence would be immaterial, in determining the character of the offense, no matter how far distant from the sittings of the court. Such lawless acts would certainly not disturb the sittings of the court or interrupt the orderly dispatch of its proceedings; yet the direct effect, in law and morals, would be as obstructive of justice as if the same lawless assembly had snatched prisoners from the hands of the marshal, or kidnapped witnesses to prevent their going before the grand jury, or, for that matter, arrested the judge himself, when found miles away from the courthouse, and detained him by force, to prevent his holding the next session of the court. No one would doubt the power to punish such acts as misbehavior "so near to the court as to obstruct the administration of justice," for they arrest or disturb the powers of the court as effectually as when done in the very presence of the court. See *In re Brule* (D. C.) 71 Fed. 943.

What is said as to the judge of a court applies with equal force to persons who aid it in a judicial capacity in the administration of justice. Commissioners are important officers in the administration of criminal justice. Though they do not hold courts of the United States, they perform judicial duties. The district court appoints them. It assigns them to posts of duty, generally at a distance from the court. They are on duty, as regards matters pertaining to their office, though not actually engaged in holding an examination, while they remain at their posts in readiness to discharge their duties. These duties cannot be fearlessly performed if commissioners must seclude themselves in their offices. They have the right to go on the highways, free from fear of molestation on account of the discharge of duty, whether past or prospective. Certainly it is of concern to the court which appoints the commissioner, and the administration of that part of justice which is confided to him, that he be protected from violence and intimidation as to his fidelity to his trust. This he does not have, unless the court protects him against violence because of his having done his duty. He is, we repeat, an officer of the district court, and under its protection as to the discharge of duty. Whatever obstructs him or degrades him, and prevents fearless discharge of duty, necessarily obstructs justice in the court of final jurisdiction, one of the first steps of which must be taken by him in the examination, and holding offenders to answer in the district or circuit court. Assaults upon him, while he remains in office, because he has discharged its duties, are assaults upon a representative of the

court because he has borne true allegiance to the law and the court. If the lawbreaker may attack him as a representative, the court may defend him as a representative. It is true that the commissioner, as an individual, is under the protection of the state laws. Local authorities are sometimes unable to give him adequate and prompt protection. The state law takes no concern in the federal officer, as such, or in protecting his authority, or in preventing violence to him because he has discharged his duty. It is not an offense against the state to resist the authority of a federal officer. The government established by the constitution is not dependent on state laws for means to protect its officers in the discharge of duty. The executive may undertake this duty, instead of relying on the laws or officers of the state. In *re Neagle*, 131 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. On the same principle, the court may do so in behalf of its officers, if it has any power it may lawfully exert to that end. How far the government will intrust the protection of its officers, in that behalf, to the laws of another government, which protect the officer as an individual only, is a matter of governmental policy. The fact that the laws of one government, operating to shield the individual only, may in that way furnish protection to the officer of another government, may be a reason why the latter power does not pass statutes of its own to shield its officers; but it does not touch its power to do so, or render it improper to rely on means of its own, instead of invoking the laws of another power. *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717. Whatever the reason for the omission to pass statutes against the evil now under discussion, it affords no reason why the court, if it has the power, ought not to exercise its authority to protect its officers against the evil.

It is not the duty of the court to notice every contempt. Many contempts may well be left to be rebuked by the good sense of the people, and the respect they entertain for the institutions of their country, without in any way impairing the authority of the court. Courts will punish for contempts only when the ends of justice will be best subserved thereby. The character of the offense charged here required the court to inquire fully as to it. The assault was committed nearly 16 months before indictment found. Three grand juries ignored the matter, if it was brought to their notice. The defendant has been prosecuted for the assault in this court and the state court. The animosities engendered by the assault, as the court is advised, have given place to kindly relations. The admonition to the defendant has been sufficient. The case and its discussion have brought home to those who might be disposed to repeat the offense, full realization that assaults upon officers because they have discharged their duties are blows at good government, degrading to those who indulge in them, which an outraged public opinion, as well as courts, will resent. Under these circumstances, it does not seem to the court that any public good will flow at this late day from punishing the offense. This conclusion renders it unnecessary to consider the interesting question whether the court, having timely notice of the offense, and allowing the first term at which it could be punished to pass without

noticing it, may punish the offense summarily after other terms have intervened, when the defendant has all the while remained openly within the jurisdiction.

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**PABST BREWING CO. v. CRENSHAW et al.**

(Circuit Court, W. D. Missouri, St. Joseph Division. February 9, 1903.)

**1. INSPECTION—MISSOURI BEER INSPECTION LAW—CONSTRUCTION.**

In Act Mo. May 4, 1899 (Sess. Laws 1899, p. 228), providing for the inspection of beer and other malt liquors, section 5, which requires every person or corporation who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in the state before offering the same for sale to notify the inspector, who shall inspect and label the same, etc., reasonably construed, has no application to the case where beer manufactured outside of the state is shipped through it for sale in another state, nor to such shipment into the state to a warehouse of the shipper used merely for convenience in distributing beyond the limits of the state.

**2. SAME—VALIDITY—DISCRIMINATION AGAINST OUTSIDE MANUFACTURERS.**

The provision of such act that beer made in the state and exported for sale outside of it shall be inspected without charge is one with which a foreign manufacturer has no concern, and does not create an illegal discrimination against him, the inspection fee being charged alike on all beer sold in the state, whether made therein or outside.

**3. SAME.**

The provision of section 5 of the act, which requires an affidavit from the manufacturer where beer made outside the state is brought therein for sale, showing that only certain ingredients are used in its manufacture, whereas no affidavit is required from domestic manufacturers, is not a discrimination against the foreign manufacturer of which he can complain or which renders the act invalid under the fourteenth constitutional amendment, but is a reasonable provision, inasmuch as it is impracticable for the state to make an actual inspection of the materials used where the manufacture is outside of the state, as it does in case of the domestic product.

**4. SAME—CONSTRUCTION OF ACT.**

The further provision of said section 5 that "upon receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquors," when given a sensible construction in connection with the other provisions of the section and the act, does not require nor authorize the inspector to open the packages and inspect the contents, but contemplates that the affidavit shall be accepted in lieu of an actual inspection, and that the inspector shall identify and label the packages covered thereby.

**5. SAME—INTERFERENCE WITH INTERSTATE COMMERCE.**

Such act, dealing as it does with liquors, which when shipped into a state as an article of interstate commerce are specially subjected to the police regulations of the state by the Wilson act of August 8, 1890 [U. S. Comp. St. 1901, p. 3177], cannot be held to impose an unconstitutional burden upon interstate commerce, because the fees for inspection fixed therein, which are paid into the state treasury, may amount to more than the cost of the inspection.

**6. SAME—ERRONEOUS CONSTRUCTION OF STATUTE—INJUNCTION.**

It is not within the police powers of a state to subject an article of interstate commerce passing through the state, or which may be temporarily stored therein for distribution to purchasers in other states, to exactions either in the way of taxes or inspection fees, and a bill

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¶ 5. State laws interfering with interstate or foreign commerce, see note to *McCanna & Fraser Co. v. Citizens' Trust & Surety Co.*, 24 C. C. A. 13.



by a manufacturer of beer in another state alleging that such inspection law is construed by the state officers to require the inspection of beer shipped into the state by complainant and there stored in its warehouses for convenience of distribution until it shall be there sold and forwarded in the original packages to the purchasers in other states, and that complainant is required under penalty of prosecution to pay the fees for such inspection, states a cause of action for an injunction.

In Equity. On demurrer to bill.

This is a bill in equity to enjoin the defendants, G. Y. Crenshaw, as state beer inspector, and his assistant, from enforcing against the complainant, a corporation of the state of Wisconsin, the provisions of an act of the Legislature of the state of Missouri, entitled, "An act creating the office of inspector of beer and malt liquors of the state, and providing for the inspection of beer and malt liquors manufactured and sold in this state," approved May 4, 1899. Sess. Laws Mo. 1899, p. 228. The bill sets out the act, the substantive provisions of which are that it creates the office of beer inspector, to be appointed by the Governor of the state, and defines his duties.

Section 3 provides that every person or corporation keeping a brewery for the manufacture of beer or malt products within the state shall cause the same to be inspected by said inspector. Section 4 requires that such malt liquor shall contain no other substances than pure hops, or pure extract of hops, or pure barley, malt, or wholesome yeast, or rice. Section 5, which it is conceded has special reference to the beer or malt liquors manufactured without the state, provides, in substance, that every person or corporation who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in this state shall, upon receipt of same and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops or the extract of hops, or pure barley, malt, or wholesome yeast, or rice, was used in the manufacture of the same; "upon receipt of said affidavit, the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this state." Section 6 provides for the keeping of books and record of fees collected, and expenditures incurred, to be reported to the Governor of the state. Section 7 makes it the duty of the inspector to cause to be inspected all beer or other malt liquors brewed, manufactured, or sold in this state, and, if found to come up to the requirements of the statute, he shall place upon the package containing such beer or malt liquor his label, certifying that the same has been inspected, and is made of wholesome ingredients. Section 8 fixes the inspection fees at one cent for each gallon contained in each package, and two cents for labeling each package, which fees are to be paid into the state treasury. The word "package" as used in the act shall mean any kind of vessel, other than pint and quart bottles, in which any beer or malt liquor may be placed for sale, containing eight gallons or less; when said beer, etc., is placed in pint or quart bottles, a "package" shall be construed to mean not to exceed 48 pint bottles or 24 quart bottles, which, when manufactured and so bottled, must, before sale, be placed in suitable cases containing said number and size of bottles, for inspection and stamping by said state inspector; and when placed in vessels containing more than eight gallons, the word "package" shall mean each eight gallons or fractional part thereof so contained in said vessel. Section 9 provides that the expense of said office, including the salaries of the inspector and his deputies, shall be paid monthly out of the amount appropriated by law from the general revenue fund; and all fees received by the inspector under the provisions of the act shall, on or before the last day of each month, be paid into the state treasury and placed to the credit of the general revenue fund. Section 10 declares that any person who shall sell any beer or malt liquor within this state which has not been inspected

according to the provisions of the act, or contained in packages which shall not have upon them the certificate of the state inspector, etc., shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$500, or by imprisonment in the county jail for a period not less than six months, and in addition thereto shall have his license or other authority, giving him the right to manufacture or sell said liquors in this state, revoked, and shall not again receive any such license or other authority for a period of two years. Section 12 provides that all prosecutions for violations and penalties under the provisions of the act shall be either by indictment or information in any court of competent jurisdiction. Section 13 declares that all beer or other malt liquors manufactured in this state and exported outside of the state for sale shall be inspected as other liquors designated in this act, but said inspection shall be free of cost to the manufacturer.

The bill of complaint, in its substantive allegations, states that the complainant is a manufacturer, in the state of Wisconsin, of grades of beer and malt liquor, requiring special treatment; and that it ships into the state of Missouri, annually, not less than 15,000 barrels of beer and other malt liquors, of 30 gallons each, of the aggregate value of not less than \$100,000; that it has a warehouse in the state of Missouri in which its beer is stored. About one-half shipped into the state is subsequently reshipped from its said warehouse and sold in other states. The bill states that a large number of persons are engaged in the manufacture of beer in the state of Missouri, a large quantity of which is for sale in the state and also for export therefrom; and that a very large quantity is also shipped into the state from other states and countries. It is charged that said act of the Legislature is in conflict with the Constitution of the United States, and is violative of the complainant's rights thereunder, and especially under the fourteenth amendment thereto. The bill then proceeds to set out, with considerable specification, the objections to the validity of the statute, which may be briefly stated as follows:

1. That the Act imposes upon the product of the importer into the state a greater exaction than upon the product of the manufacturer in the state, or is imposed upon the property of other persons in the state, and is, therefore, an unjust discrimination against the nonresident brewer; and is, therefore, in conflict with the fourteenth amendment and the interstate commerce clause of the federal Constitution.

2. That not less than 7,500 barrels, of 31 gallons each, of the value of \$50,000, shipped into the state by the complainant, is intended for subsequent exportation to other states, and is sold and reshipped to other states in the original packages, although brought into the state and stored in complainant's warehouse; and that complainant is compelled to pay, and does pay, to the state, inspection fees upon that part of its product intended for other states, in violation of section 8 of article 1 of the Constitution of the United States.

3. That such inspection fees are not required to be paid on the beer manufactured in the state of Missouri and exported therefrom, while such fees are required on the beer manufactured outside of the state by complainant and shipped through Missouri into other states.

4. That while \$12,000 is appropriated for the cost of inspection, and that as no part of this sum is paid by the manufacturers of beer in the state of Missouri upon their products exported for sale, an unjust proportion of these salaries is collected from the complainant.

5. That the act requiring the nonresident brewer to furnish an affidavit of the ingredients from which his beer is manufactured costs the complainant one thousand dollars annually, while the domestic manufacturers are not required to furnish such affidavits; and that when such affidavit is submitted it is of no force or effect, and does not take the place of an inspection. But that the act, nevertheless, requires in addition to such affidavit an inspection, which necessitates the breaking open of the packages in which the beer is contained, and that this will result in the destruction of at least one package of each shipment, as the beer in the bottle opened will become "stale, flat and unprofitable."

In one paragraph of the bill it is alleged, in terms, that a large per cent. of the beer shipped by the complainant is stored in this state, in the original packages, or bulk, temporarily, for distribution and sale outside of the state, without breaking the original packages; and that the defendants subject such to the demands of the state under said act to the inspection fees; that they have caused prosecutions to be instituted for violations of the act for refusals to pay such fees, and threaten further prosecutions, to the great annoyance of the complainant, attended with exposure to a forfeiture of its right to transact its business in the state; the particulars of which averment will more fully appear in the opinion of the court.

The defendants demur to the bill.

Harkless, O'Grady & Chrysler and Francis C. Downey, for complainant.

Wm. M. Williams and E. C. Crow, Atty. Gen., for defendants.

PHILIPS, District Judge (after stating the facts). It is conceded to the complainant that the bill is not obnoxious to the objection that this is a proceeding against the state as such. It is directed against the defendants in their individual capacity, who, under color of their office as inspectors, are alleged to be enforcing a legislative act in contravention of the Constitution of the United States, and, therefore, such act affords them no protection as representing the state. Counsel for defendants at the hearing conceded this. The Supreme Court of the state, in *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596, and *State v. Bixman*, 162 Mo. 1, 62 S. W. 828, has affirmed the validity of the statute in question under the Constitution and laws of the state. It held that the statute was not a revenue measure, as distinguished from a mere inspection fee or license under the police power of the state; that the manufacture and sale of intoxicating liquors in the state not being of the nature of a natural right, it is competent for the state, in permitting such occupation and business, to make such regulations and conditions therefor, in the interest of the public health of the people, as the Legislature, in the exercise of the police power of the state, may deem fit and proper to impose. No matter, therefore, what may be the opinion of this court respecting the correctness of that ruling, in so far as it rests upon the Constitution and laws of the state, it must adopt and follow such construction by the highest court of the state. *Cargill Co. v. Minnesota*, 180 U. S. 453, loc. cit. 466, 467, 21 Sup. Ct. 423, 45 L. Ed. 618. The important question, therefore, for the determination of this court is whether or not the act on its face, as applied to the instance and situation of this complainant, is in conflict with any of the supreme provisions of the federal Constitution.

The act in question does not impose upon imported beer any greater inspection fee than upon the domestic manufactured article. This being true, although the mode of ascertaining and collecting be different, being necessarily so, dependent upon a difference in circumstances, constitutes no discrimination, within the meaning of the Constitution, against the importer; and is not, therefore, an attempt at interference with the freedom and equality of interstate commerce. *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 387.

The principal criticism by complainant's counsel is predicated of

sections 5 and 13 of the statute. A reasonable construction of section 5 does not justify the contention that it has any application to the instance of beer manufactured outside of the state and shipped through the state for sale in another state; nor to such shipment into the state to a warehouse—of the nature of an entrepot—of the shipper, used merely for convenience or eligibility for distribution beyond the limits of the state. The Supreme Court of the state, in *State v. Bixman*, supra (page 40, 162 Mo., page 838, 62 S. W.), clearly enough indicates that the state places no such construction on the act. The court said:

“The law exacts that every brewer, foreign as well as domestic, who sells in the state, shall pay the same inspection fees or price for the privilege of selling in this state, and shall submit to the same inspection; on the other hand, the law exempts all brewers who export from paying these fees.”

The language of section 5 is:

“Every person, persons or corporation who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in this state shall, upon receipt of same, and before offering for sale, notify the inspector,” etc.

The clear intendment of this is that it has reference alone to beer received in the state for sale here. Where the language of a statute is such as to be reasonably referable to a subject-matter within the legal competency of the legislature to regulate, that interpretation should obtain which refers its import to a valid, rather than an invalid, act. “Nothing is better settled than that a statute should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.” *Lau Ow Bew v. U. S.*, 144 U. S. 47, loc. cit. 59, 12 Sup. Ct. 517, 36 L. Ed. 340. This is predicated of the wise rule laid down in *Plowden*, 205:

“From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances.”

Does the fact that section 13 of the act exempts the domestic manufacturer from any fee for the inspection of beer to be exported by him outside of the state create an illegal discrimination against the foreign importer? If the state, in the interest of the public health, requires the domestic exporter to submit his product to inspection by the local inspector prior to the exportation, without fee, how does it concern the foreign manufacturer? The Missouri manufacturer shipping into another state for sale, like the Wisconsin exporter, is subject to the laws of the state where the sale is made, and must submit to such regulations as are imposed by the state where the product is to be consumed. It would be subject to the

police power of such state for regulation. After the complainant has shipped his product into the state for sale here, and the same is sold by him, it does not concern him what disposition his vendee may make of it, or what impediments or burdens his vendee may encounter in disposing of it. The inspection fee exacted by the statute being only on beer shipped hither for sale in the state, if the purchaser intends his purchase for sale in another state, he would not be subject to any local inspection fee in Missouri on the article in the original package in transitu to another state, or temporarily stored here for the convenience of foreign distribution. It is only when shipped here to become mingled with the common property of the state that it becomes amenable to the police laws of the state. In short, the complainant is in no position to complain of any discrimination as against him by the state until his product shipped hither is subjected to some police regulation or exaction not common to a like domestic product. The allegations of the bill in this respect will be discussed further on.

This brings us to the consideration of the objection, based on section 5 of the act, respecting the requirement that when a consignment is made for sale in this state the shipper is required to furnish the inspector "with a sworn affidavit, subscribed by an officer authorized to administer oaths from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops or the extract of hops, or pure barley, malt or wholesome yeast, or rice, was used in the manufacture of the same." The making of these affidavits by complainant, it is alleged, costs it annually about \$1,000, whereas no such burden is imposed upon the domestic manufacturer. In construing this provision, regard must be had to the scheme of the police regulation of the state, which was, as held by the Supreme Court of the state, to protect the people against the use of unwholesome beer. To this end, all the beer sold for consumption in the state should contain no other substances than those defined by the act. It was competent for the State Legislature to devise some reasonable and practicable method of ascertaining and evidencing the fact of a compliance with this requirement. In the case of a domestic manufacturer, as conceded at the hearing, the inspector goes to the brewery and makes his test by "taking a sample of the mash and of the beer that they are fermenting. This method would not in the slightest manner interfere with or hinder them in their operations, and would at the same time enable the inspector to inspect hundreds and thousands of gallons of beer from the one sample; for as the mash is, so must the beer be." It is impracticable for the state to send and maintain an inspector at every outside brewery, to make an inspection and test. Hence, in respect of the foreign shipper, the Legislature had recourse to the acceptance from him of an affidavit evidencing a compliance with the requirements as to the ingredients of the imported article. It would most certainly seem that, if this were all, the importer ought not to complain. The chief objection to accepting such ex parte evidence of the purity of the imported article might, with great propriety, be made by the con-

sumer. Such evidence might be very unreliable and afford little protection. The state, having no extraterritorial jurisdiction, could not proceed against the nonresident importer for a violation of its penal statute; and, singularly enough, the statute does not undertake to impose any penalty upon the agent or representative of the foreign manufacturer for presenting in this state to the inspector a false affidavit. I suspect that the Legislature was more concerned in the matter of obtaining fees, to swell the exchequer of the state, than in the protection of the people who might drink beer. If, however, such affidavit be accepted by the state as sufficient evidence, it certainly ought not to lie in the mouth of the importer to complain that the trouble of making, on a stereotyped form, such perfunctory statement, and the inconsiderable fees likely to be paid therefor, enable him to stand on an equal footing with the domestic manufacturer, who is compelled to admit to his premises the inspector to make an actual test of every tub of mash, and to follow it with labels on the receptacles into which it is placed for sale. It seems to me, in this respect, that the law is rather a discrimination in favor of the importer. Law is intended to be a sensible and practicable thing, and therefore it recognizes distinctions growing out of different situations; and different rules may be made respecting different classes, where classification is a result arising *ex necessitate rei*. The equality of right exacted by the Fourteenth amendment to the federal Constitution is only that the laws "shall operate on all alike under the same circumstances." *Clark v. City of Titusville*, 184 U. S. 333, 22 Sup. Ct. 382, 46 L. Ed. 569.

Further objection to said section 5, in this connection, is the contention that, in addition to such affidavit, the inspector is required to make an inspection of each package containing beer; that such inspection implies a physical opening of at least one bottle in each package containing beer in bottles, and when in kegs or barrels the opening and taking therefrom a sufficient quantity to sample, which would involve the destruction and loss of the article so opened, as it is a well-known fact that beer when thus opened becomes stale and unsalable. Reading the phrase in section 5, "upon receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquor," in connection with sections 7 and 8, which impose upon the inspector the duty of causing to be inspected all beer or other malt liquors brewed or manufactured or sold in this state, to determine its ingredients, gives color to the contention that a physical inspection of the imported beer for sale in the state, in the mind of the Legislature, is as much required as in the case of the domestic manufacturer. It must be conceded that the Supreme Court of the state, in passing upon said section 7, in respect of the domestic manufacturer, was placed in distress in upholding the validity of the statute to avoid a construction that seemingly required a physical opening of the package after it was put up by the brewer for sale, by holding that it was contemplated the inspection should be made of the mash or fermented beer at the brewery before it passed into the packages or receptacles for sale. The court felt compelled to resort to this judicial coup d'état to avoid

the criticism that such mode of inspection involved a physical destruction of a part of the property of the owner, without making any provision for just compensation therefor, and thus taking private property without due process of law; and further to escape following the recognized rule that, in determining the validity of a legislative act, the question is, what do its terms authorize to be done under them? rather than what is done under them. But, as already shown, the mode of inspection suggested by the state Supreme Court respecting the inspection of domestic beer would be quite impracticable in the case of beer manufactured outside of the state. Evidently it was contemplated by the Legislature that the phrase, "upon the receipt of said affidavits the inspector shall inspect and label the packages," should imply that the inspector is merely to inspect the same thing he labels, i. e., the package; that it was intended that the affidavit should take the place of inspecting by test the ingredients of the package, and that the inspection to be made by him is only to see that the packages labeled correspond with those covered by the affidavit. And I doubt not that, as stated by defendants' counsel at the hearing, this is the course in fact pursued by the inspector.

Is this construction given by defendants' counsel to this clause of section 5 unreasonable, or too artificial? Why should the Legislature provide that the importer alone should furnish an affidavit, giving the constituent elements of his product, if that were to be followed up by a physical test, by sample, of each package? The affidavit under such construction could perform no reasonable office. It would be wholly a work of supererogation. A physical inspection by opening the packages would not only disclose all that the affidavit gives, but would furnish all the safeguard the state could want. In construing statutes, courts should not exhibit an eagerness to find flaws, nor prefer that hypercritical, technical import of a term which would reduce the statute to a legal absurdity, rather than that which, while giving a sensible office and meaning to the context, will preserve the consistency and efficiency of the law. As said by Mr. Justice Field, in *U. S. v. Kirby*, 7 Wall. 486, 19 L. Ed. 278:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will, always, therefore, be presumed that the legislature intended exceptions in its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The bill of complaint does not in terms charge that the inspector has ever attempted to open the imported packages with a view of making an analysis of the contents of a single bottle or cask, or that he threatens to do so. I should not hesitate to interpose by injunction to protect the importer of beer against a rule of inspection which would destroy a valuable part of the shipper's property without just compensation therefor to the owner. The ultimate position of complainant's counsel is that, the state recognizing the traffic in intoxicating liquors, imported beer stands upon the same footing as any other article or commodity of merchandise brought into the state; and the state may not, under the guise of inspection fees as a police regulation, subject it to onerous exactions bearing no just rela-

tion to the expenses attending such inspection. The Supreme Court of the United States has repeatedly said, in discussing the interstate commerce clause of the Constitution, that "the mere fact that an act purports to be an inspection measure is not conclusive upon the court; its purposes and objects must be determined by its natural and reasonable effect. The court is not to be misled by mere pretenses." *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. That court has also said that "a burden imposed by a state upon interstate commerce is not to be maintained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute." *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

The case at bar, however, is to be determined by its relation to the act of Congress of 1890 (26 Stat. p. 313 [U. S. Comp. St. 1901, p. 3177]), known as the "Wilson Bill," which declares—

"That every fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Counsel for complainant are in error in asserting that this act has application alone to states maintaining prohibition laws. Color is given to this contention by certain language employed in the opinion in *Scott v. Donald*, supra. But in the later case of *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, that language is explained, and its application properly limited. The court said:

"The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other states, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the states absolutely forbade sales of liquor, and not to apply in case the states determined to restrict or regulate the same. \* \* \* If the purpose of the act had been to allow the state law to govern the sale of the original package only where the sale of all liquor was forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective states full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other states. \* \* \* Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

Laws for protecting the people against impure food, adulterated milk and butter, decayed vegetables, and unwholesome ingredients in intoxicating liquors inhere in the police power of the state. The fact that a large revenue may incidentally result is not fatal to such a law, especially in respect of intoxicants. In the very nature of the



case, the amount of the license fee must rest in the sound discretion of the legislative branch of the government. As said by Mr. Justice Catron, in *The License Cases*, 5 How. 504-599, 12 L. Ed. 256:

"The assumption is that the police power is not touched by the Constitution, but left to the states as the Constitution found it. And this is conceded; and whenever a thing, from character and condition, is of a description to be regulated by that power of the state, then the regulation may be made by the state, and Congress cannot interfere."

Subject, of course, to the ascertainment by the federal courts, in a proper case, as to whether or not the thing be within the essential police power of the state.

This character of legislation is bottomed upon the postulate, in this country, that the right to sell intoxicants is not a natural right. Hence it is universally recognized that the state may prohibit entirely its sale within its territory, or it may grant permission to sell under such restrictions and regulations as the lawmaking department, in its wisdom, may see fit to impose. And so long, under the statute, as the regulation and exaction are free from unequal discrimination against products the subject of interstate commerce, this complainant is without legal grievance. The large yield to result to the state from the inspection fees, exacted beyond the cost of executing the law, is supported by that eminent jurist, Judge Cooley, who said:

"It is proper and reasonable to take into account not only the expense merely of direct regulation, but all the incidental consequences which may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon. \* \* \* The business of selling intoxicating liquors has a powerful tendency to increase crime and pauperism. It renders a large force of peace officers essential, and it adds to the expenses of the courts, and of nearly all branches of civil administration. It cannot be questioned, therefore, if it is to be licensed by the public authorities, that it is legitimate and proper to take into account all the probable consequences, or that the payment to be exacted should be sufficient to cover all the incidental expenses to which the public are likely to be put by means of the business being carried on." Cooley, *Tax'n* (2d Ed.) p. 599; *State v. Ludington*, 33 Wis. 107.

It is upon this theory that high license laws of the state are upheld.

"Such laws are regarded 'as police regulations, established by the Legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances,' and are not regarded as an exercise of the taxing power. 'Pursuits that are pernicious and detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public.' It does not follow because the license fee is large, or because it may become a part of the public revenue, that it is, therefore, a tax." *State ex rel. Troll v. Hudson*, 78 Mo. 302, loc. cit. 304, 305.

It must be held, however, that the demurrer to the bill is too broad. In the second subdivision of the eleventh paragraph of the bill it is alleged—

"That in the usual course of its (complainant's) business in such commerce it is compelled to and does maintain large warehouses and storerooms in the state of Missouri, and is compelled to and does maintain an office therein as a necessary adjunct to the proper and economical conduct of its said business and commerce; that, of the beer imported annually into the state of Missouri by your orator, a great portion, to wit, not less than seventy-five

hundred barrels, of 31 gallons each, of the aggregate value of fifty thousand dollars (\$50,000) is intended for export to other states. That, in the due course and conduct of its said business, such beer is unloaded by your orator from the cars in which it has been imported into the state, and is stored, in unbroken bulk, and in the original packages in which the same was imported, in the storehouses and warerooms of your orator in the state of Missouri. That sales of such imports, in the unbroken and original packages in which imported, are thereafter effected by your orator, in the state of Missouri, to persons resident without and noncitizens of the state of Missouri, for export by your orator therefrom, and for delivery by your orator, in such original packages, to the purchasers thereof at agreed points in other states and countries; that such imports of your orator, when so sold, are thereafter exported from the state of Missouri by your orator, as aforesaid, and no part or portion thereof is consumed within the state; that, upon such imports so thereafter by your orator sold for export and so exported by your orator, your orator is compelled to pay, and, under protest, and in order to protect its property and rights from greater injury, does pay, to the state of Missouri—the same being exacted of your orator under the alleged authority of said enactment of the General Assembly—the sum of 39 cents per barrel as a tax, such payments, so compelled to be made by your orator, amounting in the aggregate to three thousand dollars (\$3,000) or thereabouts annually; that, if such tax be not paid by your orator to said state, your orator's servants and agents will be apprehended, fined, and imprisoned as by said alleged enactment provided, to the great and irreparable injury of the business and property rights of your orator, and your orator's general license to carry on its business within the state will be revoked and annulled and no other license will be issued to it within a period of two years; in which event your orator's business within the state of Missouri will be wholly destroyed, and its property rights irreparably injured, and the defendants, and each of them, threaten to enforce against your orator, in the courts of the state, all of the penalties prescribed by said enactment for a breach of the provisions thereof, should your orator refuse to pay such assessments, charges, and taxes."

These facts stand admitted by the demurrer. As already maintained, the fifth section of the legislative act in question was intended to apply only to beer or malt liquors shipped into the state for use here. The right of the state to pass inspection laws, recognized in article 1 of section 10 of the Constitution, in the very nature of the reservation, is limited to the domestic products of the state, either for exportation or home consumption, or such as come into the state subject to the police power of regulation. "They act upon the subject before it becomes an article of foreign commerce or of commerce among the states, and prepare it for that purpose." *Bowman v. Railway Co.*, 125 U. S. 488, 8 Sup. Ct. 689, 31 L. Ed. 700; *Gibbons v. Ogden*, 9 Wheat. 203, 6 L. Ed. 23. It has no reference to and cannot touch foreign manufactures which become subjects of interstate commerce in passing through the state, or which may be temporarily stored here for distribution in the original bulk or package in transitu to another state. In the recent case of *Attorney General ex rel. v. Great Western Tea & Coffee Co. of St. Louis* (decided by the Supreme Court of this state) 71 S. W. 1011, respecting the right of the company importing baking powder into the state, it was held that the statute of this state, eliminating from the manufactured article alum as an ingredient, is not applicable to the foreign manufactured powder imported into the state, while the act is valid as to the article manufactured in the state. This distinction evidently rests upon the proposition that such food product,

being a natural subject of interstate commerce, is not subject to such police regulation of the state. I assume this to be the distinction drawn by the court between the baking-powder case and the beer case heretofore decided by that court, though I have not seen the full report of the recent case. The police power, dependent in the case at bar for its exertion upon the idea that it is essential for the protection of the health and good of the people of the state, its exercise can have no foundation of right, even as applied to intoxicants not manufactured in the state, and not to be consumed or used in the state. To subject the foreign product in its passage through the state to any exaction by the state, either by way of taxation or inspection fees, would be a direct interference with interstate commerce. So that, if the complainant's beer or malt liquor not shipped into this state for sale is subjected to the conditions and annoyances to the complainant, or its agents or servants, in the manner alleged in that part of the bill above quoted, it invites and justifies the interposition of the injunctive process of the court. This jurisdiction is supported by the recent decision of the Court of Appeals of this circuit in the case of *City of Hutchinson v. Beckham*, 118 Fed. 399. In that case an ordinance of the city of Hutchinson, Kan., was assailed on the ground that it undertook to impose a license tax upon complainants' goods shipped from Missouri, and stored for distribution in complainants' warehouse in the city of Hutchinson, when no like exaction was made of other merchants engaged in local business, or of those who did maintain their principal office there, etc. The ordinance imposed fines, and exposed the offender to arrest and imprisonment. It was alleged that such criminal proceedings had been instituted, and the city threatened to continue such prosecutions, to the great annoyance and injury to complainants in the pursuit of their rightful business as importers of interstate commerce. Thayer, Circuit Judge, said:

"Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might and probably would have been compelled to defend a multitude of suits, and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business. When, in addition to the fact that an illegal tax has been imposed, it further appears that the persons or corporations upon whom it is imposed will be called upon to defend a multitude of suits, or that they will sustain great injury if the state or municipality is left free to enforce the tax by the usual remedies, courts of equity never hesitate to assume jurisdiction and grant injunctions against those who are seeking to enforce the collection of the tax, if it appears to be clearly illegal." *Dows v. City of Chicago*, 11 Wall. 108, 110, 20 L. Ed. 65; *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601, 28 L. Ed. 1098; *City of Ogden v. Armstrong*, 168 U. S. 224, 239, 240, 18 Sup. Ct. 98, 42 L. Ed. 444; *Heywood v. City of Buffalo*, 14 N. Y. 534.

As the demurrer goes to the whole, if any part of the bill be good, the demurrer must be overruled. As the defendants will have leave to answer, they can put in issue said allegations, if untrue, and any other matters of fact alleged in the bill they may deem proper to controvert.

It results that the demurrer must be overruled.

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FOULK v. GRAY et al.

(Circuit Court, S. D. West Virginia. September 17, 1902.)

**1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—NONRESIDENCE OF PARTIES.**

A suit brought in a court of a state of which neither party is a resident is not removable into a federal court on the ground of diversity of citizenship under the judiciary act of 1887-88 unless both plaintiff and defendant waive objection to the jurisdiction of such court. Such suit is one of which that court would not have had jurisdiction in the first instance except by consent of both parties, nor can it acquire jurisdiction by removal without such consent, and plaintiff cannot be held to have waived his right to object by bringing the suit in a state court.

**2. SAME—WAIVER OF OBJECTION TO JURISDICTION.**

The defendant in such case, however, submits himself to the jurisdiction of the federal court by filing a petition for removal; and where, after the removal, the plaintiff invokes or consents to an order of the court relating to matters in controversy, he thereby waives the right to thereafter object to its jurisdiction.

On Motion to Remand to State Court.

Campbell, Holt & Duncan, for plaintiff.

Vinson & Thompson, for defendants.

KELLER, District Judge. This was a suit originally brought in the circuit court of Mingo county, W. Va., by the plaintiff, a citizen and resident of Ohio, against the defendants, all of whom are citizens and residents of Kentucky. The suit was brought for an accounting under a contract made by the plaintiff for the sale of certain logs to defendants, and the manufacture of the same into lumber, etc. The bill also prayed for the appointment of a receiver, and a receiver was appointed in vacation of the state court, and without any notice to defendants, upon the averments of the bill. At March rules, 1902, the defendants filed in the clerk's office of the state court their petition, accompanied by bond in due form, setting up the fact that they, and each of them, are, and were at the time of the institution of this suit, citizens, residents, and inhabitants of the state of Kentucky, and that the plaintiff, J. H. Foulk, is, and at the time of instituting said suit was, a citizen, resident, and inhabitant of the state of Ohio; that the matter in controversy exceeds in value the sum of \$2,000; that defendants have not in any way appeared in said suit, and that the time to plead or answer has not yet expired, etc.; and praying that the court proceed no further, except to make an order for the removal of the

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¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

cause to the circuit court of the United States for the Southern district of West Virginia. On March 3, 1902, the said petition came on for hearing, and the court thereupon ordered that the cause "be hence transferred and removed for trial to and in the circuit court of the United States for the Southern district of West Virginia, and that this court proceed no further therein." The plaintiff has moved in this court that the cause be remanded to the circuit court of Mingo county, W. Va., because this court is without jurisdiction in the premises.

This motion raises a most interesting question, and one which has been variously decided by the United States circuit and district courts, but which, under the present act (act of March 3, 1887, as corrected by act of August 13, 1888 [U. S. Comp. St. 1901, p. 508]), does not appear to have been directly passed upon by the supreme court of the United States. This question is said by Mr. Dillon, in his work on "Removal of Causes," to be well settled in favor of the right of removal in a case like the present. Judge Dillon's view is justified, treated as a statement derivable from the number of cases which have upheld that view, as compared with the number holding the opposite view; but, after a most careful investigation, I am forced to the conclusion that the cases which uphold the right of removal in a case like the present are not founded upon the best and most careful reasoning. Without now going into the history of the cases which hold either against or for the right of removal, I will cite the following cases in which the different views are advanced: As against the jurisdiction, the cases of *Yuba Co. v. Pioneer Gold Min. Co.* (C. C.) 32 Fed. 183; *Telegraph Co. v. Brown* (C. C.) 32 Fed. 337; *Harold v. Mining Co.* (C. C.) 33 Fed. 529; *Pitkin Co. Min. Co. v. Markell* (C. C.) 33 Fed. 386; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; *Cooley v. McArthur* (C. C.) 35 Fed. 372; *Tiffany v. Wilce* (C. C.) 34 Fed. 230; *Central Trust Co. v. Virginia, T. & C. Steel & Iron Co.* (C. C.) 55 Fed. 769. Among the cases ruling that the jurisdiction in a case like the present will attach upon removal are *Cowell v. Supply Co.* (C. C.) 96 Fed. 769; *Creagh v. Society* (C. C.) 83 Fed. 849; *Duncan v. Associated Press* (C. C.) 81 Fed. 417; *Long v. Long* (C. C.) 73 Fed. 369; *Sherwood v. Mississippi Valley Co.* (C. C.) 55 Fed. 1; *Bank v. Pagenstecher* (C. C.) 44 Fed. 705; *Uhle v. Burnham* (C. C.) 42 Fed. 1; *Amsinck v. Balderston* (C. C.) 41 Fed. 641; *Burck v. Taylor* (C. C.) 39 Fed. 581; *Kansas City & T. R. Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 3; *First Nat. Bank v. Merchants' Bank* (C. C.) 37 Fed. 657, 2 L. R. A. 469; *Hulbert v. City of Topeka* (C. C.) 34 Fed. 511; *Wilson v. Telegraph Co.* (C. C.) 34 Fed. 561; *Fales v. Railroad Co.* (C. C.) 32 Fed. 673; and *Whitworth v. Railroad Co.* (C. C.) 107 Fed. 557, where many of the cases sustaining the jurisdiction are cited.

Notwithstanding that, numerically speaking, the trend of authority is distinctly in favor of the proposition last decided in *Whitworth v. Railroad Co.*, supra, I have been able to find no authority which is strictly binding upon this court and as my views, derived from a construction of the act of March 3, 1887, in accordance with what I be-

lieve to be true principles, and in accordance with the trend of prior decisions of the supreme court of the United States upon kindred questions, lead me to an opposite conclusion, I feel impelled to set those views forth at some length.

First, then, I would say that the circuit and district courts of the United States have no jurisdiction except as it is conferred upon them by statute. They themselves are the creatures of statute, under the permissive power for their establishment provided in article 3 of the constitution of the United States, and the authority for the exercise of their powers in any given case must be found in the acts of congress defining their jurisdiction. The general policy impressed upon the constitution, and expressed particularly in the tenth amendment thereto, requires a strict construction of statutes conferring jurisdiction, and common justice and common right require that such construction shall be given to such jurisdictional statute as shall give equal rights to the parties plaintiff and defendant. Under the earlier acts of congress, the federal courts had no jurisdiction unless one of the parties was a citizen of the state where the suit was brought. If plaintiff was a citizen of one state, and defendant of another, the action could not be maintained in a federal court sitting within the limits of a third state, nor removed thereto. *Moffat v. Soley*, 2 Paine, 103, Fed. Cas. No. 9,688; *White v. Fenner*, 1 Mason, 520, Fed. Cas. No. 17,547; *Shute v. Davis*, Pet. C. C. 431, Fed. Cas. No. 12,828. But under the act of 1875 this could be done, provided the defendant was "found" within the territorial jurisdiction of the particular federal court. *Brooks v. Bailey* (C. C.) 9 Fed. 438, 20 Blatchf. 85.

In order to obtain a correct view of the present jurisdictional statute, and a proper construction of its intent, which has often and justly been said by the highest authority to have been restrictive, we should follow the time-honored rule of looking to the old law, the mischief, and the remedy.

By the provisions of the act of March 3, 1875 [U. S. Comp. St. 1901, p. 508], jurisdiction was conferred upon the circuit courts of the United States in the same classes of cases as by the act of 1887, except that in the act of 1875 the jurisdictional value was any amount exceeding \$500, whereas by the act of 1887 this value was raised to a sum exceeding \$2,000. This change, as will be readily seen, was restrictive in its nature; but there is another change, which, if I read it aright, is far more so. In the act of 1875 the following language defines the particular court which shall have jurisdiction of a suit brought under the act:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided."

The exception therein referred to is to be found in section 2 of the act of 1875, which provides that any civil suit pending or hereafter brought in any state court, of the character described in section 1 of the act, and wherein the amount in dispute should exceed the sum of \$500, might be removed by either party into the circuit court of the

United States for the proper district. Thus it will be perceived that by that act suits of the character described might be brought by a plaintiff in the district of which the defendant was an inhabitant, or in any district where he might be found at the time of commencing suit, and, in addition to this, that any suit pending in a state court might be removed to the circuit court of the United States by either party thereto, although the conditions as to residence or presence of the defendant might be such that it could not have been directly instituted in the federal court.

Before commenting on the change introduced by the act of 1887, attention is called to the language of the act of 1875 in saying "no civil suit shall be brought before either of said courts against any person by any original process or proceeding \* \* \* except as hereinafter provided." The exception relates solely to removals, and therefore, by the direct terms of the act, they are to be regarded as an original method, process, or proceeding in the bringing of suits in federal courts. The act of March 3, 1887, which is the same, except for verbal corrections, as that of August 13, 1888 [U. S. Comp. St. 1901, p. 508], provided that no suit shall hereafter be brought in the federal courts by original process or proceedings against any person in any other district than that whereof he is an inhabitant, except that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, "suits shall be brought only in the district of the residence of either the plaintiff or the defendant." It is to be observed that the words "except as hereinafter provided," which appeared in the act of 1875, are wanting in the present act. It would seem, therefore, that in construing the present act we must construe it as a restrictive act upon the former jurisdiction of the federal courts.

The two propositions to which I now direct attention as deducible from the language of the acts and the manifest legislative intent are the following: First. That the right of removal where the sole ground of jurisdiction is diversity of citizenship is limited by the act of March 3, 1887, as amended, to suits of which the circuit court of the United States of the district would have had jurisdiction if the action had been brought originally in that court. *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; *Yuba Co. v. Pioneer Gold Min. Co. (C. C.)* 32 Fed. 183; *Laird v. Assurance Co. (C. C.)* 44 Fed. 712. Second. That removal from a state court to a federal court is only a means whereby the suit is brought by defendant into a court having original jurisdiction thereof. *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. In the case just cited it is stated in so many words in the opinion of the court, hereafter quoted, that the right of removal under the existing act is restricted to such suits as might have been brought by the plaintiff in the court to which removal is sought.

That the entire act of March 3, 1887, was passed in an endeavor to restrict the jurisdiction of the federal courts, both in cases brought in those courts in the first instance, or brought there on removal, and to restore the practice to something like what it was prior to the passage of the act of 1875, will appear from the debate in the United

States senate on March 3, 1887, to be found in volume 18 of the Congressional Record (page 2724), where a discussion of the proposed changes in section 1 of the act proceeded as follows:

"Mr. Mitchell, of Oregon: The act which the pending bill proposes to amend,—the act of March 3, 1875,—in the first section, speaking of jurisdiction, provides as follows: 'But no person shall be arrested in one district for trial in another in any civil action before a circuit court or district court; and no civil suit shall be brought before either of said courts [that is, before the circuit or the district court] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings.' That being the existing law, as I understand it, when a person wishes to sue an inhabitant of the state of California, he must go into that state, and bring his suit there, unless he happens to find the person he wishes to sue in some other district, and then he may sue there. Now, it is proposed to change that, as I understand.

"Mr. Hoar: In the first place, the existing law allows a suit to be brought in the United States court between citizens of different states for amounts exceeding \$500. That is put up to \$2,000. In the next place, it allows a plaintiff to sue a defendant, a citizen of another state, wherever he catches him,—all over the United States. That is the existing law. But the proposed change in the law is that he can only sue him (they being citizens of different states) either in the defendant's state, or, if the defendant happens to be in the district of the plaintiff's home, then in the plaintiff's district. So, instead of the sixty or seventy districts which by the existing law the plaintiff can sue him in, there are only two left. Suppose the defendant goes to the plaintiff's home, and is found there,—a man doing business there; the plaintiff can sue him in the state court, and the defendant can take him to the United States court. It is certainly reasonable that the plaintiff should be permitted in the first instance, to take him into the United States court.

"Mr. Mitchell, of Oregon: My friend then understands this section to mean that if the plaintiff, for instance, lives in the state of New York, and the defendant lives in the state of California, then the plaintiff may either go to California and sue there, or, if he happens to find him in the state of New York, he may sue him there, but he cannot sue him anywhere else.

"Mr. Hoar: That is it, exactly; and in the state of New York, without this proposed statute, he can take him into the New York state courts, and the defendant then can remove the cause to the United States court.

"Mr. Mitchell, of Oregon: I have no objection, if that is the construction; but it seems to me that this latter part of the clause enables a plaintiff to bring suit in the district where the defendant does not reside, and where he is never found.

"Mr. Hoar: In all the districts where both parties reside in the same state, the state court is presumed to have jurisdiction between the parties.

"Mr. Mitchell, of Oregon: Then the senator holds that, where the United States jurisdiction attaches only on the fact that the action is between citizens of different states, the suit shall be brought only in the district of the residence of either the plaintiff or defendant, qualified by what is herein provided.

"Mr. Wilson, of Iowa: Undoubtedly.

"Mr. Mitchell, of Oregon: If that is the construction, I think it is a strained construction.

"Mr. Wilson, of Iowa: Instead of widening the present provision in regard to the bringing of suits out of the district of the residence of either party, it contracts it, and requires all suits to be brought either in the district of the plaintiff's or of the defendant's residence, where he may go.

"Mr. Edmunds: Just what the law of nearly every state is."

The foregoing extract from the proceedings in the United States senate shows that the purpose of the legislators was to restrict the jurisdiction of the federal courts as above stated.



Coming now to section 2 of the present act, it is equally true that its purpose was to restrict the right of removal. The report of the judiciary committee of the house of representatives made on March 17, 1886 (H. Rec. 2441), contains the following language:

"The next change proposed is to restrict the right to remove a cause from the state to the federal court to the defendant. As the law now provides, either plaintiff or defendant may remove a cause. This was an innovation on the law as it existed from 1789 until the passage of the act of 1875. In the opinion of the committee, it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a state court when he might have brought his suit in a federal court, there would seem to be ordinarily no good reason to allow him to move the cause. Experience in the practice under the act of 1875 has shown that such a privilege is often used by plaintiffs to obtain unfair concessions and compromises from defendants who are unable to meet the expenses incident to litigation in the federal courts remote from their homes."

The reasoning in the report of the judiciary committee is that the plaintiff ought not to have the right to remove in a case where he elected to bring suit in the state tribunal when he might originally have brought his suit in the federal court. That reasoning is good, and tends to show the general purpose of restriction as heretofore mentioned; but there is in this language no warrant for the assumption so frequently made in the decided cases upholding the right of removal in a case like the present, that the defendant has an absolute right of removal, whether the plaintiff might have brought his suit in the federal court in the first instance or not.

The rules of construction of statutes require, among other things, that laws be so construed as, if possible, to give effect to every part of a statute; and it is with this rule in view that I desire to call attention particularly to certain language of the first section of the act of March 3, 1887, which, it seems to me, has been partially overlooked in those decisions which hold that a case like the present is removable to the federal court over objection of the plaintiff. The language referred to is as follows:

"And no civil suit shall be brought before either of said courts [circuit and district courts of the United States] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This entire clause must be read together, and, so read, the last phrase furnishes the rule for determining whether or not a particular court has jurisdiction of a case in which the sole ground of jurisdiction is diversity of citizenship between the parties.

In *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, the supreme court of the United States, speaking through Chief Justice Fuller, says:

"The jurisdiction of the circuit courts on removal by the defendant under this section [section 2, Act March 3, 1887, as corrected by Act Aug. 13, 1888] is limited to such suits as might have been brought in that court by the plaintiff under the first section."

Again, in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, it was held that:

"The right of a plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought."

These principles are quite as applicable to the jurisdiction of the particular forum in which suit is brought as to the general subjects of jurisdiction, where, as in the case of diverse citizenship, all the elements necessary to show the jurisdiction of the particular court must be set out in the declaration or complaint. It is therefore true that a plaintiff resident in Ohio cannot bring a suit in the circuit court of the United States for the Southern district of West Virginia against a citizen of Kentucky, where the only ground of federal jurisdiction is the diversity of citizenship. The law forbids him to bring his suit in that court, and a suit so brought is subject to be dismissed for lack of jurisdiction. As has already been said, removal is only authorized as to such suits as might have been brought in that court by the plaintiff under the first section.

But it is said that the matter of jurisdiction of the person is one which may be waived, and the case of *Railroad Co. v. Davidson*, 157 U. S. 208, 15 Sup. Ct. 565, 39 L. Ed. 672, is cited as the very highest authority for that proposition. The supreme court there says:

"It is true that, by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of the residence of the plaintiff or defendant,' and this restriction is a personal privilege of the defendant, and may be waived by him." Citing *Railroad Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659.

The case of *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, is also cited in favor of this proposition,—particularly that portion of the opinion where Mr. Chief Justice Waite observed:

"The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

I have no doubt of the correctness of this proposition, but dislike the statement that this personal privilege is one belonging to the defendant alone, and which he may waive, or not, as he pleases, and thus confer or exclude jurisdiction. It is a mutual privilege of plaintiff and defendant, and must be mutually waived before jurisdiction can attach. I venture to say that, in every case in which the jurisdiction has been upheld by reason of a waiver on the part of defendant, there has also been a waiver on the part of the plaintiff. In all these cases the plaintiff waives his right to object to the jurisdiction by bringing his suit in that court. The defendant waives his right by entering a general appearance to the action. While jurisdiction of the subject-matter is fundamental, and cannot be waived by the parties, and jurisdiction of the person may be waived, yet it is a right which must be waived to give jurisdiction; and, what is more,

it must be waived by both parties. Why not? Can it be said, as a fair legal proposition, that one party to a controversy has not the same right to object to a jurisdiction over his person not specifically conferred by statute that the other party has? I see no reason for such conclusion. I regard it as opposed to natural justice, to the weight of reason, to the weight of well-considered authority, and to the plain intendment of the statute. Any other construction leads to a futility of result that is pitiful, as applied to a court of justice. Suppose this suit had been brought in this court in the first instance by Foulk, the plaintiff, a citizen and resident of Ohio, against Gray, King, and Kitchen, all citizens and residents of Kentucky; if the defendants had appeared and answered the bill, no one doubts that the court would have had jurisdiction to hear and determine the cause. Why? Because all parties waived objection to the jurisdiction over their persons,—Foulk by bringing his suit in the court, and the defendants by answering thereto. But suppose the defendants had failed to appear, or, appearing specially, had objected to the jurisdiction on the ground that the suit had been brought neither in the district of their residence, nor in that of the plaintiff; in such case the authorities are unanimous that the suit would be dismissed for lack of jurisdiction. Suppose again, such being the result, Foulk should go into the state court of West Virginia, and there sue and serve process on the defendants, thereby, under the provisions of chapter 123 of the Code of West Virginia, acquiring in the state court jurisdiction of the persons of the defendants, and upon petition the defendants were held to have absolute right of removal to the federal court; we would have the spectacle of the defendants' first saying to the court, "You shall not try our case," and then, after vexatious delay caused by their objection to the jurisdiction, find them coming back, dragging the plaintiff with them, and saying, "You shall try our case."

Remembering now that the policy of the act of March 3, 1887, was distinctly to limit and restrict the jurisdiction of the circuit courts, which policy was announced by the supreme court of the United States in a long line of cases, of which the following are only examples: *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; *Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; *Ex parte Shaw*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Railway Co. v. Davidson*, 157 U. S. 208, 15 Sup. Ct. 563, 39 L. Ed. 672,—and remembering further that it has been distinctly held, particularly in the last two cases cited, that the jurisdiction of the circuit courts on removal by the defendant, under section 2 of the present act, is limited to such suits as might have been brought in that court by the plaintiff under the first section, let us see whether this is a suit which might have been brought by the plaintiff in this court in the first instance. In the case of *Ex parte Shaw*, supra, Mr. Justice Gray, in the opinion of the court, in construing this very act, uses the following language:

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides, within the state of which he is a citizen, and that this act, therefore, having taken away the alternative, permitted in the earlier acts of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

From the logic of these clearly expressed views of the highest tribunal of the land, there is no escaping. They show that this is a case which the plaintiff would have had no right to bring in this jurisdiction,—a case which could only have been brought here in the first instance by the mutual waiver by himself and the defendants of their right to sue and be sued in the district of the residence of either one or the other of them. Therefore, under the resistless logic of the situation, if the jurisdiction can be sustained upon removal, it must be because there has been equally such a joint waiver on the part of defendants and plaintiff of objection to the jurisdiction.

What are the reasons for permitting removals by defendants? In the first class of cases mentioned in the statute, the reason is evidently because a defendant has a right to have a question arising under the constitution or laws of the United States, or treaties made thereunder, or in which the United States is plaintiff or petitioner, tried by the federal courts. In such cases his right is made absolute by the statute, regardless of his residence. In the class of cases wherein the jurisdiction is conferred by reason of diversity of citizenship, doubtless the reason for permitting removal is because, if the defendant is sued in the state courts of the state of which plaintiff is a resident, it may fairly be presumed that he is at a disadvantage as compared with the plaintiff. That this is the reason is the more apparent, because, if he is sued in the state courts of the state of his own residence in a similar case, he may not remove, though, if sued there in a case involving a federal question, he may remove the case. If, therefore, he be sued in the state courts of a neutral state, in a case wherein no special ground of federal jurisdiction exists, other than that the parties are citizens of different states, the governing reasons for removal do not exist, and the statute, so far as it provides for removals, being in derogation of the properly acquired jurisdiction of a court having concurrent jurisdiction, should be strictly construed.

For the reasons herein given if the plaintiff had stood upon his motion to remand this case to the state court, I should have felt obliged to sustain that motion. But after making such motion, and while the same was under consideration by the court, the plaintiff chose to agree with the defendants in the entering of an order in this court settling certain of the questions in controversy. Having done so, I must hold that he has waived his right to object to the jurisdiction of this court, and that by such waiver, coupled with the waiver of

the defendants in removing the case here, the court has acquired full jurisdiction to determine the questions involved.

The motion to remand is therefore denied.

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BOARD OF COUNCILMEN OF CITY OF FRANKFORT et al. v. DEPOSIT BANK OF FRANKFORT.

(Circuit Court, E. D. Kentucky. March 10, 1902.)

1. BILL OF REVIEW—EFFECT OF DISSOLUTION OF CORPORATION.

A bill of review, the object of which is to set aside a decree in favor of a corporation, cannot be maintained after the corporation has been dissolved, and has ceased to exist absolutely; and the objection to the filing of such bill may be raised by a former officer or attorney of the corporation, upon whom notice of the application has been served.

2. CORPORATIONS—RIGHT TO SUE AFTER DISSOLUTION—KENTUCKY STATUTE.

Act Ky. Feb. 14, 1856, § 2, which provided that on the dissolution of a corporation it might sue and be sued as before for the purpose of settlement of its affairs and distribution of its property, re-enacted in Gen. St. Ky. 1873, c. 68, § 9, was repealed by implication by Acts Ky. 1891-93, c. 203, which substantially re-enacted Gen. St. c. 68, but omitted section 9 thereof.

3. SAME.

Ky. St. § 561, providing for the bringing of suits by or against a corporation which "expires by the terms of the articles of corporation or by the voluntary act of the stockholders," has no application to a corporation whose existence is terminated by the repeal of its charter by the legislature.

4. SAME.

Ky. St. § 1987, relating to the chartering of corporations by the legislature, and which provides that, "whilst privileges and franchises so granted may be changed or repealed, no amendment shall impair other rights previously vested," refers to rights of the corporation and persons interested therein, and not to rights of persons having claims against it.

5. BILL OF REVIEW—APPLICATION FOR LEAVE TO FILE—EFFECT OF PERMISSION GIVEN BY APPELLATE COURT.

Where an application to the supreme court of the United States for permission to apply to a circuit court for leave to file a bill of review for the reconsideration of a decree of that court which the supreme court had affirmed was granted formally without passing on objections made to the granting of such permission going to the right of the applicant to file a bill of review, the circuit court is not precluded from considering such objections on their merits when they are renewed before it on the application for leave to file such bill.

T. H. Crockett, Ira & W. H. Julian, John W. Rodman, and R. J. Breckinridge, for petitioners.

Frank Chinn and D. W. Lindsey, for respondent.

COCHRAN, District Judge. This cause is pending on a motion by complainants for leave to file a bill of review, and on a motion by J. Buford Hendrick and Frank Chinn to quash the return on the notice served upon them of the motion to file the bill of review. By a decree of this court, rendered June 25, 1898 (88 Fed. 383), affirmed by the supreme court of the United States May 15, 1899 (19 Sup. Ct. 880), in a suit brought by Deposit Bank of Frankfort, defendant herein, against state board of valuation and assessment and board of

councilmen of the city of Frankfort, complainants herein, and Franklin county, said state board of valuation and assessment was perpetually enjoined and restrained from proceeding to value the franchise of said Deposit Bank of Kentucky under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or any other subsequent years, until the expiration of the charter of the said bank, and from certifying such value to the county clerk of Franklin county, or to any officer of said board of councilmen of the city of Frankfort or the county of Franklin; and the county of Franklin and said board of councilmen of the city of Frankfort were enjoined and restrained from endeavoring to collect any tax upon any such valuation. This decree was based upon a judgment of the Franklin circuit court rendered February 1, 1896, enjoining and restraining the making of such valuation, the certifying of same, and the collecting of taxes thereon for the years 1893 and 1894, in a suit between the same parties, as *res adjudicata*. The ground upon which this decree is sought to be reviewed is that since its rendition and affirmance by the supreme court of the United States, to wit, on June 19, 1900, said judgment of the Franklin circuit court upon which it was based has been reversed by the court of appeals of Kentucky. 57 S. W. 787, 60 S. W. 19. On February 3, 1902, permission was granted by the supreme court of the United States, which had affirmed the decree sought to be reviewed, to apply to this court for leave to file the bill of review. The notice of the motion for such leave has been served upon J. Buford Hendrick, who was the president of the defendant herein, Deposit Bank of Kentucky, and upon Frank Chinn, who was its attorney in the suit in which said decree was rendered, during the pendency thereof. The ground upon which they base their motion to quash the return upon this notice is that since the rendition of said decree and its affirmance, and before the making of this motion and the application to the supreme court of the United States for said permission, to wit, on March 22, 1900, by an act of the general assembly of Kentucky, that day approved, containing an emergency clause, the charter of the defendant herein, Deposit Bank of Frankfort, was repealed absolutely, and that since then it has been and is now no longer a corporation liable to be sued or made defendant to a bill of review, and that since then they have been and now no longer are respectively president and attorney of said defendant.

If the effect of said act of March 22, 1900, is as claimed by said Hendrick and Chinn, it must necessarily follow that their motion to quash should be sustained, and the motion to file the bill of review should be overruled. It is well settled that, after a corporation ceases to exist absolutely, it cannot be sued, or made a party to a suit, no more than an individual can be after he dies.

Wat. Corp., § 434, says:

"A defunct corporation, like a natural person who dies, cannot be brought into court by process served upon persons who were officers or agents when the corporation was in existence."

2 Mor. Priv. Corp., § 1031, says:

"The dissolution of a corporation at common law not only means that the company has lost its franchises, and can no longer act in a corporate capacity,

but it implies that the corporation has wholly ceased to exist in legal contemplation, and will not be recognized as a corporate body for any purpose. It follows that suits brought by or against a corporation are abated by its dissolution, and a judgment purporting to be rendered against a corporation which is not in existence is a nullity."

In the case of *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839, Cassoday, J., said:

"After the dissolution of a corporation, the power to proceed against it in an action is wholly divested, except as specially authorized by statute."

In the case of *Phosphate Co. v. Perry*, 20 C. C. A. 490, 74 Fed. 425, 33 L. R. A. 252, Pardee, Circuit Judge, in delivering the opinion of Fifth circuit court of appeals, said:

"That a dissolution of a corporation abates all suits against it is familiar law of the text-books."

In the case of *Investment Co. v. Hughes (C. C.)* 77 Fed. 855, Gilbert, Circuit Judge, said:

"The statute of this state gives a bare extension of life for a fixed period after the dissolution of the corporation. Without the statute, as we have seen, all corporations were defunct from the moment of their dissolution. The statute extends their existence for a further period for a stated purpose. At the expiration of that period it is the logic of the common-law rule that the corporation is as absolutely defunct as it would have been in the first instance had not its life been prolonged by the intervention of the statute."

Upon this ground he held that an Oregon corporation could not maintain an action after the dissolution of its charter, and after the expiration of five years, in which it might, under the statute of Oregon, bring suits and round up its affairs.

Mr. Thompson, in his work on Corporations (volume 5, § 6718), thus expresses the law in his usual vigorous style:

"Under the principles of the common law, excluding in this statement the principles of equity and the effect of saving statutes, the effect of the dissolution of a corporation is to put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties, so that thereafter it can neither make nor take contracts, nor sue or be sued; and so that all debts to or from it become extinguished, and all actions by or against it abate; and so that its real property reverts to the grantors or donors thereof, or their heirs; and its personal property escheats to the crown or to the state. These principles illustrate at once the feebleness and the barbaric crudity of the common law, and expand into terror and jealousy with which corporations have been regarded by all classes of people from sovereign to populace in every country and in every age."

The principles of equity to which he refers do not have effect of saving the existence of the dissolved corporation, so that it can sue or be sued, but its liabilities, and the right to collect same out of its property, into whosoever hands it may have passed, provided he is not a bona fide purchaser, as shown in section 6730. It would follow from this that a bill of review cannot be filed against a corporation to set aside a decree in its favor after it ceases to exist absolutely, because it is well settled that the party in whose favor a decree has been rendered, or his representatives, must be made parties defendant to the bill of review. 2 Beach, Mod. Eq. Prac., § 873, says:

"A decree cannot be set aside upon the ground of fraud, or for any other cause, without having all the parties to a decree before the court. So, in

a bill of review, it is indispensable that all the parties to the original decree should be included; and, if they be dead, their legal representatives must be made parties."

In the case of *Friley v. Hendricks*, 27 Miss. 412, a bill of review was filed to set aside a decree in favor of one Dinkins. The bill stated that Dinkins had died, and that his estate had been administered upon, and his administrator discharged, before the bill of review was filed. The only party defendant was the purchaser of the property involved in the decree, named Hendricks. On demurrer to the bill, it was held that it could not be maintained. The court said:

"A preliminary objection to the bill of review is raised here under the demurrer which is decisive of the case. This is that the bill does not make the complainant in the decree sought to be reversed, or his representatives, parties to the proceeding. The legal object and effect of a bill of review being to have the decree examined and reversed, it was formally held to lie only against those who were parties to the original bill (2 Barb. Ch. Prac. 94; Lube, Eq. 129), in analogy to a proceeding in error. It was afterwards extended so as to embrace other parties in interest. Still it is held to be indispensable that all the parties to the original decree should be included. *Bank v. White*, 8 Pet. 268, 8 L. Ed. 938; *Story*, Eq. Pl. § 420. And, if they are dead, their representatives must be made parties, as in other proceedings in error. The reason of this is manifest,—that, the proceeding being in its nature one to reverse the original decree, it would be inequitable to entertain such a case without giving the party in whose favor the decree was rendered an opportunity to justify it. This, being a technical bill of review, must fall by the application of this principle."

Much more so cannot this bill be maintained without any party to the suit, which is the case if the defendant corporation has ceased to exist absolutely.

It is further well settled that Messrs. Hendricks and Chinn, on whom the motion for leave to file the bill has been served, have such standing in court that they can raise the question as to whether it is proper to permit the bill of review to be filed, which they have done, by their motion to quash the return upon the notice, and be heard upon it. In the case of *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839, the former secretary of a defunct corporation intervened in a suit against that corporation, upon which service of summons had been had by order of publication, and moved that said service and order be set aside and held for naught. Upon his motion being denied, he appealed to the supreme court of Wisconsin, and it was held that he had a right so to intervene and appeal, and that his motion should be sustained. *Casoday, J.*, said:

"In *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945, it was held that "there is no pretense to say that a scire facias can be maintained, and a judgment had thereon against a dead corporation, any more than against a dead man." In that case the attorneys of record for the corporation, at the time of the rendition of the original judgment, appeared, and suggested the death of the corporation after the rendition of such judgment, and alleged the same by way of a plea in abatement. The facts being admitted, the trial court gave judgment that the plaintiff take nothing by his writ of scire facias, and that judgment was affirmed by the supreme court of the United States. From the very nature of things, the dissolution or death of a corporation defendant, like the death of a party to a pending action, can only be brought to the attention of the court by some one other than the defunct corporation."



And again:

"We think it was competent for Dwight W. Keyes, who had been the secretary of the defunct corporation, to intervene, and inform the court of the facts which had worked a dissolution and death of the corporation."

It is further settled that the right to file a bill of review is not a matter of right, but of the discretion on the part of the court in which it is desired to file it, and that, therefore, a motion for leave to file it is necessary. And it would seem, if the bill cannot be maintained, that it is a proper exercise of discretion to refuse to grant the desired leave. The vital question, therefore, in the case is whether the existence of the defunct bank was put an end to absolutely by the repealing act of March 22, 1900. It is certain that, so far as that act itself was concerned, its existence was so put an end to by it. After it became a law, because of its emergency clause, the defunct bank no longer existed for any purpose whatever, so far as its terms were concerned. We do not understand that it is claimed that its existence for any purpose was preserved by the provisions of that act. Reliance is had upon the act of February 14, 1856, entitled "An act reserving power to amend or repeal charters and other laws." (1 Acts 1855-56, p. 15.) Sections 1 and 3 thereof are the well-known statutory provision by which power was reserved to the legislature to amend and repeal all charters and grants for corporations or amendments thereof granted after the passage of said act. Section 2 is in these words:

"That where any corporation shall expire or be dissolved or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property and all debts payable to it shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid."

It is conceded that, if section 2 of this act is still the law, then the defendant bank's existence has been preserved thereby for the purposes of the bill of review sought to be filed, because its charter was granted after that act.

Is, then, that section still in force? This act was re-enacted in the General Statutes of Kentucky, adopted by the act of April 22, 1873. Sections 1 and 3 thereof are contained in section 8, and section 2 thereof is contained in section 9 of chapter 68 of said revision, entitled "Legislature." This chapter contains in all 10 sections. In the revision of the Statutes of Kentucky after the adoption of the present constitution, amongst other acts passed was chapter 203 of the Acts of 1891-93, p. 919, approved May 16, 1893, and entitled "An act concerning the general assembly." This act is a substantial re-enactment of chapter 68 of the General Statutes, entitled "Legislature." It contains eight sections. The first five are the same as the first five of that chapter. The sixth section thereof is the same as section 8 of said chapter, which was a re-enactment of sections 1 and 3 of the act of 1856. The other two sections are entirely new. Sections 6, 7, 9, and 10 of said chapter 68, Gen. St., are omitted entirely from said latter act; and, as we have seen, section 9 thereof was a re-

enactment of section 2 of the act of 1856, and is the provision whose present existence as a law is under consideration. It was probably left out because it was thought that its subject-matter was covered by a provision of the act providing for the creation and regulation of private corporations enacted as a part of the same revision, and which will be hereafter considered. Did, then, the omission of section 9 of chapter 68 of the General Statutes from chapter 203 of the act of May 16, 1893, amount to a repeal of that section? Under the decisions of the court of appeals of Kentucky it must be held that it did. It was held that the adoption of the General Statutes had the effect of repealing any previous statutory provision relating to a subject treated therein under a separate title, and omitted therefrom because the provisions under said title must be regarded as containing all the statute law on that subject. *Broadus' Devises v. Broadus' Heirs*, 10 Bush, 299; *Parrish v. Ferguson*, 83 Ky. 18. This same principle has been applied to the various general laws, comprehensive in character, prepared by the commissioners appointed under section 245 of the present constitution, and thereafter enacted by the legislature. *Buchannon v. Com.*, 95 Ky. 334, 25 S. W. 265; *Long v. Stone*, 39 S. W. 836; *Com. v. Newcomb (Ky.)* 58 S. W. 445. In the case of *Buchannon v. Com.*, the act so adopted, entitled "Crimes and Punishments," approved April 10, 1893, re-enacted sections 2 and 3 of an act of April 11, 1873, known as the "Kuklux Law," and omitted section 4 thereof. The question was whether that section was thereby repealed. It was held that it was. The ground upon which it was so held is well stated by Judge Eastin in the late case of *Conley v. Com.*, 98 Ky. 125, 32 S. W. 285:

"It had adopted sections 2 and 3 of the act of 1873, and had expressly and purposely left out the other section, thereby showing an intention to repeal that much of the law on the subject. It legislated upon the subject embraced by the act of 1873, and it was reasonable to assume that it legislated fully on that subject."

In the case of *Com. v. Newcomb* it was held that a former statutory provision, which gave an alien the same right to acquire property in this state that citizens of Kentucky had by the laws of the government of which he was a citizen or subject, was repealed by the omission thereof from the act approved April 29, 1892, entitled "An act concerning citizens, expatriation, aliens." Hobson, J., said:

"In the revision of the statute laws of the state after the adoption of the new constitution, this act was omitted, and so was repealed by the act of April 29, 1892."

Chapter 203, approved May 16, 1893, was one of those laws so prepared and enacted. The provision in question was a part of the chapter of the General Statutes, entitled "Legislature," which must be treated as legislative declaration that it was germane to that subject, and in immediate connection with the rest of the statute of 1856. In the revision after the new constitution, as we have seen, a new act is adopted in relation to the same subject containing the other portion of the act of 1856, from which this statutory provision is omitted, and it is not elsewhere re-enacted. This must be treated as a repeal of all of chapter 68 not re-enacted by the later act. The compilers

of the Kentucky Statutes have so treated it by omitting the provision from said compilation.

We do not understand that it is claimed by counsel for complainants that this statutory provision is still in force in the form in which it was contained in the General Statutes and the act of 1856. It is contended by them, however, that it is substantially re-enacted by section 24 of article 1 of chapter 171 of the Acts of 1891-93 (page 612), entitled "An act providing for the creation and regulation of private corporations," which is the same as section 561, Ky. St. It is said on the other side that this section relates solely to corporations organized under that statute, and that the defendant was not organized thereunder. To this, perhaps, it might be responded that it is provided by section 36 of article 1 of said statute—same as section 573 of Kentucky Statutes—that "after the twenty-eighth day of September, 1897, the provision of this chapter shall apply to all corporations created or organized under the laws of this state, if said provision would be applicable to them if organized under this chapter." But the sole contingency on which that statutory provision applies—whether only to corporations organized under that statute, or, since September 28, 1887, to all corporations—is "when any corporation expires by the terms of the articles of corporation, or by the voluntary act of the stockholders." The expiration of defendant's existence as a corporation was due to the happening of neither one of these two contingencies, but solely and alone to the repealing act of the legislature, which with one blow put an end to its life. That provision, therefore, can have no application to this case.

It is contended further that this proceeding against defendant is authorized by the provision in section 1 of the act of 1856, section 8 of chapter 68 of the General Statutes, section 6 of chapter 203 of the Acts of 1891-93, and section 1987 of the Kentucky Statutes, which is in these words:

"That whilst privileges and franchises so granted may be changed or repealed, no amendment shall impair other rights previously vested."

But the rights here referred to are rights of the corporation and persons interested therein, not the rights of persons who have claims against the corporation. Those rights, so far as covered by the act of 1856, were protected by section 2 thereof, which has been repealed, as we have seen. Counsel for complainants cite the case of *Smith v. Gower*, 2 Duv. 17; *Railroad Co. v. Griest*, 85 Ky. 619, 4 S. W. 323. These cases decide that a corporation is not dissolved by parting with all its property, and that, notwithstanding such parting, it may sue or be sued; and on the equitable principles referred to by Mr. Thompson in his work on Corporations, in the quotation therefrom heretofore cited, its creditors may pursue its assets in the hands of its stockholders. This and nothing more. Here it is not claimed that the defendant has been dissolved by the distribution of its assets, but by the act of the legislature putting an end absolutely to its existence. The citations by counsel for complainants from Cook on Corporations likewise have reference to the rights of creditors of a corporation against its property after its dissolution.

It remains to be considered what was the effect of the action of the

supreme court granting the complainants permission to apply to this court for leave to file a bill of review. Can that action be construed as passing upon any of the questions heretofore considered, or upon this court's duty to give the leave sought? Notice of the motion for such permission was served upon Messrs. Hendrick and Chinn, and they appeared before that court, and moved to quash the return on the notice, and resisted the application upon the same grounds as here. Both motions were briefed by counsel on each side. The court, however, just made an order granting the motion for permission to apply to this court for leave to file a bill of review. It delivered no opinion, and did not act upon the motion to quash at all. As application had to be made to that court for such permission, it had certainly the power to pass upon those questions, and determine the complainants' right to file a bill of review. It had also the power to refrain from doing so, and grant the permission, leaving it to this court to pass upon those questions and determine complainants' right. And this is what we think was the effect of the order which it made, and no more. It was to the same effect as the order of the circuit court of appeals, First circuit, in the case of *Watson v. Stevens*, 3 C. C. A. 411, 53 Fed. 31, which was as follows, to wit:

"Ordered, that whereas, it appears from the suggestions of the counsel for the appellees, made in open court, and accompanied with a verified petition and affidavits, that the appellees conceive that they will have just cause for application for leave to file a bill of review, and to proceed with such bill, this court reserves to the appellee liberty to file such application and proceed thereon, and on such bill of review in the circuit court as the circuit court may determine; and this order shall form a part of the mandate in this cause, which shall issue forthwith."

There the right to file the bill of review was argued before the circuit court of appeals, but that court declined to pass upon it, and made the order quoted.

The motion to quash the return on the notice herein is sustained, and the motion for leave to file a bill of review is overruled.

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CITY OF DAVENPORT v. ALLEN et al.

(Circuit Court, S. D. Iowa, E. D. January 27, 1903.)

No. 243.

**1. LIMITATIONS—IOWA STATUTE—NONRESIDENCE OF DEFENDANT.**

Under the statute of Iowa, as construed by its supreme court, limitation does not run in favor of a defendant during the time he is a nonresident of the state.

**2. RES JUDICATA—MATTERS CONCLUDED BY JUDGMENT.**

A decision of the supreme court of Iowa, in a suit by a property owner against a city, that a contract for paving a street, made by the city, was void because it created an indebtedness of the city beyond the constitutional limit, in respect to street intersections and pavement in front of abutting public property, for which the city was required to pay, is not an adjudication between the parties that the property of the complainant is not liable for the reasonable value of the paving done in front of it,

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¶ 1. See *Limitation of Actions*, vol. 33, Cent. Dig. § 458.

which the city has paid for, to be recovered by a suit in equity, under sections 478, 479, Code Iowa 1873, nor is a further decision in such suit that the city could not set up such claim by a cross-bill therein, filed after the case had once gone to decree, a bar to the maintenance of a separate suit therefor.

**8. MUNICIPAL CORPORATIONS—SUIT TO RECOVER FOR STREET IMPROVEMENTS—  
IOWA STATUTE.**

Where a special assessment made for street paving was illegal, but the work was done, and the city subsequently paid the claim of the contractor therefor, it may maintain a suit in equity against an abutting property owner to recover for the improvement in front of his property on a quantum meruit, under sections 478, 479, Code Iowa 1873; and the defendant cannot set up to defeat such recovery any technical irregularity in the assessment or proceedings, or that the city had no authority to pay the claim of the contractor.

In Equity. On demurrer to answer and cross-bill.

Henry Thunen, Jr., and E. M. Sharon, for complainant.

Hiram J. Grover, W. W. Chamberlain, and W. R. Donaldson, for defendants.

McPHERSON, District Judge. This case is by a bill in equity brought in the state court at Davenport, Iowa. The plaintiff is a city under a special charter under the laws of Iowa, and for the purposes of this case a city of the first class, under the laws of Iowa. The defendants are all, save one, citizens of other states, and that other is a citizen of Rome, Italy. On the ground of diverse citizenship, on petition of defendants, the case was removed to this court.

From the bill the following facts appear: In 1896 the plaintiff, by its counsel, directed the paving and curbing of Eddy street and the Le Claire road, in the city, of about 3,700 feet, and adopted a resolution therefor. Notice thereof was duly given and published, and sealed bids invited for the work. The Flick & Johnson Company was the lowest and best bidder therefor, and was awarded the contract, and gave a bond for the performance of the work. From the inception of these matters, up to March, 1897, the defendants were the owners of certain lands abutting on the streets, subject to a life estate of Ann R. Allen, and since the date stated have been and still are the absolute owners of the land. Under the law then in force, the cost and expenses of said improvements became a lien on the land. The Flick & Johnson Company did furnish the material and perform the labor and did curb and pave said streets to the satisfaction of the city authorities. A plat of said improvements and the cost thereof, and what was chargeable to the different properties, was made and filed, notice thereof given to defendants and the proper proportion, as chargeable to the different properties, was February 3, 1897, assessed to and levied upon the properties, including that chargeable to defendants' properties, particularly describing the same. Prior to all this the city had adopted an ordinance, which still remains in force, by the terms of which it is provided that when such improvements are made, and the cost assessed against the adjacent properties, the same should be a lien on the said real estate and payable by the owners personally, and that the same shall be collected as provided by sections 478, 479, Code 1873, Laws Iowa. The ordinance and said

laws were in force during all of the times in question, as also was chapter 7, Acts 25th Gen. Assem. (Laws 1894). The proper proportion of the cost of such improvements, as well as the reasonable charge and value thereof, chargeable against defendants' said property amounts to \$14,675.26. It was not the intention that the city should be directly holden to the Flick & Johnson Company, although by oversight certain recitals were omitted from the contract, but it is alleged that omissions do not alter the obligations or rights of the parties hereto. Judgment is prayed against the defendants for the amount above claimed, with interest, and that said sum be declared a lien.

The plaintiff afterwards filed an amendment to its bill. Copies of the specifications, bond, and contract were set forth, and it asks that a railway company be brought in as defendant, for that it is seeking to take a right of way across defendant's lands by eminent domain proceedings, and that it should be holden to take its right of way subject to plaintiff's lien and rights. No order with reference to this has been made. The defendants in due time filed their answer to the bill. As a defense they allege in meaning as follows:

The adoption of the resolution for the paving and curbing is admitted. They also admit that the notice was given inviting sealed proposals. They also admit that the Flick & Johnson Company was the lowest bidder for the work, and that it gave the bond and entered into the alleged contract, and they annex a copy of the contract. The said contract was an absolute liability on the part of the city to the Flick & Johnson Company for said improvements, and in no way dependent upon the city being able to collect any special tax, and that the Flick & Johnson Company was not to look to any special taxes for its compensation.

The 107 Iowa, or 77 N. W., case was pending in the Scott county court on or about September 12, 1896, shortly after work begun, but before any payments to the Flick & Johnson Company. The city paid from time to time as work progressed for said work and labor, and has paid it in full. And said liability was an unlawful indebtedness, for that it was in excess of the limitation fixed by the Iowa constitution, and has been so adjudged in an action between these parties. See *Allen v. City of Davenport*, 107 Iowa, 90, 77 N. W. 532.

What was in issue and what was determined in the 107 Iowa, or the 77 N. W., case, is set forth in detail, as defendants understand the same; and, after the case was decided by the Iowa supreme court on mandate, the state district court entered a decree in favor of these defendants, decreeing that the city be enjoined from collecting the said assessment, or from selling any of the lands to pay the said assessment under or by virtue of said assessment. That decree has not been vacated on motion or appeal. That decree is pleaded as *res adjudicata*.

They admit that the streets in question run through their lands. They admit that the Flick & Johnson Company did and completed said improvements as alleged in the bill by December, 1896, but whether it was done to the satisfaction of the city or under said resolution they have no information. They admit said plat of improvements, and that the city did attempt to assess said sum against their

property, and that said plat shows such sum. It is alleged that the Iowa supreme court adjudged said assessment as void. The ordinance referred to is admitted. But they deny the construction of the ordinance as claimed by the plaintiff, and they also deny the construction of the different statutes which plaintiff contends for. They deny the reasonableness of the charges, but that the city has paid the Flick & Johnson Company the sum claimed. But they say that said work was done and the payments made under a void contract, and that there can be no recovery on the quantum meruit, and particularly is this so because of the fact that the city contended it was holden to Flick & Johnson Company, and the Iowa supreme court adjudged against it.

The defendants also pleaded that the alleged cause of action is barred by the statute of limitations, because the cause of action did not accrue within five years. The payment to Flick & Johnson Company by the city out of the municipal revenues was unlawful and illegal. The defendants by cross-bill pleaded the same facts as in the answer, and ask that said claim be decreed void, etc.

The city has filed a demurrer to the answer and cross-bill. The demurrer insists that no defense is pleaded; that the defendants do not offer to do equity; that plaintiff's cause of action is not dependent on the validity of the alleged contract between the city and the Flick & Johnson Company; that the adjudication of the Iowa courts was only as to the assessment of February, 1897; that defendants admit that plaintiff is seeking to recover the reasonable value of the improvements under sections 478, 479, Code 1873, Laws Iowa, by reason of which the only question is that of the right to recover such reasonable value, and that under said statutes it was necessary for the city to pay the Flick & Johnson Company the cost of the material and labor. The demurrer also urged that plaintiff's lien attached under chapter 7, Acts 25th Gen. Assem. (Laws 1894), and that the lien is not barred by the statute of limitations. It is also urged that the cross-bill does not contain any matter of equity entitling the defendants to any relief. Such other facts, if any, necessary to a correct presentation of the case, will be noticed later on.

And it seems to me that plaintiff's demurrer to the answer and cross-bill should be sustained or overruled as the following matters may be ruled: (1) Is the cause of action barred by the statute of limitations? (2) Is the plea of res adjudicata good? Or what is the effect of the opinion of the Iowa supreme court and of the decree of the state district court? (3) Can the city recover the reasonable value of the labor and material aside from the above two questions?

1. First, as to the statute of limitations. Neither of the defendants are residents of Iowa, and all have been nonresidents from a time prior to the first date referred to in the case. And the same was true of their ancestor Ann R. Allen, up to the time of her death. Therefore, under the Iowa statute, as construed by the supreme court of the state, the statute never commenced to run in favor of either Ann R. Allen or any one of the defendants.

Section 3451 of the Code of 1897 provides: "The time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation." *Ross v. Rees*, 55 Iowa,

296, 7 N. W. 611; *Wetmore v. Marsh*, 81 Iowa, 677-681, 47 N. W. 1021. What the statutes of limitation may be in the states of the residence of some of the defendants I am not certain, but, as I am advised, equally as long as the Iowa statute. But, beyond all this, it is not the five-years clause of the Iowa statute that controls, because complainant is seeking to enforce a lien against real estate, in which case the action is not barred until ten years has expired. And, even if the five-years clause does control, the complainant's cause of action in no event accrued until it paid the money to the Flick & Johnson Company, which was less than five years before the commencement of this action. And again, the city did assert its claims by a cross-bill in the former action. It is true the Iowa supreme court held it could not be so maintained. But to have adopted the conclusion that such was the proper practice was not negligence, but a mistaken conclusion only, and concerning a matter about which lawyers and judges differ. And the city in due time brought this action, which took the matter from under the Iowa statute of limitations. For these several reasons, any one of which would avoid the statute of limitations, I do not believe the claim in that respect to be a defense.

2. Is the plea of *res adjudicata* good? Or what is the effect of the opinion of the Iowa supreme court and of the decree of the state district court? Generally speaking, one gets but little help by reviewing the authorities upon the subject of estoppel by judgment. There is but little difficulty as to what the law is, as compared with applying the law to a given state of facts. The rules of law upon the subject are plain and easily understood. The court rendering the former judgment must, of course, have had jurisdiction of the subject-matter. There is no question as to this phase of the matter. The court rendering the decision in the former case must have had the parties before it, and acquired jurisdiction over them, as are now before the court, although the order of the parties, as plaintiffs or defendants, need not correspond in the two cases; and as to this branch of the question there can be no issue raised.

The next question arising is as to what question was before the court in the former case and what was then decided. What was the thing adjudicated? It need not have been upon the same demand, because a judgment upon a coupon is an adjudication as to the bond. Sometimes a judgment on a note is an adjudication as to a series of notes. But the question is, what was adjudicated? and that often becomes a mixed question of fact and law. By turning to the case as reported in 107 Iowa, 90, 77 N. W. 532, it is all made plain. The Allens, as complainants, brought the action against the city, alleging that the city was about to create an illegal indebtedness, because the city was already in debt up to the 5 per cent. limit allowed by the state constitution; and this, because of the paving of street intersections, and adjacent to public property, the expense of which was to be borne by the city as a municipality. There were some minor questions in the case, all of which were decided in favor of the city. But the question of the case was whether the city was about creating an unconstitutional indebtedness. And that question was decided adversely to the city. It was not decided, and could not have been decided, that the



expense to be borne by the Allens and other adjacent property owners created an unlawful indebtedness; because the Iowa supreme court has decided several times, and all lawyers recognize that in Iowa, that part of the expense assessed against the adjacent property, or that can be recovered from the owners of such property, shall not be taken into account in estimating the amount to which the city may legally become indebted. So that the thing decided was that the city was creating an illegal indebtedness as to the other portions of the paving. But, even though this be a mistaken view, yet there can be no doubt about the proposition, that the Iowa supreme court did not decide that the Allens could not be compelled to pay for the paving adjacent to their property. The supreme court did not decide that. And to my mind it is to no purpose to say that the writer of the opinion in the case in 107 Iowa, 77 N. W., said this or that or something else by way of illustration or argument. The question all the time is, what was decided? And the only answer is that the supreme court held that an illegal debt was being created, because it was exceeding the limit of 5 per centum, and therefore prohibited by the constitution. Thereupon the case was remanded to the district court, with the usual directions in equity cases. Then the city undertook to plead by a cross-bill the same matters it now urges by its bill herein. The district court held this to be proper, and again the case is passed on by the supreme court. *Allen v. City of Davenport*, 87 N. W. 743.

Now, what was decided on the second appeal in the case just cited? It was decided that after reversal of a decree in an equity case the defendant could not plead facts by way of a cross-bill when the defendant had been cognizant of such facts before the case first went to a decree; and, secondly, that instead of urging such facts by cross-bill the city must present such facts by an original bill, just as has been done. This is said over and over again in the opinion of the supreme court, and it was what was decided. One will look in vain to find that the supreme court decided against the claim of the city, other than such claim could not then be urged in that case by a cross-bill. Then the situation was that the supreme court had held that the city was creating an illegal indebtedness, being so held in the first case.

In the second appeal the supreme court held that the issues must be limited to the bill, the answer, and reply. And on that state of the pleadings the case appeared for the third time in the district court, and on those issues, and none other, the case went to a decree in favor of the Allens and against the city. While the decree is quite broad, and in it are found extravagant recitals, yet when it is recalled that it is elementary, that decrees are always construed by the pleadings, I have no difficulty in concluding that the present claim of the city was not adjudicated. The claim was not in issue, and, not being an issue, how could it have been adjudicated? *Burlington Sav. Bank v. City of Clinton* (C. C.; Shiras, J.) 111 Fed. 439; *Gill v. Patton* (Iowa) 91 N. W. 904.

The assessment being held void is all that can fairly be claimed for the decrees of either the district or supreme courts.

When the city paid the Flick & Johnson Company, the contractors, it took the place of those contractors as to the entire situation. And

by taking the place of the contractors there was no release or discharge of the Allens as owners of adjacent property. It did not pay their debt, and did not discharge their property from any lien. It is claimed that the money was illegally paid, in that money was improperly taken from other funds. Just how that can inure as a defense to the Allens I cannot understand. The officers of a city are agents of limited authority, and that their unauthorized acts should estop the city is not logical, to my mind. The city paid the Flick & Johnson Company, and that is enough for the Allens to know. And the city paid it for the use and benefit of the Allens. Now, why should the Allens not pay? Their property has been benefited. Why should they have the benefits without expense? They own a large tract of land within the city. Their property is enhanced in value by reason of the city surrounding their property. This of course, is their good fortune. But why should the other taxpayers build walks, and driveways, and boulevards through and by their property, and they pay nothing?

The contention of the defendants is so inequitable and unconscionable that it cannot be entertained for a moment, unless there is some insuperable legal objection in the way. They cannot say that their property is being taken without due process of law, because they are now in court, and if they are required to pay off the lien it is only after a decree. They cannot be heard to say that the assessments were irregular or the proceedings were not in strict conformity to law. Such objections might be entertained, if the money was sought to be collected by and through the channels for collecting taxes. But such are not the proceedings. On the contrary, they are brought into a court of equity, where irregularities should be brushed aside, and the very right of the matter decreed. The defendants have never made any tender of any amount. They do not now say they are ready or willing to pay any amount. But they retain the benefits conferred, and they say they will pay no sum. And it should be remembered that the city is not seeking to recover the contract price, but is seeking to recover on the quantum meruit, and on that only.

And the very purposes of the statutes, under which the action is brought, is to allow a recovery, when one could not be had, through the usual channels. It is a curative statute. It recognizes that there may be irregularities in the proceedings of the city authorities, and because thereof the parties may be brought into court and compelled to pay the reasonable price for the benefits received. *Fort Dodge Co. Electric Light & Power Co. v. City of Ft. Dodge (Iowa)* 89 N. W. 7; *City of Burlington v. Quick*, 47 Iowa, 222; *City of Chariton v. Holliday*, 60 Iowa, 391, 14 N. W. 775.

It has been my purpose to only state my own views, and to state them briefly. My conclusion is that the position of the defendants is inequitable and unconscionable, and wholly without legal or equitable merit. And I also conclude that the city should be allowed, as the pleadings now are, to recover the reasonable value of the paving done by, through, or adjacent to the property of the defendants; and, so believing, the demurrer of the city to the answer and the cross-bill of the defendants will be sustained.

## In re WILMINGTON HOSIERY CO.

(District Court, D. Delaware. January 12, 1903.)

No. 71.

**1. BANKRUPTCY—ACT OF BANKRUPTCY—ADMISSION OF INSOLVENCY BY CORPORATION.**

Where a bill is filed against an insolvent corporation, alleging its insolvency and praying the appointment of a receiver, and the corporation in its answer admits its insolvency, and a receiver is appointed, the corporation cannot be held thereby to have admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, within the meaning of Bankr. Act 1898, § 3a, cl. 5 [U. S. Comp. St. 1901, p. 3422].

(Syllabus by the Court.)

In Bankruptcy. On motion to dismiss petition in involuntary bankruptcy.

Charles M. Curtis, for petitioning creditors.

Tilghman Johnston and William S. Hilles, for Wilmington Hosiery Co.

BRADFORD, District Judge. This is a motion to dismiss a petition in involuntary bankruptcy filed against the Wilmington Hosiery Company, a corporation of Delaware. Only one alleged act of bankruptcy is set forth. It is as follows:

"That said Wilmington Hosiery Company is insolvent and that within four months next preceding the date of this petition the said Wilmington Hosiery Company committed an act of bankruptcy in that it did heretofore, to wit, on the 28th day of August, A. D. 1902, upon petition to the Chancellor of the State of Delaware praying for the appointment of receiver for said Wilmington Hosiery Company on the ground of insolvency acknowledge under the oath of its President that said insolvency existed and consented to the appointment of such receiver on the ground of said insolvency, a certified copy of which petition with the answer thereto and the order of the Chancellor thereon is hereunto annexed, and your petitioners pray may be taken as a part of this petition."

The petition or bill in chancery contains the following averment:

"That said respondent corporation has become and is now insolvent and unable to pay its debts, and that it will be for the benefit of the stockholders and creditors of the said corporation, that a receiver be appointed for the purpose of preserving its assets, and properly adjusting its business and liabilities."

It then prays for the appointment of such receiver. The company in its answer admitted the truth of the above averment, and the Chancellor thereupon appointed a receiver as prayed. It is properly conceded by the counsel for the petitioners that the petition in bankruptcy in its present form cannot be sustained unless what is alleged as an act of bankruptcy can be regarded as an admission by the company in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. But such a conclusion is wholly inadmissible. While the company admitted in writing its insolvency it did not expressly or by implication admit its willingness to be adjudged a bankrupt. In fact, although admitting the truth

of the averment of insolvency, it did not allege a willingness to have a receiver appointed; but, if its admission of insolvency carried with it implied consent to the appointment of a receiver, the aspect of the case would not be materially different. A written admission of insolvency and consent to have a receiver appointed by the Chancellor cannot be regarded as a written admission of inability to pay debts and willingness to be adjudged bankrupt. No doctrine of equivalency is applicable in this connection. Further, to hold the one equivalent to and of the same effect as the other not only would be unwarranted by the language and meaning of the bankruptcy act, but would be calculated as a precedent to produce uncertainty and confusion in its administration. At the conclusion of the argument the petitioning creditors through their counsel asked leave to amend the petition and stated their readiness to submit their proposed amendment within a few hours. Leave will be granted them to submit within the next twenty-four hours their proposed amendment, and the propriety of its allowance will thereafter be determined. Should such proposed amendment not be submitted within the time mentioned, or should it be disallowed, the petition will be dismissed with costs.

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In re WILMINGTON HOSIERY CO.

(District Court, D. Delaware. January 20, 1903.)

No. 71.

**1. BANKRUPTCY—ACTS OF BANKRUPTCY—CORPORATION.**

Where an insolvent corporation, against which a bill was filed alleging its insolvency and praying the appointment of a receiver, made answer admitting its insolvency, and a receiver was thereupon appointed who took possession of its property, the corporation did not thereby permit its property to be removed, with intent to hinder or delay its creditors, or any of them, within the meaning of section 3a (1) of the bankruptcy act [U. S. Comp. St. 1901, p. 3422].

**2. SAME—SCOPE OF ACT.**

The bankruptcy act was not intended to cover all cases of insolvency to the exclusion of judicial proceedings in state courts affecting the property of the insolvent, but only such cases as are within its provisions.

**3. SAME—ACTS OF BANKRUPTCY—REMOVAL OF PROPERTY.**

The word "removed" as employed in section 3a (1), whether taken by itself or viewed in the light of the context, signifies an actual or physical change in the position or locality of the property constituting the subject of the removal. It is an inapt expression for the taking possession of property by a receiver under competent authority.

**4. SAME.**

One does not permit a removal of property within the meaning of section 3a (1) who has neither power nor right to prevent its removal.

**5. SAME—INTENT TO HINDER OR DELAY CREDITORS.**

Section 3a (1) requires an actual intent to hinder, delay or defraud creditors, and such actual intent will be presumed when one does an act which he knows will produce that result. But an actual intent, whether directly shown or established by presumption, must exist.

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¶ 4. See Bankruptcy, vol. 6, Cent. Dig. § 82.

**6. SAME.**

An intent to hinder or delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone them in the collection or enforcement of their claims.

**7. SAME.**

The bankruptcy act nowhere denounces a mere intent on the part of an insolvent debtor not to become a bankrupt. Nor does section 3a (1) provide that the commission or permission of any of the acts therein specified with intent not to become bankrupt shall constitute an act of bankruptcy. While such an intent involves a purpose that the debtor's property shall not be distributed under the provisions of the act and that his creditors shall not enjoy its benefits, it is not in all cases equivalent to an "intent to hinder, delay, or defraud his creditors, or any of them" within the meaning of subdivision (1).

(Syllabus by the Court.)

In Bankruptcy.

Charles M. Curtis, for petitioning creditors.

Tilghman Johnston and William S. Hilles, for Wilmington Hosiery Co.

BRADFORD, District Judge. Pursuant to leave heretofore granted in this case the petitioning creditors have submitted a proposed amendment to their petition and ask that it be allowed. It contains the following averments:

"That the said Wilmington Hosiery Company by its President by authority of a resolution unanimously adopted at a meeting of the stockholders of said company, all of the stockholders of said company being present, held on August 28th, A. D. 1902, as well as authority of a resolution unanimously adopted at a meeting of the directors of said company, all the directors being then present, held on August 28th, 1902, made and filed on the twenty-eighth day of August, A. D. 1902, an answer to the bill filed in the Court of Chancery of the State of Delaware in and for New Castle County by Alfred D. Warner, a creditor and stockholder of said company, against the said company, alleging in said bill the insolvency of said company and praying for the appointment of receiver for said company, and in and by said answer admitted the facts therein set forth to be true and thereby and by submitting without objection to the jurisdiction of said Court of Chancery to take possession of the business of said corporation and wind up its affairs for the benefit of the creditors of said corporation, committed a fraud upon an act of the Congress of the United States entitled 'An Act to Establish a Uniform System of Bankruptcy throughout the United States,' approved July 1st, 1898, and also thereby committed sundry acts of bankruptcy.

First. The said corporation conveyed, transferred and removed and permitted to be removed property of the said company to receiver appointed by the Court of Chancery of the State of Delaware in the cause above mentioned, with intent on the part of the said corporation, its stockholders and officers, to hinder and delay the creditors of said company in the collection of their claims against said company.

Second. The said company thereby admitted in writing inability of said company to pay its debts and its willingness to be adjudged a bankrupt on that ground."

This court has heretofore decided that the company did not admit in writing inability to pay its debts and willingness on its part to be adjudged bankrupt. The correctness of this holding is now conceded on the part of the petitioning creditors and it is unnecessary further to allude to what is designated the second act of bankruptcy.

During the course of the argument the controversy narrowed down to the contention that the petition if amended as sought would show that the company permitted its property to be removed with intent to hinder and delay its creditors within the true meaning of section 3a (1) of the bankruptcy act [U. S. Comp. St. 1901, p. 3422] which provides that

“Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them.”

It is admitted that no act of bankruptcy under any subsequent subdivision of section 3 would be disclosed by the allowance of the proposed amendment, and further, that it would not show that the company conveyed, transferred, concealed or removed any of its property, or permitted it to be concealed. Nor is there any allegation in such amendment of an intent on the part of the company to defraud its creditors or any of them. The sole contention is, as above stated, that the company would be shown to have permitted its property to be removed with intent to hinder and delay its creditors. Unless removal with such intent would appear no act of bankruptcy would be charged. The word “removed” as employed in subdivision (1), whether taken by itself or viewed in the light of the context, clearly signifies an actual or physical change in the position or locality of the property constituting the subject of the removal. This case does not involve the consideration of any removal of mere evidences of property. It nowhere appears in the proposed amendment that the property of the company or any part of it was in fact removed. No removal is disclosed by the certified copy of the proceedings in the Court of Chancery annexed to the petition. Those proceedings, as certified, show the appointment of a receiver with the usual powers, but not any removal of the property of the company “to receiver appointed by the Court of Chancery” or any other removal thereof. The proposed amendment, it is true, sets forth that the company in its answer in the Court of Chancery admitted its insolvency and by submitting without objection to the jurisdiction of that court “committed a fraud” upon the bankruptcy act and “thereby committed sundry acts of bankruptcy” including what is now relied on by the petitioning creditors as constituting an act of bankruptcy, namely, that the company permitted its property to be removed and a receiver to be appointed with intent to hinder and delay its creditors. There is no positive, direct averment that property was so removed. Its removal has been deduced as a conclusion of law from the precedent allegations in the proposed amendment. There is no substantive allegation of it as a fact. Doubtless the receiver did take possession of the property of the company, and were the fact under the circumstances important, it could be shown by a proper amendment. It may be seriously questioned whether the term “removed” has legitimate application to the taking possession of the property by a receiver under the circumstances disclosed. In the case of *In re Baker-Ricketson Co.* (D. C.) 97 Fed. 489, Judge Lowell, speaking of subdivision (1), said:

"The provision concerning removal applies only to concealment and removal. That a receivership is not concealment, secretion, falsification, or mutilation of property (see sect. 11, cl. 22 [U. S. Comp. St. 1901, p. 3418]) the petitioners do not contend. They have not shown that in this case the receiver has removed anything, and the phrase 'removal of property' is a totally inapt definition or description of ordinary receivership proceedings. Moreover, the phrase is not a new one, and its meaning may be judged from its use in other bankrupt cases."

But I am unwilling to rest the decision of this case solely on this ground. To sustain the petition as sought to be amended it should appear not only that there was a removal of property of the company, but that the company "permitted" such removal with intent to hinder or delay its creditors "in the collection of their claims against said company." It is necessary that the company should have "permitted" with the specified intent, and that such intent was the concomitant of such permission. The statute under which the receiver was appointed is the act of March 25, 1891 (chapter 181, vol. 19 Laws Del.). It is as follows:

"That whenever a corporation shall be insolvent, the Chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation, to take charge of the estate, effects, business and affairs thereof, and to collect the outstanding debts, claims, and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by such corporation and may be necessary and proper; the powers of such receivers to be such and continued so long as the Chancellor shall think necessary: provided, however, that the provisions of this act shall not apply to corporations for public improvement."

The Wilmington Hosiery Company, not being a corporation for public improvement, came within the provisions of the act. Under the settled construction of this statute the Chancellor, unless the bankruptcy act has suspended its operation, has on proper application power through a receiver or receivers appointed by him to take charge and possession of the affairs and property of an insolvent corporation, and for the protection and benefit of creditors or stockholders, or both, either temporarily or fully administer the same. In case of full administration the assets of the corporation are distributed among the creditors and, should a surplus from any cause exist, among the stockholders, in accordance with the principles of equity. While valid existing liens or priorities are recognized and enforced, the institution of proceedings under the statute does not create or result in the creation of a preference of any kind. It is contended on the part of the petitioning creditors that the company by filing an answer in the Court of Chancery admitting its insolvency as charged in the bill and submitting itself to the jurisdiction of that court "permitted" its property to be removed. This contention cannot be sustained. The company, as a defendant, was obliged, if the state statute was operative, to make answer to the allegation of its insolvency. It is not denied that it was insolvent, nor can its insolvency, as against the copy of the record made part of the petition in bankruptcy, be disputed. Neither law nor morals required the company falsely to aver solvency which did not exist. In *Wilson v. City Bank*, 17 Wall.

473, 21 L. Ed. 723, Mr. Justice Miller, in discussing the omission by certain defendants to resort to dilatory and false pleas in an action brought against them in a state court, said:

"There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the State court would have been a moral wrong and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics."

Having made true answer, the appointment of a receiver was a consequence which could not have been prevented by the company. Being a corporation, it was not entitled to file a petition in voluntary bankruptcy. And it is inadmissible to assume that it was the duty of the company in order to defeat or affect the proceedings in chancery to commit an act of bankruptcy, which might or might not have induced its creditors or some of them to proceed in bankruptcy against it. The word "permitted," as employed in subdivision (1) of section 3 [U. S. Comp. St. 1901, p. 3422], is by no means synonymous with the word "suffered" in subdivision (3) of the same section. One does not permit a removal of property within the meaning of the former provision who has neither power nor right to prevent its removal. Such was the situation of the company. One of the essential elements of an act of bankruptcy under subdivision (1) is therefore lacking. It is further urged that submission by the company to the jurisdiction of the Court of Chancery involved an intent to hinder and delay its creditors "in the collection of their claims against said company," and it is argued that this intent, drawn by counsel for the petitioning creditors as a conclusion of law from the proceedings in chancery, is equivalent to an intent on the part of the company to hinder and delay its creditors by depriving them of the benefits of the bankruptcy act. As before stated, an intent to hinder, delay or defraud creditors is, under subdivision (1), a necessary concomitant of permission to remove property. The bankruptcy act does not define the meaning of the phrase "hinder, delay, or defraud his creditors." It nowhere denounces a mere intent on the part of an insolvent debtor not to become a bankrupt. Nor does subdivision (1) provide that the commission or permission of any of the acts therein specified with intent not to become a bankrupt shall constitute an act of bankruptcy. While such an intent involves a purpose that the debtor's property shall not be distributed under the provisions of the act and that his creditors shall not enjoy its benefits, it is not in all cases equivalent to an "intent to hinder, delay, or defraud his creditors, or any of them," within the meaning of the subdivision in question. In *Wilson v. Bank*, supra, Mr. Justice Miller employed language, equally applicable here, as follows:

"We do not construe the act as intended to cover *all* cases of insolvency, to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy."



Subdivision (1) requires an actual intent to hinder, delay or defraud creditors, and such intent will be presumed when one does an act which he knows will produce that result. But an actual intent, whether directly shown, or established by presumption, must exist. The terms of the provision read in their common and natural sense leave no substantial doubt on this point. This conclusion receives additional support from the fact that subdivision (1) does not require that the debtor shall be insolvent when committing or permitting any of the acts therein enumerated. Section 3c [U. S. Comp. St. 1901, p. 3422] provides that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed," &c. But the requirement of insolvency is confined to the date of filing the petition, and the bankruptcy act nowhere requires the existence of insolvency at the time of the commission or permission of any of the acts denounced in subdivision (1). It is inadmissible to assume that the specified intent must be actual in one case, and, in another, may be only constructive. The clause should receive uniformity of construction. It would be unreasonable to hold that the required intent can be other than actual in the case of a debtor who was solvent at the time of committing or permitting any of the enumerated acts. If this be true, an actual intent on the part of an insolvent debtor is equally required. Not only must there be an actual intent, but that intent must be to hinder, delay or defraud creditors. An intent to hinder or delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone them in the collection or enforcement of their claims. Aside from the bankruptcy act certainly no such intent can be imputed to the company. The proceedings in the Court of Chancery were instituted with a beneficent purpose, and calculated to secure a proper adjustment of the affairs of the company and a just and equitable distribution of its assets among its creditors. In *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377, Mr. Justice Field, in discussing the validity of an assignment under the laws of Ohio for the benefit of creditors made more than six months before the institution of proceedings in bankruptcy, while recognizing that such an assignment, if made within that period, might be voidable under the provisions of the bankruptcy act of 1867, but without expressing an opinion on that point, said:

"Independently of the Bankrupt Act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such

a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hindrance and delay to particular creditors, in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction."

Nor can the company legitimately be charged with an intent to hinder or delay its creditors in the sense of merely depriving them of the benefits of the bankruptcy act. For, even on the assumption of the sufficiency of an allegation to that effect to supply the intent specified in subdivision (1) [U. S. Comp. St. 1901, p. 3422], the proposed amendment does not disclose an actual intent to deprive creditors of such benefits. As before stated, the company had no right to become a voluntary bankrupt. No proceeding in bankruptcy was pending against it at the time it filed its answer. It is not alleged that it had then committed or contemplated the commission of any act of bankruptcy. Non constat that it would commit any such act or, if it should, that any of its creditors would proceed in bankruptcy against it. In fact, the proposed amendment does not contain any averment of an intent to deprive creditors of the benefits of the bankruptcy act. The allegation in it, deduced as a conclusion of law, and relied on by the petitioning creditors, is that the company permitted its property to be removed with intent to hinder and delay its creditors in the collection of their claims against it. I am unable to find on the facts as stated in the proposed amendment anything to warrant the deduction made by counsel of the intent claimed to have existed or any such intent as would meet the requirements of subdivision (1). Much of the argument on the part of the petitioning creditors was in support of the proposition that the Delaware statute is an insolvent law, and that its operation was suspended by the bankruptcy act. On this assumption it was claimed that it was the duty of the company to raise the question of jurisdiction in the Court of Chancery and that its omission so to do amounted to permission on its part that the receiver should take possession of and remove the property of the company. It is not necessary to the decision of this case that the correctness of the above assumption should be determined, and I refrain from expressing any opinion on the point; for even if the state statute were an insolvent law, and as such rendered dormant or inoperative by the bankruptcy act, the specific intent on the part of the company required by subdivision (1) would still be lacking.

My conclusion on the whole case is that an allowance of the proposed amendment would not cure the insufficiency of the petition as originally filed. I am not aware of any decision at variance with this conclusion. On the other hand, there are several cases which strongly support it. In *re Baker-Ricketson Co.* (D. C.) 97 Fed. 489; In *re Harper & Bros.* (D. C.) 100 Fed. 266; *Vaccaro v. Bank*, 43 C. C. A. 279, 103 Fed. 436; *Davis v. Stevens* (D. C.) 104 Fed. 235. In *Vaccaro v. Bank*, *supra*, it was held by the circuit court of appeals for the sixth circuit that failure by surviving partners of a dissolved partnership to contest the appointment of a receiver by a state court was not permitting their property to be concealed or removed with

intent to hinder, delay or defraud their creditors under subdivision (r). Judge Lurton, in delivering the opinion of the court, among other things, said:

"There is no evidence of collusion, fraud, or any other evil thing or purpose. \* \* \* It would be an abuse of language and a confusion of ideas to hold that the passive conduct of the Vaccaros in respect to the bill seeking a receiver was a concealment or removal with intent to hinder, defraud, or delay creditors."

For the foregoing reasons leave to file the proposed amendment must be denied and the petition dismissed with costs.

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ILLINOIS TRUST & SAVINGS BANK v. MINTON et al.

(Circuit Court, S. D. Iowa, C. D. December 3, 1902.)

No. 2,398.

**1. STRIKES—INJUNCTION—FEDERAL COURTS—NONRESIDENT TRUSTEES—CAPACITY TO SUE.**

An Iowa telephone company executed a deed of trust in which plaintiff, a foreign corporation, was named as trustee, but plaintiff was not authorized to bring any suit to enforce the deed, nor exercise any control over the corporation or its property, until after default had been made in the payment of interest on its bonds, etc. Before such default, the telephone company brought suit in a state court to restrain certain strikers, residents of the same state, from boycotting, picketing, and intimidating its employes, etc. *Held*, that plaintiff had no capacity to sue such strikers for the same relief in a federal court in an action in which the telephone company was not joined.

In Equity.

William Connor, E. E. Cook, and N. T. Guernsey, for complainant.  
L. Kinkead, John M. Read, and Howard J. Clark, for respondents.

McPHERSON, District Judge. This is a bill in equity, praying a writ of injunction against the respondents, and is what is usually known as a "Strike Case." Complainant is a citizen of Illinois, and all of the respondents are citizens of Iowa. The requisite amount in controversy has been alleged. There is no federal question, and the jurisdiction alone depends on diverse citizenship. The Iowa Telephone Company, the owner of the property in question, is a corporation and citizen of Iowa, for which reason it could not maintain this action in this court. Complainant, in a lengthy bill, makes allegations against the respondents, charging them with "boycotting," "picketing," and numerous acts of intimidation, terrorizing, and acts of violence, which, if true, are without lawful excuse, and wholly unjustifiable. And, if those allegations were substantially sustained by the evidence, and were in a case in which this court had jurisdiction, the writ of injunction would be ordered. I have but recently, in a case pending in the circuit court for the district of Nebraska, filed an opinion expressing my views as to all such acts, and defining my views as to the rights, duties, and obligations to both employers and employes. *Union Pac. R. Co. v. Ruef et al.*, 120 Fed. 102.

As each of counsel in this case have my opinion in that case, and as all others having a desire to know my views can readily obtain that opinion, I shall not now restate any of those views. Whether any of those allegations in the bill now before me are sustained by the evidence, I have not considered, for the reason that it is urged that in this case this court has no jurisdiction. And, if this court has no jurisdiction, it would be a waste of time to go through with the many thousands of pages of evidence, and attempt to render a decree upon the merits or lack of merits of the case, as to the unlawful acts charged. As soon as I learned that the jurisdiction of the court was to be challenged, I urged several times that such question be first tried, but was not successful in having the evidence so taken. The jurisdictional question arises on the following facts: The bill does not allege insolvency of the telephone company. The bill does not allege that the company, or some one for it, has refused to bring a similar action in the proper court; but, on the contrary, it appears that such suit has been brought by the company, and is now pending in the state court of Polk county, Iowa. The position, and all the rights, burdens, duties, and obligations of complainant, is that of a trustee created by a written instrument executed in 1897 by the telephone company and trustee. This instrument is very lengthy, and I shall call attention only to those features material to the present inquiry. In part it is a mortgage on all the Iowa lines and appliances and property in the state. It was given to secure an issue of bonds, some of which were to be issued at once, and others from time to time. The trustee had and took no personal interest in the mortgage, and only was to act in a representative capacity, and in that capacity only in certain events and contingencies. For the use and benefit of the bondholders, the company gave to the trustee a mortgage. In part, therefore, the instrument is a mortgage, and to that extent the trustee is a mortgagee, excepting as modified and controlled by the instrument. Whether the property covered by the mortgage is real estate, or personal property, or mixed, or partly of each, is a matter of no consequence, because the company was to retain the possession of all property, occupy and manage the same, until after default, which default has as yet not occurred. And in Iowa, so far as the facts pertaining to this case are concerned, the only difference is that, as to real estate, the mortgagor retains possession, and of personal property the mortgagee can take possession, and as to matters of foreclosure. But in this case by agreement the mortgagor retained possession. And as to the procedure for foreclosure, this court would not be bound as to the procedure prescribed by the Iowa statutes, but would follow such procedure, or the procedure that is in harmony with the practice of this court, as might seem preferable to this court. So that whether it is a real estate or personal property mortgage is immaterial.

In addition to holding the mortgage for the use and benefit of those who from time to time, by purchase and transfer, became owners of the bonds, the trustee enjoys but few rights and practically has no responsibilities. The trustee is in no way responsible for the disbursement of the money arising from the sale of the bonds,

nor responsible for new construction, but can rely on the orders and recitals thereof as made by the board. Until default in paying of the bonds, or interest thereon, the company can manage the property and take all receipts "with the same effect as if this deed had not been made." The trustee can resign at pleasure. All of its expenses including counsel fees shall be paid by the company, including reasonable compensation for whatever it may do in and about the property, the bonds, foreclosure, redemption of bonds, etc. In case the trustee elects to do anything, it has the right to require, in writing, instructions from the bondholders, and proof that they are holders of bonds, and as such proof the deposit of the bonds with the trustee may be exacted. The trustee may act through agents and attorneys, but is not chargeable with their defaults or negligence, but is only bound to the exercise of due care in the selection and retention of such agents and attorneys. It is not liable, excepting in cases of negligence, for anything it may do or fail to do in matters of foreclosure, taking possession of the property, managing it, etc., but cannot take possession excepting after default. The company agrees to pay the taxes as they become due, and "that it will not commit or suffer any waste." And finally the paper recites as follows:

"All recitals herein contained are made on behalf of the telephone company, and the trustee assumes no responsibility as to the correctness of any of the statements herein contained. The trustee and its successors shall have no responsibility as to the validity of this deed of trust or mortgage, nor as to the execution or acknowledgment thereof, nor as to the amount or extent of the security afforded by the property covered by this deed of trust or mortgage, and the trustee shall not be in any way liable for the consequences of any breach on the part of the telephone company of the covenants herein contained, or for any other act or thing hereunder, except its own several negligence."

This paper gives the trustee its right to bring this action, if it has such right; and, if this paper does not confer such right, then no such right exists. And, as has been said by the courts over and over again, this court is one of limited jurisdiction. But if it takes jurisdiction on allegations and facts so warranting, then it has all the powers of any court of chancery. So important is this that this court is always supposed, as is its duty, on its own motion to inspect the record, and, first of all things, determine whether it has jurisdiction, and, if it has not, then dismiss the case. The greater part of the argument was on the question or right of a mortgagee to maintain an action against parties who were engaged in acts tending to impair the securities conveyed or covered by the mortgage. Such actions generally are against the mortgagor for waste or threatened waste. But this is not such an action. The mortgagor in this case is not a party to the record. If it were joined as complainant, that fact of itself would defeat the jurisdiction of the court, because then we would have one of complainants and all of the respondents citizens of Iowa. The company cannot be made a respondent excepting on allegation that it has refused to take action against the respondents. Such an allegation is not, and in this case cannot be, made, because it has instituted such an action, which action is still pending. A stockholder cannot main-

tain an action like this, excepting on allegation that the company has been requested to act, but declines so to do. Then why should bondholders, or the trustee acting for them, be allowed to maintain the action, excepting upon a like allegation? Of course, if the company, the mortgagor, were doing wrongful acts, which would destroy or impair the mortgaged property, then, of course, such request would be needless. No case for or against the proposition has been called to my attention. But I fail to see why a stockholder should be compelled to make the allegation that the company declines to bring the action, but to allow a bondholder to maintain a suit without alleging such fact. And this is emphasized by the fact that the company has brought such suit, which is still pending. But this is not all. If the complainant were simply a mortgagee, with all the rights of a mortgagee, and such rights were not limited or controlled in any way, I would have some hesitancy in making the order rest on the above-stated proposition, because the courts should see to it that lawlessness and intimidations and terrorizing shall not go on to the detriment of order and the rights of property. But complainant is not simply a mortgagee. Limitations of various kinds are placed upon it, as appears from the analysis of the written agreement between the company and the trustee. With the company, under the contract, rightfully in the possession and control and management of the property, its taxes and the interest on the bonds paid to date, it in no way committing, suffering, or consenting to any waste, or impairing the security, the company now seeking to maintain an action for the same wrongs charged in the bill in this case, and finally the agreement which makes complainant the trustee, both expressly and impliedly prohibiting complainant from bringing any action excepting upon certain contingencies, not present in this case, all force me to the conclusion that the complainant has neither the right nor the authority to maintain this action. I therefore conclude that complainant has not, by its bill and the evidence, as the case now stands, such an interest, and particularly under the powers and rights conferred by the trust deed, as to enable it to maintain this action.

The restraining order made by the circuit judge will remain in force for 15 days from this date, and will then be regarded as vacated, unless within that time the bill shall be amended, and the evidence filed showing a right in it to maintain the action.

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DAVIS et al. v. UNITED STATES.

(District Court, S. D. Alabama, N. D. February 13, 1903.)

No. 375.

1. UNITED STATES—CLAIMS—ARMY—SOLDIERS—MEDICAL ATTENDANCE—IMPLIED CONTRACT.

Army Regulations, § 1452, provides that when medical attendance is required by an officer or enlisted man on duty, and the attendance of a medical officer cannot be had, the officer, or, in his absence, such enlisted man, may employ a civilian physician, and a just account for his services and necessary medicines will be paid by the medical department. Section 1457 requires that accounts for board, lodging, nursing,

and medical attendance of sick soldiers in private hospitals shall be sent to the surgeon general for settlement. *Held*, that where a corporal was taken sick while detached on recruiting service, and required immediate medical attention, which could not be afforded by the department, and he was sent to a private hospital by his captain in command, who requested that board, lodging, medical attendance, etc., be furnished to him, an implied contract was thereby created, which entitled plaintiff to recover against the United States for the reasonable value of the services so furnished.

Cabaniss & Weakley, for petitioners.  
Thomas R. Roulhac, U. S. Dist. Atty.

TOULMIN, District Judge. This suit is brought under the act of congress of March 3, 1887, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], entitled "An act to provide for the bringing of suits against the government of the United States." By this act it is provided, among other things, that all claims founded upon any contract, express or implied, with the government of the United States, may be sued upon in a district or circuit court of the United States, according as the amount involved may be less or more than \$2,000. This suit is for \$332.50.

#### Finding of Facts.

I find the facts to be that on the 24th day of June, 1898, while the United States were at war with the kingdom of Spain, one Corporal Shannon Jones was in the service of the United States as a soldier, doing recruiting duty at Birmingham, Ala., under the immediate command of Capt. W. J. Parks, of the First Alabama Volunteers, who was also in the military service of the United States, the detachment to which said Jones belonged having been sent to Birmingham by the commanding officer of the First Alabama Volunteers, under orders from the war department of the government; that said Jones, while so engaged in said recruiting service, became seriously ill with typhoid fever, and while so ill was by the direction of said W. J. Parks, who was in command of said detachment and of said Jones, conveyed to the infirmary of the petitioners for medical treatment and attention, and was boarded and cared for by the petitioners in such infirmary while so ill from June 24, 1898, to September 2, 1898; that said Jones was seriously ill during said time, and was furnished and supplied by the petitioners during all of said time with board, lodging, medicines, medical attention, and attention of nurses; that reasonable value of said board, lodging, medicines, medical attention, and nursing was \$332.50, the sum sued for; that the services so rendered said Jones by the petitioners were reasonably necessary, and were rendered him while he was enlisted as a soldier in the military service of the United States, and that he was so ill during said time that he could not have been safely discharged from said infirmary sooner than he was discharged therefrom; that immediate and close attention to said Jones was necessary, and that there was no army surgeon at or near Birmingham, Ala., whose medical services could be obtained for him, and no army hospital to which he could be sent; that the nearest army surgeon and hospital was at Atlanta, Ga., 165 miles away, and that it would have been extremely hazardous

and at great risk to his life to have attempted to carry him so far; that at the time said Jones left his command for Birmingham on said recruiting service the command was stationed at or near Mobile, Ala., some 300 miles from Birmingham, and that shortly thereafter it was removed to Miami, Fla. I further find that Capt. W. J. Parks, the officer under whose immediate command said Jones was, sent him to the infirmary of the petitioners, with the request that they render him medical services and attention; that he had no other means of caring for said Jones; that said Parks had no express agreement with the petitioners as to terms, and no special agreement other than that they agreed to take said Jones into their infirmary and to treat and care for him there, and that said Parks told them he expected them to charge the customary prices,—such as other physicians would charge; that said Parks gave information of what he had done in the matter to the chief surgeon of the department at Atlanta, and requested blanks upon which to make accounts for the services rendered, and there was no express approval or disapproval of what he had done. I further find that the charges made by the petitioners were customary and reasonable, and that they have not been paid, although an account for the same has been presented to the proper department of the government, and payment denied.

#### Finding of Law.

Section 1452 of the army regulations, which were promulgated by the secretary of war under direction of the president of the United States, on October 31, 1895, provides that: "When medical attendance is required by an officer or enlisted man on duty, and the attendance of a medical officer cannot be had, the officer, or if there be no officer present, then the enlisted man may employ a civilian physician, and a just account for his services and the necessary medicines will be paid by the medical department;" and section 1457 provides that "accounts for board, lodging, nursing and medical attendance of sick soldiers in private hospitals will be sent to the surgeon-general for settlement."

Where a parol contract has been executed and performed on one side, the party performing will be entitled to recover the fair value of his services as upon an implied contract for a quantum meruit. *Clark v. U. S.*, 95 U. S. 539, 24 L. Ed. 518; *U. S. v. Gill*, 20 Wall. 517, 22 L. Ed. 421.

I find that there was no valid express contract, as required by Act June 2, 1862, 12 Stat. 411 [U. S. Comp. St. 1901, p. 2510], with the petitioners for the services, etc., rendered by them; but I am of opinion that Capt. Parks acted within the line of his authority, under the army regulations, in sending the sick soldier, Jones, to the infirmary of the petitioners, from which there arose on the part of the United States government an implied contract to pay the fair value of the services rendered by the petitioners, and as claimed by them in this suit.

My conclusion is that the petitioners are entitled to a judgment for \$332.50.



## NEW RIVER MINERAL CO. v. SEELEY.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 462.

**1. JUDGMENTS—RELIEF AGAINST IN EQUITY—FRAUD OF PLAINTIFF.**

A New York corporation, having its principal office in that state, owned and operated coal mines in Virginia. Its general manager there, having entire charge of its affairs in that state, shortly before leaving the service of the company, procured a judgment to be entered in his favor against it by a federal court in Virginia without its knowledge, and for this purpose employed one of the attorneys of the company, whose firm had been theretofore retained by him, to represent it, and which had no relations with the company except through him. The attorney secured an acceptance of service of process for the company by a bookkeeper, who was under the plaintiff's control, and who, in the acceptance, represented himself, without authority, to be the company's agent. The company had no notice of the suit or judgment until months after it was rendered, although both the plaintiff therein and the bookkeeper were in constant communication with its officers. *Held* that, in the absence of conclusive proof of the plaintiff's good faith, a court of equity should set aside his judgment to permit the company to defend the action on the merits.

**2. FOREIGN CORPORATIONS—SERVICE OF PROCESS—VIRGINIA STATUTE.**

The statute of Virginia (Code, § 1105) provides that, where a foreign corporation doing business in the state fails to comply with the requirement to designate an agent upon whom process may be served, service upon either of the officers, agents, or employes of the company shall be deemed a sufficient service on the company; but the statutes of the state nowhere provide for the acquiring of jurisdiction over a foreign corporation by an acceptance of service by any of its agents or employes. *Held* that, to acquire jurisdiction under section 1105 by service upon an agent or employe, its provisions must be strictly followed, and the service made by an officer, and that an acceptance of service by a bookkeeper employed by a foreign corporation, who represented himself, in the acceptance, as having authority to represent the company, but in fact did not, conferred no jurisdiction on a federal court in Virginia to render a judgment against the company.

**3. PROCESS—SUFFICIENCY OF SERVICE—EFFECT OF RECITAL IN JUDGMENT.**

Where jurisdiction to render a judgment against a defendant is claimed upon a substituted service, and the record shows that such service was not made as prescribed by the statute, a recital in the judgment that "process was duly executed on the defendant according to law" is not conclusive.

Appeal from the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

See (C. C.) 117 Fed. 981.

John C. Blair and M. M. Caldwell, for appellant.

A. A. Campbell and Joseph L. Kelly, for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and BOYD, District Judges.

BRAWLEY, District Judge. The appellant is a corporation organized under the laws of the state of New York, with its principal office and officers in the city of New York. It is engaged in mining

¶ 2. Service of process on foreign corporations, see note to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3.

coal in the state of Virginia, and George M. Seeley, the appellee, was its general manager in that state, having been appointed in the year 1850, and remaining in charge until May 31, 1898. In the early part of that year he had offered his resignation as general manager, but was induced to withhold the same and remained until June 1st. On March 24, 1898, Seeley commenced an action at law for balance due for services against the New River Mineral Company, retaining for that purpose Capt. F. S. Blair, who, with his son, John C. Blair, constituted the firm of Blair & Blair, the attorneys in Virginia of the New River Mineral Company. In lieu of service of process upon the company, Ira Dumont, the bookkeeper, was requested to accept service by F. S. Blair, who told him to sign it, as it was all right; the acceptance of service indorsed upon the summons being in the words following:

"As agent of the New River Mineral Company, at Ivanhoe, Wythe county, Virginia, and representing it, I accept legal service of the within summons for said company this 24th day of March, 1898.

"[Signed]

Ira Dumont."

At the regular May term, 1898, in the Circuit Court of the United States, Western District of Virginia, a verdict for \$12,069.37 was found, and judgment entered; the company not being represented. The acceptance of service and verdict are in the handwriting of F. S. Blair. Dumont testifies that he had no authority from the company to accept service in its behalf. The company had no notice of this suit, nor knowledge that judgment had been obtained against it, although it appears from the testimony that Pearson, the secretary of the company, was at Ivanhoe, in Virginia, on May 25, 1898, and remained there for nearly a week in conference with Seeley and Dumont, in contemplation of turning over the management from Seeley to Dumont, which was done on June 1, 1898. Letters from Dumont to Pearson, the treasurer of the company, in New York, covering the period from March 2, 1898, to May 28, 1898, are in evidence, and no mention is made therein of this suit; and in June, 1898, Seeley was in New York, and had frequent conferences with the vice president, who had full control over the affairs of the company, and no mention was made of the judgment. Some months thereafter, when the company learned that judgment had been obtained, it immediately instructed the attorneys, Blair & Blair, to commence proceedings to set it aside. F. S. Blair having died in January, 1899, his surviving partner associated with him other counsel, and a motion was made before Judge Paul to set aside the judgment, which motion was refused, apparently upon the ground that a bill in equity was the proper remedy, and such bill was duly filed. Upon the hearing thereof, a decree was entered May 28, 1902, dismissing the bill. Hence this appeal.

The undisputed facts are that Seeley, the general manager of this company, its trusted agent, and having entire charge of its affairs in the state of Virginia, shortly before severing his relations with the company, procured a judgment to be entered against it without its knowledge, and for this purpose employed one of the attorneys of the company, whose firm had been theretofore chosen by him to rep-

resent it, and which had no relations with the company except through him; that in furtherance of this object the attorney so employed secured an acceptance of service of process for the company by Dumont, its bookkeeper, who was under Seeley's control, and he accepted service, representing himself to be its agent, without any authority from the company; that the company had no knowledge of the suit, nor of the judgment until months after it was obtained, although during that period Seeley was in constant communication with it and had repeated personal interviews with its active head.

The disputed facts relate to the circumstances attending the bringing of the suit. The death of the attorney who had procured the judgment has prevented the obtaining of his testimony as to this transaction, but his son and surviving partner says in his deposition:

"Several years prior to the year 1898 our firm represented the New River Mineral Company, having been retained by George M. Seeley, manager. We represented the company at the time the judgment was recovered. We were not acquainted with any of the officials of the company, except Seeley, who employed us and gave us directions as to the conduct of any legal matters that he wished attended to, the institution of and defense of suits. My recollection of the transaction now in controversy is that Seeley came to our office and stated to my father that the New River Mineral Company was indebted to him on account of salary; that they did not want to pay the money, but desired that he take a judgment for the amount due him, no execution to issue at that time; that Mr. Dumont would accept service of process, and requested that we prepare a declaration and obtain the judgment accordingly; that we were employed by Seeley for the company, and received our authority solely from him. My recollection is that my father prepared the declaration and obtained the judgment, as requested by Seeley. I took no part in the transaction, and only remember the circumstance of his having been in our office and made the request as above set forth. I heard no more of the matter until several months afterwards, when we received a letter which I herewith file, instructing us to take steps to set aside the judgment, which we immediately did, as will be seen from the papers on file in this court, in the name of said company against Seeley. In January, 1899, my father died, and I associated in the case with me Messrs. Walker & Caldwell. Mr. Ira Dumont had in the meanwhile been appointed general manager of the company, and I asked his co-operation in setting aside the judgment. He agreed with me that the circumstances of the suit and recovery of the judgment are as above stated."

Seeley denies that he told Mr. Blair that he had a letter from the company instructing him to secure judgment and for Dumont to accept service, and claims that he showed his attorney the letters of the treasurer and the statement of his account, which disclosed that the company was indebted to him in the amount claimed, and that he simply wished to get a judgment to secure this amount. In explanation of his silence respecting this suit and judgment, he says that he was informed by his attorney that the judgment would not be a binding judgment until it was recorded in Wythe county, and that he did not have it recorded there until after they had refused to pay him, and that he supposed that the company was amply warned of his intention to secure himself by his conversation with them, and by the service of the writ upon Dumont, who had been appointed manager to succeed him, and by the fact that he went to F. S. Blair, the chief counsel of the company. Dumont, who had been dismissed from the service of the company at the time when

his testimony was given, says that he was requested by Seeley to "go with him to Wytheville, so he could settle up all the affairs of the company prior to his leaving"; that he went with Seeley to the office of Blair & Blair, and was requested by F. S. Blair to sign a paper accepting notice of service, etc.; when he was reading it over F. S. Blair told him to sign it, as it was all right; he did not remember whether it was Seeley or Blair who told him that the suit was brought by Seeley for services rendered; that no one but F. S. Blair, Seeley, and himself were present at the time when this interview took place. The testimony of J. C. Blair evidently refers to a conversation between his father and Seeley at some time prior to the day when Seeley and Dumont went to the office of the firm for the purpose of carrying out the plans referred to in that conversation.

The conclusion of the learned judge below as to this phase of the case is as follows:

"On the proposition that Seeley deceived the company's attorney, the most that can be contended is that the evidence stands equally balanced."

A judgment ought to be, as Lord Coke defined it, "the very voice of law and right," and we have now to determine whether this judgment for a considerable sum of money, obtained by a trusted agent of this foreign corporation, admittedly without its knowledge, through the instrumentality of other trusted agents, who were to a considerable extent under the direction and control of the plaintiff, who concealed from the defendant any knowledge of his suit, is so far conformable to law and justice that it should be upheld. Mr. Justice Field, in *Windsor v. McVeigh*, 93 U. S. 277, 23 L. Ed. 914, quotes some remarks of Mr. Justice Swayne in another case, as follows:

"The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And he then adds:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

No laches can be imputed to the defendant here in delaying the proceeding for the vacating of the judgment. As soon as it was informed of it, it directed its attorneys to institute proceedings for vacating it, and a motion to that end was promptly made, and upon the refusal of the motion a bill in equity was filed, which is the appropriate proceeding, taking the place of the old writ of *audita querela*, which was invented, says Blackstone, "lest in any case there should be an oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law." Any irregular

or improper conduct in procuring a judgment to be entered is a well-settled ground for vacating it. Accordingly, says Freeman on Judgments (section 100):

"It is laid down by the most eminent elementary writers, and fully sustained by the adjudged cases, that, when a case has not been heard on the merits, the court will, good cause being shown, exercise a discretionary power of vacating an enrollment and giving the party an opportunity of having his case discussed. The fact that the merits of the case were never before the court seems to be the controlling one in all applications for the exercise of this discretionary power. Therefore, where a decree is perfectly regular, so far as regards the appearance of the parties, and is in conformity with the general practice, it may be vacated at the discretion of the court upon a showing of mistake, accident, or surprise, or of negligence of the solicitor, by which the decision on the merits was prevented."

In many of the states it is provided by statute that courts, at their discretion and on such terms as may be just, may at any time within one year after notice thereof relieve the party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. The maxim that "fraud vitiates everything" is applicable to judgments, and is always available to the injured party on the ground that it had occasioned the rendition of a judgment against him by surprise or mistake, or any circumstance which as to him might well be deemed excusable neglect.

We are of opinion that in the circumstances of this case, in view of the peculiar relations of confidence and trust which the plaintiff sustained toward this absent corporation, it is not sufficient that testimony tending to show that the plaintiff deceived the company's attorney should stand "equally balanced." This attorney owed his retainer as the company's attorney to the plaintiff. The bookkeeper who accepted service of process was under the plaintiff's control. The plaintiff was the general manager of the absent corporation. His relation to it was such that the doctrine of uberrima fides obtained, and in any transaction wherein his interest was antagonistic to the interest of his company he should be required to show that he was duly regardful of the interest of his principal, not by "equally balanced" testimony, but by conclusive testimony. The surviving partner of Blair & Blair testifies, and this is not disputed, that his firm had been retained to transact such business as the company required in Virginia, by Seeley; that it had no relations with the company, except through him. It is also undisputed that Dumont, the bookkeeper, was under Seeley's control. It is not denied that, although in constant communication with the company by correspondence, he did not disclose to it the fact that he was bringing suit against it, and that he did not mention it to the officer of the company who was in Virginia during that period, and that he did not have the judgment recorded in the county where its property was situate until some time after it was entered. If there was a studied design to take an unfair advantage of his position as the trusted agent of the company to obtain a judgment against it surreptitiously, it is difficult to see what could have been done or omitted by him which would have more effectually accomplished that purpose than that which he actually did and omitted to do.

Apart from this consideration, which seems to us to furnish sufficient ground to set aside the judgment, we doubt that it can be legally sustained. The learned judge below has upheld it on the ground that Dumont, being an agent of the corporation on whom process against it might be legally served, was competent to accept service for the corporation; citing from Thompson on Corporations (section 7526): "Any one upon whom service of process may be executed is competent to acknowledge in writing in behalf of the corporation that he has been served,"—and 19 Encyclopædia of Pleading and Practice, p. 670, to the same effect.

Section 1104 of the Code of Virginia provides as follows:

"Every company incorporated under the laws of this state or another state, and doing business in this state, except an insurance company incorporated under the laws of another state, shall have an office in the state at which all claims due residents of the state against such company may be audited, settled and paid. Every such company incorporated under the laws of another state, shall, by written power of attorney, appoint some person, residing in the state, its agent upon whom all lawful process against the company may be served, and who shall be authorized to enter an appearance in its behalf."

The remainder of the section provides for the recording of the power of attorney in the office of the clerk of the court of the county wherein such office is located, and the evidence is that no such power of attorney was filed by this company.

Section 1105 provides:

"The officers, agents and employees of any such company, doing business in this state, without complying with the provisions of the preceding section, shall be personally liable to any resident of the state having a claim against such company, and, moreover, service of process upon either of such officers, agents or employees shall be deemed a sufficient service on the company."

Chapter 158 relates to the service of process.

Section 3220 provides that process from any court, whether original, mesne, or final, may be directed to the sheriff or sergeant of any county; that it shall be returnable within 90 days after its date to the court on the first day of the term, or in the clerk's office to the first or third Monday in the month, or the first day of any rules.

Section 3222 provides:

"Every officer who attends a court, shall, within five days after the end of any rules, go to the clerk's office and receive all process, orders and decrees to be executed by him, and give receipts therefor. For any failure so to do, he shall forfeit fifty dollars."

Section 3223 provides:

"The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered nor any blank therein filled up, except by the clerk."

Section 3224<sup>1</sup> provides:

"Any summons or scire facias shall be served as a notice is served under section 3207, except, that such process (unless it be a summons for a witness)

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<sup>1</sup> This section was amended by Acts 1891-92, p. 1083, c. 701, and the requirement of service by an officer was stricken out. The attention of the court was called to the amendment in a petition for rehearing, but, after consideration the petition for rehearing was refused.

shall in all cases be served by an officer, and except also, that when such process is against a corporation, the mode of service shall be as prescribed by the following section."

Section 3225 provides:

"Process against or notice to a corporation may be served as follows:  
\* \* \* If against a corporation created by some other state or country, or in any case, if there be not in the county or corporation wherein the case is commenced, any other person on whom there can be service as aforesaid, on any agent of the corporation against which the case is (unless it be a case against a bank), or on any person declared by the laws of this state to be an agent of such corporation."

Section 3226 relates to service on corporations operated by trustees or lessees.

Section 3227 provides:

"Service on any person under either of the two preceding sections shall be by delivering to him a copy of the process or notice in the county or corporation wherein he resides, or his place of business is or the principal office of the corporation is located, and the return shall show this, and state on whom and when the service was; otherwise it shall not be valid."

Section 3207, which was referred to in section 3224, provides:

"A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of the purport to his wife or any person found there, who is a member of his family, and above the age of sixteen years; or if neither he nor his wife, nor any such person be there, by leaving such copy posted at the front door of said place of abode."

These are substantially all of the provisions of the Code of Virginia relating to the service of process, and an examination of the rules of the Circuit Court for the Western District of Virginia does not disclose anything relating to the subject. In those states which have adopted a Code of Civil Procedure there are other provisions which differ from those in force in the state of Virginia. As an example of the latter class, the Code of South Carolina provides (section 159) that:

"Proof of service of the summons and of the complaint or notice may be: (1) If served by the sheriff, by a certificate thereof; (2) if by any other person, by his affidavit thereof; (3) in case of publication, by the affidavit of the printer, etc.; (4) by the written admission of the defendant."

It will be observed that section 3224 of the Code of Virginia provides that "process shall in all cases be served by an officer," and section 3227 provides for the delivery to the agent of a copy of the process, and that the "return shall show this and state on whom and when the service was; otherwise it shall not be valid." It might fairly be inferred, then, that it was the policy of the state of Virginia, when by section 1105 it was provided that "service of process upon an absent corporation might be made upon any agent or employee," thus greatly enlarging the number and class of persons who might be served as representing the company, to throw such safeguards around service of this nature as would forbid collusion, and by requiring service to be made by a public officer under the responsibilities of his office, and where there would be public record of the same, it might enable parties interested, by examination of such public records, to know whether or not suits were pending against it; otherwise, it might be possible for any employé of a company, however

humble and unrepresentative might be the nature of his employment, by an acceptance of service to bind the company which employed him. The cases are numerous where the courts of the United States have considered the question whether the agents of a foreign corporation were so far representative as would bind the corporation; but we have not found any case wherein a statute as broad as that now under consideration has been reviewed.

In *St. Clair v. Cox*, 106 U. S. 359, 1 Sup. Ct. 362, 27 L. Ed. 222, Mr. Justice Field says:

"A transaction of business by the corporation in the state, general or special, appearing, and the certificate of service of process by the proper officer on the person who is agent there, would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in any state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé or to a particular transaction, or that his agency had ceased when the matter in suit arose."

And in *Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 617, 19 Sup. Ct. 308, 314, 43 L. Ed. 569, Mr. Justice Peckham says:

"Continuing to do business, the company impliedly assented to the terms of that statute, at least to the extent of consenting to the service of process upon an agent so far representative in character that the law would imply authority on his part to receive such service within the state."

And, while the court held that such service upon that particular agent was sufficient, there is an intimation that the court might not hold that service upon any agent mentioned in the act of 1887 therein referred to would be good.

In the cases dealing with this subject the service of process upon an agent of a foreign corporation is frequently referred to as constructive or substituted service, and the general rule is that, where service is made under a statute, the statute must be strictly complied with to obtain jurisdiction. It is thus stated in *Thompson on Corporations* (section 7503):

"Where a particular method of service of process upon corporations is pointed out by statute, that method must be followed. \* \* \* Statutes of this kind are not regarded as directory, but as mandatory and exclusive. Hence, when the statute prescribes the method of service, a method not included therein will not be good, although it might have been good at common law."

Thus, in cases where a minor is a party, the fact of minority does not dispense with the necessity of obtaining jurisdiction over his person by the service of process upon him. The general rule stated by Freeman on Judgments (section 151) is that:

"Neither a minor nor his guardian can waive such service unless authorized to do so by some statute. \* \* \* Service of process upon a minor must precede the appointment of a guardian ad litem for him, and though such guardian was appointed, and appears and represents the interest of an infant defendant, his appointment and all subsequent proceedings, including the final judgment, are void, as against an infant not served with process."

In *Insurance Company v. Bangs*, 103 U. S. 435, 26 L. Ed. 580, the process was not served personally upon the infant, but was served upon his general guardian. The case arose in Michigan, where the statute required the general guardian of an infant to appear for and



represent his ward in all legal suits and proceedings. The court held that this statute—

“Does not change the necessity of service of process upon the defendants in a case before a court of the United States, where a personal contract alone is involved. It may be otherwise in the state courts. It may be that by their practice service of process upon a general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. We believe that in some states such is the fact, but the state court cannot determine for the federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. \* \* \* In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants or their voluntary appearance.”

And the decree rendered against the infant in that case was held ineffectual for any purpose, because the jurisdiction was not acquired over the infant, and the court had no authority to appoint a guardian *ad litem* for it.

In *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285, Keith, P., says:

“Being a service regulated by statute, the law should have been strictly pursued, and this not having been done, but having been wholly disregarded, we are of opinion that the summons and the return thereon were ineffectual to bring the defendant, the West Clifton Forge Investment Company, before the hustings court of the city of Staunton; that that court acquired no jurisdiction over it; and that the judgment rendered by that court was, as to this defendant, null and void.”

The decisions of the Supreme Court of Appeals of Virginia clearly establish the proposition that, where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized must be strictly followed, or the service will be invalid, and the judgment rendered thereon by default be void.

It is contended here that the recital in the judgment, which is in these words: “This day came the plaintiff, and it appearing that the process was duly executed on the defendant according to law”—is conclusive, or that it at least raises the presumption that the court heard evidence as to Dumont’s authority to accept service, and found that he was so authorized. Such a contention was not sustained in the case of *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110. In that case the statute required that “in actions in personam service could be made by the sheriff’s delivering to the defendant personally, or if he could not be found, some white person of his family above the age of fourteen years, at his dwelling house or usual place of abode, a copy of the complaint and notice to answer.” The sheriff’s return showed that the service was made by delivering to the wife of the defendant, a white woman over 14 years of age, at the usual place of abode, a copy of the complaint and notice, but it contained no statement that the defendant could not be found; and at the ensuing term a judgment was rendered against him, with a recital that the “defendant, although served with process, came not, but made default.” It was held that the court by such service acquired no jurisdiction and its judgment was void. The court says:

“The substituted service in actions purely in personam was a departure from the rule of common law, and the authority for it, if it were allowed at all, must have been strictly followed.”

As the statute of Virginia contains no provisions for acquiring jurisdiction over foreign corporations by an acceptance of service by any of its agents or employes, is such authority to accept service to be presumed? We think not; and the fact that Dumont was an agent or employe upon whom service might legally have been made does not, in the absence of a statutory provision authorizing him to accept service, raise any presumption of his authority to bind the company. He has testified that he had no such authority, although in his acceptance of service he describes himself as "agent of the company and representing it." Thompson on Corporations (section 7527) thus states the law:

"By analogy to the principle that an agency is not proved by the mere declaration of a person that he is agent of another, so the authority of a person assuming to accept service for a corporation is not shown by the relation in which he describes himself in his written indorsement of acceptance; but his authority must otherwise appear."

Dumont having testified that he had no authority from the company to accept service for it, we are of opinion that he was not an agent who was so far representative of the company that it would be fair, reasonable and just to imply an authority on his part to bind the company by an acceptance of service; and as the statute of Virginia gave him no such authority, and service upon this corporation was not effected in the manner provided by such statute, it would follow that the court had no jurisdiction. No principle is better settled than that a court of equity will interfere in all cases where advantage has been gained by the improper conduct of a party through judicial proceedings, where the party seeking relief is without fault, whether those proceedings were regular or not; otherwise, those tribunals would be instruments of injustice.

The decree of the court below is reversed, and the case remanded to the Circuit Court, with instructions to vacate the judgment.

Reversed.

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MARTIN v. WILSON.

(Circuit Court of Appeals, Seventh Circuit. February 3, 1903.)

No. 901.

**1. JUDGMENTS—ASSIGNMENT—ACTION BY ASSIGNEE.**

Under the laws of Kansas the assignment of a judgment carries with it the legal title, and the assignee of a judgment rendered in that state, and there assigned, may sue thereon in his own name in the courts of any other state or jurisdiction.

**2. CORPORATIONS—SUIT TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDER—CONCLUSIVENESS OF JUDGMENT AGAINST CORPORATION.**

Under the law of Kansas, as settled by the decisions of its supreme court, a judgment against a bank, adjudging it liable for an assessment as a stockholder in another bank, is conclusive upon its stockholders as to such liability, and a stockholder sued on such judgment in another jurisdiction to enforce his statutory liability cannot set up the want of power of the bank to become a subscriber to the stock of another corporation.

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† 2. Effect of judgment against corporation in action to enforce stockholder's liability, see note to *Bank v. Supplee*, 52 C. C. A. 305.

**B. LIMITATIONS—ILLINOIS STATUTE—CAUSE OF ACTION ARISING IN ANOTHER STATE.**

The provision of the Illinois statute of limitations that when a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action cannot be maintained thereon by reason of the lapse of time, an action thereon shall not be maintained in Illinois, is not applicable to a case where an action is not barred by the statute of the state in which the cause of action arose because the defendant was a non-resident, and was not within the state, so that he could be there sued.

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

The action was brought in the Circuit Court to enforce the double liability of a stockholder in a Kansas corporation. Upon demurrer to the declaration, the demurrer was sustained, and on refusal of plaintiff in error to amend or otherwise change the declaration, the case was dismissed. From this decree, sustaining the demurrer to the declaration, and dismissing the cause, this writ of error is prosecuted.

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

Geo. E. Miller and James M. Graham, for plaintiff in error.

John Lynch, Jr., for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the Court.

The plaintiff in error, plaintiff below, was a citizen of the State of Kansas, and the defendant in error, defendant below, a citizen of the State of Illinois. The declaration averred that the Exchange Bank of Kansas City, Kansas, at all the times referred to in the declaration, was a banking corporation organized under and by virtue of the laws of the State of Kansas, with a paid up capital of \$51,000; that the defendant in error at all such times, was the owner of \$10,000 of such capital stock; that said bank was not organized or created for religious, charitable or railroad purposes; that the First National Bank of Kansas City, Kansas, was a national banking corporation, organized under and by virtue of the general laws of Congress; that prior to the 21st day of February, 1891, the authorized capital stock of the First National Bank of Kansas City, Kansas, was \$100,000; that on said date said National Bank was authorized by the Comptroller of the Currency, to increase its capital stock to \$150,000; that the said Exchange Bank subscribed to said capital stock as increased, the sum of \$27,800 and received in return therefor, shares of stock in said bank to the number of 278 of the par value of \$27,800; that on the 16th day of July, 1891, the said First National Bank became insolvent, closed its doors, and suspended business; that on the 17th day of August, 1891, the Comptroller of the Currency appointed one Atkinson, as receiver, who duly qualified and continued to act as such receiver until the first day of June, 1898; that about the 28th day of April, 1893, the Comptroller of the Currency made an assessment and requisition upon the shareholders of said bank to the amount of eighty per cent. of the par value of its capital stock held and owned at the time of its suspension; that by said assess-

ment, the Exchange Bank was assessed and required to pay upon its stock, held in said bank, the sum of \$22,240; that failing to pay such assessment, Atkinson, receiver, on the 7th day of October, 1893, filed his complaint in equity in the Circuit Court of the United States, for the District of Kansas, against the said Exchange Bank, and other stockholders in the First National Bank, to recover the amount of said assessments; that the said Exchange Bank waived issue and service of summons in said suit, entered its voluntary appearance, and stipulated that if no answer was made on or before rule day, the decree should be taken and entered by the Court at any time thereafter; that on December 1, 1894, a judgment was entered in said case against the said Exchange Bank, directing it to pay the receiver the sum of \$22,240 with interest from the 28th day of April, 1893, within thirty days from the date of said judgment, and in default thereof an execution should issue; that said Exchange Bank failed to pay the amount of said judgment, or any part thereof, and on the 7th day of October, 1897, execution was issued on said judgment against said Exchange Bank, which was returned Oct. 27th, 1897, nulla bona; that on the 31st day of May, 1898, the said receiver being authorized so to do, sold and transferred said judgment to one Hobbs; that in making said purchase the said Hobbs was acting as agent and trustee of plaintiff in error, and paid for same with moneys that belonged to plaintiff in error; that on the 12th day of October, 1898, said judgment, in discharge of said trust, was transferred to said plaintiff in error, and that plaintiff in error is now owner of said judgment, and entitled to enforce the same; that said judgment is unpaid, unreversed, and in full force and effect against the said Exchange Bank, and all persons in privity with said bank, and who may be liable under the laws of the state of Kansas as stockholders in said bank; that at all times herein mentioned, defendant in error was, and now is, the owner of one hundred shares of the capital stock of said Exchange Bank, of the par value of \$10,000; that section 2, art. 12 of the Constitution of Kansas reads as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes;" that the statutes of Kansas in force then and now, have the following provision: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

These averments are followed in the declaration by averments relating to the construction of the statutes of Kansas by the Supreme Court of that state, and the construction of the statutes of Kansas regarding the limitation of actions by the Supreme Court of that state, averring that during all the time when the statute of limitations in this case might have been running, the defendant in error resided in Illinois; and that he has never been within the limits of the state of Kansas, or the jurisdiction of the Courts of that state; wherefore the declaration alleges the defendant in error is liable to the plaintiff in error for the sum of \$10,000 with interest, which sum has been demanded and payment refused.

The three substantial propositions urged by counsel for appellee against the sufficiency of the case thus stated against him are: (a) That the judgment was non-assignable at law, wherefore plaintiff in error had no right of action at law in her own name; (b) That the Exchange Bank was without power to subscribe for the stock on which the liability against defendant in error is predicated; and (c) That the right of action is barred by limitation. These propositions will be considered in the order named:

I. Under the laws of Kansas, the assignment of a judgment carries with it the legal, as well as the equitable title. The plaintiff in error, therefore, came into the Illinois courts, bringing with her legal title to the judgment sued upon; for the nature of the title acquired through assignment is governed by the *lex loci*. True, had the assignment been made in Illinois, the action would not lie in the name of the assignee, for she would have acquired an equitable title only; but legal title having been acquired under the Kansas laws, the inability of the plaintiff in error to sue in her own name in the Courts of Illinois is removed.

II. Defendant in error relies perhaps, with more confidence upon his second proposition, viz.: That the Exchange Bank was without power to subscribe for the stock on which the liability against defendant in error is predicated. But may defendant in error, in this action, challenge such power?

The effect of the judgment of the Kansas court was, that the Exchange Bank was liable upon its subscription, and the assessment thereon. This, so far as the bank is concerned, forecloses any further question in a collateral jurisdiction, for full faith and credit must be given by the federal courts sitting in Illinois, to the judgments of the courts of Kansas. Not only is the Exchange Bank foreclosed, but the judgment is an adjudication of all the questions involved, against all persons who are, by the laws of Kansas bound by the judgment.

What, then, is the relation of the defendant in error to the Kansas judgment? He was, at the time the judgment was entered, a stockholder of the Exchange Bank, and as such, in the absence of fraud or collusion, was represented by the corporation in the action in which the judgment was entered. True it is still open to him to plead, even in a suit upon the judgment in a collateral jurisdiction, that he was not at the time a stockholder, or that the judgment had been paid or discharged, or that it had been obtained by fraud or collusion.

But to the extent that the Kansas court has adjudged that the Exchange Bank is liable on the subscription, such adjudication binds defendant in error, as well as the Exchange Bank. *Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619. In *Hancock Nat. Bank v. Farnum*, supra, it was held that the question how far a stockholder is bound by a judgment against the corporation, is one determinable by the law of the state where the judgment is entered, and not by the general law; and in *Ball v. Reese*, supra, it was held that under the laws of Kansas, such judgment as the one under review is, in the absence of fraud or collusion, conclusive against the stockholders, as well as the corporation, upon the question of the corporation's liability.

True, an attempt is made to distinguish these cases from the one under consideration. It is said that the judgment entered against the corporation in *Hancock Nat. Bank v. Farnum*, was upon a transaction contractual in its nature, and that the liability of the Exchange Bank, in the case under consideration, is not contractual. The argument is urged that because the Exchange Bank is said to be without power to subscribe, no contract could have arisen, and no question of contract could have been involved.

The distinction urged does not convince us. Either the subscription to the capital stock was a contract, or it was a void thing. There is in the transaction no element of tort, or of liability other than that of contract. Now the underlying questions in the Kansas case were, first: the fact whether the subscription had been made; and secondly, the power of the bank to subscribe. The one was a question of fact, the other of law, but both were essential to and involved in the judgment entered.

The Kansas judgment, in effect, ruled, both that the bank had entered into the subscription, and that it had power so to do. The corporation being a Kansas corporation, and its powers arising under Kansas law, this ruling is binding as we have seen, both upon the bank and the stockholder. It binds them to the full extent of all the questions involved. The faith and credit required by the constitution is full faith and credit. That constitutional mandate is not met if a collateral court takes the judgment to pieces—dissolves it into its original elements of law and fact—and respects only such pieces as meet with the approval of the collateral enquirer. Such faith and credit would be only partial faith and credit. Every question involved in the Kansas judgment, including the one of law relating to the power of the bank to subscribe, are now closed questions, so far as the bank and the defendant in error may inquire, unless the inquiry is lodged in the court where the judgment was entered.

III. It is insisted that the action was barred (1) by the Illinois statute providing that when a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained, by reason of the lapse of time, an action thereon shall not be maintained in this state; and (2) by the Illinois statute that actions for damages for a statutory penalty, shall

be commenced within two years next, after the cause of action accrued.

Plainly the second statute does not apply, and the first one is also inapplicable, because under the laws of Kansas, the statute did not run in favor of Wilson during the time he was out of the state of Kansas. *Hoggett v. Emerson*, 8 Kan. 262; and the averment of the declaration is, that at the time the cause of action accrued, Wilson was not, and since then never had been, within the limits of the jurisdiction of the courts of Kansas.

The declaration, in our judgment, stated a sufficient cause of action, and the judgment of the Circuit Court sustaining the demurrer thereto was erroneous. The judgment of the Circuit Court will be reversed with instructions to overrule the demurrer, and proceed further in accordance with this opinion.

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ROOD v. CLAYPOOL DRAINAGE & LEVEE DIST.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 928.

1. CONTRACTS WITH DRAINAGE DISTRICT—CONSTRUCTION OF DITCH—IMPLIED OBLIGATION OF DISTRICT TO FURNISH RIGHT OF WAY.

In a contract between a drainage district and one who agrees to construct certain ditches for the district, it is an implied condition that the district will provide the necessary right of way, without which the contractor could not perform the contract on his part.

2. SAME—LIABILITY FOR BREACH.

A drainage and levee district created under the Illinois statute, which expressly provides that such district shall be a body corporate, with power to contract and be contracted with, and to sue and be sued, although a corporation in invitum, is liable in damages for breach of a contract, lawfully made by its commissioners under the powers conferred by the statute for the construction of ditches, where it failed to provide right of way therefor, so that the contractor could complete the same within the time specified, and by reason of the delay he was damaged.

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

The plaintiff below (plaintiff in error here), a citizen and resident of the State of Iowa, was a contractor on a ditch in the County of Grundy, State of Illinois, to be constructed by the defendant below (defendant in error here), a corporation organized under the law of Illinois—known as the "Levee Act." The suit was for damages caused to plaintiff by defendant in failing to give plaintiff right of way within the time provided in the contract.

A jury having been waived the cause was tried to the Court, and upon the conclusion of plaintiff's evidence, on motion of defendant, a judgment was entered for the defendant.

The Circuit Court found in substance the following facts: That on the second day of August, 1897, the plaintiff entered into a contract with defendant, whereby plaintiff agreed to do all the ditch work designated in certain plans, specifications and orders of the County Court of Grundy County, in accordance with such plans, specifications and orders, and to receive therefor compensation at the rate of seven and nine-tenths cents per cubic yard, the work to be completed January 1st, 1898; that plaintiff has fully performed his contract, and defendant has paid for the number

of yards excavated according to the price stipulated in the contract; that the work was not completed January 1st, 1898, but was not completed until June 14th, 1898; that the evidence tended to show that the plaintiff would have completed his contract within the time fixed, had he not been delayed by the defendant's failure to furnish the necessary right of way; and that the evidence tended to show that by reason of such delay, the plaintiff sustained damages to the amount of more than \$2,200 exclusive of interest and costs, which damages were the natural and probable consequence of such delay.

The Court further found that the evidence tended to show that the delay was caused by the following circumstances: The Elgin, Joliet & Eastern Railway, successor to the Gardner Coal City & Northern Railway, by purchase, crossed the line of the proposed ditch. The latter road had been made a party to the proceedings in the County Court, but, until the 9th of November, 1897, the former had not. On the last named date, the Elgin, Joliet & Eastern brought its suit for injunction, in the Circuit Court of Grundy County, against both plaintiff and defendant, in which suit an injunction was issued, restraining them from excavating or interfering with the right of way of the railroad. November 20th, 1897, the plaintiff had completed the ditch to a point as near the right of way of the railroad as he could go with his ditching machine, without violating the injunction, and thereupon served defendant with notice that he had been stopped, and was being greatly damaged. Prior to this time the defendant had done nothing toward requiring the railroad company to enlarge the opening in the grade of its road; but after such notice the defendant served the railroad company with notice to enlarge the opening across its right of way, and this resulted in a stipulation, filed twenty days later, in the proceedings in the County Court, wherein it was agreed that the railroad should, at its own expense, as soon as practicable, make an opening through its grade at the point where the ditch crossed its track, thus permitting the plaintiff to cross the right of way with his dredge. Thereupon an order was entered dissolving the injunction, but reserving to the defendant and the railroad company the privilege to determine all questions of benefits, damages, and requirements, as if the parties respectively had appeared in the County Court at the original hearing. But not for some time after this were the differences between the defendant and the railroad adjusted, and it was already the thirtieth of December, 1897—by which time the ground was frozen to the depth of about two feet—when the plaintiff was permitted to go through with his dredge.

On this statement of facts the Circuit Court came to the following conclusions of law: First: That the court has jurisdiction of the subject matter involved in the suit, and of the parties thereto. Second: That it was not the duty of the defendant to furnish the plaintiff the right of way necessary to allow the plaintiff to perform his contract. Third: The defendant, being organized under the general statutes above referred to, is not simply a quasi corporation, but a limited corporation with limited life and limited powers. It is simply a method prescribed for drainage, which is a part of the general system of the state. It has no general fund, and no power of taxation, except for one specific purpose. Under the statute there is no recourse against the defendant for damages, whether growing out of contract or tort; there is no way whereby a judgment therefor can be enforced. Fourth: Assuming, as proved, all that the evidence tended to prove, the defendant is entitled to judgment.

And thereupon the judgment for defendant was accordingly entered.

Geo. Burry, for plaintiff in error.

B. F. Lincoln, for defendants in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts delivered the opinion of the Court.

If the liability of the drainage district, on its contract, were such



as would be enforced in case it were a private corporation or individual, there would be no room to hold that the defendant was under no duty to furnish the plaintiff the right of way necessary to the plaintiff's performance of his contract. Right of way was a prerequisite to plaintiff's performance of his part of the contract, and being in the power of the defendant and not of the contractor, must be furnished by the defendant. It was an implied contract obligation of the defendant. *U. S. v. Babbitt*, 66 U. S. 55, 17 L. Ed. 94. Indeed, no serious argument against this proposition is submitted.

The turning point in this case, then, is this: Is the district liable, at the instance of the plaintiff, for the character of damages declared? Unquestionably, were it a private corporation or individual or a voluntary municipal corporation, it would be liable. But, the insistence is, that the drainage district is a public involuntary quasi corporation, organized for one purpose only, and having no lawful power to make assessments except for benefits; that damages of the character asked by plaintiff is not in the nature of benefits within the meaning of the statute; that the commissioners of the district had no power, by contract or otherwise, to bind the district to such damages; or to any contract relation that would give the plaintiff such right of damages; and that the plaintiff, at the time the contract was entered into, had notice of such limitation upon the commissioners' power to contract, and the district's liability to respond. Reliance for these propositions is placed on the cases of *Elmore v. Commissioners*, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363, *Badger v. Drainage District*, 141 Ill. 540, 31 N. E. 170, and *Commissioners v. Kelsey*, 120 Ill. 482, 11 N. E. 256.

In *Commissioners v. Kelsey*, 120 Ill. 482, 11 N. E. 256, the original assessment was found, in the execution of the work, to be insufficient, principally on account of an extra half mile of open ditch not contemplated in the original assessment. Thereupon an additional assessment was made. The contention of the landowner was, that the original assessment had equalled the benefits conferred; and, whether this was true or not, the commissioners had, by making one assessment, exhausted their powers. The Court held the second assessment valid, subject to its not exceeding the benefits conferred; saying on that topic, that benefits were an essential element to sustain an assessment, and that, in the absence of benefits, no assessment could be imposed.

*Elmore v. Commissioners*, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363, was a case, where, after the assessment on Elmore's land, and the payment of such assessment and the construction of the ditch, the commissioners, without Elmore's knowledge or consent, proceeded to enlarge the boundaries of the district, so that a much larger volume of water than originally contemplated was gathered and discharged into the ditches constructed. The ditches proved insufficient to carry off the additional water, and Elmore's land was in consequence submerged, and his crops destroyed. Elmore's suit was for damages. The Court held that the action would not lie, because it was based solely, either upon the tortious act of the commissioners in enlarging the district, or upon the negligence or mis-

conduct of the commissioners, which could only have consisted in their failure to provide ditches large enough to carry off the additional water.

*Badger v. Drainage District*, 141 Ill. 540, 31 N. E. 170, was a case of a contractor, who, for a specified sum of money, removed a dam across a creek in the district and brought suit to recover the contract price. To meet this liability an assessment had been made by the commissioners, but was enjoined at the instance of one of the landowners, and no other assessment was levied. The Court held, that as the district was first organized, there was no provision for the removal of the dam, and, therefore, no power in the commissioners to contract for its removal; that before the commissioners could make any contract in that respect, there must be a hearing in the County Court upon plans, specifications and estimates of cost, to which all the parties to be affected should be made parties; and upon this ground held that the district was not liable.

It will be seen that the case under consideration falls under neither of these rulings. The contract on which suit was brought in the Court below is not outside of the original plans approved by the County Court; nor is it a suit to recover damages for the tortious act of the commissioners; nor will a result favorable to plaintiff in error be an appropriation of money beyond the benefits conferred. We feel at liberty, therefore, to regard the case presented as one not ruled upon by the Supreme Court of the State of Illinois. The inquiry, then, arises, Is the district, within the contemplation of the Levee Act, liable for damages arising from such breach of contract as is here shown—a contract that the commissioners had the power to enter into and to perform?

The act of the General Assembly of the State of Illinois, known as the "Levee Act," approved May 29th, 1879, is intended to provide for the reclamation of large bodies of swamp and overflowed lands, and their consequent improvement as farm lands, by a system of mutual enforced contribution by those benefited. It is in this way a matter of public concern, undertaken under, and by means of the taxing powers of the state.

The machinery set up by the statute, to put such power into operation, provides, that the improvement shall not be undertaken unless petitioned for by a majority of the owners of the land within the proposed district, representing at least one-third in area of the lands to be affected; and that the County Court of the County where the land is situated, shall be the tribunal to hear and determine whether the proposed work is necessary or useful.

The provision for assessments upon the adjoining lands contemplates that all the parties to be assessed shall be made parties to a hearing, which shall be by a jury, wherein it shall be determined, considering both damages and benefits, the amount to be paid by each owner of the lands affected. The verdict of the jury, when confirmed by the court, practically amounts to the levy of a tax against the lands.

The statute provides, that the district thus created, and with such powers, shall be a body corporate, with power to contract and be

contracted with, sue and be sued, plead and be impleaded, and to do and perform in its corporate name, all such acts and things as may be necessary for the accomplishment of the purposes of the act; the administration of these powers being entrusted to three competent persons, denominated commissioners, who shall lay out and construct the work, collect and use the money, under the direction and approval of the court, and provide, from time to time, as appears necessary, new assessments, additional to the previous assessments, when the original assessments are found inadequate to the completion of the work,—provided that the total assessments shall not exceed the total benefits adjudged.

The corporation thus created is, doubtless, one strictly in invitum. It is to be classified, in this respect, with counties, townships, school districts, road districts and other quasi involuntary corporations, as distinguished from municipal corporations or private corporations. It is a subdivision, merely, of the general powers of the state, for the purposes of civil and governmental administration. But though a corporation, in invitum, the district remains liable at the suit of others to the extent contemplated in the law of its creation. The district is expressly given power to contract and be contracted with, to sue and to be sued. That its liability to suit does not extend to tortious acts of the commissioners, nor to acts not performed in furtherance of a duly empowered contract, is no test that the failure of the commissioners to perform a contract binding on the district shall not make the district liable for the results.

Unquestionably, the commissioners had power to make the contract under which the plaintiff in error claims. To that contract the district is bound as principal. Unquestionably, the commissioners had power to appropriate moneys collected on assessments in the execution of such contracts; the assessments were levied and appropriated to that very end. Had the plaintiff in error, upon the commissioners' failure to furnish the right of way, thrown up his contract, the commissioners could, within the power already granted, have provided and paid for the completion of the ditch, even at the increased cost arising from the frozen condition of the ground; and could, in furtherance of such purpose, have employed the money already appropriated for the construction of the ditch. This is the practical equivalent, so far as the landowners are concerned, of paying the plaintiff in error his just damages, and allowing him to complete the ditch under the contract already in existence. It distinguishes this case, therefore, in practical result, from the cases already cited.

The statute under which the district is created contemplates, in our opinion, that the district shall not only be held to perform its contracts, but to pay damages arising from its failure to perform. No reasonable construction other than this can be given to the bestowal of powers to contract and be contracted with, to sue and be sued. The contract is an entirety. As such it is incapable of subdivision so that one part of the obligation assumed may be valid, and the other parts invalid. If it bind the parties at all, it binds them to the fulfilment, not of part, but of all the obligations assumed.

Unquestionably, the district was under contract obligation to furnish the right of way. This carried with it, as a necessary incident, the obligation, either to furnish the right of way in apt time, or to make the plaintiff whole for its failure so to do. To hold otherwise would be to say that, though the plaintiff in error was bound, the district was not bound; which is only another way of saying, that neither was bound; and, therefore, there was no contract at all.

It is our judgment, that upon the findings embodied in this record, there was evidence tending to show liability upon the part of the district; in which event it was error, at the conclusion of plaintiff's evidence, to enter judgment for the defendant. For this error the judgment must be reversed and a new trial granted.

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FIRST NAT. BANK OF CHICAGO v. SELDEN.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 927.

**1. NATIONAL BANKS.—DISTRIBUTION OF ASSETS IN INSOLVENCY—HOLDERS OF OUTSTANDING DRAFTS.**

When a national bank has been placed in the hands of a receiver as insolvent, the federal law becomes from that moment the law of the distribution of its assets to the exclusion of the law of any state; and a second bank, which holds a deposit of funds of the insolvent bank, against which the latter has drawn drafts which have not been paid, cannot pay the same after notice, and set up the payment as a defense to an action by the receiver to recover the deposit, although by the law of the state in which the second bank is located a draft or check is held to be an assignment pro tanto of the fund on which it is drawn; since by the federal law it is not such an assignment as entitles the holder to a preference over the other creditors when the drawer has become insolvent before payment.

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

Orville Peckham, for appellant.

Before JENKINS, GROSSCUP and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The bill in the Circuit Court was to enjoin the prosecution by appellee of a certain action at law, against the appellant, pending in the United States Circuit Court for the Northern District of Illinois. The cause came on for hearing, upon demurrer to the bill, and upon a motion for a preliminary injunction; whereupon a decree was entered, refusing the motion, sustaining the demurrer, and dismissing the bill for want of equity. From this decree this appeal is prosecuted.

The bill in substance alleges: That the complainant and the First National Bank of Niles were both national banking associations, the former located at Chicago, in the state of Illinois, and the latter at Niles, in the state of Michigan; that the latter had long kept an account as a depositor with the former on which it had been accustomed to draw and issue checks; that on the 9th day of March,

1901, the Niles bank was insolvent, and on or about that date it failed to redeem its circulating notes; whereupon it was on that date closed under the authority of the Comptroller of the Currency, and the defendant herein, Joseph W. Selden, was by the Comptroller, appointed as its receiver and took charge of its affairs and entered upon the discharge of his duties as such receiver; that of these facts the Chicago bank had notice on said 9th day of March, 1901, but not before; that on that date also the receiver notified the Chicago bank not to pay any drafts or checks theretofore issued by the Niles bank.

The amended bill further alleges that at the close of business on March 9, 1901, the Niles bank had a balance of account standing to its credit on the books of the Chicago bank of \$9,179.39. Thereafter the Chicago bank credited certain items, and incurred certain expenses, and made certain remittances, on account of the Niles bank or its receiver, none of which is questioned, which reduced the balance to \$5,792.21; that prior to March 9, 1901, twenty-seven checks, amounting in the aggregate to \$5,792.21 had been drawn and issued by the Niles bank on the Chicago bank in the regular course of business, all of which were outstanding when the receiver was appointed, as aforesaid. After that date and before April 4, 1901, all of said checks, at times respectively when the balance aforesaid was sufficient in amount for their payment, were presented for payment to, and payment was refused by, the Chicago bank, pending an inquiry into the rights of the various parties interested. All of said twenty-seven checks or drafts were issued to, and held by, bona fide holders thereof for value. Afterwards eighteen of them, to a total amount of \$4,910, were again presented, and on such second presentation were paid by the Chicago bank and charged, when paid, against the Niles bank, thus further reducing the balance standing to the credit of the Niles bank as aforesaid; that the remaining nine checks, being those only once presented as aforesaid, and not paid, amount to \$882.21; and eight of these, amounting to \$878.30, have, since the Chicago bank refused to pay them as aforesaid, been presented by the holders to and allowed by the receiver as claims against the Niles bank; and these eight the Chicago bank, prior to the fourth day of April, 1901, offered to pay to the receiver if he would present them for payment as the holder and owner thereof.

On April 4, 1901, the receiver demanded of the Chicago bank payment of \$5,792.21; being the amount which would be the balance to which the receiver as such would be entitled, if none of the twenty-seven drafts had been presented for payment as aforesaid. The Chicago bank refused to comply with this demand, and thereupon the receiver brought the action in the United States Circuit Court for the Northern District of Illinois, Northern Division, the prosecution of which this bill was brought to restrain. In that action the receiver sought to recover the amount of said twenty-seven drafts, being \$5,792.21, notwithstanding the payment by said Chicago bank as aforesaid of eighteen of said checks, and the presentation of the remaining nine thereof for payment, at times, respectively, when the Chicago bank had funds sufficient for the payment thereof standing to the credit of said Niles bank in its account as depositor.

The bill further alleges, that under the law of Illinois, a bona fide holder of a check or draft on a bank may, if payment thereof be refused when the bank has funds of the drawer subject to check sufficient in amount to pay it, bring an action at law on such check, immediately against such bank; the check, as between drawer and bona fide holder, being regarded as an assignment in law, pro tanto, of the balance which the bank owes to its depositor, the drawer of the check. And such seems to be the settled law of Illinois. *Munn v. Burch*, 25 Ill. 35; *Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; *Bank of Antico v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611.

The bill further alleges that the law as declared and administered in the federal courts is opposed to, and irreconcilable with, the Illinois law as stated above; that in the federal courts a check holder, as such, cannot maintain either an action at law or a suit in equity against the bank on which the check is drawn; the check being held, as between maker and payee, not to be an assignment pro tanto, even in equity, of the indebtedness owing by the bank upon which the check has been drawn. This averment of the law, under the federal rule, is supported in the cases of *Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704, *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, and other cases.

The bill then avers that the Chicago bank as a citizen of Illinois, doing business there, was subject to the processes of both the state and federal courts; that it could not have successfully defended, in the state courts, against actions by the check holders, and that the pendency of such actions or judgments therein would have given it no defense in the federal court against the receiver; that it would have been a serious injury to appellant in its business of banking, and would in no way have benefited the Niles bank, or its receiver, to allow such actions to be brought and prosecuted in the state courts; wherefore the appellant was justified in preventing such actions, by paying the checks presented for payment as aforesaid, and asking the federal court, as in the bill presented, to restrain a suit by the receiver, that would in substance compel the bank to pay the same debt a second time, and to virtually the same party who got the benefit of the first payment.

In *Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704, it was decided, that as between the right of general creditors in a fund received from a bank by an assignee under a general assignment for the benefit of creditors, and the payee of an outstanding check or draft, there was no such equitable assignment pro tanto, of the funds in the drawee's possession, as gave to such payee a priority over the general creditors. This, unquestionably, is the law, also, respecting funds in the hands of a receiver of a national bank, appointed by the Comptroller. In each case the purpose is to obtain a ratable distribution of the insolvent bank's assets. In neither case, in the absence of an assignment more effective than the drawing of a check, will the federal law allow one set of creditors to obtain an advantage over another set.

The Niles bank, as an insolvent, in the hands of the receiver ap-

pointed by the Comptroller, in the interest of creditors, stands toward the Chicago bank, in a relation different from the relation between the Niles bank, solvent, and the Chicago bank. In the latter, the creditors of the Niles bank would have no immediate interest in any ratable distribution of the funds; in the former, the interest is immediate and urgent.

Now, while it may be questioned, whether as against the Niles bank, solvent, the Illinois bank might not, as to the payment of check and draft holders, act under the Illinois law as against the law prevailing in federal courts; and, thus acting, defend, even in the federal court, against an effort to compel a second payment; it is clear that as against the receiver, executing his trust, the federal law alone is applicable. In such a case the federal trust must be administered according to the mandate of federal law. The moment the Niles bank went into the hands of the receiver, the federal law became the law of the distribution of its assets. In no other way could there be unity of administration, and a carrying out of the federal mandate of equality. All this, the Chicago bank is bound to have known, and the rule for distribution prescribed, the Chicago bank was bound to observe. That the Illinois law on the subject of checks and drafts, and their effect as assignments at law, was different, is no excuse; for, in the winding up of national banks by the federal authorities the Illinois law cannot be allowed to displace the federal law looking to a ratable distribution among the creditors.

Nor was the situation of the Chicago bank, upon presentation of the checks by the check-holders, an intolerable one. It could have defended, even in the state courts, by pleading the insolvency of the Niles bank, and the federal law that controls the administration of such affairs. The state courts, as well as the federal courts, enforce federal law, and are bound thereby; and from any decision, adverse to the federal law, an appeal could have been taken to the Supreme Court of the United States. Of course this meant law-suits—or possibly, by bill of interpleader, a law-suit—but inconveniences thus occasioned are not defenses against the substantial rights of the creditors of the insolvent Michigan bank.

The decree of the Circuit Court dismissing the bill is affirmed.

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DONOVAN et al. v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 917.

- 1. RAILROAD STATIONS—USE BY HACKMEN—RIGHT OF COMPANY TO EXCLUDE.**  
 A railroad company is under no duty, as a common carrier, to permit hackmen to enter its stations for the purpose of soliciting business from its passengers, and therefore its granting of such right to one person or concern does not entitle others to equal privileges on the same terms.

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¶ 1. See Carriers, vol. 9, Cent. Dig. § 29.

**8. SAME—OBSTRUCTION OF ENTRANCE—INJUNCTION.**

A railroad company has a property right to a free and unobstructed entrance to its stations for its passengers and employes, and is entitled to protection in such right by injunction to restrain hackmen from continuously congregating upon the sidewalk around the doors of a station, for the purpose of soliciting business, in such numbers as to interfere with ingress and egress; but such an injunction should go no further than is necessary to protect complainant's private right of property, leaving any obstruction to the use of the street or walk by the public generally to be dealt with by the municipality.

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

For opinion below, see 116 Fed. 907.

Richard J. Coney and Wm. Thompson, for appellants.

E. A. Bancroft and Frank J. Loesch, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The temporary injunction appealed from, entered at the suit of appellee, a railroad corporation organized and existing under the laws of Pennsylvania, commands appellants, citizens of Illinois, to desist (1) from soliciting the custom of incoming passengers for cabs, carriages, express wagons, and hotels within appellee's passenger station at Chicago; and (2) from congregating upon the sidewalk in front of, adjacent to, or about the entrances, and there soliciting the custom of passengers.

1. Appellee has a contract with the Parmelee Transfer Company under which two agents of the transfer company are stationed within the depot building to solicit the custom of passengers. Those appellants who are hackmen have continuously asserted the right, over appellee's repeated objections, to have two of their number enter the building to solicit custom, and have acted accordingly, and threaten to continue. Those appellants who are not hackmen claim no right to enter appellee's building for the purpose of plying their trades. The question on this branch of the case is the right of the hackmen to solicit business within the station, over appellee's protest. That appellee may exclude all hackmen is not denied. But it is insisted that appellee may not lawfully give an exclusive privilege to one hackman; that, by granting the privilege to one, it has waived its right of exclusion; and that its only remaining right is to promulgate and enforce reasonable rules and regulations under which all hackmen, without discrimination, shall be afforded equal facilities in soliciting patronage within the station. In support of this view (*Montana Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Lindsay v. Anniston*, 104 Ala. 257, 16 South. 545, 27 L. R. A. 436, 53 Am. St. Rep. 44; *Mississippi v. Reed*, 76 Miss. 211, 24 South. 308, 43 L. R. A. 134, 71 Am. St. Rep. 528; *Indianapolis Union Ry. Co. v. Dohn*, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53



L. R. A. 223), as well as against it (*Jencks v. Coleman*, 2 Sumn. 221, 13 Fed. Cas. 442 [No. 7,258]; *Barker v. Midland Ry. Co.*, 18 C. B. 46, 86 E. C. L. 45; *Marriott v. London & S. W. Ry. Co.*, 1 C. B. [N. S.] 499, 87 E. C. L. 498; *Beadell v. Eastern Counties Ry. Co.*, 2 C. B. [N. S.] 509, 89 E. C. L. 509; *Painter v. London, B. & S. C. Ry. Co.*, 2 C. B. [N. S.] 702, 89 E. C. L. 701; *Barney v. Oyster Bay Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *Barney v. The D. R. Martin*, 11 Blatchf. 233, 2 Fed. Cas. 892 [No. 1,030]; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; *Commonwealth v. Carey*, 147 Mass. 40, 17 N. E. 97; *Fluker v. Georgia Ry. Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Griswold v. Webb*, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302; *Smith v. N. Y. L. E. & W. R. Co.*, 149 Pa. 249, 24 Atl. 304; *N. Y. Cent. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *N. Y. Cent. Ry. Co. v. Sheeley* [Sup.] 27 N. Y. Supp. 185; *Brown v. N. Y. Cent. & H. R. R. Co.*, 75 Hun, 355, 27 N. Y. Supp. 69; *Id.*, 46 N. E. 1145; *Summitt v. State*, 76 Tenn. 413, 41 Am. Rep. 637; *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376; *N. Y. R. R. Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; *Snyder v. Union Depot Co.*, 19 Ohio Cir. Ct. R. 368; *Kates v. Cab Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; *Godbout v. St. Paul Union Depot*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *N. Y. Cent. & H. R. R. Co. v. Warren* [Sup.] 64 N. Y. Supp. 781; *Boston & Albany R. Co. v. Brown*, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418; *Boston & Maine R. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; *N. Y., etc., R. Co. v. Bork*, 23 R. I. —, 49 Atl. 965; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *St. Louis Drayage Co. v. Louisville & Nashville R. Co.* [C. C.] 65 Fed. 39), our attention is directed to a large number of cases.

The asserted right of the hackmen necessarily postulates a correlative duty on the part of the railroad company. The company owes the duty to all persons, without discrimination, to carry them on equal terms of service and compensation. As a common carrier of passengers, the company must provide facilities for the reception, carriage, and discharge of its passengers, and must establish rates which are available equally to all who desire to become passengers. But the company does not owe to its passengers the duty to provide on its trains the opportunities for them to purchase newspapers, books, fruit, and the like, or to employ the services of a stenographer or of a barber, or to buy cab or express tickets. Much less does it owe the duty to any one to permit him to pursue his vocation on the trains. And if not on the trains, then not in the station buildings. The relation of carrier and passenger continues not merely on the train, but within the station at the end of the journey. The right of way on which the trains run, and the lands on which the depots are built, were obtained and are held for purposes of the same general character.

The fact that the person who asserts the right to carry on his business for his own profit upon the trains or within the station buildings is himself a common carrier does not affect the question.

The railroad company is a common carrier of merchandise, but is not a common carrier of common carriers of merchandise. It owes no duty to express companies to haul their cars and safes and messengers. Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. If it owed the duty it would have to treat all alike. Owing no duty, it may engage, or not, as it pleases, in the business of serving express companies, and may choose the company, and name the terms that are acceptable to it. It may therefore contract against its own negligence in injuring express messengers (Baltimore, etc., Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Louisville, etc., Railroad Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; Pittsburgh, etc., Railroad Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503), though public policy forbids such exemption in the case of passengers (Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627). Similarly, a railroad company is not a common carrier of common carriers of passengers. It owes no duty to sleeping car companies to haul their cars and clerks and porters, and may therefore exempt itself from liability for negligence. Russell v. Pittsburgh, etc., Railroad Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214. So, also, a railroad company is under no obligation to issue passes, and may therefore exempt itself from liability for negligence. Payne v. Terre Haute, etc., Railroad Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472. Through all of these particulars, namely, the relations between railroad companies and news dealers, fruit venders, restaurateurs, hotel runners, hackmen, baggage agents, transfer companies, express companies, sleeping car companies, and pass holders, there runs one common principle: Whatever a railroad company does as a common carrier, it is compelled to do for all without discrimination. Whatever it may lawfully do outside of its obligations as a common carrier is a matter of favor. And by the term, favor goes not by right.

The true relations of the parties are the same, whether the suit be instituted by the one who seeks to participate in the favor, or by the railroad company that withholds it. No taint of uncleanness can justly attach to the complainant who asks protection in the possession of his own, on the ground that he declines to license the defendant to enter, though he licenses others. And if it were to be held that the granting of such favors was beyond the charter powers of a railroad company, appellants would not be helped. It is the part of the public authorities to restrain and punish ultra vires acts. No one can maintain that the law shall be violated with him as a particeps criminis because it is broken with another.

Appellee, a Pennsylvania corporation, comes into the federal courts, not on account of its citizenship, for it has none, but by virtue of the irrebuttable presumption that all of its stockholders are citizens of states other than Illinois. If it were to be conceded that the question now under consideration is one of local law, we would nevertheless feel free to act as we see the right, because we do not find that the Supreme Court of Illinois has decided the question. No statute is referred to that touches the question. No case is cited in which the Supreme

Court of Illinois has decided that hackmen have the right, over the objection of a railroad company, to ply their trade on trains and within stations unless all are excluded. In *Pennsylvania Company v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223, the company unsuccessfully prosecuted a suit and an appeal against the city to avoid an ordinance which established a hack stand in the street in front of a portion of the station. Certain hackmen were permitted to intervene and file an answer. They denied the invalidity of the ordinance, and asserted, in effect, that, since the company had leased ground owned by it, and situated near its passenger depot, to an owner of hacks for use in his business, it could not contest the right of the city to establish a hack stand in the street adjoining its property. But no claim was set up in the hackmen's answer, or adjudicated in the decree appealed from, that hackmen, under any circumstances, could compel a railroad company to permit them to carry on their business by soliciting patronage on the company's premises.

2. The main entrance to the station comprises three doorways, each five feet wide. Most of the thirty-odd thousand passengers a day go through this entrance. The building abuts upon the street. In the street, in front of the building, some distance from the entrance, is the hack stand established by the city ordinance. From 10 to 20 hackmen throughout each day have persisted in congregating about the entrance, to the material interference with the ingress and egress of passengers and railroad employes. The number has been swelled by the presence of baggagemen, hotel runners, and Parmelee agents. The Parmelee Company has no greater rights in the street and on the sidewalk than the others, and appellee has not undertaken to give it any. Every one who has an existing contract to deliver or receive a passenger has, through the passenger, the right of access and entry to serve the passenger. This the appellee concedes.

The title and the right of control of the streets for street purposes are in the city. If the streets are obstructed, the city should clear them. Appellee may not take upon itself the vindication of the city's or the public's rights. But to have a free and unobstructed entrance is a property right—an easement appurtenant to the abutting realty. From continuous infractions of that right, appellee is entitled to relief. *Benjamin v. Storr*, L. R. 9 C. P. 400; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Fritz v. Hobson*, 14 Ch. Div. 542; *Jacques v. Natl. Exhibit Co.*, 15 Abb. N. C. 250; *Hallock v. Scheyer*, 33 Hun, 111; *Flynn v. Taylor*, 53 Hun, 167, 6 N. Y. Supp. 96; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *Shook v. Cohoes*, 108 N. Y. 649, 15 N. E. 531; *Cohen v. Mayor*, 113 N. Y. 535, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506; *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556; *Porth v. Manhattan Ry. Co.*, 134 N. Y. 615, 32 N. E. 649; *Carter v. Chicago*, 57 Ill. 283; *Field v. Barling*, 149 Ill. 557, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Hart v. Buckner*, 5 C. C. A. 1, 54 Fed. 925; *McDonald v. Newark*, 42 N. J. Eq. 136-138, 7 Atl. 855; 2 *Dillon on Munic. Corp.* (4th Ed.) sec. 587b, 656a; 1 *Lewis on Eminent Domain* (2d Ed.) pp. 170 to 196; 1 *Am. & Eng. Corp. Rep.* 47, 1 *Am. & Eng. Ency. of Law* (2d Ed.) 225, 238; *Elliott on Roads*

(2nd Ed.) 761; *Branahan v. Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. 528.

But a decree that enjoins appellants "from congregating on the sidewalk in front of, adjacent to or about the entrances, and there soliciting the custom of passengers," appears to us to be too broad. If the congregating created only a public nuisance, that would be the public's concern. The congregating that may be restrained in this suit of appellee is only such as interferes with the ingress and egress of passengers and employes.

Inasmuch as the decree, by its terms, is not limited to protecting appellee's private right of property, as above indicated, the second part thereof should be modified to restrain appellants "from congregating upon the sidewalk in front of, adjacent to, or about the entrances of appellee's passenger station in Chicago, and from there soliciting the custom of passengers, so as to interfere with the ingress and egress of passengers and employes"; and it is so ordered.

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#### THE AUSTRALIA.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1903.)

No. 1,084.

**1. COLLISION—BARGES IN TOW MEETING—BURDEN OF PROOF.**

Where a collision between two barges in tow meeting in a channel was caused by the sheering of one past the middle of the channel, the burden rests upon her, in order to avoid liability, to show that such sheer was the result of inevitable accident or some force which she could not guard against by that reasonable degree of skill required of a navigator in the waters where it occurred.

**2. SAME.**

A barge while being towed up through St. Mary's river, and while passing another barge in tow coming down, in a channel or cut 300 feet wide, under a passing agreement, sheered first into the bank on the starboard side, and then in the opposite direction across the middle of the channel, and came in collision with the other barge, which was well to the west side of the channel. *Held*, that the fact that there was a cross-current at the point where the first sheer took place did not exonerate her from liability, the existence of such current being well known, and its effect such that it could be overcome by proper care and skill in navigation.

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

The barge *Malda*, bound down the river *Ste. Marie* in tow of the steamer *Marina*, came into collision with the barge *Australia*, bound up the river, in tow of the steamer *Italia*, the *Malda* receiving considerable damage. The collision occurred on a bright afternoon in May, 1898, in that part of the river known as the "Little Rapids Cut." That cut is an artificial channel 300 feet wide, between navigable banks. There is a current through this cut of about four miles. There is a cross-current setting around the foot of Island No. 1, on each side of the cut, which comes into the cut at an angle down stream of about 45 degrees. The force of this cross-current is variable, dependent on direction and force of the wind on Lake Superior. When some distance apart, passing signals of one blast were exchanged between the two towing steamers. About as the bow of the *Australia* reached the lower end

of the island referred to, she took a sheer to starboard, and persisted in it until she struck the right-hand bank just above the foot of the island, and then sheered to port. A collision with the Marina was narrowly avoided, and one actually occurred with the Maida before the sheer to port was broken, or just about as she had begun to swing to starboard, though still pointed somewhat toward the westerly bank. The collision was almost head on, the starboard bow of the Australia striking the starboard bow of the Maida. Judge Ricks, after hearing a great mass of evidence, held that the Australia was in fault, and acquitted the Italia, as well as the libellant's two vessels, of all contributory fault. The Australia only has appealed.

John C. Shaw, for appellant.

Herman A. Kelley, 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.

Within a proper distance the two steamers agreed to pass port to port. The navigable channel was 300 feet wide. The day was clear. There ought to have been no difficulty in these two tows passing each other if properly equipped and navigated. That the two barges should, under such circumstances, come into collision, strongly indicates that there was negligence in the navigation of one or both. Both barges were under obligation to follow in the wake of their steamers. The steamers did pass port to port in safety. The barges were both unusually long, the Maida 391 feet and the Australia 390 feet. Both were laden. Each was on a towline of about 500 feet. The passing agreement bound the Australia to keep on the right-hand or eastern side of the cut, while the Maida was equally bound to keep on the western side. Confessedly the Australia took a sheer when about opposite the foot of Island No. 1. This sheer was not controlled, according to her answer and the evidence of her master, until she struck the bank just above the foot of the island. She then took another sheer to port. There is a great deal of conflict in the evidence as to the extent of this sheer to port. The master of the Australia makes little of it, and testifies that he recovered and straightened up just about mid-channel, and contends that if the Maida had directed her course to the starboard, as she was bound to do under the passing signals, there would have been no collision, as he claims the collision occurred in, or just about, the middle of the channel. The other officers and the crew of the Australia and the officers and crew of the steamer Italia substantially concur in putting the collision in the middle of the cut. The people on the Maida and her steamer, the Marina, unite in putting both the Marina and her barge close in to the western shore at the moment of the collision. Certain shore witnesses were also heard, but they, too, differed as to the location of the collision. The probabilities are that the Marina and her barge did direct their course to starboard as they had agreed to do, and that they were over on the westerly side of the channel when the collision occurred. This probability is strongly confirmed by certain evidence now to be mentioned.

It is in evidence and undisputed that, at the very instant when the stems of the two schooners came into collision, the Maida dropped her

kedg anchor over. That anchor was found and picked up from the bottom of the channel the next day. It was found at a point about 98 feet from the visible west bank of the cut, or about 62 feet from the west channel bank. Now this kedg anchor was kept on the port side, about halfway between the keel and the side. The heads and flukes of a patent anchor belonging to the *Australia* were also broken off short at the starboard hawse pipe at the time of the collision. The bows of the two colliding vessels remained locked together for a moment after the collision, swinging, while so locked, a little to the eastward and slowly downstream. The theory of the appellee is that the broken anchor head and flukes must have dropped to the bottom just as the two vessels separated. In confirmation it is shown that in February, 1899, divers went down and located these broken parts at a point 62 feet west of the mid-channel, and at such a point downstream as tends to support the theory that these broken parts had not been dropped until the stems of the colliding vessels separated.

Without entering into an argument, we are convinced, upon all the evidence, that the collision occurred quite over on the western side of the channel, and about as claimed by the appellees. This was the conclusion of Judge Ricks, and we see every reason to concur in his opinion on this question of fact. We have, then, a case of where a collision is shown to have occurred which certainly would not have occurred if the *Australia* had kept upon the eastern side of the channel, as she was bound to do. What is her excuse? She says she was sheered by the effect of a cross-current which is felt at the lower end of Island No. 1. But this was a well-known condition of navigation, and vessels properly equipped and properly navigated are not materially affected by the current. But if the sheer which carried her to starboard was without fault, how did it happen that it was not broken before striking the right bank, and how did it happen that she should then take so wide a sheer in the other direction as to get on the other side of the channel and across the bow of the *Marina* coming down? The presumptions are very strongly against her proper navigation. It is not upon the libelant to show that the *Australia's* sheer was originally due to any specific fault of equipment or navigation, or that it might have been sooner broken, or that the second sheer was the result of some affirmative fault. Her sudden departure from her course, her failure to keep the side of the channel which she was bound to keep, were very plain violations of her duty to the down tow. To say that her erratic course in bounding backward and forward across the channel was due to a sheer is no defense, unless she can show that that sheer was unavoidable; that is, that the cause which started the sheer and maintained it was a force which she could not resist or guard against by that reasonable degree of skill required from a navigator in the waters where this sheer occurred. This is the doctrine of *The Louisiana*, 3 Wall. 164, 173, 18 L. Ed. 85; *The Olympia*, 9 C. C. A. 393, 61 Fed. 120; *The Ohio*, 33 C. C. A. 667, 91 Fed. 547; *The F. W. Wheeler*, 24 C. C. A. 353, 78 Fed. 824; *The Centurion*, 40 C. C. A. 634, 100 Fed. 663; and of *The Fontana* (decided in January last by this court) 119 Fed. 853; *Mars. Coll.* 38. In *The Louisiana*, the court said:

"The collision being caused by the *Louisiana* drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a *vis major*, which human skill and precaution, and a proper display of nautical skill, could not have prevented."

Has the *Australia* accounted for her conduct? The existence of the cross-current was a well-known factor in the navigation of the river at this point. Her master says he never knew a barge to sheer in and strike the east bank as she did. He says when he first struck the current he ported; that he was then about mid-channel; that this porting took him "up against the east bank, as she kept going in that direction." He adds: "After I got headed up with the current I steadied her and tried to overcome it, but she kept about on that same angle until she struck the bank." He claims to have put his helm hard astarboard so soon as he got to the eastward of mid-channel under his port helm. His explanation of her sheer, to quote his own words, is "that there was a little stronger current than usual, and that as she approached up there she got the pressure of the current against her more than usual, and that length [sic] of the boat held her off." Now, he knew all of the conditions or ought to have known them. The fact that the current was a "little stronger than usual" was a fact to be anticipated, the wind being north or northwest, as the current was somewhat affected by such a wind driving the water of Lake Superior more strongly into the river. We cannot escape the conviction that the helm was put too far to port or held over too long. It certainly was held there in such manner as to catch the strong down current on her port bow and carry her over against the eastern bank, in spite of the fact that her helm was put to starboard so soon as this effect of the current was observed. To further show his own defense, we quote two questions and answers from his cross-examination:

"Q. There were no conditions then that were unknown to you? A. No; not apparently. Q. And with the conditions known to you, you put your helm to port enough, as you supposed, to overcome that cross current; but in spite of that you were not able to catch her on starboard wheel in time to prevent her from going into the bank; that is the way that happened, wasn't it? A. Yes, sir; that is it."

The extent of the second sheer is unexplainable. She struck the bank with her bow some 300 or 400 feet above the lower point of the island around which the disturbing current had come. She was then above and beyond its influence. Her bow, he says, "glanced off, and her stern came along the bank so that she straightened up along the bank." He further says that as soon as she stopped sheering he steadied his wheel, which had last been hard astarboard, and put it hard aport, and that the wheel was kept hard aport until the collision. Under this wheel he claims that she "worked up the bank about half her length," or 200 feet, and then began swinging off to port or the westward side of the channel. His contention is that he did not take anything like a broad sheer, and was never headed more than one point towards the center of the channel, and that she straightened out head up stream just about mid-channel. But the probabilities and the weight of the evidence contradict him upon this point, for the collision

occurred considerably west of mid-channel. That the collision was head on, or nearly so, shows that she had then broken her sheer and was about headed up stream. But she was then within about 50 feet of the western bank of the channel. The sheer to port was therefore much longer persisted in than would seem from this witness' evidence. We have referred to Capt. Marsden of the Australia because his evidence is substantially that of the other officers and crew of the Australia and Italia. We see no reason to find that the Italia was responsible for either the sheer or its persistence. She seems to have done all she could to break it, and in no fault for its starting.

Neither do we think the Marina or the Maida are to be condemned as contributing. We are satisfied that both directed their course to the westward side, and that, when the sheer of the Australia was observed, they went as far over as was safe, and that the Maida was probably within 50 feet of the western channel bank when the collision occurred.

'As to the maneuvers of these boats after the sheer commenced we need say little. The very erratic course of the Australia is adequate cause in itself to account for the disaster. Her effort to impugn the management of either the Marina or her barges as contributing should be made very clearly to appear, her own fault being so glaring and sufficient. The Oregon, 158 U. S. 187, 15 Sup. Ct. 804, 39 L. Ed. 943; The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84. The Australia has not made out her defense. The master knew the conditions and the dangers incident to the cross-current he would meet at the foot of Island No. 1, and he knew he would have to pass a descending tow with whom he had already made a passing agreement. He voluntarily put himself in a position where he was obliged to receive the natural effect of that current. He should have foreseen and anticipated the possibility that it might be somewhat stronger than usual, as he knew it was a current of variable force. He has not shown that the conditions were such that he could not avoid the sheer he took. Upon the contrary, the exercise of that degree of skill and maritime caution required under such circumstances would undoubtedly have prevented this accident.

The decree must in all things be affirmed.

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BRIGGS v. NEAL et al.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 434.

**1. EQUITY—SPECIAL MASTER—APPOINTMENT OF DEPUTY CLERK.**

Where a circuit court determines that a special reason exists for appointing a deputy clerk special master, such appointment is not reversible error because, through inadvertence, the reason is not assigned in the order, as required by Act March 3, 1879 (20 Stat. 415 [Comp. St. 1901, p. 591]).

**2. RECEIVERS—REVIEW OF APPOINTMENT—DISCRETION OF COURT.**

The appointment of a receiver is discretionary, and will not be reviewed unless a gross abuse of discretion is shown.



**3. EQUITY—REFERENCE TO MASTER—WHEN PROPER.**

Where a bill presents a case in which the taking of an account is necessary, a reference to a master may properly be made on the pleadings, and notice to the defendant is not essential.

**4. INJUNCTION—REQUIRING BOND—DISCRETION OF COURT.**

Requiring a bond as a condition to the granting of a preliminary injunction is a matter within the discretion of a circuit court.

**5. MORTGAGES—LIABILITY OF MORTGAGEE IN POSSESSION.**

A mortgagee, put in possession of a going concern which by the terms of the mortgage he is required to keep in operation, cannot be charged with the rental of the property while so in his possession, but his duty is to operate the plant as would be done by an ordinarily prudent owner, and his liability is only to account for the net proceeds of the business.

**6. APPEAL—REVIEW—FINDINGS OF FACT.**

While findings of fact made by a master and concurred in by the Circuit Court are entitled to great weight, and will generally be followed by the Appellate Court, they are not conclusive, and it is the duty of the Appellate Court to examine the record and form its own conclusions.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at New Berne.

For opinion below, see 110 Fed. 477.

James E. Shepherd and Edward R. Baird, Jr., for appellants.

W. W. Clark, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the Circuit Court of the United States for the Eastern District of North Carolina. The cause originated in the superior court of Carteret county, in the state of North Carolina. It was commenced by summons and complaint on the part of R. S. Neal, and John Dunn and O. H. Guion, assignees of Neal, and E. K. Bishop, on behalf of himself and other creditors of Neal, against George S. Briggs, trading as George S. Briggs & Co. After certain proceedings had in the state court, which will be referred to hereafter, the cause was removed into the Circuit Court for the Eastern District of North Carolina, and the answer of the defendant was filed.

R. S. Neal was a manufacturer of lumber in the town of New Berne, N. C., and George S. Briggs & Co. were commission merchants, sellers of lumber in the city of Norfolk, Va. On 22d March, 1900, an agreement in writing was entered into between these parties, whereby on his part Neal agreed to deliver to George S. Briggs & Co. all lumber manufactured at his mill on Bogue Sound, near Morehead City, Carteret county, N. C., from 22d March, 1900, up to and until 15th February, 1901, using all necessary and proper care in the manufacture of the lumber, so that it could be sold to the best advantage, and to manufacture, ship, and deliver the same in accordance with the directions and specifications of Briggs & Co., furnishing a statement daily or weekly, as may be required, of all timber cut and manufactured at the mill, the lumber to be inspected.

¶ 4. See Injunction, vol. 27, Cent. Dig. § 323.

by a competent inspector at the mill as each car load or cargo is loaded, and the mill to be insured for the benefit of Briggs & Co., at cost of Neal. Neal agrees that Briggs & Co. shall receive 5 per cent. on all gross sales of lumber. Further, in consideration of an advance by Briggs & Co. of \$5,000 to Neal, to be used in the operation of the mill and in the purchase of a steamer and of timber, it is agreed that Briggs & Co. shall be entitled to deduct from all sales of lumber \$1 a thousand feet so long as the \$5,000 advance is not paid. When \$1,250 are paid, they can deduct 75 cents a thousand; when \$2,500 are paid, 50 cents a thousand; and 25 cents per thousand when \$750 (\$3,750) are paid; with the right in Neal to anticipate his notes. The usual discount on all advances is to be paid by Neal. The payment of the \$5,000 advance is acknowledged, and is represented by three notes, two of these each for \$1,250, payable at six and nine months, respectively, from date of contract, and one for \$2,500, payable 15th February, 1901, all without interest. On their part, Briggs & Co. agree to furnish all necessary vessels or barges for transporting lumber, on notice of its readiness for delivery, to handle all lumber received and dispose of it upon the best markets and at the best prices obtainable therefor, in the exercise of their best judgment to that end, and to render to Neal a statement of every cargo or car load delivered. They also agree to advance to Neal on all lumber at the mill or in sheds or in the yards \$4 per thousand feet as and when said lumber has been manufactured and insured at Morehead, and also, when each cargo of lumber is loaded on a vessel or car or barge and a clean bill of lading signed, duly sent and presented to Briggs & Co., such further sum, in addition to the \$4 per thousand, as will equal two-thirds of the cash value of said cargo at the mill, and to pay to Neal the other one-third of selling price of the lumber 10 days after its arrival at the point of destination and it is discharged, inspected, and accepted, less the sum authorized to be deducted under this agreement. In order to secure his performance of his contract, and especially the repayment of the advances, Neal mortgages the steamer Nellie, the sawmill, and all the plant, and four tracts of land fully described. Neal to remain in possession until default, and, in case of default, Briggs & Co. to have the right to enter into possession and cause the lumber to be cut and delivered, the sawmill to be operated in the manufacture of lumber, until so much has been cut and manufactured as will repay all advances and all expenses incident to the manufacture of the lumber, a duty imposed by this contract on Briggs & Co.

Numerous shipments were made by Neal to George S. Briggs & Co. under this contract until September, 1900. At this time Neal became largely involved, and was forced into an assignment for the benefit of his creditors. A few days before this he had telegraphed Briggs to come to Morehead City. Upon his arrival, Briggs met Neal and his counsel, Mr. F. H. Busbee. Neal then stated that he owed other parties beside Briggs & Co. \$18,000, and asked Briggs to make further advances to him. This Briggs was willing to do, if he were secured. Neal could not secure him, and, under the advice of Mr. Busbee, he turned over the whole mortgaged property to

Briggs. Then in a few days he made the assignment above spoken of, and in it he stated his debt to Briggs to be \$8,350. Very shortly thereafter the suit was brought in Carteret county. The burden of the complaint is that out of the lumber shipped to him by Neal, and that turned over to him, Briggs had received full satisfaction for all sums advanced by him to Neal. Under the prayer of the complaint an injunction was issued against Briggs & Co. restraining them from operating the mill, and the assignees in the assignment were made receivers. The injunction was continued, and the receivers were confirmed in the federal court. After defendant appeared in the court below, he moved to dismiss the bill on a ground to be stated hereafter. This being refused, he answered, denying all the main allegations of the bill, and insisting that the debt and advances were not paid. Upon hearing the bill and answer, the court referred the cause to the deputy clerk of his court, as special master. This is made a ground of exception, and will be discussed hereafter. The court also allowed the testimony to be taken and the references to be held at New Berne, instead of at Elizabeth City, where the court was then sitting. This also is one of the grounds of exception to be discussed hereafter. The master held references, took the account between the parties, examined witnesses, and made a report giving his findings of fact and stating his conclusions of law. There is nothing in the record showing that the parties consented to refer the case to the master to hear and decide the issues. So the report was treated as merely advisory to the court, to be accepted and acted on, or to be disregarded, according to the judgment of the judge. The master found, as a conclusion of law from his facts, that the defendant was indebted to the plaintiff Neal, after giving him all proper credits, in the sum of \$5,108.15. To the findings of the master, exceptions were taken. At the hearing, the court sustained the master. An appeal was allowed, and the case is here on seven assignments of error.

In this connection the selection of the deputy clerk as special master is objected to. It is a bad practice to appoint clerks or their deputies special masters. It is forbidden by the act of Congress of March 3, 1879 (20 Stat. 415 [U. S. Comp. St. 1901, p. 591]), except when the judge shall determine that special reason exists therefor, to be assigned in the order of appointment. In the present case his honor assigns in his opinion a special reason for the appointment. Its omission in the order must have been an inadvertence. This is not reversible error.

1. The first assignment of error is that the appointment of receivers and of a special master, at the first presentation of the bill in the court below, was premature, there being no proof in the record making their appointment necessary or proper, and no proof of complainants' claim, and no notice given to defendant or his counsel. The appointment of a receiver is a matter within the discretion of the court, and will not be reviewed unless there be a gross abuse of the discretion. Bates, Fed. Proc. § 582. We see no abuse of it here. The bill presented a case in which it was absolutely necessary to take an account. This being so, a reference was also neces-

sary. The practice to refer such a matter to a master is invariable. *Field v. Holland*, 6 Cranch, 8, 3 L. Ed. 136; *Dubourg de St. Colombe's Heirs v. U. S.*, 7 Pet. 625, 8 L. Ed. 807.

2. The second assignment of error is hardly in compliance with the twenty-first rule of the Supreme Court and the eleventh rule of this court. It embraces five distinct grounds of error. These rules require that the assignments of error shall set out separately and particularly each error asserted and intended to be urged. This second assignment charges error in the court in overruling defendant's motion to dismiss the bill on the ground that it was vague, uncertain, and indefinite. We see no error in the action of the court. This assignment also charges as error that the court did not dismiss the bill, in that it did not state facts sufficient to constitute a cause of action. A motion of this kind belongs to code pleading. It has no place in equity practice. If the motion had been to dismiss the bill for want of equity, it could not have been granted, because the bill prayed an account, which is a ground of equity jurisdiction. This assignment also objects to the bill because it was signed by Neal alone, and he had already parted, by assignment, with all his interest in the property. The twenty-fourth rule in equity requires a bill to be signed by the counsel, for reasons stated in the rule. This bill is signed by all the counsel for all parties complainant. Neal only verifies the bill, the facts stated therein being practically within his knowledge. This assignment also alleges as error that no bond was required in granting the injunction. This is a matter within the discretion of the judge granting the injunction. *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642; *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060.

The fourth assignment of error brings up the merits of the controversy. The Supreme Court of the United States and this court have frequently announced that the concurrence of the court below in the findings of fact of a master have great weight, and will be generally followed in the Appellate Court. But although this is the general rule, still the Appellate Court may, and indeed should, examine the record and come to its own conclusion. The case before us is one requiring this course.

When Neal, after doing business with George S. Briggs & Co., under the contract, from March to September, had an interview with Briggs, in which he was assisted by his attorney, Mr. Busbee, he stated that he was indebted to Briggs & Co. about \$8,000. The master in his report finds as a fact that, instead of being a debtor, Neal was a creditor, of George S. Briggs & Co. in the sum of \$5,108.15, growing out of a volume of business, in all \$21,683.47. This result is sufficiently startling to induce an examination of the testimony. Briggs & Co. and Neal were business men of experience. They were dealing with each other under a written contract. By that contract Neal cut, manufactured, and prepared lumber for market, shipping it under orders from Briggs & Co. These orders specified the character of the lumber and the price. And in nearly every instance of shipment the order stated the price at which the lumber sold. This mode of doing business was kept up from March to Sep-

tember. During that whole period Neal made no complaint or objection whatever to the dealings of Briggs & Co. Even when he failed, and was compelled to stop, he called on Briggs & Co. to aid him, and, failing to get such assistance, he fulfilled his contract, turning over the mortgaged property to Briggs & Co. He did this, fortified and aided by the advice of able counsel. It goes without saying that had Neal at that time communicated to Mr. Busbee any suspicion of bad faith on the part of Briggs & Co., any reason to suppose that, so far from being a creditor of Neal, Briggs & Co. owed him money, were accountable to him for a course of fraudulent dealing, this learned and faithful lawyer would have been the first to call a halt and to defy any action on the part of Briggs & Co. The conclusion is irresistible that at that time Neal was satisfied that the claim of Briggs & Co. upon him for advances and commissions, to the extent of some \$8,000 and upward, was just and reasonable, and that he so instructed Mr. Busbee. After Neal made his assignment he began to challenge the account of Briggs & Co., and to seek to surcharge and falsify it. His testimony to this end consists for the most part of conjecture, of what he heard from others, and of the result of other sales of lumber. It must be borne in mind that Neal charges a skillfully wrought scheme of fraud, carried on in many transactions. His indictment against Briggs & Co. is that they obtained control of his lumber, and systematically sold it at one set of prices and accounted to him for another. Fraud never is presumed. He who charges it must take the burden of proving it. And the proof must be of such a character as to rebut the presumption that in the ordinary transaction of business men generally act fairly. A discussion of the testimony in detail is not necessary. We have carefully examined it, and the great preponderance of the evidence sustains the correctness of the account of Briggs & Co. Neal, pursuing the terms of the mortgage, surrendered possession of the mortgaged property to Briggs & Co., the mortgagees. They remained in possession some weeks, and were removed by the receivers under order of court. Among the property mortgaged were the tugs Nellie and Moore, as well as the mill and the timber on the land. Briggs & Co. operated the mill, cut timber, and used the tugs. These tugs had been purchased for and were used in the operations of the mill. The special master found that Briggs & Co. were chargeable with the rent of the mill, and the rent of the tugs whilst in possession, and also for the timber used by them.

A mortgagee put into possession of a going concern, under the operation of the mortgage, goes in as a quasi trustee or bailiff for the mortgagor. Jones Mortg. § 1116. He takes the business as he finds it, and conducts it to the best advantage. His duty in possession is that of an ordinarily prudent owner, and his liability is for negligence in failing to make the property as productive as it might be in the hands of a reasonably careful and prudent owner. *Kiewert Co. v. Juneau*, 24 C. C. A. 297, 78 Fed. 708; *Schaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211. Out of the proceeds he pays all necessary current expenses, reimburses himself for all sums paid in taxes and necessary repairs. *Jones, Mortg.*, supra; 4 Kent, Comm.

(14th Ed.) 106. And he applies the net results toward the debt due to him. Of course, he has the right to use the mortgaged plant for this purpose. He is in no sense the tenant of the mortgagor, and as to the personalty mortgaged he is the owner. This being so, Briggs & Co. are not chargeable with rent either of the mill or of the tugs. Even if they were, this rent would be a part of the expenses of the business, payable out of the gross proceeds. The master erred, therefore, in charging Briggs & Co. with these rents. With regard to the timber cut and used, Briggs & Co. have accounted for this in the report of the operations of the mill, and cannot be charged with it separately. The account of Briggs & Co. is subject to a deduction of all acceptances charged in it which have not been paid by them. In this respect the conclusions of the master are correct.

The decree of the Circuit Court is reversed, and the case remanded to that court, with instructions to state the account between Neal and Briggs & Co., allowing as credit to the latter the amount of his account—\$8,210.16—and such demurrage as Briggs & Co. were compelled to pay by reason of default of Neal, and charging against said account any acceptances of Neal's drafts unpaid by Briggs & Co., as also the profit realized by Briggs & Co., after taking possession of the mill and plant, deducting all necessary expenses for drying and handling and manufacturing the lumber on hand when the possession was taken by Briggs & Co. of the mill and plant, and for necessary repairs.

Reversed.

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SMITH et al. v. COOPER et al.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1903.)

No. 1,208.

1. INVOLUNTARY BANKRUPTCY—ATTORNEYS FOR CREDITORS—FEES—ALLOWANCE. Petitioners were attorneys for creditors in involuntary bankruptcy proceedings, and obtained an order adjudging the debtor a bankrupt. A receiver in insolvency having been appointed in the state court, injunction proceedings were brought by such attorneys to compel the receiver to turn over the property to the trustee in bankruptcy. This proceeding was contested, and such attorneys followed a decree in their favor to the Circuit Court of Appeals, where the decree was reversed. Thereupon the attorneys applied to the United States Supreme Court for certiorari to review the decree of the Court of Appeals, which application was refused; whereupon, pending an application to the state courts for an order requiring the receiver to surrender the assets, a compromise was effected, by which \$2,500 was paid by the receiver to the trustee, which was all the money the trustee received from the estate. On an application for the allowance of attorney's fees, a master allowed the sum of \$1,000, which was not objected to by any of the creditors of the estate. *Held*, that the judgment of the district court in reducing such fees to 10 per cent. of the amount remaining in the hands of the trustee, after payment of costs and expenses, which amounted to \$196.68, should be amended, and a fee of \$1,000 allowed.

Appeal from and Petition for Revision of Proceedings in the District Court of the United States for the Southern District of Georgia.

John R. L. Smith and J. T. Hill filed in the court below in *Re Macon Sash, Door & Lumber Company, Bankrupt*, their application for payment out of the bankrupt estate of their fees as attorneys for the petitioning creditors, and for services rendered under employment of authority of the court to the receiver and trustee in said bankruptcy matter. The court referred the application to a special master, with directions to "take testimony and report \* \* \* the approximate amount of compensation which should be allowed to petitioners." The special master, after due notice to the trustee and attorneys for the bankrupt and all creditors, proceeded to take testimony. No evidence was offered except that for petitioners, which consisted of testimony by one of them as to the services performed by them, and the testimony of two attorneys, who testified that they were engaged on the opposite side of the litigation, and well knew the services rendered, and the value thereof, and that such value was \$1,500 to \$1,750. There was no conflict of evidence, nor was there anything in the record tending to discredit the witnesses for petitioners. The special master filed a report, to which was attached the evidence taken before him. This report contained a finding at length of the services rendered by petitioners and the propriety thereof, and concluded that if petitioners had been successful in their efforts "it would have been but proper that they should receive full and complete value for their services. But while recognizing that the value of their services must exceed any amount which can now be allowed them; considering that but sixteen hundred dollars approximately, outside of costs fixed by law and their expenses to be reimbursed, is now on hand for all compensation; and considering that, though costs of the bankruptcy court must necessarily have priority, it is but just that claims of creditors should not be wholly overlooked and disregarded, as must be were greater compensation allowed—I find that petitioners are entitled to \$1,000, \$700 to both as attorneys for petitioning creditors, and \$300 for petitioner Smith for services to the receiver, trustee, and marshal." On filing this report, on September 5, 1902, the trustee and attorneys for the bankrupt and all creditors entered an acknowledgment of notice of the report, and a consent that the same might be passed upon by the court forthwith. There were no exceptions filed to the master's report, nor had any one ever made any objection or resistance whatever to petitioners' claims.

The court delivered an opinion as follows: "The court is always very glad, indeed, to allow counsel in all proper cases fees which adequately compensate them for the skill and ability with which their professional services are rendered. Estimated upon this basis, the compensation of Mr. Smith in this case would be very large. There are, however, a good many considerations which must influence the court in fixing the fees of the attorneys. Since the enactment of the bankruptcy law we have habitually fixed the fees, not only of counsel, but of receivers, referees, and others, upon an economical scale. In fact, from the beginning the court has been pretty regularly assailed with complaints that such allowances for compensation have not been sufficiently large. Perhaps these complaints were at times justifiable. We have, however, felt that it was due the parties and due the law that there should be an economical administration of bankrupts' estates. Now, in this case, application is for a fee of over fifty per cent. of the amount in the hands of the trustee. This is only about \$2,000, and yet two attorneys have testified that it should be subjected to a charge of \$1,500 counsel fees. The master allows over fifty per cent. of the actual amount of the recovery. I do not think it is proper for court to make any such allowance. While doubtless the services of counsel were worth the amount allowed, if considered with sole regard to the skill and learning displayed, yet the court must have in consideration the amount which was secured by those services for the general creditors. It is one of those cases in which counsel take a certain degree of chance. Had they been successful they would, without doubt, have received a considerable enlargement of the compensation which the court will allow; but they were unsuccessful. The effort to defeat the bankruptcy law was successful. I cannot, therefore, regard myself as at liberty to consider solely the services of counsel for petitioning creditors. All I can allow is 10 per cent. upon the amount in the hands of the trustee; that is, about two hundred dollars. It will be so ordered"—and thereupon entered

a judgment fixing petitioners' fees for all services at \$196.68, being 10 per cent. of the amount remaining on hand after paying other costs and expenses.

Jno. R. L. Smith, for petitioners.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). In considering an appeal from the allowance of attorney's fee in a case of involuntary bankruptcy, the Circuit Court of Appeals for the Seventh Circuit (In re Curtis et al., 41 C. C. A. 61, 100 Fed. 785, 786), said:

"In the administration of an estate in bankruptcy the law permits the allowance of 'one reasonable attorney's fee for the professional service actually rendered \* \* \* to the petitioning creditors in involuntary cases.' 30 Stat. c. 541, § 64b, subd. 3 [U. S. Comp. St. 1901, p. 3447]. The act grants an appeal to this court from an order of the district court sitting in bankruptcy allowing or rejecting any claim exceeding \$500 against the bankrupt estate. 30 Stat. c. 541, § 25a, subd. 3 [U. S. Comp. St. 1901, p. 3432]. This clearly lodges in the appellate court the right to review the allowance of any such claim. The attorney for the petitioning creditors is entitled to this reasonable fee as of right. Its allowance or disallowance is not matter of discretion. So, also, the amount to be allowed does not rest in mere discretion. The amount must in all cases be reasonable, to be determined upon evidence of the service performed and of its value, and, in the absence of evidence of its value, by the court from knowledge of its worth. The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion, and that judgment and judicial discretion are subject to review. We are loath to disturb a finding upon a question of this character, unless fully persuaded that the judgment of the court was founded in misconception of the ground upon which the allowance should be based, or, if proceeding upon correct grounds, that the amount allowed was largely excessive or greatly inadequate. The question is one of delicacy, but the duty of review may not be put aside. It becomes us, therefore, to inquire with respect to the matter in hand concerning the character and value of the service rendered, and of the grounds upon which the allowance was predicated. The elements which enter into and should control judgment upon the value of professional services we think to be these: The nature of the service, the time necessarily employed therein, the amount involved, the responsibility assumed, and the result obtained."

In this view of the law, both as to the right of appeal and the determination of the amount of a reasonable fee for services actually rendered in involuntary bankruptcy, we fully concur.

The nature of the services rendered by appellants herein, the time employed, the amount involved, the responsibility assumed, and the result obtained are undisputed, and are found by the master as follows:

"As appears from their petition, and from the statement of Mr. John R. L. Smith, on November 17, 1900, John R. L. Smith and J. T. Hill, representing certain petitioning creditors, filed in the District Court a petition praying that the Macon Sash, Door & Lumber Company might be adjudged a bankrupt. Previous to that time the Exchange Bank of Macon had instituted in the superior court a proceeding, under which a receiver had been appointed, who had taken possession of the assets of the company. In order to prevent the administration of these assets for the benefit of the Exchange Bank on mortgages which it held, under the bill in the superior court this bankruptcy proceeding was instituted by Mr. Smith and Mr. Hill for the benefit of the unsecured creditors, with the purpose of procuring an adjudication, and getting the property and mortgages then in the superior court within the jurisdiction of the bankruptcy court. This petition having been assigned for hearing on November 25, 1901, in the meantime, having reason to believe that the parties in the superior court were intending to proceed with the case in that court, and have the property sold and administered while the proceedings in bank-



ruptcy were pending, they filed a bill on behalf of petitioning creditors, praying that the plaintiffs in the state court be enjoined from further prosecuting their suit or procuring a sale of the property, and such injunction was accordingly granted by the bankruptcy court. Afterwards, having ascertained that the state court receiver was proceeding to sell certain parts of the property, they filed another bill in the bankruptcy court, praying that the receiver be enjoined from the alleged contemplated acts; whereupon this court entered an order enjoining the said receiver as prayed for. On November 25, 1901, the petition for adjudication came on for a hearing before the court, and, attorneys for the bankrupt having filed an answer and a demand for jury trial, considerable time and labor seems to have been expended by the petitioners, in their preparation for this trial, in examining the law and authorities bearing upon the issues involved, and especially in securing evidence to prove the fact of insolvency. This labor seems to have been performed by them before their knowledge of the withdrawal of the answer and demand filed by the company's attorneys, which was subsequently done, and the company consented to be adjudged a bankrupt, as prayed for. After such adjudication, on the 26th day of November, attorneys for petitioning creditors filed another bill in equity in aid of the bankruptcy proceeding, wherein they set forth the proceedings in the superior court, and alleged that such proceedings in the state court were void for want of jurisdiction in that court to entertain insolvency proceedings, and prayed that the mortgages of the Exchange Bank, upon which these proceedings were predicated, might be set aside; the said judgments controlled for the benefit of the general bankrupt estate; the said bank required to account for preferences received; that the parties and receiver in the state court be perpetually enjoined from proceeding with the administration of the assets; and that the said bankrupt court should take possession of all the assets and effects of said bankrupt for administration in this court. Upon this bill this court entered an order enjoining the parties and receiver in the superior court, and issued a warrant to the marshal requiring him to seize and take possession of the assets and effects of the bankrupt. This bill seems to have formed the basis of the more extended and universal part of the services rendered by the petitioners, and marks the second stage of the litigation—the effort to secure possession of the assets from the receiver of the state court, and to transfer them into the hands of the bankruptcy court. The receiver of the superior court, upon demand of the marshal, having refused to surrender the assets and effects of the bankrupt in his custody, and the marshal having reported such refusal of the court, attorneys for petitioning creditors filed a petition reciting the aforesaid facts, and praying a rule against the receiver, requiring him to show cause why he should not surrender such assets and effects, or, in default thereof, be punished as for contempt. To this Mr. Carling filed an answer, contending, in substance, that, the superior court having jurisdiction in the premises, the bankruptcy court did not have jurisdiction or authority to wrest the property from the officers of that court under principles of comity between the two courts. Upon this great labor and care seems to have been expended by petitioners in preparing for the hearing of a case, which involved questions of tremendous importance. On December 6, 1901, your honor, after hearing argument, delivered an opinion sustaining the main contention of the petitioners, and passed an order peremptorily directing the receiver to surrender the assets to the marshal; which the receiver still declining to do, the court ordered him to be attached and imprisoned for contempt, until he should purge himself of such contempt by the surrender of the assets, but directed a suspension of such order for 10 days, to allow his counsel time to make application for review to the Circuit Court of Appeals. And such petition having been filed by his attorneys, and made returnable on January 7, 1902, at New Orleans, the case came on for argument on that day. With the judgment and decision of the honorable District Court in their favor, it was wholly necessary and proper that counsel for respondents should proceed further in that court, wherein the judgment and decision of the District Court was sought to be reversed. The entire time preceding the hearing at New Orleans seems to have been devoted by petitioners to work on this case, and in its preparation the more arduous part of their services were expended. A brief

was prepared by them for the appellees, and comprised 39 printed pages. Mr. Hill and Mr. Smith both went to New Orleans. After argument, which consumed a day and part of another day, in the Circuit Court, another supplemental brief was filed by them, containing 17 printed pages. Afterwards, upon reversal of the decision of the District Court, 'inasmuch as two courts had decided differently on the question,' and the Circuit Court seemed to rule with them on the propositions of law for which they contended, 'but simply refused to admit the conclusion' which attorneys for petitioning creditors thought necessary to follow from those principles, they 'deemed it necessary and proper to carry the case to the Supreme Court of the United States.' In this effort to secure the granting of certiorari by that court, a petition of 29 printed pages was prepared, 'to see to the proper filing of the petition and brief, to arrange for printing them, and see that the case was properly entered on the docket for presentation to the court'; the second, 'to present the application and briefs to the court, the rules requiring that they should be presented in open court, at the motion hour, on motion.' Preparing this petition for certiorari required considerable thought and investigation on the part of petitioners. After taking this application under advisement, the Supreme Court, not being bound to grant a writ of certiorari, entered an order declining to grant the writ. Afterwards, it being indicated by the Circuit Court of Appeals as the proper procedure, counsel for petitioning creditors filed a petition in this court, praying that a receiver be appointed, and directed to make application to the superior court for an order requiring its receiver to surrender the assets and effects in his possession. And John R. Cooper having been appointed receiver by your honor, and authorized to make such application, and afterwards, in his capacity as trustee, duly made such application to that court. But, pending this application of the trustee, the superior court having authorized its receiver to propose a compromise of the controversy as to the possession of assets and effects, and such offer having been made by T. J. Carling, its receiver, to the said John R. Cooper, trustee, and the said trustee having been authorized and directed by your honor to accept such compromise, the case was thereupon compromised by the payment of the said Carling into the hands of the trustee of \$2,500, in full settlement of all claims and demands of the said trustee against the property and assets in the hands of the said Carling, receiver."

It thus appears that the services for which compensation is claimed were actually rendered in the bankruptcy court, in this court, and in the Supreme Court of the United States; that they were meritorious, and so far successful that all the funds brought into the bankruptcy and in the hands of the court for distribution were thereby obtained.

The section of the bankruptcy act of 1898 [U. S. Comp. St. 1901, p. 3447] authorizing and requiring the payment of such fees as claimed herein is headed "Debts which have Priority," and clause "b" provides that such fee shall be paid as a part of the costs of administration, and before wages due workmen, etc. By the uncontradicted testimony of two competent witnesses, the services were shown to be worth at least \$1,500. The master found, in consideration of this evidence and for other reasons considered valuable by him, that the petitioners were entitled to the sum of \$1,000. In considering the master's report, the learned judge seems to concede that for the services actually rendered the amount allowed by the master was not in excess of a reasonable fee, but, for considerations of economy and the necessity of preserving a good portion of the fund recovered for the benefit of creditors, he considered it proper to reduce the amount recommended by the master, and allow only a small percentage, not of the amount actually recovered, but upon the amount left in the hands of the trustee after paying certain of the costs. While

we agree with the learned judge of the bankruptcy court that to aid the parties and under the law there should be an economical administration of the bankrupt's estate, we are unable to concur with him in his reasons for reducing the fee to be allowed appellants in this case.

When we consider that the professional services of the appellants were continuous, arduous, running through courts in Macon, New Orleans, and Washington City, and that without such services there would be no funds at all in the hands of the court to distribute; that under the statute appellants are allowed the payment of a reasonable fee as a prior claim; that the amount reported by the master as a reasonable fee was supported by the evidence, and was apparently agreed to by all the parties in interest, as appears by the submission of the master's report without objection—we are of opinion that the amount so fixed by the master should be allowed.

It is therefore ordered and adjudged that the decree appealed from be amended so as to provide that the amount allowed J. T. Hill and John R. L. Smith for all the services rendered by them as attorneys in the matter of the Macon Sash, Door & Lumber Company, bankrupt, be fixed at the sum of \$1,000, and as amended that said decree be affirmed. The costs of this appeal, including costs of the transcript and printing, to be paid by John R. Cooper, trustee.

The petition to revise proceedings is dismissed, at the costs of the petitioners.

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In re PARMELEE LIBRARY.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

Nos. 932, 933.

**1. BANKRUPTCY—LIBRARY CORPORATION—INVOLUNTARY BANKRUPT.**

A library corporation, not engaged in manufacturing, trading, publishing, printing, or any mercantile pursuit, but the business of which is merely to circulate and loan its books through the state to subscribers and members paying a certain sum monthly to the library, cannot be adjudged an involuntary bankrupt, under Bankr. Act, § 4b [U. S. Comp. St. 1901, p. 3423], providing that a corporation engaged in manufacturing, trading, printing, publishing, or mercantile pursuits may be adjudged an involuntary bankrupt.

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

In Bankruptcy.

Frederick A. Brown, for appellant.

S. S. Gregory, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

**PER CURIAM.** The Parmelee Library, a corporation of the state of Illinois, engaged principally in the business of carrying on a circulating library throughout that state, loaning its books to its

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

subscribers and members who pay a certain sum of money by the month or year to become members of or subscribers to its library, but which had not otherwise been engaged in either manufacturing, trading, publishing, printing, or mercantile pursuits, was, on the 20th day of August, 1902, upon petition of certain of its creditors, adjudged a bankrupt by the court below; from which adjudication the bankrupt, and also A. C. McClurg & Co., one of its creditors, appeal.

The question presented is whether the corporation is such a one as is comprehended within the terms of the bankruptcy act (30 Stat. c. 541, § 4b [U. S. Comp. St. 1901, p. 3423]), which provides that a corporation "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits" may be adjudged an involuntary bankrupt. The matter is ruled by our decision in the case of *In re The Surety, Guaranty & Trust Company*, 121 Fed. 73, announced at this term. In addition to the authorities referred to in the opinion in that case, we may call attention to the following: *In re Oriental Soc. (D. C.)* 104 Fed. 975; *In re Mutual Mercantile Agency (D. C.)* 111 Fed. 152; *In re Philadelphia & L. Transp. Co. (D. C.)* 114 Fed. 403; *In re Tontine Surety Co. of New Jersey (D. C.)* 116 Fed. 401; *In re White Star Laundry Co. (D. C.)* 117 Fed. 570. We are content to adhere to our ruling in the case referred to.

The decree of involuntary bankruptcy is reversed, and the causes are remanded to the court below, with a direction in each case to set aside the adjudication and to dismiss the petition.

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### O'NEIL v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 920.

#### 1. USE OF MAILS TO DEFRAUD—INDICTMENT—EVIDENCE.

An indictment under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], charged that defendant, having devised a scheme to defraud certain persons named, pursuant thereto, by means of letters sent through the mail, induced such persons to send him money for the supposed purpose, in each instance, of redeeming a ring from pawn; that he obtained such sums of money, and converted the same to his own use, "without furnishing to any of those persons any ring at all equal in value to any of the sums so sent and paid to him for the purpose aforesaid." *Held*, that the gist of the fraud charged was the obtaining of such money without furnishing to the persons sending it rings equivalent in value, and that a conviction could not be sustained upon evidence which showed that in all cases the retail price of the ring sent in return was equal to the money forwarded.

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

At the December Term, 1901, of the United States District Court, the plaintiff in error was tried for, and convicted of, a violation of section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3696].

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¶ 1. Nonmailable matter relating to frauds and counterfeiting, see note to *Timmins v. U. S.*, 30 C. C. A. 86.

The indictment on which he was convicted charged him with having devised a scheme and artifice, to defraud certain persons therein named, "by pretending to each of those persons, by and through correspondence, under some fictitious name, to be a lady friend of such person, who had pawned her diamond ring, and was unable to redeem the same, and preferred giving such person the opportunity of redeeming the same, for his own benefit to forfeiting it to pawn-brokers, and by sending to such person, along with such correspondence, a fictitious and pretended pawn ticket, showing the pledging of a diamond ring with the 'Central Agency Chicago Pawn Brokers, Baltimore Building, 21 Quincy Street,' and by this means inducing the said persons, respectively, to send and pay their money to him, the said Thomas L. O'Neil, under the said name and designation of the Central Agency Chicago Pawn Brokers at No. 21 Quincy Street in Chicago aforesaid for redeeming from pawn, rings of great value, upon payment of sums less than their respective values, and by converting to his own use such sums of money as should be so sent and paid to him the said O'Neil, without furnishing to any of those persons any ring at all equal in value to any of the sums so sent and paid to him for the purpose aforesaid."

The indictment then charged in apt language, that the scheme above set forth to defraud was effected by opening correspondence with certain persons therein named; and sets out at large the letters deposited in the Post Office by the plaintiff in error.

At the conclusion of the testimony, the plaintiff in error asked the Court to instruct the jury to find him not guilty. This request was refused, and to its refusal the plaintiff in error then and there excepted. The jury having rendered a verdict of guilty, judgment was entered thereon, and from this judgment the writ of error is prosecuted.

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

Thomas L. O'Neil, in pro. per.

S. H. Bethea, U. S. Dist. Atty.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the Court:

The record does not disclose that any person to whom the letters were sent, redeemed any of the rings on account of any sentiment connected with the ring, or on account of any sentiment connected with the person who was supposed to have pawned it. It is possible that the recipients of the letters may, under misapprehension of the identity of the writer, have supposed the writer to have been some past time friend in trouble; but no specific proof of that kind was offered, nor does the indictment charge that such was the controlling motive, either of plaintiff in error in sending the letters, or of the persons receiving the letters in sending their money.

The record does not disclose that any of the rings, received in return for the money forwarded, was worth less than the money forwarded. Indeed, it is admitted, by counsel for the government, that the retail price of the rings was in all cases equal to the money forwarded. There is therefore, no specific proof in the record, that the plaintiff in error intended to obtain from the parties addressed the sums of money named, without furnishing to such persons, rings equal in value to the sums so sent. But this is the gist of the fraud charged in the scheme set forth in the indictment, and, the proof failing, the charge must fail.

It is insisted, however, that at common law and in civil and equitable cases, it is fraud to obtain money or property, by any false rep-

resentation of fact; and from this it is argued, that irrespective of whether the rings were worth the sums sent, or not, the impression created, on account of their being in pawn, that they were worth much more, was a false representation of fact upon which an indictment could be based.

The question thus mooted would be interesting, if it were fairly involved in the case. But it is not. The indictment makes no charge of fraud in that respect. The plaintiff in error could not be put on trial for a fraud not set forth in the indictment.

It appearing therefore, that the defendant has been convicted without proof of any scheme with which he is charged in the indictment, the judgment of the District Court must be reversed, and a new trial granted.

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WESTERN DREDGING & IMPROVEMENT CO. v. HELDMAIER.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1903.)

No. 808.

**1. NEGLIGENCE—ACTION FOR DAMAGES—QUESTIONS FOR JURY.**

In an action to recover for damage alleged to have been sustained by plaintiff by reason of the breaking of a temporary dam constructed by defendant, evidence as to cause of the damage and upon the question of defendant's negligence and plaintiff's contributory negligence held such as to require the submission of such questions to the jury.

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

John M. Duffy and Wm. Thompson, for plaintiff.

Ira C. Wood, for defendant.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. Plaintiff in error is a corporation organized under the laws of Indiana, and defendants in error are citizens of the state of Illinois. Both were at the time of the happening of the events out of which the action in the Circuit Court grew, contractors on the drainage canal in the Sanitary District of Chicago. The action was brought to recover damages resulting from the breaking of a dam, constructed by and upon the work of the defendant in error, whereby the work being performed by the plaintiff in error was overflowed and submerged; the averment being that the dam had been negligently and unskillfully constructed, and of not sufficient strength to resist the pressure of water against it. Negligence was denied by defendant in error, and contributory negligence charged upon the plaintiff in error.

The case was tried to a jury, but at the conclusion of the evidence, on motion of defendant in error, the jury was instructed to return a verdict for the defendant, and upon this verdict was entered the judgment, which this writ of error is brought to reverse.

Both contracts were located in or near the old channel of the Desplaines River, from which the water had been diverted by a chan-

nel beginning above both, and rejoining the old channel at a point below. A wier, put in above the point where the diverting channel came into the old channel, had backed the water well up into the bed of the old channel. To obviate the trouble thus occasioned, defendant in error had erected the dam complained of, and pumping the water from above the dam, thus procured a dry channel above, on which to carry on his work.

The plaintiff in error was engaged at that time at a point above the defendant in error, and outside the river bed, and was protected, for the time, from the back water by a natural barrier. But when the defendant in error built his dam, and thus drew the water from the river bed above, the plaintiff in error, seeking to utilize the result thus obtained, cut a slit into its barrier, for the more expeditious carrying on of its work.

The wall of water, pressing from below against the dam of defendant in error, was four or five feet high, and there was proof in the case tending to show that when the dam broke, this column of water was thrown suddenly against plaintiff in error's barrier. But for this—it is claimed—the barrier would not have broken, or the damage complained of ensued.

In our judgment it is fairly questionable from the testimony, whether the damage was caused by the force of the water coming on as a column, or whether it would have occurred had the water come up to plaintiff in error's barrier in the ordinary currents of back water. For damage occasioned by the ordinary currents of back water, plaintiff in error would, perhaps, have no remedy; but against damage caused by the water being thrown upon their work in a column, occasioned by the breaking of the dam, a right of action would arise, provided the dam was negligently and unskillfully constructed, and plaintiff in error was not guilty of contributory negligence.

There was evidence in the case tending to show that the soil where the dam was erected, was not adapted to work of that kind; that it was a soft and slippery muck; that the dam was constructed by building across the channel a trestle, and then taking up this muck and dropping it on the sides of the trestles; that no interlacing timbers were used; or other precautions taken against the inherent weakness of such a dam. Whether, taking into consideration the fact that the dam was necessarily temporary, this was negligent and unskillful construction, and whether plaintiff in error was, in reference thereto, guilty of contributory negligence in the cutting of the slit in its barrier, are questions of fact, or of mixed law and fact, that ought in our judgment, to have been submitted to the jury.

We are of the opinion, therefore, that the court erred in taking the case from the jury, and that the judgment entered on such direction must be reversed, with instructions to grant a new trial.

## MERRIMAN et al. v. CHICAGO, D. &amp; V. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 27, 1903.)

No. 905.

**1. APPEAL—RECORD IN CIRCUIT COURT OF APPEALS.**

A circuit court of appeals cannot make its own record for the hearing of a case on appeal by authorizing the withdrawal from its files of the record on a previous appeal, and permitting the same to be refiled as a part of the record on a subsequent appeal in the same case. It can act only upon a record which comes from the court below, properly certified.

**2. SAME—INSUFFICIENCY OF RECORD—MOTION TO DISMISS.**

The circuit court of appeals will not dismiss an appeal on motion on the ground that the record filed is insufficient; that being a matter to be determined at the hearing on the merits, or to be corrected by certiorari for a diminution of the record.

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

On motion by appellants to complete the record, and by appellee to dismiss the appeal.

S. A. Lyne and Charles Osborn, for the motion.  
John Barton Payne, opposed.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

**PER CURIAM.** The transcript of record filed in this court on the 2d day of June, 1902, purports to be, according to the certificate of the clerk attached thereto, a true and complete transcript of the proceedings had of record in the circuit court, made in accordance with the præcipe filed. In accordance with the directions of the præcipe the transcript consists only of the proceedings of the court below "since the time of the preparation of the transcript of the record filed in the United States circuit court of appeals on the former appeals in this cause from the decree of June 18, 1892." It is claimed that the suit is brought by judgment creditors of the Chicago, Danville & Vincennes Railroad Company against that company, the Chicago & Eastern Illinois Railroad Company, Edwin Walker, and others, to set aside and to redeem from the sale of the railway of the first-named company under certain trust deeds, of which railway the Chicago & Eastern Illinois Railroad Company had become the possessor and claimed to be the owner, and to compel an accounting by the appellee Walker with respect to certain bonds charged to have been received by him from the Chicago & Eastern Illinois Railroad Company; that at the hearing, and on June 18, 1892, the bill was dismissed as to the Chicago & Eastern Illinois Railroad Company for want of equity, and an interlocutory decree was entered against Edwin Walker, the appellee here, directing an accounting with respect to the bonds so charged to have been received by him, execution of the decree to be, however, stayed until the final determination of a prior suit in a state court with respect to such bonds; that that decree was brought to this court by appeal, where, on November 27, 1894, as to the Chicago & Eastern Illinois Railroad Company the de-



crec was affirmed, and as to the appellee Edwin Walker the appeal was dismissed as premature, the decree as to him being held to be interlocutory. *Merriman v. Railroad Co.*, 12 C. C. A. 275, 64 Fed. 535; on petition for rehearing, 14 C. C. A. 36, 66 Fed. 663. Subsequently the appellants moved the court below, upon a showing of the final determination of the suit in the state court referred to in the interlocutory decree, for a final decree against Edwin Walker for the amount of the proceeds of the bonds so directed to be accounted for, less the amount claimed to have been paid to the complainant in the suit in the state court. In the answer to that petition it was insisted that the interlocutory decree had practically, in the opinion of this court, been held to be erroneous, and that the bill should be dismissed for want of equity. On November 4, 1901, the court below found that the bill was one for redemption from the sale of the railroad, and could not be converted into a creditors' bill, so as to compel an accounting from Edwin Walker of the proceeds of the bonds received by him from the Chicago & Eastern Illinois Railroad Company. The petition was thereupon denied, the interlocutory decree vacated, and the original and supplemental bill dismissed for want of equity. An appeal to this court was allowed May 3, 1892, and the transcript first referred to was filed here. On June 25, 1902, the appellants filed a motion here for leave to withdraw from the files of the cause upon the former appeal the transcript of the record filed therein, and to refile it in this cause as a part of the record thereof. The motion was brought to the attention of the court at its May session, but by reason of the illness of the appellee, and at his request, the hearing was postponed until the following October term. On October 1, 1902, the appellee filed his motion to dismiss the appeal, substantially because no transcript of the record in the circuit court, as directed by law, and copies of the proof of such entries and papers as may be necessary on the hearing of this appeal, have been filed in or transmitted to this court, and that therefore the cause has not been removed from the circuit court, and this court had no jurisdiction to review the final decree of the court below.

The motion of the appellants cannot be sustained. It might seem to be a matter of little moment, in a case where the facts are unquestioned, to authorize the withdrawal from the files of the record on a previous appeal, and to cause it to be refiled in the present appeal; but it would be a practice that could not be sanctioned without opening the door to abuses, and would tend to impair the integrity of the records of the court; nor do we think that we are authorized to make a record here for the hearing of a cause upon appeal. The statute (Rev. St. § 698 [U. S. Comp. St. 1901, p. 568]) provides that the record shall be transmitted from the court below, and indicates what the transcript should contain, and it is provided, as well by the rules of the supreme court as by our own rules, that "no case will be heard until a complete record shall have been filed, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings necessary to the hearing in this court." This must come to us certified by the clerk of the court below as part of the very case in which the appeal is taken. We cannot properly know that the case

which was before us under the same title as the present one is the same as the present case. We may assume the fact so to be, but ought not to be put to a comparison of the old record with the present record to ascertain if such be the fact. The record sent us should, according to the rule, be one which contains within itself, and not by reference, all the documents necessary to a determination of the appeal. The object of counsel for the appellants in causing this partial record to be filed was, in a sense, praiseworthy. It was to avoid an expense apparently unnecessary, and which could be avoided by the course proposed, of using the printed record upon the former appeal, so far as it contains the record to that time, and thus dispense with reprinting. That we would have the authority to allow if the record before us in this cause was sufficient. It might, perhaps, have been made complete by adding to a printed copy of the record on a former appeal the subsequent proceedings in the court below, all properly certified by the clerk. We cannot, however, supply the deficiency. The record must come to us from the court below complete in itself. The motion of the appellants will therefore be overruled.

The motion to dismiss the appeal must also be overruled. The record filed here perfected the appeal in this court. It may be insufficient to authorize a reversal of the decree, if otherwise it should be reversed. That goes to the merits of the appeal. The remedy for a defective record is by certiorari for a diminution of the record, and not by motion to dismiss.

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UNITED STATES v. REID, MURDOCH & CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 908.

**1. CUSTOMS DUTIES—CURRANTS—DEDUCTION ON ACCOUNT OF IMPURITIES.**

Imported currants, packed in casks, are dutiable under paragraph 264 of the tariff act of 1897 [U. S. Comp. St. 1901, p. 1651], which imposes a duty of two cents per pound on currants, "Zante or other," without any deduction on account of the dirt or other impurities contained therein. It being shown that currants so imported prior to the passage of the act always contained such impurities, which could be removed only by a somewhat complicated process, it must be presumed that congress intended to levy the duty on currants in the condition imported.

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

Albert H. Washburn, for the United States.

W. Wickham Smith, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. This appeal involves a construction of the tariff act of 1897 [U. S. Comp. St. 1901, p. 1626]. The imports were one hundred barrels of currants per steamship "Montauk", arriving in New York, January 27th, 1900, and transported in bond to Chicago, for consumption at that port. The invoices were liquidated March 10th, 1900, the duty being assessed at the rate of two cents per pound upon the weight returned by the United States weigher, under

the provision of paragraph 264 [U. S. Comp. St. 1901, p. 1651], which levies a duty of two cents per pound on currants Zante or other. Against this the importers protested, insisting that a deduction of fifteen per cent should have been made on account of dirt, gravel, and other foreign substances.

The protest was heard by the Board of General Appraisers, and decided adversely to appellees. Thereupon appellees filed their petition in the Circuit Court for the Northern District of Illinois, to review the board's decision, and on this petition, and the testimony taken thereunder, a decree was entered finding that the currants, constituting the importation, contained dirt, gravel and other impurities to the extent of eleven per cent; and ordering a re-liquidation on that basis. From this decree the appeal is prosecuted.

Imported currants are substantially all grown, either on the Island of Zante, or on the main land of Greece. They are a kind of raisin made from a small seedless grape, and have been known to the commerce of the world since the fourteenth century. They belong to the grape vine family, as distinguished from the shrub currant. In preparation for exportation, they are packed in casks so tightly that upon the staves being broken, the form of the currants remain unchanged. The record shows that prior to the passage of the tariff act of 1897, currants thus shipped, always contained certain impurities; that the impurities were not perceptible by the eye, and not easily separable from the currant proper; and were ascertainable, as to percentage, only by somewhat complicated processes known as the wet and dry processes.

The tariff act of July 24, 1897 [U. S. Comp. St. 1901, p. 1626], provides that on and after the passage of that act, "there shall be levied, collected, and paid, upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedule and paragraphs respectively prescribed, viz.:" \* \* \*

Paragraph 264: "Currants Zante or other, two cents per pound."

Thus brought together, the two clauses of the act show that Congress intended to levy the duty named upon currants as imported.

Now currants, as before that time imported—the article of commerce—contained, as a constant constituent, the impurities in question. Congress legislated with each article of importation in mind. It cannot be supposed that Congress meant to apply the duty, not to the article of commerce, but to the article after purification; especially in view of the fact that purification was a difficult process.

The case is dissimilar from *Seeberger v. Manufacturing Co.*, 157 U. S. 183, 15 Sup. Ct. 583, 39 L. Ed. 665. In that case the article was flaxseed, and it was admitted or proven, that it contained four per cent. of impurities, while there was no proof that the imported article, according to the customs of the trade, contained any such impurity. The seed case did not involve a construction of the language of the act; it proceeded on the proof or admission that the seed imported was not the article of commerce mentioned in the act.

The decree of the Circuit Court must be reversed with instructions to dismiss the petition of appellees.

**HAVENS & GEDDES CO. v. PIEREK.**

(Circuit Court of Appeals, Seventh Circuit. Jan. 6, 1903.)

No. 912.

**1. BANKRUPTCY—JURISDICTION OF DISTRICT COURT—SUIT IN EQUITY.**

An agreement between a creditor of a bankrupt and his trustee, by which a fund claimed by the creditor is paid over to the trustee, to be held by him for the creditor's benefit, subject to the order of the court of bankruptcy, gives that court authority by a summary proceeding to determine the right to the fund as one in its custody; but it is without jurisdiction of a plenary suit in equity for that purpose, brought by the trustee against the creditor, where the latter is a corporation of another state, and does not consent nor appear.

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

James M. Graham, for appellant.

Logan Hay and Alonzo Hoff, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

PER CURIAM. Herman Pierek, trustee of the bankrupt, filed a bill in equity in the district court against Havens & Geddes Company, a corporation of the state of Indiana, alleging the adjudication of Flora J. Graham as an involuntary bankrupt on April 16, 1900; that the bankrupt's stock of goods in January, 1900, was destroyed by fire, being insured, and on February 1, 1900, the sum due from the Insurance Company of North America upon a policy issued by it upon the stock was adjusted at the sum of \$1,561.34; that on February 10, 1900, and within four months prior to the adjudication in bankruptcy, the bankrupt assigned to the Havens & Geddes Company all her rights under the policy to the sum so adjusted and due; that on June 22, 1900, by an arrangement between Havens & Geddes Company and the trustee in bankruptcy, the policy was transferred to the trustee, and he agreed to hold the money to be realized on the policy "for the benefit of said Havens & Geddes Company, subject to the order of the United States district court for the Southern district of Illinois." The amount collected was received by the trustee, and is now held by him in his capacity as trustee in bankruptcy, and under that arrangement. The bill seeks to have the assignment and transfer declared void, and to adjudge that the Havens & Geddes Company have no right to the proceeds of the policy or to the fund in the hands of the trustee. The defendant in the bill appeared specially and solely to object to the jurisdiction and power of the court, and filed its plea to the effect that the subpoena was not served upon the Havens & Geddes Company, but upon one of its traveling salesmen, then being temporarily within the state of Illinois; that it is a corporation of the state of Indiana, located and doing business in that state; and that it is not, and never was, a resident of the state of Illinois, and had no office or place of business, officer, or managing agent within the state. The plea was by the court stricken from the files upon the ground that the matters and things in the plea contained should have been set up by motion to

quash the service, and it was ordered that the defendant enter its appearance in the suit. Afterward, no appearance having been entered, there was decree pro confesso, and a final decree adjudging the trustee to be entitled to the fund, and excluding the Havens & Geddes Company from any right or interest therein, and decreeing against that company the costs of the proceedings.

The effect of the agreement under which the moneys were received was to transfer them to the custody of the district court, that that court might adjudge the rights of the respective parties thereto. The fund being in the registry of the court, or in the hands of its officers or appointees, the court, whether one of equity, common law, admiralty, or bankruptcy, could determine the right informally and by summary intervening petition. A bill in equity, if otherwise justifiable, would not lie in the district court sitting in bankruptcy against a party not assenting to the jurisdiction (*Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175), and the district court, otherwise than as a court of bankruptcy, has no jurisdiction of a bill in equity. It was unquestionably the right of the district court upon petition of the trustee—certainly upon notice to the Havens & Geddes Company—to determine the right to the fund, because such action had been stipulated by the agreement which it had made. If that company did not choose to respond to the notice and to appear in the district court to have the question determined, it could not complain of the action which the district court might take. But the district court, sitting not as a court of bankruptcy, has no jurisdiction to entertain a plenary suit in equity, or, sitting as a court of bankruptcy, to decree against a defendant not consenting to the jurisdiction, and who has not been, and who could not be, brought within its jurisdiction to answer to an independent and original bill in equity. The stipulation of the parties cannot be construed to be a consent to the exercise of jurisdiction by the district court upon an original bill. It provided, in effect, for the covering of the fund into the registry of the district court to be dealt with by that court, the rights of the parties thereto to be determined upon summary petition.

We have hesitated somewhat whether this bill should not be treated informally as a petition under the agreement, and so authorize the district court to determine the matter agreed upon by the parties to be determined by it. If it could be so considered, the practice adopted was certainly cumbersome and inapt; but in view of the fact that the district court has no jurisdiction in equity over the defendant, and has adjudged costs against it, when it neither appeared nor consented, but protested, against the jurisdiction, we are unable to sustain this bill in equity as a summary petition.

The decree must therefore be reversed, and the cause remanded, with directions to dismiss the bill.

## STAR BREWERY CO. v. HORST et al.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 913.

1. SALES—CONSTRUCTION — AGREEMENT TO PURCHASE ARTICLE TO BE PRODUCED.  
A contract by which the first party agreed to sell and deliver hops of a certain quality, of the crop to be grown five years after the contract was made, and the second party agreed to receive and pay for the same, does not constitute a sale, which entitles the first party to recover the contract price for goods sold and delivered, on the refusal of the second party, without justification, to receive and pay for the hops when tendered at the designated time and place of delivery, but is merely an agreement to sell and purchase at a future time; and the remedy of the first party is by an action for damages for breach of the contract.

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

The parties entered into the following contract: "Memorandum of agreement made and entered into by and between Horst Brothers, doing business in city of New York and San Francisco, parties of the first part, and Star Brewery Company, party of the second part, witnesses: That the said parties of the first part agree to sell and deliver to the party of the second part, and that the party of the second part agree to purchase, pay, and receive from the parties of the first part, twelve thousand (12,000) pounds choice California hops of the crop of 1895. Three one-half pounds tare to be deducted on each bale. Said hops to be delivered f. o. b. cars at Belleville, Ill., and to be paid for in net cash ten days from date of arrival at the rate of twenty-one (21) cents per pound. Time of shipment October, 1895. In witness whereof, the said parties have hereunto set their hands, Belleville, 9th day of December, 1890." In due time Horst Bros. loaded a car with the specified quantity of hops, but did not prepay the freight. When the car arrived at Belleville, the railroad company placed it on the side track of the brewery company. Within three days that company examined the hops, refused to accept them on the ground that they were not of the required quality, notified Horst Bros., and asked instructions. Both parties continued in their refusal to take the hops. The railroad company afterwards took the car away, and that is the last shown by the record, except that neither party ever came into possession of the hops or any proceeds from their sale. Horst Bros. filed their declaration, containing common counts only, and attached thereto a copy of the contract. The brewery company filed a plea of the general issue, and gave notice of a special defense that the hops were not of contract quality. Horst Bros. had a verdict and judgment for the full contract price.

Lucius D. Turner, for plaintiff in error.

Clinton L. Conkling, for defendants in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

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

The evidence warranted the jury in finding that the hops were of proper quality and that the brewery company's refusal to accept them was prompted by a great decline in the market price. In view of the prior dealings between the parties, shown by the record, we attach no importance to Horst Bros.' failure to prepay the freight. On shipments that had been accepted, the brewery company had been paying freight and charging back the amount to Horst Bros.;

and no objection was made to the present shipment on the ground that the freight had not been prepaid. Treating the freight as prepaid, and the brewery company's refusal to accept as perverse, there remains the question of Horst Bros.' right to recover for goods sold and delivered. The parties had the right to make a contract which would require the brewery company to accept Horst Bros.' selection of choice California hops and to pay within 10 days after the arrival of the car at Belleville. But the contract they entered into in 1890 bound Horst Bros. to an agreement to sell and deliver in 1895 an article which would have no existence until then, and bound the brewery company to an agreement to purchase, receive, and pay for that article. This was not a sale. The minds of the parties had never met on a specific, identified thing as the object of barter. Their minds could not meet until Horst Bros. had made an appropriation of a specific, identified thing as a fulfillment of the contract in that respect, and until the brewery company had accepted or acquiesced in that appropriation. Under this contract, neither Horst Bros. nor any third party was authorized to make a binding selection and appropriation for the brewery company. The brewery company never consented to the appropriation. That it should have done so is of no consequence in this action for the price of goods sold and delivered. If a party purchases, he may be held to pay for the thing. If he agrees to purchase and refuses, the remedy is for breach of the contract to purchase. 2 *Benj. Sales*, §§ 1051, 1117; 1 *Mechem, Sales*, §§ 729, 730; 2 *Mechem, Sales*, §§ 1369, 1370; *Pope v. Allis*, 115 U. S. 363, 371, 6 *Sup. Ct.* 69, 29 *L. Ed.* 393.

The judgment is reversed, with the direction for further proceedings not inconsistent herewith.

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**BAKER-WHITELEY COAL CO. OF WEST VIRGINIA v. NEPTUNE  
NAV. CO., Limited.**

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 471.

**1. ADMIRALTY—APPEAL—REVIEW OF FINDINGS OF FACT.**

Where the objection on appeal to a decision in admiralty is that it is based on a fact found by the lower court, the decision will not be reversed unless it clearly appears that there was error.

**2. TOWAGE—INJURY OF TOW—LIABILITY OF TUG.**

A steamship lying in a slip without steam up employed a tug to take her out and move her to another location, a service which required especial care because of the presence of other vessels in the slip. The tug borrowed a hawser from the ship, which broke, and the ship was injured by striking against a pier. *Held*, that the tug, which was in her home port, was bound to provide herself with proper equipment, and could not charge the injury in whole or in part to the fault of the ship on the ground that the hawser was insufficient.

Appeal from the District Court of the United States for the District of Maryland, in Admiralty.

¶ 1. See Admiralty, vol. 1, Cent. Dig. § 770.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

J. Wilson Leakin, for appellant.

Robert H. Smith, for appellee.

PURNELL, District Judge. In June, 1900, the steamship Queen Wilhelmina, the Neptune Steam Navigation Company, Limited, owner, was lying in a slip or dock at Pier 32, Baltimore, Md., bows to the mainland, stern to the open water, and another ship 100 or 150 feet astern, in the same dock. The Queen Wilhelmina had discharged her cargo, and it was desired to move her to Elevator No. 3 at Canton. For this purpose the steam tug Britannia, owned by the Baker-Whiteley Coal Company of West Virginia, the respondent below (appellant here), was employed. The Wilhelmina had no steam. She was a steamship 360 feet long and about 42 feet beam. There was very little wind, and what there was drifted down the dock. The other steamship in the dock was 100 or 150 feet immediately astern on the same side of the dock, and there was about 80 feet between her and the opposite side of the dock, Pier 31, for the Queen Wilhelmina to pass. The tug came into the dock through the passageway between the other steamship and Pier 31, and threw her hawser to the Wilhelmina, which was made fast to the port quarter. Those on the Wilhelmina were asked for another rope or hawser, and passed a seven-inch manilla hawser, which was also made fast, connecting the ship and tug. The tug then steamed ahead, pulling the stern of the Wilhelmina across the dock, in which direction it was found the stern of the ship was making too much headway, when the tug, to check this momentum, steamed in an opposite direction, tightening the hawser which had been obtained from the steamship, with the result that it parted, and that the propeller of the steamship struck some part of Pier 31 on the opposite side to where she had been lying, causing the injury complained of to the propeller and shaft, described in the libel. The contention of appellant is that the controversy turns on the strength and age of this hawser. There is conflicting testimony as to the age and condition of the manilla hawser obtained from the steamship; some witnesses testifying it was new and sufficient, others that it had been in use two, three, or four months. In addition to the depositions taken, witnesses were examined in open court, and on the final hearing the following decree was entered:

"This cause having been heard and duly considered by the court, and the court having found that the respondent is liable to the libellant for damages claimed in these proceedings, it is adjudged, ordered, and decreed by the court this 17th day of June, 1902, that the respondent, the Baker-Whiteley Coal Company of West Virginia, pay to the libellant, or its proctor, within ten days from the date of this decree, the sum of three thousand six hundred and nine dollars and seventeen cents (\$3,609.17), and the costs to be taxed in this case, with interest on said sum after said ten days."

Appellant filed six assignments of error as follows:

"First. For that the court refused to find that the collision was solely caused by the insufficiency of the rope provided by the steamship Queen Wilhelmina, which was attached to the port quarter of the said steamship and the tug Britannia at the time of the collision. Second. Because the



court refused to find that the said hawser was too old and worn for the purpose of connecting the said tug and steamship. Third. Because the court found that the tug *Britannia*, owned by the Baker-Whiteley Coal Company, was solely in fault for said collision. Fourth. For that the court refused to find that all of the damage to the tail-end shaft of the steamship *Queen Wilhelmina* was caused by other reasons than the collision of the said steamship with the pier in the port of Baltimore. Fifth. Because the court found that the said damage to the tail-end shaft of the steamship *Queen Wilhelmina* was sustained by reason of its collision with the pier. Sixth. For that the court refused to find that the steamship *Queen Wilhelmina* was solely in fault for the said collision."

The assignments of error 1, 2, 4, and 6 are to the refusal of the court to find facts which a careful examination of the record shows would not have been justified by the evidence, which, in fact, justifies a contrary finding to that contended for by appellant. The fifth assignment is the converse of the fourth, to wit, the court found the damage to the tail-end shaft was caused by reason of its contact with the pier. It is a well-established rule in admiralty that, where the objection on appeal to a decision is that it is based on a fact found by the lower court, the decision will not be disturbed or reversed unless it clearly appears that there was error. The Circuit Court of Appeals of the Ninth Circuit in *Jacobsen v. Expedition Co.*, 50 C. C. A. 126, 112 Fed., at page 78, cites this rule as applicable where there was conflicting testimony, and cites a great many decisions; among others a recent decision by this court—*The Anaces*, 45 C. C. A. 596, 106 Fed. 742—in which this court cites the rule as laid down by the Supreme Court in *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289, where the rule, with its limitations, is stated. In the opinion of this court (at page 597, 45 C. C. A., and at page 744, 106 Fed., it is said:

"We have uniformly held that, while the findings of the court on questions of fact can be reviewed in this court, the conclusion of the District Court on a conflict of evidence is entitled to and treated with great respect."

The argument on the hearing and the briefs filed are devoted exclusively to a discussion of the age and condition of the hawser borrowed from the steamship by the tug. Tugboats are not common carriers, but still a high degree of care and efficiency is required of them in the discharge of the duties which they undertake, and they should be duly equipped for such services. Such equipment includes sufficient hawsers. There was no special danger in the work required of the tugboat *Britannia*. There was no sea, no high winds, no shoals, or other incidents usually accompanying the towage of large vessels, but it was a service requiring especial care. The port was the home port of the tug, where the required equipment could have been obtained. The ship was in a dock the mouth of which was partly blocked by another ship that extended about one-third across it, thus allowing a narrow passage for the *Wilhelmina* to be towed through. The testimony shows that the tug was not properly equipped with hawsers, and that it was compelled to borrow one from the steamship. Instead of allowing the ropes which made the ship fast to the pier to remain for the purpose of steadyng or checking the headway across the dock, the stern lines seem to have been cast off, and the tugboat gave to the

stern of the ship a momentum which it afterwards attempted to check, going in the opposite direction under a full head of steam, thereby causing the hawser to part, which resulted in the loss complained of. The steamship was helpless, and entirely dependent on the tug. For this reason alone the tug was employed, because, with her own steam, the *Wilhelmina* might have backed out and gone to the elevator where it was desired she should be. Under these circumstances—and they are abundantly proved by a mass of testimony—it would be an unjust, unsupported conclusion to hold that the steamship was even partially liable for the injury.

The decree of the District Court is affirmed.

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**DAVIDSON v. AMERICAN STEEL BARGE CO.**

(Circuit Court of Appeals, Sixth Circuit. February 3, 1903.)

No. 1,112.

**1. COLLISION—DEVIATION OF TOW FROM COURSE—BURDEN OF PROOF.**

Where it is shown clearly that the navigation of one of the vessels in a collision was proper, and that the collision was due to the deviation of the other, which was in tow, from the course of the towing steamer, the burden rests upon such tow to make such explanation as will free her from liability.

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

Frank S. Masten, for appellant.

Herman A. Kelley, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. The American Steel Barge Company, the appellee here, filed its libel in the District Court against the schooner *Athens*, charging it with damages inflicted by that vessel upon the barge No. 131, a vessel of the libellant, by the negligent management of the former vessel whereby they were brought into collision. Davidson, who is the appellant here, appeared as claimant, and answered, denying the fault imputed to the *Athens*, and filed a cross-libel charging the barge and the steamer in charge of her with the sole responsibility for the collision, and praying that the barge be condemned to pay the damages. In the District Court the libel was sustained, and the cross-libel was dismissed.

A tow of vessels belonging to the American Steel Barge Company, consisting of the steamer *John B. Trevor*, the barge No. 133, and the barge No. 131, were going up the St. Mary's river in the order in which they are here named, without cargo, on a voyage from Cleveland to Duluth. On the morning of July 2, 1897, at about half past 2 o'clock, the tow was approaching the foot of the lock on the American side of the Sault St. Marie. Shortly prior to this a tow of vessels belonging to the appellant, consisting of the steamer *Rappahannock*, the barge *Algeria*, and the *Athens*, had been coming down in that order, from the opposite direction, loaded; and after getting through

the lock and straightening up below was moving down slowly, seeking a place in which to tie up until the weather should clear. A heavy mist or haze was on the surface of the water, though not so dense as to prevent navigation if it was conducted with due caution. But there was a place below, at the turn of the Little Rapids, where the navigation was more difficult, and hence the precaution of waiting for better light. There was no wind, and the night was not dark except for the low-lying mist or haze just mentioned. The vessels of the tows were each about 300 feet long, the steamers a little longer, and the rear barges were on hawsers about 300 feet long. Other vessels were in the water, and the docks along down on the American side were pretty fully occupied.

As the steamers approached each other they agreed, by a signal of one blast, to pass to the right. The steamers did so at a proper distance from each other. Up to this point the location of the vessels of the two tows appears to have been free from fault. There is nothing in the evidence which induces us to doubt that the tows and all the vessels thereof were at a safe distance from each other, and that there was no special danger to be apprehended. In respect to what ensued there is an irreconcilable conflict in the testimony. An illustration of it is found in what relates to a question of fact so bald as this: whether the *Algeria* was at the time the tows were passing each other lying abreast and on the port side of the *Rappahannock*, with the *Athens* trailing behind her, or whether all three of that tow were straightened out in line except while the *Athens* was on the course which resulted in the collision. But fortunately the salient facts are easily enough seen, and we are relieved from the necessity of attempting to harmonize the proof relating to the smaller details.

The substantial facts are that at about the time the barge No. 131 was passing the *Rappahannock* the tug *L. B. Smith* came along the port side of that barge, and, lines being fastened to her, brought her forward along the port side of No. 133, preparatory to their being put into the basin of the lock, and was proceeding to push both vessels to starboard for proper position to enter the lock. The *Athens* was coming down on a slackening tow line, and sheered off toward the tug and the tow it was trying to assist. Seeing the *Athens* coming, the tug fell back. Then No. 131 fell back also, until she was behind No. 133, where she was struck a glancing blow on the port bow by the *Athens*, which had not recovered herself. The stem of No. 131 was carried to starboard by the impact of the *Athens*, and she was again hit amidships by the latter vessel as they passed.

1. There is no proof which we can think impeaches the movements of the *Trevor* and the vessels in that tow. The utmost that can be said is that some of the officers on those vessels did not know some conditions and events that with sharper observation they would have known. But nothing which they failed to observe contributed to the disaster. And it is fair to remember that almost to the moment when the mischief happened there was nothing to indicate danger or stimulate unusual observation.

2. The navigation of the vessels of the libellant being proper, and the irregular and damaging conduct of the *Athens* being clearly

shown, it was incumbent upon her to make such explanation as should free her from liability. The *F. W. Wheeler*, 24 C. C. A. 353, 78 Fed. 824; The *Ohio*, 33 C. C. A. 667, 91 Fed. 547; The *Fontana* (C. C. A.) 119 Fed. 853. This she has not done. In her answer and in the cross-libel, it was charged that the speed of the *Trevor* was too great, and that not only that vessel, but those in her tow, crowded too far over towards the American shore. But neither of these defenses is made out.

It would not be difficult, if it were open upon the pleadings to do so, to conclude that the sheer of the *Athens* which brought the vessels into collision was the result of her being left by her steamer without proper steerage way. There is much in the case to produce the impression that the *Rappahannock* was moving very slowly, and that her tow was, in consequence, somewhat collapsed. But the answer of the *Athens* insists that she maintained a proper position, though her headway was only "sufficient for her to swing very slowly," and her captain testifies that she had sufficient headway. The testimony of the mate points to a different conclusion. The District Court held that the *Athens* was at fault in not porting her helm in obedience to the signals for passing, and also in not employing a tug to assist her in her navigation. If she had sufficient headway, the reasonable conclusion is that her helm was not properly attended to.

No explanation of her erratic and dangerous course being given by the *Athens* sufficient to justify or excuse it, the decree of the District Court holding her responsible for the damages was right, and it is affirmed.

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**VILLAGE OF MACKINAW CITY v. UNITED STATES.**

(Circuit Court of Appeals, Sixth Circuit. January 15, 1903.)

No. 1,127.

**1. JURISDICTION OF CIRCUIT COURT OF APPEALS—MODE OF REVIEW—CONDEMNATION PROCEEDINGS.**

A proceeding in a circuit court by the United States to condemn land for public purposes is a suit at common law, within the meaning of the judiciary act, and the judgment therein can only be reviewed by the Circuit Court of Appeals on a writ of error.

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

Upon the suggestion of the Secretary of the Treasury that certain parcels of land in the village of Mackinaw City were required for lighthouse purposes, the Attorney General, through the District Attorney for the Eastern District of Michigan, instituted these proceedings in the District Court for that district to acquire the title for the United States. The lands appear to have belonged to the village. In response to the petition and the order of the court, the village appeared, and three commissioners were appointed in conformity with the statutes of the state providing for such proceedings to determine the necessity for taking the lands, and the compensation to be al-

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¶ 1. Jurisdiction of Circuit Court of Appeals, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

lowed therefor. The commissioners reported that the taking of the lands was necessary, and that they were of the value of \$400, and further reported that by the taking of the premises, and maintaining a fog horn thereon, other property—a park belonging to the village—would be damaged to the amount of \$1,500. Upon an exception of the district attorney, the item of \$1,500 was disallowed by the court, but the report was in other respects confirmed. Thereupon judgment was entered for the condemnation of the land first mentioned, upon payment of the said sum of \$400. The village, because of the disallowance of the \$1,500 as damages, prayed an appeal to this court, which was allowed. Upon the case being called for hearing, counsel for the appellee raised the point that an appeal was not a proper remedy, and that this court was without jurisdiction in the case. The court, being of that view, granted a motion to dismiss the appeal.

Theodore F. Shepard, for appellant.

Wm. D. Gordon, U. S. Atty., and James V. D. Wilcox, Asst. U. S. Atty.

Before SEVERENS, Circuit Judge, and THOMPSON and WANTY, District Judges.

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

It is a familiar rule that the appellate jurisdiction of the Circuit Courts of Appeals of the United States must be exercised upon an appeal or writ of error according to the nature of the proceeding in the court below; that is to say, whether it was a proceeding in equity or at the common law, or was essentially of the one or the other character. This court has on several occasions been required to apply this rule, and has been compelled to decline jurisdiction because of the mistake of counsel in the adoption of the wrong remedy—a writ of error in a suit in equity, or an appeal in a proceeding at the common law. Among such cases, see *Muhlenberg Co. v. Dyer*, 13 C. C. A. 64, 65 Fed. 634; *U. S. v. Diamond Match Co.* (C. C. A.) 115 Fed. 288. Now, while a proceeding to condemn land for a public use is somewhat anomalous, it is clear that it in no sense partakes of the qualities of equitable jurisdiction; nor does it rest upon any ground peculiar thereto. It happens that the first case in which the authority of the United States to condemn land for public uses was vindicated by the Supreme Court was *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449, which was a proceeding to condemn the land whereon stands the building in which this court is now holding its sessions. The case came into the Supreme Court by writ of error, and the proceedings in the court below were sustained upon the ground that they constituted a suit at common law, within the meaning of the judiciary act of 1789. It is true, no question was raised in that case in respect to the method of obtaining a review in the appellate court, but the ground on which the jurisdiction of the court below was sustained clearly implies that a writ of error is the only remedy for review. The case of *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194, confirms this view. That case went up on writ of error. The writ was dismissed, not because it was not the proper remedy, but because it was prematurely sued out—the judgment below not being final. In *High Bridge Lumber Co. v. U. S.*, 16 C. C. A. 460, 69 Fed. 320, a case brought into this court by writ of error to the

District Court for the district of Kentucky, Judge Lurton, in delivering the opinion of the court, explained that the right of eminent domain is a common-law right, and the remedy for its enforcement is a common-law action.

We are clearly of opinion that we cannot review the proceedings of the District Court on this appeal. The appeal is accordingly dismissed.

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VACUUM OIL CO. v. CLIMAX REFINING CO.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1903.)

No. 1,115.

**1. TRADE-MARKS—NUMBERS OR LETTERS DENOTING QUALITY.**

After the number "600" had long been used by manufacturers in marking barrels containing petroleum cylinder oil, to indicate quality, by denoting the number of degrees of heat at which it had been subjected to fire test, and various letters had been used in connection with it to indicate other qualities or grades or special uses, one manufacturer could not appropriate the symbol "600W" to his exclusive use as a trade-mark, so as to exclude other manufacturers from using such numbers, either alone, or in combination with other letters of the alphabet.

**2. SAME—UNFAIR COMPETITION.**

Evidence examined, and *held* not to sustain a charge of unfair competition in simulating complainant's marks or brands used on barrels of lubricating oil.

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

This is a bill to restrain infringement of an alleged trade-mark, and also to restrain unfair competition. The trade-mark claimed consists of the figures and letter "600W," in connection with the sale of cylinder oil, and branded upon the barrel heads in which such oil is sold. The defendant is charged with infringing by using in connection with the sale of its cylinder oil the character "600V." The charge of unfair competition is based on the claim that complainant's oil has become widely and favorably known as "600W," and that the use by defendant of the symbol "600V" in connection with the sale of its oil is calculated to mislead and deceive the public into the purchase of the defendant's oil as and for the oil made and sold by complainant. District Judge Wing, upon the pleadings and evidence, dismissed the bill.

C. S. Davis, for appellant.

F. A. Quail, 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.

Oils adapted for use in the cylinder of an engine as a lubricator must be capable of enduring a high degree of heat without burning or injury to their lubricating qualities. As lubricating oils having as a base petroleum came into use in competition with animal fat oils, so long exclusively used, it became important to assure the consumers of the safety of the new lubricator at a high degree of heat.

¶ 2. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

It was found that a high grade of such oil ought to be able to endure 600 deg. of heat without taking fire from a flame brought into close contact. This led to the general adoption of 600 deg. as a proper test for a high grade of cylinder oil, and packages of oil which would stand that test, or higher, were accordingly branded with the figures "600," sometimes with and sometimes without the degree sign; the figures being understood to indicate the fire test of the oil, whether the degree sign was added or not. The weight of the evidence shows that the figures "600," in connection with the sale of cylinder oil, had come to have this significance to the trade, and to makers of such oils, long before the complainant adopted "600" as a part of its private trade-mark. The evidence also shows that in the oil business it was also customary to indicate other qualities or grades or special uses of cylinder oil by one or the other of the letters of the alphabet, used in association with the figures showing the fire test. Thus the symbol "600V," which the defendants now use, was a not uncommon description stenciled on the head of barrels containing cylinder oil; the "V" being an abbreviation of valve. There is satisfactory evidence that these methods of describing the oil included many other letters of the alphabet, including the letter "W," associated with "600." This method of describing the test and grade or use of cylinder oil began before complainants appropriated "600W" as its exclusive brand, and has continued to find favor among some of the manufacturers and dealers ever since. Complainant claims to have adopted this symbol as a trade-mark indicating origin and ownership as far back as 1879. It is not clear that this early use of these well-understood methods of describing the quality or grade of the oil made or sold by it was not descriptive, as in the case of others. Not until 1886 did it undertake to register "600W" as a private trade-mark. But if we assume that its first use of "600W" was as a symbol indicating origin of manufacture, and not quality or grade, it is still confronted with the fact that, when it attempted to appropriate "600W" as its exclusive trade-mark, its competitors and rivals were using "600V" and "600," in combination with other letters of the alphabet, as symbols well understood in the trade, signifying quality or grade, and therefore descriptive of the cylinder oil so branded. Under such circumstances, the complainant cannot appropriate to its exclusive use, as a trade-mark, signs or symbols which had come to have well-known significance in the oil trade as indicative of quality or grade. These signs or symbols were public property. Every one had a right to use them to signify the same things. To permit them to be withdrawn from public use, and to be appropriated to the exclusive use of the complainant company, as signifying origin of manufacture, would give a most unjust monopoly, calculated to greatly injure others, by creating the popular belief that oils so branded were the product exclusively of the complainant's factory. The principles preventing such an appropriation of words or signs or symbols having a popular and primary signification from becoming a technical trade-mark are well settled. *Deering Harvester Co. v. Whitman & Barnes Co.*, 33 C. C. A. 558, 91 Fed. 376; *Computing Scale Co. v. Standard Scale Co.* (decided

by this court Nov., 1902, and not yet officially reported) 118 Fed. 965; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.

That a descriptive word or sign or symbol, descriptive from popular use in a descriptive sense, may acquire a secondary significance denoting origin or ownership, is true. But this secondary significance is not protected as a trade-mark, for a descriptive word is not the subject of a valid trade-mark; the only office of a trade-mark being to indicate origin or ownership. When a descriptive or geographical word or symbol comes by adoption to have a secondary meaning denoting origin, its use in this secondary sense may be restrained, if it amounts to unfair competition. In such case, if the use of it by another be for the purpose of palming off the goods of one as and for the goods of another, a court of equity will interfere for the purpose of preventing such a fraud. But this kind of relief depends upon the facts of each case, and does not at all come under the rules applicable to the infringement of a trade-mark. We have lately had to deal with this question, and need not again go over the distinction. Computing Scale Co. v. Standard Scale Co., cited above; Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 679, 21 Sup. Ct. 270, 45 L. Ed. 365.

The complainant has not made a case of unfair competition. The defendant company is not a maker of the cylinder oil which it sells, but buys from a well-known manufacturer a grade of cylinder oil which it sells in barrels, having stenciled on the barrel heads the symbol "600V." This oil is of high grade, and dealers put it on the market under their own brands or names, retaining the mark "600V" as a guaranty of quality, and as a descriptive symbol. The defendant company stencils the word "Climax" over "600V," and the words "Cylinder Oil" below. The lettering is black. The complainant, on the other hand, makes its barrels with a parti-colored circle on the barrel head, within which, in parti-colored letters, is the marking "Vacuum Oil Co. No. ———600W Cylinder Oil, Rochester, U. S. A." The simplest examination shows that defendant has made no effort to simulate the general marking of barrels used by complainant. It is difficult to see how a purchaser of average observation can be deceived into mistaking one of defendant's packages for one marked and sold by the complainant.

The decree below must be affirmed.

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SWARTS v. HAMMER.

(Circuit Court of Appeals, Eighth Circuit. February 2, 1903.)

No. 1,806.

**I. BANKRUPTCY—TAXATION—PROPERTY IN HANDS OF TRUSTEE.**

Property of a bankrupt in the hands of the trustee in bankruptcy is subject to taxation.

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



Lee Sale (Moses N. Sale, on the brief), for appellant.  
Herbert R. Marlatt, George S. Johnson, Charles A. Houts, and Harry B. Hawes, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Solomon L. Swarts, as trustee in bankruptcy of the Siegel-Hillman Dry Goods Company, had in his hands as such trustee the sum of \$68,320 belonging to the bankrupt estate, which sum was deposited to the credit of the trustee in the designated depository of the court. This money was so held by the trustee at the time appointed by the law of the state for the assessment of moneys and other personal property, and was duly assessed to the trustee. The trustee refused to pay the tax on this money in his hands, claiming that the bankrupt law exempted it from taxation. The referee decided it was liable to taxation, and this decision was affirmed by the district court, and the trustee appealed to this court.

The money was clearly liable to be taxed under the state law, and the tax is valid and collectible, unless the bankrupt act exempts it from taxation. Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed. Whether Congress could rightfully exempt from state taxation the property of a bankrupt in the hands of a trustee in bankruptcy, and otherwise subject to taxation, we need not inquire. It has not attempted to do so, and it is highly probable it never will. The power of taxation, as well as the power to exempt from taxation, is a legislative, and not a judicial, function; and a bankrupt court, no more than any other court, can exempt from taxation property in the hands of one of its officers which is liable to taxation under the state law. It has never been questioned but what property in the custody and control of receivers and trustees of the federal courts was subject to taxation under the state law, the same as other like property. Judson on Taxation, section 407, and cases cited. And this applies to trustees in bankruptcy as well as receivers and trustees in other cases and proceedings in the federal courts. It is a grave mistake to suppose that property in the possession and custody of an officer of the federal court by that single fact enjoys immunity from taxation. So far from exempting property in the custody and possession of its officers from taxation, a federal court, upon proper application, will always order and direct the payment of the taxes duly assessed on such property, and treat the same as a preferred claim against the estate or fund. Judson on Taxation, section 541.

The decree of the District Court is affirmed.

## COWEN et al. v. GRABOW.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1903.)

No. 1,128.

## 1. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, struck by a train while driving over a railroad crossing in a town, testified that before driving on the crossing he stopped his team, and looked and listened, and that, while he could not see in the direction from which the train was coming because of obstructions, he heard nothing, and his testimony was corroborated by other witnesses and by testimony tending to show that the whistle was not blown nor the bell rung for the street crossing, the question of contributory negligence was properly submitted to the jury.

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

The defendant in error, who was the plaintiff below, hereafter referred to as the "plaintiff," brought this action against John K. Cowen and Oscar G. Murray, receivers of the Baltimore & Ohio Railroad Company, hereafter called the "defendants," to recover damages for personal injuries he received in an accident at the village of Hamler, Ohio, about noon of April 16, 1898. The plaintiff, who had lived near Hamler for many years, and was perfectly familiar with the crossing where the accident occurred, had been at a blacksmith shop about 400 feet northeast of where the Baltimore & Ohio tracks cross east and west on Marion street, where he loaded a plow into his wagon, and drove his team directly to the crossing on a brisk walk. Immediately east of the Marion street crossing, where the accident occurred, was located a coal shed. East of the coal shed was a stock-chute; east of the stock-chute an elevator; and north of the east end of the elevator were two corncribs running parallel with the track, about 150 feet long. Between these corncribs and the place where the Detroit & Lima Northern Railroad crosses the Baltimore & Ohio Railroad at grade, 1,200 feet east of Marion street, were located three stave sheds. This crossing of the Baltimore & Ohio Railroad and the Detroit & Lima Northern Railroad, it was testified by the plaintiff's witnesses, was blocked by a Detroit & Lima Northern train at the time the plaintiff started from the blacksmith shop. At the time of the accident the plaintiff was standing in his wagon, driving his horses, and he testified that he looked both ways when he started south from the blacksmith shop, but that he could not see a train approaching from the east on account of the obstructions. When he got within a few feet of the side track, and beside the coal shed, he came to a full stop, and looked west, but his view was obstructed to the east. He listened, and, hearing no sound, drove onto the track, when a danger signal was blown from a freight train of about 50 cars, coming from the east, and only 250 feet from him. His horses were so frightened that they stopped and pranced on the track, and the plaintiff urged them with his lines. They started, and the wagon had nearly crossed the track when the engine struck in front of the rear wheel, and threw the plaintiff to the ground, causing the injuries for which recovery was had in the court below.

H. F. Burket, for plaintiffs in error.

Wm. P. Tyler, for defendant in error.

Before SEVERENS, Circuit Judge, and THOMPSON and WANTY, District Judges.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The negligence imputed to the defendants was the failure to blow the whistle and ring the bell when approaching the crossing, where

the view from the highway was obstructed by the buildings and a number of freight cars which were scattered along the track as far as the Detroit & Lima Northern crossing. There was a sharp conflict in the evidence regarding the giving of any signal by the defendants, and their negligence in that matter was found by the jury under proper instructions.

The only error urged in this court is the refusal of the trial judge to give a peremptory instruction for the jury to find a verdict for the defendants on account of the contributory negligence of the plaintiff. This could only have been done if, from the evidence, all reasonable men would have drawn the conclusion that the plaintiff did not exercise that degree of care which, under the circumstances, a prudent person should have exercised. The law in this class of cases is so well settled that a citation of authorities is unnecessary. Each case must be judged in the light of the circumstances surrounding it. The defendants urge that the plaintiff was negligent in failing to discover the approaching train before he arrived at the crossing. They claim he did not look, or, if he did look, as he testified he did, it was so negligently done that he failed to see the train, which must have been in sight for 200 feet before he got behind the coal shed, which hid it from his view. The plaintiff and some of his witnesses, on the other hand, testified that at the time the plaintiff started from the blacksmith shop the Baltimore & Ohio train was east of the Detroit & Lima Northern track, which they testified was blocked by a train, which, with the obstructions on the north side of the Baltimore & Ohio track, made it impossible for the plaintiff to see the train at any time while he was going from the blacksmith shop to the place where the accident occurred. Giving this testimony every inference which can be drawn from it in favor of the plaintiff, as must be done in determining whether the court would have been justified in directing a verdict, it cannot be said that all reasonable men would have come to the conclusion that the plaintiff was negligent in not seeing the approaching train. The crossing, by reason of the obstructions, was peculiarly dangerous; and it is urged that, if an approaching train from the east could not be seen, it was incumbent on the plaintiff to be more vigilant in an endeavor to ascertain its presence by the use of his hearing. This, he testified, he did, and he is corroborated by another witness, who was at the time walking on the sidewalk near the place of the accident. The plaintiff says that when he came to the crossing he stopped, and, not being able to see east, he listened, but could hear no sound of an approaching train. He also says that his horses always became frightened at the cars, and that while he was listening he watched them, and they showed no sign of fright, and, becoming satisfied of his safety, he drove onto the track. Under this testimony it seems to us that it was the duty of the trial judge to submit the question of the negligence of the plaintiff to the jury, which he did in a very comprehensive and clear charge, and the judgment is affirmed.

## ADAM v. FOLGER.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 930.

**1. PATENTS—PRELIMINARY INJUNCTION AGAINST INFRINGEMENT—ACQUIESCENCE IN VALIDITY.**

It is within the discretion of the court to grant a preliminary injunction against infringement of an unadjudicated patent, where the defendant has for three years been making and selling the patented article under a license from the patentee, which was then terminated by the latter, although the patent was not issued until near the close of such time, and where defendant since the cancellation of the license has been marking the articles sold by him as made under such patent.

**2. SAME—INFRINGEMENT—CHANGING LOCATION OF PARTS.**

While a patent for a combination is not infringed if any one of the elements of the combination is omitted, a change in the form or the location or sequence of the elements will not avoid infringement where they are all employed to perform the same functions, unless form, location or sequence is essential to the result or to the novelty of the claim.

**3. SAME—NAME OF PATENTED ARTICLE—LICENSE TO USE.**

A patentee, who has adopted a name to denote and identify the patented article, may license the use of the name in connection with the right to manufacture and sell the article, and the licensee has no right, after the expiration of the license, to continue the use of the name in connection with a different and competing article.

**4. SAME—VALIDITY AND INFRINGEMENT—WATER HEATER.**

The Folger patent, No. 680,769, for a water heater, claim 5, held valid and infringed on appeal from an order granting a preliminary injunction.

**5. SAME—SUIT IN EQUITY—MULTIFARIOUSNESS OF BILL.**

A bill which seeks to enjoin an unauthorized person from using a patented article, and also from using the generic name of that article, is not multifarious.

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

Thomas A. Banning, for appellant.

Walter F. Murray and Rufus S. Simons, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The temporary injunction appealed from, entered at the suit of Folger, a citizen of Ohio, restrains Adam, a citizen of Illinois, from continuing to infringe letters patent No. 680,769, August 20, 1901, for improvements in water-heaters, and from using the name "Victor" on or in advertising any water-heater. Folger filed his application on May 31, 1895. Before this he had sold a number of heaters made in conformity to his specifications. He adopted the name "Victor" to denote the heater manufactured according to the specifications and embodying his inventions. Prior to June 8, 1898, the Victor had become well and favorably known, and very many had been sold, and were in satisfactory use. June 8, 1898, he gave a nontransferable license to Adam to make, use, and sell heaters containing the inventions set out in his application throughout

¶ 5. Pleading in infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.

the United States, except Ohio, Kentucky, and Tennessee. Folger reserved the right to cancel the license for certain causes. In connection with the license to practice the invention, Folger authorized Adam to use the name "Victor" on and in advertising heaters made under the license. Adam and Folger made Victor heaters in accordance with Folger's specifications, and sold about 4,000 of them in their respective territories, without any controversies arising between them until June, 1900. Adam then advised Folger that he intended to change the construction of the coil, and discard the use of the "manifold" ends described in the specifications. Folger protested, and forbade the change. In December, 1900, and during 1901, Folger found out that Adam had nevertheless made that and other changes and was selling the altered heaters by means of circulars that contained descriptions and cuts of the true Victor construction. For that and other reasons Folger served a written notice on Adam, on January 7, 1902, terminating the license on February 8, 1902, in pursuance of the reservation in the contract. Before the patent was issued, the outer covering of the heaters bore a name plate showing the words: "The Victor Instantaneous Water-Heater. Patent applied for." After the patent was issued "Patent applied for" was changed to "Patented August 20, 1901." After his license was canceled, Adam continued to make water-heaters, but he claims to have altered the construction so as to avoid infringement of the Folger patent. But the record shows that he continued to advertise his heater as the "Victor"; that he issued circulars that contained cuts illustrating features that are admittedly within the patent; and that he published testimonials, the dates of which he changed, which were given by users of the genuine "Victor." And a heater of the alleged noninfringing type, sold by Adam in June, 1902, is exhibited, which bears a name plate containing the words: "The Victor Instantaneous Water-Heater. Patented August 20, 1901." No patent on water-heaters, except Folger's, was issued on that date. The evidence tends to show that Adam's alleged noninfringing heater is of inferior construction, and injures the reputation and sale of the genuine Victor.

1. The validity of the patent had not been adjudicated, and Folger relied upon acquiescence to secure an injunction pendente lite. Without deciding how far, if at all, the use and sale of the Victor heater before the patent was issued should be taken as evidence of acquiescence in the validity of the patent (see *Sargent v. Seagrave*, 2 Curt. 553, Fed. Cas. No. 12,365; *Wilson v. Store Service Co.*, 31 C. C. A. 533, 88 Fed. 286; *McDowell v. Kurtz*, 23 C. C. A. 119, 77 Fed. 206; *Corser v. Overall Co.* [C. C.] 59 Fed. 781; *White v. Hunter* [C. C.] 47 Fed. 819), we are of opinion, on this branch of the case, that the temporary injunction was not improvidently issued. The purpose of showing adjudication against others or acquiescence by the public is not to foreclose the question of validity, but to aid the presumption which the patent raises to a point where the court is satisfied that the probabilities of a final decree in the complainant's favor are so strong that the defendant should be excluded at once from practicing the alleged invention. Three years before the patent issued, Adam took from Folger a license to make heaters according to Folger's specifica-

tions. True, he could not examine the claims in the patent office; but he could examine the heater, interrogate Folger, and search the whole of the prior art for himself, if he chose. He built the heaters in accordance with the specifications furnished by Folger. After the patent was granted, he did not surrender the license. On the contrary, the record seems to indicate that he would be holding it yet if Folger had not canceled it. His use of the patent imprint, and his present contention that, after the withdrawal of the license, he altered the construction so as to avoid the claims, are strong concessions of the patent's validity. No other member of the public has questioned it. So far as Adam is concerned, his actions evidence a sufficient acquiescence. *Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur*, 3 C. C. A. 455, 53 Fed. 98; *White v. Surdam* (C. C.) 41 Fed. 790; *Steam Gauge & Lantern Co. v. Ham Mfg. Co.* (C. C.) 28 Fed. 618; *Burr v. Kimbark* (C. C.) 28 Fed. 574. We think it rests with him to convince the court on final hearing that the patent is void. Till then let the point of validity stand in Folger's favor.

2. Concerning infringement, the question at the preliminary hearing was limited to the fifth claim, which is as follows:

"The combination of the heating-coils, a water-supply leading thereto, a valve interposed in the water-supply pipe to turn the water on or off from the coils, a supplemental regulating-valve arranged in the plug of the main valve to regulate the quantity of water passing to the coils without moving the main valve, a gas-burner beneath the coils, a gas-supply pipe leading to the burner, a valve in the gas-supply pipe, and connections between the gas-valve and the main valve of the water-pipe by which the gas-valve and the main water-valve may simultaneously be opened and closed, and the supplemental valve may be regulated independently, substantially as shown and described."

The combination comprises eight elements,—heating-coils, gas-burner, water-supply, gas-supply, water-valve, gas-valve, connections between the two latter whereby one handle operates both valves equally, and a supplemental water-valve adjustable independently of the main water-valve. Grant that each element is old, and that some have been combined in various ways, yet the fact remains, as far as this record discloses, that Folger was the first to perceive that, if it were desired to have the water more highly heated than usual, he might, while leaving the gas burning at its full height, cause the water to flow less rapidly, and still secure the desirable result of having the gas and the water turned on or off by one operation. His invention lay in the concept of a combination that would produce this useful and new unitary result. Adam's altered heater contains the eight elements, each performing the same function to effect the same combined result as in the genuine Victor heater. In the Victor, however, as the exhibit shows, the construction follows the very letter of the claim, and the supplemental water-valve is "arranged in the plug of the main valve"; while in Adam's heater, as exhibited, the supplemental valve has been moved from the plug to the side of the main valve. He has escaped infringement if the words "arranged in the plug of the main valve" are of the essence, and not merely descriptive of a preferential location. It is well settled that there is no infringement if any one of the material parts of the combination is omitted, and that

a patentee will not be heard to deny the materiality of any element included in his combination claim. *Vance v. Campbell*, 1 Black, 427, 17 L. Ed. 168; *Meter Co. v. Desper*, 101 U. S. 337, 25 L. Ed. 1024; *McClain v. Ortmyer*, 141 U. S. 423, 12 Sup. Ct. 76, 35 L. Ed. 800. If a patentee claims eight elements to produce a certain result, when seven will do it, anybody may use the seven without infringing the claim; and the patentee has practically lost his invention by declaring the materiality of an element that was in fact immaterial. But form, location, and sequence of elements are all immaterial, unless form or location or sequence is essential to the result, or indispensable, by reason of the state of the art, to the novelty of the claim. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958; *Bundy Mfg. Co. v. Detroit Time Register Co.*, 36 C. C. A. 375, 94 Fed. 524; *Extraction Co. v. Brown*, 43 C. C. A. 568, 104 Fed. 345; *Norton v. Jensen*, 1 C. C. A. 452, 49 Fed. 859; *Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713. Here Adam did not omit the supplemental valve; on the contrary, he could not avail himself of Folger's conception without using it. The location of the supplemental valve "in the plug of the main valve" is not essential to the result Folger desired to accomplish. When the main valve is closed, the water is entirely shut off; when open, it forms a part of the continuous waterway. The function of the supplemental valve is to form a partial obstruction in the waterway, to a greater or less extent as desired. It performs that function wherever placed in the waterway. Folger's location seems preferable, because it does not interfere with the free use of the handle that turns the main water and gas valve. But location was not of the essence of Folger's conception as above described. Nor was location, by reason of the state of the art as disclosed by this record, indispensable to the novelty of the claim. As stated before, Folger conceived the idea of regulating separately the flow of the water while preserving the unity of action of the supply-valves for water and gas. His contribution to the art did not consist in improving the form or location or sequence of elements in an existing combination, but in taking and combining the elements to produce a new result. He is entitled to an application of the doctrine of equivalents in proportion to the scope of his invention. Cases supra. To construe his statement of location as essential, and not merely descriptive, would ignore the nature of the invention, and deprive him of the benefits of equivalency. It may be noted that a gas-burner is essential to the combination. It is mentioned in the claim as "a gas-burner beneath the coils." Did Folger invent the placing of the burner beneath the coils? May the combination, which he did invent, be lawfully used by one who chooses to throw the gas against the coils from the sides or top? It is unnecessary, perhaps, to say that on this hearing we do not aim to preclude the circuit court or ourselves from finding noninfringement on a fuller or different record. We merely decide that on the preliminary hearing infringement was shown with sufficient certainty to warrant the injunction pendente lite.

3. The name "Victor" was adopted to denote the heater manufactured in accordance with the specifications of the patent. We pass the question of farming out trade-marks on competitive articles as inapposite. The word "Victor" stands as the identifying and generic name of the patented article. Adam was licensed to use it as such on and in connection with the patented article, and not otherwise. As used, the word did not represent to the public that they were getting any skill or excellence of workmanship which Folger alone possessed, but that the heater was the kind covered by the patent. As Folger had the right to license Adam to use the thing, he had the right, as a part of the same transaction, to license him to use the name of the thing. The very fact that it would be a fraud upon the public to allow one to hold a monopoly of the name of a thing after his monopoly of the thing itself had expired (*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. And, see further, *Holzapfel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49; *Centaur Co. v. Heinsfurter*, 28 C. C. A. 581, 84 Fed. 955; *Gally v. Manufacturing Co.* [C. C.] 30 Fed. 118; *Stimpson Computing Scale Co. v. W. F. Stimpson Co.*, 44 C. C. A. 241, 104 Fed. 893) emphasizes the conclusion that it would be a fraud upon the public, during the life of the patent, to permit a stranger to palm off a spurious for the patented article by means of the identifying and generic name of the latter.

4. We do not regard a bill multifarious which seeks to enjoin an unauthorized person from using a patented article, and also from using the generic name of that article. *Animarium Co. v. Neiman* (C. C.) 98 Fed. 14; *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.* (C. C.) 60 Fed. 622; *Weir v. Gas Co.* (C. C.) 91 Fed. 940; *Dennison Mfg. Co. v. Thomas Mfg. Co.* (C. C.) 94 Fed. 651; *Harper v. Holman* (C. C.) 84 Fed. 222; *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

The order appealed from is affirmed.

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**HORLICK'S FOOD CO. v. ELGIN MILKINE CO. et al.**  
(Circuit Court of Appeals, Seventh Circuit. January 6, 1903.)

No. 896.

**1. TRADE-NAMES—TERMINATION OF EXCLUSIVE RIGHT TO USE—EXPIRATION OF PATENT.**

Where the manufacturer of an article, to which he gave a name, by which it became known, placed upon the packages in which it was sold to the public a notice in the usual form that the article was made under a patent, the right to the exclusive use of the name as a trade-name expires with the expiration of the patent, whether the article was in fact made in accordance with the patent or not.

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

Charles Quarles and Frank F. Reed, for appellant.  
F. C. Winkler and E. H. Bottum, for appellees.



Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. This is a suit brought by appellant, a citizen of the State of Wisconsin, against appellees, citizens of the State of Illinois, to restrain fraudulent competition charged to be perpetrated in the use, by appellees, of the words "Malted milk" in the preparation and sale of their products.

The case is not free from contradictory testimony; but in the view we have taken, that portion which is material, may be assumed as substantially stated by appellant.

In 1887, the appellant began the manufacture at Racine, Wisconsin, of a dry granulated or powdered extract of malt, flour and milk, to which it gave the name of "Malted milk." At this time, as appellant claims, it was not known that malt acted upon milk chemically, and the name "Malted milk" was, unless fanciful, suggestive only of the two ingredients entering into the product.

Appellant's business has been, and is, very profitable. More than \$200,000 has been invested in its plant, and over \$250,000 expended annually in advertising. The product was known, the world over, as "Malted milk." Its trade name, and the name by which it has been known in medical and other literature, has been simply "Malted milk"; so that the product has come to be bought and sold by that name.

In the year 1897, the appellee corporation was organized, and began to manufacture, sell and advertise a granulated milk food, as malted milk; claiming in its circulars, that this product was better than appellant's malted milk. No action was taken by appellant, however, until 1901, when appellees began putting upon the market a powdered extract of malt, flour and milk, to all appearances identical with appellant's product, and called it "Meadows Malted Milk." The packages used by appellees are dissimilar in shape and in color of ink, from those of appellant, but the words "Malted milk" are conspicuously employed.

The contention of appellant is, that the words "Malted milk" had, at the time they were adopted as the name of appellant's product, no known significance; that they were not descriptive, for it was not then known that milk could be malted; but they have come to describe the product solely through the exploitation of the product by appellant; and that, under such circumstances, the term has become, exclusively, within the right of appellant to use.

Were this presentation substantially true, and were it unaffected by correlative facts, appellant's right to an injunction against appellee, might easily be sustained. But there are material and important correlative facts. The claim of appellant is, that Horlick's Malted Milk was, and is, manufactured as follows: Coarsely ground malt and wheat flour are macerated in water, raising the temperature to 150 degrees F., holding it at that temperature for about half an hour, so as to insure the conversion of the starch in the flour into dextrine and maltose, or malt sugar; then raising it to a temperature of from 165 to 170 degrees F., holding it there for about fifteen minutes; then running it into a press and expressing all of the liquor out of the

mashed grain; then passing it through fine sieves; then evaporating this liquor to a thick syrup; then adding fresh cow's milk, the whole milk, then raising the temperature to at least 160 degrees in order to pasteurize; then evaporating in vacuum pans, where it is agitated, adding salt and bicarbonate of potash and soda, to the total amount of one-half of one per cent., then grinding the dry mass to a granulated form or powder, packing it in air-tight glass jars, with parafine sealing, and metal caps with screw connection.

June 5, 1883, appellant took out a process patent upon a granulated food for infants. The process is said to follow a process published in Ruth on Infants Foods, in 1876, and earlier by Liebig. The process is described in the patent as follows:

"In carrying out my invention I take equal parts of selected barley-malt and ground wheat (or oats) and thoroughly macerate or soften the same in pure fresh cow's milk, sufficiently to admit of the whole being stirred and mixed so as to form a loose soft mash. I then place the mash in a kettle provided with a steam-jacket, where it is gradually raised to a temperature of 150 degrees Fahrenheit, and kept constantly stirred or agitated, so as to prevent the possibility of any damage thereto by reason of the heat. The mash being kept at this degree of heat (150 Fahrenheit) for half an hour, the starch is thus transformed into dextrine and grape-sugar through the action of the diatase contained in the malt. It is then raised to the temperature of 170 degrees Fahrenheit, and retained at that degree of heat for fifteen minutes, after which it is taken out of the kettle, placed in bags, and pressed, the liquid extract running from the bags, when pressed, through very fine sieves, which serve to reject all husks and insoluble matter. This fine liquid is then put into a vacuum pan provided with a strong central shaft having teeth or knives, the latter serving, when the shaft is revolved, during the evaporation or drying of the extract, to keep the mass cut up into small parts until the whole is reduced to a dry powdered extract. This extract readily dissolves again in water, and is put up for public use in cans or bottles."

It will be noted, that while the process employed in the preparation of Horlick's Malted Milk is, in some respects, different from the process described in the patent, the product of both is a dry granulated powder, composed of milk and malt, supposedly affected, correlatively, by chemical action. Under enquiry by chemists, the two products might be distinguished by analysis; but so far as the purchasing public is concerned, they would probably pass for the same product.

Now, beginning with 1890, and continuing until the commencement of the action in the court below, the appellant placed on its commercial packages of Horlick's Malted Milk the words, "Patented June 5, 1883." It is perhaps significant that the patent mark was omitted from packages distributed gratuitously to physicians, and also from packages sent to Great Britain. The reason given by Mr. Horlick for thus marking the commercial packages sold in the United States was, that he believed he was entitled to the protection of the patent of June 5, 1883. However this may be, the effect on the public was to stamp the packages thus marked with notice that they were manufactured under the patent; and to some extent, at least, the patent notice afforded shelter against the competition of others.

It matters not, in our judgment, that the patent may not have been in fact valid; nor that the product,—malted milk—could not in fact have been covered by the description of the patent. The point is, that appellant chose to mark its product as if it were a monopoly,

thereby obtaining, measurably at least, the benefit of a monopoly; and gave to it a name, that became the generic name of the supposed monopoly. The case is thus brought, in our judgment, within the principle, if not the exact facts, of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and must be ruled accordingly.

The decree must be affirmed.

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**LAMB KNIT GOODS CO. v. LAMB GLOVE & MITTEN CO. et al.**  
**SAME v. MICHIGAN KNITTING CO. et al.**

(Circuit Court of Appeals, Sixth Circuit. December 2, 1902.)

Nos. 1,102, 1,103.

**1. PATENTS—CONSTRUCTION OF CLAIMS—LIMITATION BY SPECIFICATION.**

Where the identity or specific character of a patented article of manufacture is affected by the means of its manufacture, an exception must be made to the general rule that the means or process of manufacture is immaterial, and the claims may be construed with reference to the specification and drawings describing such means, and limited to the article so produced, although not so limited in terms. So in a patent for gloves formed from blanks, which, as described and illustrated in the specification and drawings, were knitted, and in fact, as so described and illustrated, could not be made otherwise, claims which contain no limitation in terms as to the means of manufacture, to save them from the objection that they are too broad, may properly be construed as limited by the specification to knitted gloves; and especially is such construction permissible where it appears to have been the one accepted and acted on by the patent office.

**2. SAME—VALIDITY—ARTICLE OF MANUFACTURE.**

The validity of a patent for an article of manufacture is not affected by the fact that such article can be produced on machines previously in use, and adapted to produce various articles, where it was not previously made, and the instruction of the patent was necessary to enable a workman to construct it on the machine.

**3. SAME—INVENTION.**

The fact that an article is not more useful than other similar articles does not affect its patentability, but, if it is useful and new, and invention is involved in its production, it is a proper subject for a patent.

**4. SAME—CONTRIBUTORY INFRINGEMENT.**

A patentee, who, after disposing of his patent, joins in forming a new company, which manufactures an infringing article, but which he claims to be a new and independent invention of his own, is liable as a contributory infringer.

**5. SAME—INFRINGEMENT—KNITTED GLOVES.**

The Lamb patent, No. 462,563, for a glove constructed from two knitted blanks, one for the thumb and the other for the rest of the hand, including the fingers, construed, and *held* not anticipated, and to disclose invention. Also *held* infringing.

**6. APPEAL—STIPULATION AS TO RECORD—DUTY OF CLERK TO RECOGNIZE.**

Stipulations by counsel as to the parts of the record to be embodied in the transcript on appeal, entered into for the purpose of eliminating unnecessary matter, are to be encouraged, and it is the duty of the clerk to recognize such stipulations, and to make the transcript in conformity

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¶ 2. See Patents, vol. 38, Cent. Dig. § 55.

¶ 4. Contributory infringement of patents, see note to *Edison Electric Light Co. v. Peninsular Light, Power & Heat Co.*, 43 C. C. A. 485.

therewith. Where he refuses to do so, costs will be taxed only for that part of the record embraced in the stipulation.

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

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

Fred L. Chappell, for appellant.

Edward Cahill and Clark C. Wood, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. These two cases were argued and submitted together. In each the appellant complained of the infringement of patent No. 462,563, belonging to it by assignment from Isaac W. Lamb, the patentee, who is also one of the defendants and appellees in the first of the cases above entitled. The patent is for a glove, and bears date November 3, 1891. The defendant in each case, other than the corporations named, are officers thereof; Lamb being the president of the one named as defendant in the first-entitled cause. In each case the defendants, except Lamb, by their answers disputed the validity of the patent, and all denied infringement. The causes were heard upon pleadings and proofs, and the bills in both cases were dismissed upon the ground that the patent was void for lack of invention, except with respect to the defendant Lamb, and as to him because it was not shown that he infringed.

The patent was issued to Lamb for a glove constructed from two blanks, one for the thumb and the other for the rest of the hand, including finger pieces. The specification describes these blanks as being fabrics knitted upon a machine, and then joined and put into form by sewing or crocheting. The method of making the blanks upon the machine is specified with such minuteness that a skilled operator could make them without further direction, and displays a good deal of ingenuity. The claims of the patent are as follows:

"(1) A glove formed of two blanks, the hand blank having finger pieces formed thereon, and narrowed at the point where the thumb is attached, and of a uniform width from the thumb to the wrist, and the thumb blank having its upper portion knit going, substantially as described. (2) A glove composed of a main blank having finger pieces narrowed at the bases, said blank being narrowed at the point where the thumb is attached, and having its upper portion of uniform width, and a thumb blank secured to the main blank at the point of narrowing, substantially as described. (3) A glove comprising a main blank having the fingers thereof composed of seven pieces, six of which are narrowed at the bases, and a thumb blank suitably secured to the main blank, substantially as described."

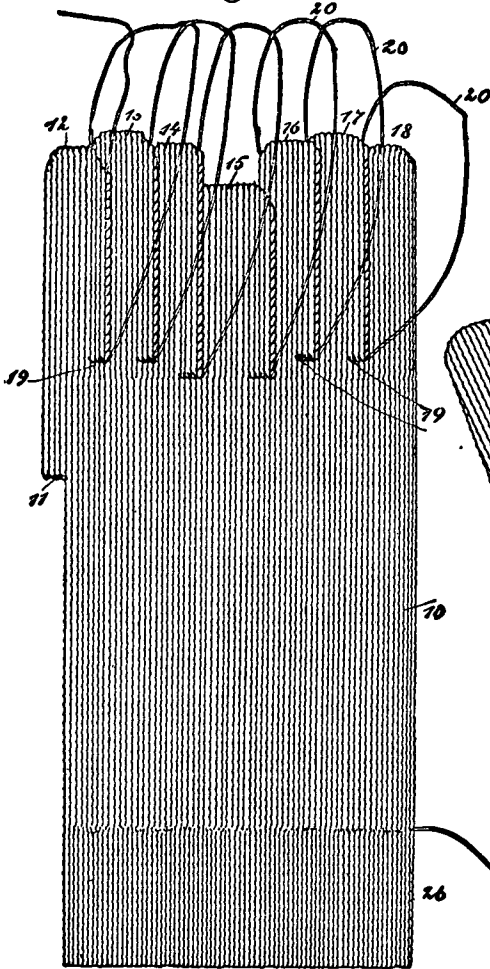
The drawings are shown below in another connection.

A question of some difficulty meets us at the outset, which is not noticed in the briefs, nor was it commented upon in the argument. It will be noticed that the specification describes a glove made up of knitted blanks. The claims are for a glove made up of blanks constructed in the forms described, but there is nothing in them which expressly requires that they shall be knitted blanks, except that in the first claim there is a requirement that the thumb blank shall be knitted; and the question is: Are the claims to be construed as lim-

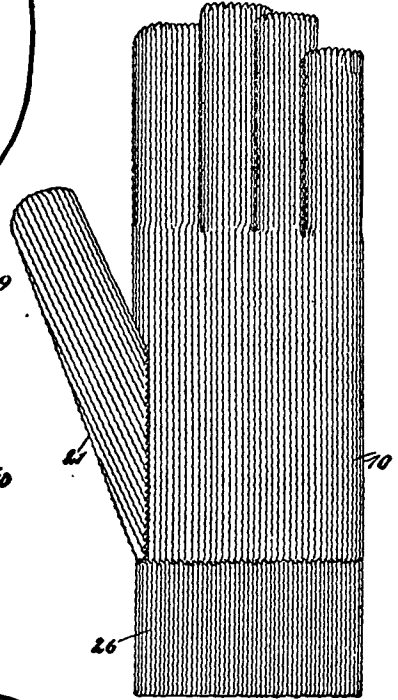
ited to a glove formed from knitted blanks, or as extending broadly to a glove made up of blanks of any suitable fabric (say of leather or cloths). It is probable from the proceedings in the patent office that the claims were regarded as limited to the kind of fabric described in the specification, for it appears from the contents of the office files, which were put in evidence, that what is now claim 1 described the thumb piece as having its "upper portion cut goring," and for that reason was objected to, upon a suggestion that it should be stated that the upper portion was knit goring. And it appears that upon an amendment accepting this suggestion the claim was allowed in its present form. It is the settled rule in patent law that claims must stand or fall as made (*Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344); but it is equally well settled that the claims of a patent are to be construed by reference to the specifications (of which the drawings form a part), and that such reference may be had, not for the purpose of expanding the claim, but for the purpose of defining it and limiting it to the description of the invention (*McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Howe Mach. v. National Needle Co.*, 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963; *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263; *Tilghman v. Proctor*, 102 U. S. 729, 730, 26 L. Ed. 279). And within certain limits the courts are inclined to adopt this mode of construction when it is necessary, as in the present case, to save the patent from the objection that the claims are too broad. *Rubber Co. v. Goodyear*, 9 Wall. 788, 795, 19 L. Ed. 566; *McClain v. Ortmyer*, *supra*; *Coupe v. Royer*, *supra*, 577; *Soehner v. Stove Co.*, 28 C. C. A. 317, 84 Fed. 182. And this would seem to be all the more safe and permissible where the construction adopted plainly appears to have been the one accepted by the patent office. Of course, this cannot be done when the claim specifically calls for matter not described at all, but only where there is a description to which the claim, when correspondingly restricted, may apply. If the patent, when construed upon what stands "within its four corners," claims more than the actual invention, the patentee must disclaim the excess in order to save that to which he is really entitled. We do not think it necessary to enter into the beclouded question as to how far the words "substantially as described," which are added to each of these claims, may affect the construction which we ought to adopt. The question we are considering is one of serious importance here; for, in general, when the patent is for a product of manufacture, it is not material by what means or by what process it is manufactured. But it is obvious that there must be an exception to this rule to cover cases where the identity or specific character of the thing patented is affected by the means or method of its manufacture. Thus it is easy to understand that a glove made up of knitted material is a different thing from one made from cloth or leather. Its qualities are dependent on the way in which it is made. If the method of manufacture is indifferent, then, of course, the general rule applies. We think the patent should be construed as one for a glove composed of knitted blanks, such as are described in the specification.

Figs. 1, 2, and 3, shown by the drawings, sufficiently indicate the blanks and the glove.

*Fig. 1.*



*Fig. 2.*



*Fig. 3.*



The thumb piece is set into the other blank, the part "knit goring" extending toward the wrist. The loose threads of the blanks are left to be used in completing the ends of the pieces to which they are attached. The finger pieces are knit separately, and are wider; that is, their aggregate width is wider than the main part of the blank which covers the hand. Each finger piece is knitted entire down to hand, where the knitting is stopped on one part of the length, as shown at 19. Thereupon, the knitting for the hand is taken up and continued until the place 11 is reached, where the thumb piece is to be inserted, and where a part of the knitting is discontinued to accommodate it, and then the rest of the hand blank is knit out as shown. The several flaps left on the edges of the finger pieces are knitted wide enough to extend around the finger to the other side of the finger piece, where the edges are secured together, thus making only one seam along the finger piece necessary. So the thumb piece is entire, and, when sewed in, the glove is completed. The court below found that this was not a new structure, it appearing, as the court held, that such gloves had previously been made by hand, and that all Lamb did was to knit the parts by a machine, rather than by hand. Undoubtedly, the conclusion that the patent was void was correct if the facts were as supposed; but we are unable to find in the record any evidence which satisfies us that there had been in prior public use a glove, such as the patent describes, knit by hand or otherwise.

A number of patents on knitting machines are shown by the record, containing directions for their use. They describe how a blank with thumb and finger pieces can be knit on them, but none describes the method of the patent in suit of knitting the blank for the hand and the finger pieces in a single structure. In fact, those patents with their specifications fall far short of anything furnishing instruction for making the glove of the Lamb patent, and none of them pretended to do so. All that can be said of them is that the machines were capable of knitting circular work, and flat work also, which could thereafter be sewed up by hand. The nearest approach made by any previous patent to that of the Lamb patent was that of a patent to Wakeman in 1881,—No. 241,458,—the main object of which was to show a knit mitten in which the fabric was widened on knitting up from the wrist into the thumb, but having the rows of stitches parallel; and also showing the rows of stitches to be continuous in the main fabric and in the thumb. But this was round work. Stitches were thrown off at the base of the thumb so as to provide a square end. A cut was made into one side of the mitten where the thumb was to be knitted on by pricking out the threads across enough of the rows so that with those dropped there should be enough left on which to continue the thumb. The patent being for a mitten, showed no finger pieces. It is obvious that it contained very little of the characteristics of the patent in suit. There is an English patent to Upsdale for knitted fabrics, but it is still more remote, and hardly furnishes a basis for comparison. Then there is the oral testimony of the witness Phelps, who is a son-in-law of the defendant Lamb, who swears that he himself at one time, pre-

vious to the date of this Lamb patent, produced a glove like that of the patent; but he does not produce a specimen, and a witness who, he says, had knowledge of it at the time, does not recollect the circumstance. And Lamb himself, in a rather dubious way, furnished what at most is a hint of a previous production of his own that might anticipate the structure of the patent. The circumstances and the testimony of the other witnesses bear heavily against this evidence, and it is not persuasive.

The defendants also contend that the patented glove is simply the product or result of the operation of the patented machine, and so is not of itself patentable. This might be so if it was the only thing that could be made on the machine; but the machine is adapted to knitting of various fabrics, and it would seem that the instruction of this invention is necessary to enable the workman to construct the glove on the machine. It is also urged that the patent shows "simply a good, average, well-fitting glove," and that these are the advantages claimed for it; but that it really fits no better and looks no better than other gloves. We cannot say how this is. No doubt, however, is expressed of its utility. The defendants are engaged in the business of manufacturing and selling something very similar to it, and this must be accepted as very cogent evidence for the purposes of the case. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 96, 26 L. Ed. 939; *Gandy v. Belting Co.*, 143 U. S. 587, 595, 12 Sup. Ct. 598, 36 L. Ed. 272. It may be more or less useful than other gloves. That is unimportant. If it is a useful article, and is new, it is the proper subject of a patent, provided it involved invention to produce it. *Gibbs v. Hoefner* (C. C.) 19 Fed. 323; *La Rue v. Electric Co.* (C. C.) 31 Fed. 82; *Seymour v. Osborne*, 11 Wall. 516, 549, 20 L. Ed. 33. We think these conditions existed, and that the patent is valid.

Upon the question of infringement, the glove manufactured and sold by the defendant in No. 1,103 (the Michigan Knitting Company) is identical, or so nearly so that we are unable to distinguish it in any essential particular from the glove of the complainant. All three of the claims are infringed. The glove of the defendants in the other case shows substantially the same characteristics as those of the first and second claims of the patent, with some slight variations, which, however, furnish only a frail foundation for distinguishing them. It is conceded that the third claim is not infringed by these defendants. It looks to us as though the defendant Lamb had claimed to carry over into his new company more of what he had invented than was consistent with the rights of his former associates. This, perhaps, was not altogether unnatural, for this art was what he had made it. And we think also that he must be held responsible with his corporation for the infringement. He states in his answer that the gloves manufactured by the defendant corporation are made by a "new and improved" method invented by his skill expressly for that purpose. The answer of the corporation says the same thing. Both answers seem to found their denial of infringement upon their contention that their product is something different from that of the complainant. We can have no doubt, if there is infringement, that Lamb should be held to be a contributor to it. The



other individual defendants are not shown to have personally, and independently of their corporation, participated in the infringement, and the decrees of the court below must be affirmed as to them, with costs in both courts. As to the defendant corporations and Lamb, the decrees will be reversed, and the causes remanded for the usual accounting for profits and damages. As to these last-mentioned defendants—that is to say, the Michigan Knitting Company in the one case, and the Lamb Glove & Mitten Company and Lamb in the other—the complainants will recover costs in this court and in the court below.

Another matter remains to be considered. When these appeals were taken, counsel for the respective parties agreed upon the parts of the record which they would require to be embodied in the transcripts in the respective cases, being all such parts as they deemed essential for the purposes of revision in this court. Written stipulations containing this agreement were filed with the clerk of the circuit court, and he was requested to proceed accordingly. The clerk declined to recognize the stipulations, being of opinion, as we infer, that his duty required him to return the whole record, and that the stipulation of the counsel would not justify him in doing less, and he made complete transcripts in both cases. We are of opinion that the clerk erred in this. The proper course was for him to observe the agreement of counsel, and leave the parties to abide the consequences. His certificate to the transcript would, of course, be according to the fact, and state that the transcript was a copy of so much of the record as counsel had required him to include in the transcript. If it should be found by this court that the transcript did not contain all that was necessary to a proper determination of the case, and that justice required a further return, this court would make an order therefor, and in the end make the proper order in regard to costs. The endeavor of counsel to eliminate matter which has been found to be superfluous and unnecessary to a review in the appellate court is one to be encouraged. It mitigates the costs to the parties, and facilitates the labor of the court. The supreme court has on several occasions complained of the neglect of counsel to perform this duty, and our own experience has been such as to impress us with the justice of reproof in such cases. The duty which devolves upon counsel in this respect cannot be performed if the clerk who makes out the transcript refuses to be governed by their directions.

Entertaining these views, we must direct that in the taxation of costs only such costs in respect to the making of the transcript as are due for so much as was included in the stipulations shall be considered or taxed.

## FULLER v. BERGER et al.

(Circuit Court of Appeals, Seventh Circuit. February 5, 1903.)

No. 847.

## 1. PATENTS—VALIDITY—UTILITY OF INVENTION.

An invention is useful within the meaning of the patent law if it is used, or is designed and adapted to be used, to accomplish a good result, though in fact it is oftener used, or is as well, or even better, adapted to be used, to accomplish a bad result.

## 2. SAME—BOGUS-COIN DETECTOR—IMMORAL USE.

The Mills patent, No. 613,844, for a bogus-coin detector for coin-operated vending machines, which is adapted to be used in connection with any coin-operated machine, is not void for lack of utility because it was assigned by the inventor to a manufacturer of gambling machines and has been used solely in connection with such machines.

## 3. SAME—RIGHT TO EQUITABLE RELIEF AGAINST INFRINGEMENT—MISUSE OF PATENTED DEVICE.

Neither the nonuse nor misuse of a patented device by the owner of the patent deprives him of the right to maintain a suit in equity to enjoin infringement.

## 4. SAME—SUIT FOR INFRINGEMENT—ISSUES.

The right of an inventor to make, use, and vend his device is not derived from the patent law, but is his natural right, the government's grant to the patentee and his assigns being merely of the right to exclude others from practicing the invention. Hence in a suit to protect the right so granted by enjoining infringement an inquiry into the use which the owner of the patent makes of the invention is collateral and irrelevant, and cannot affect complainant's right to an injunction if infringement is shown.

Grosscup, Circuit Judge, dissenting.

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

Douglas Dyrenforth and John H. Lee, for appellants.

James H. Pierce, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Appellant, complainant below, unsuccessfully sought to enjoin appellees from infringing letters patent, No. 613,844, on a bogus-coin detector for coin-operated vending machines. The letters were granted November 8, 1898, to the Mills Novelty Company, assignee of the inventor. While that company was the owner, the only practical use to which the detectors were put was to guard gambling machines, made and controlled by the company, from being operated by means of bogus coins. On December 8, 1899, the company assigned the patent to appellant, and, as a part of the same transaction, took from him a license to make and use the device. No one else used it by authority. Appellees, without license, applied it to gambling machines of their make. This suit was begun about a month after the assignment. The circumstances surrounding the assignment and attending the conduct of this litigation warranted the trial court in finding that the equities of the case should be determined as if the Mills Novelty Company had been complainant.

The defenses are two: That the patent is void for want of utility; and that, even if it is found not to be void, complainant has no

standing because he comes into court with unclean hands, in this, that his suit is brought to enable the Mills Novelty Company to prevent another gambler from interfering with its illegal enterprises.

In support of their first contention, appellees cite *Device Co. v. Lloyd* (C. C.) 40 Fed. 89, 5 L. R. A. 784; *Novelty Co. v. Dworzek* (C. C.) 80 Fed. 902; *Schultze v. Holtz* (C. C.) 82 Fed. 448; *Rickard v. Du Bon*, 43 C. C. A. 360, 103 Fed. 868; and *Mahler v. Animarium Co.*, 49 C. C. A. 431, 111 Fed. 530. In the *Rickard* Case, involving a process for spotting tobacco leaves, and in the *Mahler* Case, concerning a cure-all device, the clear purpose and the sole use of the respective inventions were found to be to deceive and defraud the public. In the *Schultze* Case, the fact that the invention had been used solely for gambling and could not be put to any other use was held to avoid the patent. In the two other cases, applications for injunctions were denied on showings that the devices had been used only for gambling purposes. But the court, in each case, went further and held the device to be wanting in utility, saying: "The patent has been very recently issued, and it is possible that a useful application may yet be found for it; but, as the case now stands, the only use to which the invention has been put being for gambling purposes, I must hold that it is not a useful device within the meaning of the patent law." It may be doubted whether, in the latter holding, useableness (utility) and use (application) were not confounded; but, at all events, the courts in those cases came to the same end as the others in deciding that the respective patents were not for useful devices within the meaning of the patent law.

With regard to the defense of no utility (available equally at law and in equity), we hold that the true inquiry is, Was the government improvident in making the grant? Does the opposing evidence, the grant itself being prima facie proof of utility, go to the extent of establishing not merely that the device has been used for pernicious purposes, but that it is incapable of serving any beneficial end? As the just criterion, we approve and adopt Mr. Walker's conclusion (section 82 [3d Ed.]), with the additions to his text which we note by parentheses:

"An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of Colt's revolver was injurious to the morals, and injurious to the health, and injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and thereby to cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersmen. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore, is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? Or is everything useful within the meaning of the law, if it is used (or is designed and adapted to be used) to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one? Or is utility negatived by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypothesis cannot stand, be-

cause if it could, it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. The first hypothesis cannot stand, because if it could, it would make the validity of the patents to depend on a question of fact to which it would often be impossible to give a reliable answer. The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirement of utility."

We deem the additions to the second hypothesis necessary to a complete statement of the acceptable test, for, to continue with Colt's revolver as an example, if at the time of a suit for infringement the defendant should prove that the only uses to which "that instrument of death" had been put were vicious, the patent should not be held void for want of utility, if the court for itself should see, or be convinced by experts, that the instrument was susceptible of good uses, though in fact never put to such before the suit was begun. And, if utility is found, the cases seem to be uniform that courts will not set up a measure of utility which must be filled.

If the device here in question should be found unsusceptible of other use than to guard gambling machines from being operated by means of bogus coins, we would be led to an outlook from which two interesting queries appear in view: (1) The statutes of Illinois, it is said, prohibit the use of coin-operated gambling machines, but not the manufacture or sale thereof. We are referred to statutes of other states, which, it is claimed, legitimate the use of such machines. Should a circuit court of the United States, sitting in Illinois, hold invalid a patent on such a machine and thereby destroy the monopoly of its manufacture and sale, because its use is forbidden in Illinois, though its manufacture and sale in Illinois and its use in certain other states are lawful? And (2) if the federal courts may properly hold patents on gambling machines void for lack of utility, because immoral, though countenanced by the legislation of particular states, is a device attached to such a machine likewise inimical to good morals, which prevents a gambler from being also a cheat?

But, returning to the main road, we have no difficulty, under the principles hereinabove asserted, in finding some degree of utility in this invention. In the specifications and claims the device is called a bogus-coin detector for coin-operated vending machines. The inventor's attention to the need of such a mechanism was not directed by the Mills Novelty Company or other maker of chance machines. A manufacturer of coin-operated banjo-playing instruments expressed a want for a bogus-coin detector. The invention in suit resulted. The parties failed to come to terms, not because the detector would not supply the need for which it was designed, but because the inventor asked more than the banjo manufacturer was willing to pay. Afterwards the application was assigned to the Mills Novelty Company, and by it the device was applied to gambling machines. There is no element of chance, however, in the operations of the detector. Its mechanism has no connection with that of the machine to which it is attached. The outlets of its coin chutes are placed in registration with the inlets of the chutes of the coin-operated machine. "The object of the invention," says the specification, "is to provide, as an attach-

ment for use with coin-operated vending-machines generally, a device through which the coin for paying the purchase price of the article to be delivered, and for rendering the machine operative to produce the delivery, must be passed in view and shall remain in view until the machine has been operated one or more times by another inserted coin or other such coins. \* \* \* When the machine \* \* \* is adapted to vend two or more articles, \* \* \* the arrangement of the detector is such as to permit the coin or token last inserted previous to operating the machine to occupy a higher plane in its chute in the detector than the uppermost coin in the other detector chute or chutes, thereby to make it indisputably clear which of the array of coins or tokens was last inserted, so that the fraud, if any occurs, may be fastened with certainty upon the guilty person." The testimony of experts was not needed to show that the detector would perform its functions without regard to the character of the machine below its outlet. It is doubtless true that the detector would be more efficacious if an attendant were constantly beside it; but, without an attendant, the fact that the coin, instead of being dropped directly within the opaque case of the machine, remains in view during several subsequent operations, to reproach the cheat and expose him to the owner or other customers, would tend to act in some degree as a deterrent. And the facts that the inventor put the price beyond the willingness of good users to pay, that he assigned his invention to an evil user, and that appellant's suit is prosecuted with the ulterior aim of aiding the evil user, his sole licensee, go to the standing of appellant in equity, not to the legality of the grant. Colt's revolver is not in fault whether it comes to the hand of a policeman or a burglar.

The second defense amounts to this: The holder of a legal patent, who refuses to use or permit others to use his device for good purposes, and who prostitutes his invention in practice, will be given no relief in equity, though on the facts shown he could successfully maintain an action at law against the infringer. As counsel states it: "The court wholly disapproves of the complainant suitor, and declines to aid him, though the patent still retains its life. With that, the court's decree does not attempt to meddle. \* \* \* There is ample chance ahead to efface the stain if the invention is really capable of worthy use and the patent owner seriously lends himself to accomplish the reform."

It seems clear that one who practices his invention in a noxious way only has no better standing in equity than one who declines to use the device for good purposes or to permit others to use it. And in *Hoe v. Knap* (C. C.) 27 Fed. 204, 212, there is a statement that "under a patent which gives a patentee a monopoly, he is bound to use the patent himself, or allow others to use it on reasonable terms." But this doctrine has been vigorously denied, and rightly, we think, in subsequent cases. *Roller Mill Co. v. Coombs* (C. C.) 39 Fed. 803; *Campbell Printing Press & Mfg. Co. v. Manhattan R. Co.* (C. C.) 49 Fed. 935; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 294, 47 U. S. App. 146. An extract from the last cited case, quoted in *Bement v. National Harrow Co.*, 186 U. S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058, will sufficiently indicate the general attitude:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use, or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The dictum found in *Hoe v. Knap* (C. C.) 27 Fed. 204, is not supported by reason or authority."

So nonuse is not a defense in equity. Is misuse? Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular rights asserted in his suit. *Saddle Co. v. Troxel* (C. C.) 98 Fed. 620; *Folding Box Co. v. Robertson* (C. C.) 99 Fed. 985, and cases therein collated. A complainant asserts the validity of his patent (a question of law on the facts), and infringement by defendant (a question of law on the facts), and asks an injunction on account of continued and threatened trespasses (an equitable remedy to make up for the inadequacy of the legal). Though the defendant may not be able to deny the validity of the patent or the fact of infringement, he may defeat the application for an injunction if he can show that the complainant, in his dealings with or conduct towards the defendant in relation to the subject-matter of the litigation, has acted unfairly or oppressively, or has misled the defendant with respect to the validity of the patent or the fact of infringement, or if the complainant, to make his case, is compelled to bring forward and count upon his own wrong. But if the defendant can do no more than show that the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums. In the present case, there have been no dealings between the parties. Nothing has been done to mislead appellees. And appellant, to make his case, simply brings forward his patent and proves the continued and threatened infringement. Against this, appellees establish that appellant has been misusing the patented device. But how does this concern appellees more or differently than it does others? Equity will aid the owner of a lawful patent if he puts the device to good uses, but will deny relief if he puts it to bad uses? The "reform," for the lack of which appellees contend that appellant must be kept out of a court of equity for the present and until the reform is accomplished, is the reform of the man.

The conclusion follows from the foregoing premises that appellant is entitled to injunctive relief. But another consideration leads more strongly to the same result. The inventor's right to make, vend, and use his device does not come from the patent law; it is his natural right. The government's grant to the patentee and his assigns is the right to exclude others from practicing the invention. As Mr. Chief Justice Taney said in *Bloomer v. McQuewan*, 14 How. 539, 548,

14 L. Ed. 532: "The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented, without permission of the patentee. This is all he obtains by the patent." And on this basis rests the decision in *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115, that a state law which prohibits the use of a certain article, which is patented, is not in derogation of the inventor's grant under the patent law. That is, the state law operates wholly upon the inventor's natural right to the use of his property, and not at all upon the franchise which the patent grants, which consists altogether in the right to exclude. His right to use his property is destroyed, but his right to exclude others stands unimpaired. Now, if the complainant in a patent suit is seeking merely to enforce his right to exclude, according to the terms of the government's grant, an inquiry into what use (or lack of use) the inventor is making of his natural right would seem to be clearly collateral and irrelevant. And if the right to exclude is the substance of the grant, it is a legal right. And in determining legal rights, equity follows the law. And if a legal right is established beyond every defense, legal or equitable, available to the defendant or to the court on its own motion, equity must grant appropriate relief if there is no adequate remedy at law. Injunction, it is evident, is the only means equal to enforcing the right to exclude.

It is sometimes said that the granting of an injunction is a matter of discretion. But courts of equity may not exercise a mere arbitrary discretion. They must act within and according to definite and certain principles. The conscience of equity is not the conscience of the particular chancellor. But if the conscience of equity were the conscience of the individual chancellors of this court, who, for example, may think that the public sentiment against the liquor traffic would be vindicated by denying the writ of injunction to an habitual drunkard whose property by repeated trespasses was being illegally confiscated, the appeal made in this case to deny the writ of injunction, on the ground that its issuance would aid crime and abet practices universally denounced, exhibits a misapprehension of the scope of this litigation. It is obvious that a denial of the writ would leave the defendants and all others perfectly free, so far as the power of this court is concerned, to follow the practices that are repugnant to the individual chancellors, while the maintenance of the complainant's right to exclude the defendants and all others would, to the extent that the patented device might otherwise be used by them to promote gambling, be a vindication of the public sentiment against gambling. It is equally obvious that, however the court may act upon complainant's asserted right to exclude, neither the grant nor the denial of the writ of injunction would operate upon complainant's practices or habits (which he did not acquire from the patent laws), and that the gambler, like the drunkard, is amenable to the municipal authorities alone for violations of the municipal law.

GROSSCUP, Circuit Judge (dissenting). Gambling and gambling devices are condemned by the laws of every state and territory, except perhaps New Mexico. Upon this it can be safely predicated that the

conscience of the people of the state in which this court sits; of the people of the three states that constitute this circuit; indeed, of the people of every state and territory, except a little territory bordering on Mexico, condemns the practice of gambling. Gambling and gambling devices are condemned, also, by the enactments of congress, in the statutes forbidding the use of the mails in aid of lotteries and other gambling purposes. Thus the national conscience is seen to be outspoken against the practice. Nothing could be conceived more conclusively showing a general conscience, and a general conception of policy. Unless a moral sense, thus widespread and unanimous, may be accepted as the conscience, not simply of the chancellor, but the judicial conscience, I am at a loss to know where to look for any authority for judicial conscience.

In the opinion from which I am compelled to dissent, it is assumed—and the record fully justifies the assumption—that the equities of the case under consideration should be determined as if the Mills Novelty Company were the complainant. The Mills Novelty Company has used the invention solely as an adjunct to a gambling machine. So far as the record discloses, its sole purpose for the future, is to use the invention in connection with gambling devices. The patentee shows no other purpose or practical use. The practical purpose of the writ of injunction asked for, therefore, is to aid them in their business of manufacturing and selling gambling machines; and such, and such alone, will be the practical effect of the writ when issued by this court.

In my judgment, on this state of facts, the writ should not be issued. But, because it is possible to apply the patent mechanically to a use not pernicious—though practically no such application is in mind—the majority of the court seem to think that the writ asked for cannot rightly be withheld. The majority are impressed with the cases that hold, that irrespective of whether the patentee actually uses his patent or not, the right to exclude others from its use is retained; and upon this postulate is based their judgment, that irrespective of the pernicious use of the patent by complainant, he may successfully invoke the aid of a court of equity to exclude others from its use. The majority hold that because the invention is mechanically capable of a moral use, there is created, at least technically, in the patentee, a valid property right,—a property right they feel themselves bound to protect, no matter what complainant is actually doing, or intends to do, with his invention.

I can assent to no such limitation upon the moral discretion of a court of equity. The bare existence of legal title does not leave the chancellor without discretion to issue, or withhold, his writ. Whence comes, it may be pertinently asked, the right to withhold the writ where complainant comes into court with a clear title, but without clean hands; or is guilty of laches; or bears in some other respect toward the party proceeded against an unconscionable attitude?

If a court may withhold the writ, though asked in aid of clear title, under one set of unconscionable circumstances, why may it not under another? Why is not the power to control its writ in the instances named applicable to any other instance where expediency, public policy, or substantial consideration of morals and conscience, are



equally commanding? The chancellor, in my judgment, is master of his own writ, and though the claimant hold a legal title, is under no compulsion of law to issue the writ, so long as sound consideration of public morals and conscience forbid.

The majority of the court is misled, I fear, by the seeming analogy of the cases that hold that a patentee, though declining to use his invention, may forbid its use by others. Non-use and pernicious use must not be confounded. The inventor who declines to put his patent into use occupies toward society an attitude entirely distinct from the inventor who is using his invention in a way that injuriously affects society. I am not sure that an inventor is not bound either to use his invention, or permit others to use it. The Supreme Court has not yet passed upon that question. But however that may be, the doctrine cannot be invoked in aid of a pernicious use. Non-use is not, in itself, pernicious, and inflicts no moral injury on society. At most, it is the withholding only of what society, but for the invention, would possibly never have had. But pernicious use is something different. It does not deny simply to society the present benefit of an invention—it visits upon society an affirmative moral harm. Pernicious use injures where non-use only withholds; wounds, where non-use only declines to help.

It may be doubted if complainant comes into equity with clean hands, even under the limitation that unclean hands is not a disability to be extended to any misconduct unconnected with the matter in litigation, or with anything with which the opposite party has no concern. A patent is not a private contract, nor a transaction between private individuals. It is a contract between the patentee and the public; and to every suit brought to enforce the patent, the public is beneficially a party. How a patentee has used his contract right, and how he intends to use it in the future, is a matter not unconnected with the public's interest in the litigation, and comes, therefore, to be a pertinent inquiry when an enforcement of his contract rights is asked for.

I would not, in the case under consideration, have the court, upon the facts presented, pass upon the validity or invalidity of the patent. The court should stand aloof from the whole transaction, not because the pernicious use is a defense that lies in appellee's mouth, but because it is a consideration the public may interpose, and because to issue the writ under such circumstances, would be to pollute the writ itself. The issuance of the writ, upon the case presented, will involve the court as an abettor in practices universally denounced and legislated against as harmful to the public morals. It will be an injunction in aid of crime. When the patentee comes into court with some conscionable use for his invention, or even with a non-use divorced from unconscionable use, it will be time to consider his claim for a writ; until that time, he should be shown the chancellor's back.

The decree is reversed, with the direction to enter a decree in appellant's favor for an injunction and an accounting.

**DIAMOND DRILL & MACHINE CO. v. KELLY BROS. (No. 1)**

(Circuit Court, E. D. Pennsylvania. December 27, 1902.)

No. 49.

**1. PATENTS—CONSTRUCTION OF CLAIMS—EFFECT OF AMENDMENT IN PATENT OFFICE.**

The scope of the claims of a patent is not restricted by verbal changes made to meet objections of the patent office that the claims did not clearly define the construction intended, and without abandoning any of the essential features claimed for the invention and described in the specification.

**2. SAME—ANTICIPATION—PRIOR PATENT AS EVIDENCE.**

Where the question is one of anticipation, the date when the alleged anticipating patent was issued controls, and the defendant cannot be permitted to show that the invention described in the prior patent was made prior to the date of such patent. That is admissible only where the issue is who was the original and first inventor, which is entirely different. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68, followed. *Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co.*, 60 Fed. 605, 9 C. C. A. 154, distinguished.

**3. SAME—SUIT IN EQUITY FOR INFRINGEMENT—OBJECTION TO EVIDENCE.**

In a suit in equity for infringement of a patent, the question of the relevancy as well as the legal effect of evidence is necessarily reserved until the final hearing, and the failure to object to its introduction does not preclude an objection to its relevancy on the hearing.

**4. SAME—INFRINGEMENT—BELT FASTENING.**

The Jackson patent, No. 433,791, for a coil clasp for fastening belts, etc., claim 7, construed, and held not anticipated, valid, and infringing.

In Equity. Suit for infringement of letters patent No. 433,791, for a coil clasp, granted August 5, 1890, to Calvin Jackson. On final hearing.

Wm. C. Strawbridge, for complainant.

Horace Pettit, for respondents.

ARCHBALD, District Judge.\* The patent in suit was issued to Calvin Jackson, August 5, 1890, for a coil clasp; the object of the invention being declared to be "to provide a simple, cheap, and efficient clasp for mail bags, boots and shoes, gloves, trunks, valises and traveling bags, grain bags, corsets, belts, and for similar uses." Its application to machine belts is that which has proved most general and effective, and is the one with which we have to deal in the present case. Stated in broad terms, as it appears in the specifications, the clasp consists in two spiral coils of wire, screwed into equidistant holes in the opposite ends of the material to be united; the coils being then brought together until they intermesh, and a pin run through the interlocking spaces to fasten them. Right and left hand coils are spoken of in some of the claims, and, according to the specifications, are preferably to be used, but the inventor expressly declares that he does not limit himself to them. He also says that "the coils, after being fastened, may, if desired, be pressed into various shapes, so that a cross-section \* \* \* would show an oval, oblong, or other form, as may be required."

\* Specially assigned from Middle District.

The seventh claim, which is the one particularly relied upon, is as follows:

"The combination with the belt, bag, or other article having ends or edges to be connected, said edges each having a row of apertures, of individual spiral coils, extending through said apertures, whereby strips are formed within each coil, and a rod to be passed through and removed from the space formed by the overlapping portions of the said coils, substantially as set forth."

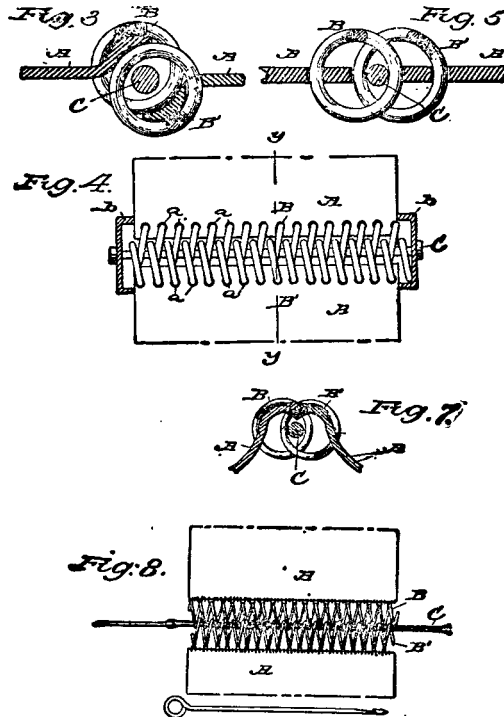
The defendants are manufacturing machine belt clasps composed of spiral coils that intermesh and are fastened with an interlocking pin, apparently infringing on this claim. The fact that the spirals used are not rights and lefts is immaterial, nothing being said upon that subject in this claim, however it may be in others; and, even if it were, it is a question whether, in view of what is said in the specifications, any of them would be so limited. Neither are the defendants' coils to be distinguished because, after being inserted in the belt ends, they are flattened down; the inventor, as we have just seen, expressly declaring that the coils, after having been set, may be pressed into various shapes. Equally futile is it to seek to confine the clasp to ladies' belts, excluding those used in machinery. "Belts," in broad terms, are spoken of; and there is nothing to suggest that only those worn by ladies were intended, except that corsets are mentioned in the same connection. But so are mail bags, grain bags, trunks, and valises. The word is sufficiently comprehensive to embrace belts of every character, ladies' belts, if any, being the most doubtful; it being difficult to see how an intermeshing double coil fastened with a pin could afford them anything either useful or ornamental.

But it is earnestly contended that, in order to infringe the particular claim relied upon, the two ends of the belt must extend into the coils far enough to make a complete closure, which is not the case in those manufactured by the defendants. The strips of which the claim speaks, it is argued, are not incidental, but for a purpose; that purpose being to effect a closing up of the two ends of the belt, as an essential part of the invention. Attention is called in this connection to the specifications, where it is stated:

"By having the holes \* \* \* a proper distance from the edges, \* \* \* a strip of leather or other fabric will be formed within each coil. These strips are very important, as they make the clasp tight, so that, when applied to a bag or other receptacle, a complete closure may be effected."

But that is not all that is said upon the subject. With regard to these strips, the inventor, as the specifications and drawings plainly show, had three possible constructions in mind. "In some cases," he declares in a previous paragraph, "I allow the edge of the belt or other material to which the clasp is applied to project some distance into the spiral, so that it may overlap the adjoining spiral when the clasp is united, as shown in Fig. 3. In other cases I allow the adjoining edges of the leather or fabric to lie in the same plane, as shown in Fig. 5, when the connecting wire \* \* \* will also be inserted in the two spirals, so as to lie in the same plane with the leather or fabric united." Later on, where the strips are declared to be of importance in effecting a complete closure, reference is made

to Fig. 7 as particularly displaying this construction; and while, in the same connection, there is again a reference to Fig. 3, there is no such reference to Fig. 5,—a discrimination which is significant. In addition to this, in Fig. 4 we actually have an open construction exhibited. These figures are as follows, and explain themselves:



Furthermore in the sixth claim there is an express provision that the space between the coils shall be "practically closed, and a tight joint formed," which shows that, when the inventor intended to adopt that feature, he said so; and, inasmuch as there is no difference except this between the sixth and seventh claims, if the construction which is contended for is imposed upon the latter we shall have the one duplicating the other, which is to be avoided if it can be. While, then, it is, no doubt, true that strips formed within each coil are an essential feature of the claim in suit, so that there would be no infringement where they did not exist, yet that the strips must be wide enough to meet and close the joint is not stated, and cannot be made a part of the claim without reading into it what is not there. A sufficient purpose for them may be found in the fact that they tend to prevent the coils from tearing out; but, even without attempting to assign any such particular object, there is nothing incomplete or ambiguous in the claim as it stands, requiring us to go into the specifications to make it clear. I by no means concede that, if we did, we should be compelled to adopt the construction contended

for by the defendants; and, on the contrary, I think we should not, as I have endeavored to show. But the claim is satisfied if strips are formed within the coils, whatever be their width, and that is all we need to know.

Neither is this result disturbed by the course of the application through the patent office. To make that of any concern, it must appear that the claim was narrowed to its present form in response to objections made by the examiner. In the first application presented by the inventor, the claims were all very broadly, if not indefinitely, stated, and were rejected on the strength of the Pickhardt belting (1882) and the Walker belt fastener (1869). The applicant amended, and, in the accompanying argument, suggested that the Pickhardt was a wire fabric, and so not relevant, and that in the Walker the belt fastening was simply a hinge,—a fair criticism, and, to a certain extent, apparently convincing, as they were not brought up afterwards. But the invention was a second time rejected; the fourth claim, which is said to be a rudimentary form of the present seventh, being declared to present no tangible or merchantable article; and that, as well as the others, being held to be anticipated by the Schpakowsky belting (1873). Thereupon they were all again remodeled into what is practically their present form, the specifications being also amended by the insertion of the paragraph which is the subject of controversy. The Schpakowsky was differentiated in several ways in the accompanying argument; it being declared, among other things, that the strips within the coils effectually closed the mouth of the bag (the only article mentioned), as shown by the accompanying exhibits. This resulted first in an allowance by the examiner, and then a withdrawal and rejection on a newly discovered reference,—the Rowat (English) belting (1872). An argument against this reference followed, and a reply by the examiner, criticising all the claims except the second, and stating with regard to the sixth and seventh that the words "strips," there used, failed "to clearly define the construction referred to." Some slight verbal changes were then made, and after a personal interview with the examiner the application went through. From this review of the record, it cannot be successfully maintained that the reference to the strips formed within the coils in the seventh claim was inserted to distinguish it from the other alleged anticipating inventions on which it had been rejected, nor yet to overcome any particular objection raised by the office. All that can be said was that it was accepted and passed in its present form after the arguments and emendations which we find. Assuming, as suggested, that the fourth claim in the second application was the original of the present seventh, the specific objection to it was that it did not present anything tangible or merchantable, and it was to overcome this that it was recast into its present form. It is also true that it was met by the general objection, along with the other claims, that it was anticipated by the Schpakowsky; and it was at this juncture that the paragraph with reference to the effect in certain cases of the strips formed within the coils was inserted in the specifications. But side by side with this paragraph was the other, which was still allowed

to remain, in which the three different arrangements already alluded to were recognized, in one of which the edges project into the coil so as to lap over, in one of which they abut, and in the other simply lie in the same plane. There was no abandonment of this part of the specifications by the introduction of the other, and establishing, as it does, that the closed construction, while applicable in some cases, was not expected in all, it must be regarded as qualifying and limiting the other to that extent. No substantial amendment was called for after this; the examiner being apparently convinced that the references on which he had relied were not applicable, as they certainly were not. Even his suggestion that the word "strips," in the sixth and seventh claims, did not clearly define the construction intended, was not insisted upon. There were a few verbal changes, and that was all. I fail to see that in any of this the applicant was required to do more than define and clear up his claims, reducing them from their original vagueness to something specific and definite, without abandoning the essential features which are now contended for. As is well said in *Société Anonyme Usine J. Cleret v. Rehffuss* (C. C.) 75 Fed. 657: "An estoppel is not to be implied from circumstances of doubtful import;" and that, as it seems to me, is the most that we have here. Unquestionably, the applicant is held to the effect of changes on the strength of which he gets his patent, but this cannot be predicated of a mere restatement or remodeling of the claims, without any material recession.

On the question of anticipation, it must be conceded that it was not new to intermesh opposing coils, and fasten them with a pin inserted in the interlocking spaces, nor yet to run a spiral coil through a row of apertures, and it did not need the numerous references introduced by the defendants to prove this. But that is not all with which we have to deal. The plaintiffs claim a combination of these particular features to produce a new and useful result in the way of a belt fastener, and, unless they appear to have been already so appropriated or applied, they constitute a patentable invention. Many of the references relied on may be disposed of with a word. The *Mosman* (1869) has to do with a new method of inserting wire coil around the edges of lamp deflectors; the *Garland* (1883) is for a bag-sewing machine; the *Keep* (1886), for a pen rack; the *Webster* (1886), for an overedge sewing machine; and the *Lindley* (May, 1889), for a julep strainer. It is difficult to see the value of either of these for the purposes of this case. The only possible relevancy of the *Garland* and the *Webster* is that each employs spiral needles, which coil their way through the material to be sewed together, while the *Mosman*, the *Keep*, and the *Lindley* simply show what has already been conceded,—that it was not new to run a coil of wire through a line of holes. Furthermore, the *Lindley* is later than the patent in suit, and so entirely immaterial; being in this respect like the *Sherman* belt fastener, also referred to, which, although granted in December, 1889, on an application in September of the same year, is subsequent, as an anticipation, to the present patent, which was applied for in April, 1889, although not granted until August of the next year. The same is also true of the *Maier* bed-spring fast-

ener, patented May 13, 1890, of which much is made, and which may as well be disposed of in this connection. Aside from its date, it is not an anticipation, in my judgment; simply making use, as it does, for quite a different purpose, of interlocking coils fastened with a pin. But however that may be, its date is against it here. Where the question is one of anticipation, the date when the alleged anticipating patent was granted is what controls. This was decided in *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68, where, speaking to this question, it is said:

"Neither the defendant in an action at law, nor a respondent in an equity suit, can be permitted to prove that the invention described in the prior patent \* \* \* was made prior to the date of such patent, \* \* \* for the reason that the patent \* \* \* can only have the effect as evidence that is given to the same by the act of congress."

In this respect it is put by the statute on the same footing as a printed publication disclosing the invention, which cannot be known until it has been given to the public by being issued. It is true that the defendant in such a suit may plead and show, as the statute provides, that the patentee was not "the original and first inventor or discoverer of any material and substantial part of the thing patented"; and it is also true that the answer in the present instance sets up this defense, as well as all the others which the statute allows, alleging that the invention was known to and used by each of the patentees named in the several patents cited as anticipations, and was in public use and on sale by each of them more than two years prior thereto. Wholesale pleading of this kind does not commend itself, although it may not be unusual; but, entirely aside from that, it does not control the issues made by the proofs. The defense that the patent has been anticipated is one thing, and that the patentee was not the original inventor is quite another, and the proofs bearing on each are equally separate and distinct. In the present instance, as between the Maier patent and the one in suit, we have, at most, the same principle applied to different subjects,—a bed spring and a belt fastener. It may be that the one which was patented first would be held to anticipate the other, although, as I have indicated, that is not my view; but it could not be said that either patentee, as against the other, was or was not the first inventor. In accordance with this, not one word has been offered to show that Maier was the original discoverer of this belt clasp, any more than that he or any one else ever made any prior use of it; and, whatever be the allegations of the answer, that is not what is really contended for. He patented one device, and Jackson another, and each, so far as the other was concerned, was first in his own line. The only question raised is whether Maier's patent, assuming that it would negative the novelty of the Jackson, was prior in date of issue. It is clear that it was not, and that is the end of it. The case of *Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co.*, 9 C. C. A. 154, 60 Fed. 605, is not at variance with this view, because the issue there was who was the real inventor of the very invention in suit, which is entirely different. It is urged that no objection was made when the Maier file wrapper was offered, and that none, in

consequence, can be made to it at this time. But in equity the relevancy, as well as the legal effect, of the proofs, is necessarily reserved until the final hearing, and the failure to oppose its introduction does not, therefore, preclude an objection now.

The other references given are the Walker (1869), the Rowat (British, 1872), the Schpakowsky (1873), the Du Bois (1873), and the Fontneau (1884). These do not need to engage us much longer than the others. The Walker is for an improved belt joint, consisting of thin metal plates set opposite each other on either side of the belt ends to be united, and fastened by rivets or screws. This is advanced by the inventor as an improvement on what he calls the "ordinary hinge joint," a modification of which he illustrates in his first figure. By mistake the construction presented in this figure seems to have been taken as the invention itself, both by counsel and experts, led on by the patent examiner; and a display model of it has accordingly been exhibited as part of the proofs. But neither this figure, nor the patent itself, is an anticipation. There is no approach in either to the one in suit; the only resemblance in the hinge-joint figure being that the hinges which make up the joint are fastened like the leaves of any other hinge,—by a pin run through their loops or eyes. The Rowat is for an improved flexible metallic web for "conveying or carrying materials, or for window shutters, or other similar purposes"; its ability to be used for belts being also recognized. It is made up of sets of spiral coils of wire, flattened and intermeshed, and then fastened with a pin. While it is true that each set of spirals is interlocked with the next, similarly to the belt clasp in suit, yet there is such a wide difference in the result aimed at and attained in the two cases that they must be regarded as entirely separate and distinct. The most that can be charged is that the means employed in the present clasp is the same, in a general way, as that by which the structure of the web is made up, but that the one in any sense suggests or anticipates the other cannot be maintained. The Schpakowsky is almost identical with the Rowat, and the same may be said of it. Both are utterly impracticable devices for belting, as the complainants' experiments abundantly prove; and neither of them avails as a reference against the patent in suit, as the patent examiner, although at first relying on them, was led to conclude. The Du Bois is for an improvement in tools to effect the lacing of belts. This lacing the inventor declares is preferably to be accomplished by the use of metal wire, to be run through holes in the belt, and the invention consists in a machine to hold the ends of the belt while this is being done. By the means suggested, the belt is virtually sewed together, wire being used instead of a thread or thong. The resemblance in this to anything which we have here is of the remotest kind. It might just as well be argued that the thongs or lacing by which belts have heretofore been fastened were an anticipation, as that this was. The Fontneau is the only one left. It is for a tubular metal fabric, supposed to be suitable for bracelets and other jewelry. It seems to have been brought forward simply because, like some of the other things referred to, it is made up of intermeshed spiral coils fastened with a pin. As al-



ready stated, the general construction employed in it is admittedly not new, but its application in a new way to new and useful purposes is not thereby prohibited. The two arts, as well as the two instances, are distinct, and it is only by a strained comparison that they can be brought together. There is nothing in it, or in any of the other patents referred to, which amounts to an anticipation, and the patent must therefore be sustained.

Let a decree be drawn in the usual form in favor of the plaintiffs, referring the case to a master to take an account.

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DIAMOND DRILL & MACHINE CO. v. KELLY BROS. (No. 2.)

(Circuit Court, E. D. Pennsylvania. January 6, 1903.)

No. 7.

1. PATENTS—INVENTION.

A literal mechanical correspondence is not necessarily an anticipation. The principles of mechanics are always the same, and, in the almost endless combinations of them possible, it is not to be expected that duplications will not occur. Where they appear, the question is whether the new use is so closely analogous as to have been presumably brought about by what had preceded it, or is so remote and different that the result cannot be ascribed to mere suggestion. Stated in another form, it may be said that, while the mere mechanical adaptation of an old device to an analogous use is not invention, a new application in a different one whereby a new and distinct result is produced, will be.

2. SAME—CLAIMS—CONSTRUCTION.

In a patent for a machine for making and inserting wire-coil clasp fasteners for belt ends, the words, "in a wire-coil machine, substantially as described," found in a claim, carry nothing into the claim which is not specifically enumerated there, either for the purpose of narrowing it to avoid anticipation, or broadening it to make out infringement.

3. SAME—IDEA NOT PATENTABLE—INFRINGEMENT—EQUIVALENTS.

An idea is not patentable, but only the particular mechanical combination for bringing it about. This includes all substantial equivalents, but not every other method imaginable. There must be some reasonable correspondence, not only in the function performed, but in the way by which it is done, to establish an equivalency. A mere similarity in result is not enough.

4. SAME—INFRINGEMENT—MACHINE FOR MAKING AND INSERTING WIRE COILS.

The Jackson patent, No. 482,965, claim 2, for a machine for making and inserting wire coils as fastenings for belts, etc., construed, and held not anticipated, and valid, but not infringed.

In Equity. Suit for infringement of letters patent No. 482,965, granted September 20, 1892, to Calvin Jackson, for a method of, and apparatus for, coiling and inserting wire. On final hearing.

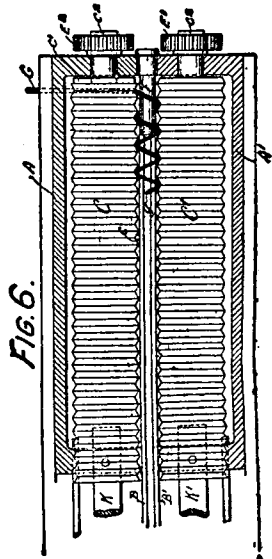
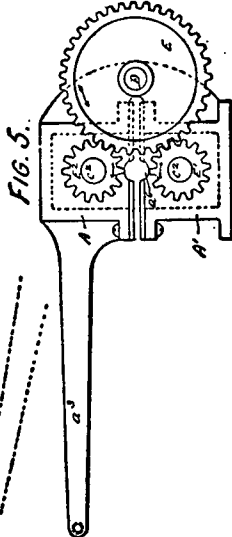
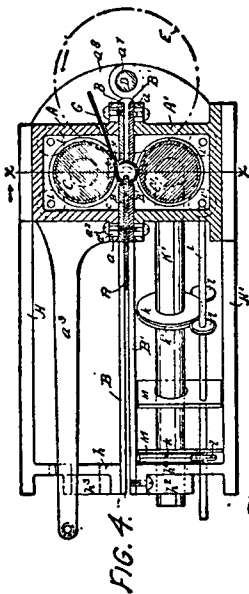
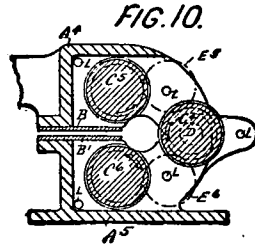
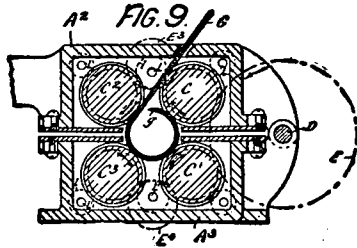
Wm. C. Strawbridge, for complainant.

Horace Pettit, for respondents.

ARCHBALD, District Judge.\* In a suit between the same parties, just decided (120 Fed. 282), the patent of Calvin Jackson for a coil clasp belt fastener has been sustained. The present proceedings have to do with a machine for making and inserting such coils, patented by the same party September 20, 1892 (No. 482,965). As de-

\* Specially assigned.

scribed by the inventor, the machine consists, in substance, of two or more peripherally grooved rollers, journaled in a frame made up of a fixed and a movable part, hinged together; the rollers being simultaneously rotated by means of intermeshing gears, and being so located with reference to each other and the frame in which they are set as to form an intermediate space, in which the coil is operated. There are one or two modified forms of this, but none that we need to notice. It is essential to the efficient working of the machine that the upper half of the frame should be capable of being lifted away from the lower,—this being necessary to regulate the size of the coils to be formed, to allow the fabric in which a coil is to be inserted to be laid in place, and to adjust the clamping plates to different thicknesses of material and sizes of coils, so that pressure may be brought at the same time upon both; and, in order to keep the rolls in gear while this is being done, an intermediate gear-wheel is provided, which is pivoted at the hinging point of the two frames. Different forms of the machine are shown in section in the following diagrams:



To form a coil, the end of the wire out of which it is to be made is given one or more turns around a proper-size mandrel placed between the rollers, and, being forced forward by their pressure and rotary motion, is made to coil its way in a spiral track between the successive grooves of the upper and lower rollers; these grooves being set a little in advance of each other, according to the pitch of the spiral desired. Where the coil is to be inserted into other material, such as a belt or bag, the upper frame is raised on the hinge, and the fabric laid in between clamping plates, which hold it in place, when the frame is lowered; and, the edge of the fabric being made to extend into the space between the rollers in which the coil revolves, the coil is forced through it by their motion. According to the suggestion of the inventor, the coil may be made and inserted at one and the same time, or the two operations may proceed separately. The defendants are manufacturing a machine for inserting wire coils (but not making them), made up of similarly placed and similarly operating rollers geared together; but they deny that they have infringed the plaintiff's patent, and they further contend that it is void for want of novelty. The particular features of the patent which are drawn in controversy are embodied in the second claim, which is as follows:

"(2) In a wire-coil machine, substantially as described, the combination with one or more rollers supported in a fixed frame, of one or more similar rollers supported in a movable frame pivoted to the fixed frame, said rollers being geared with a gear-wheel, having its center at said pivotal point, substantially as set forth."

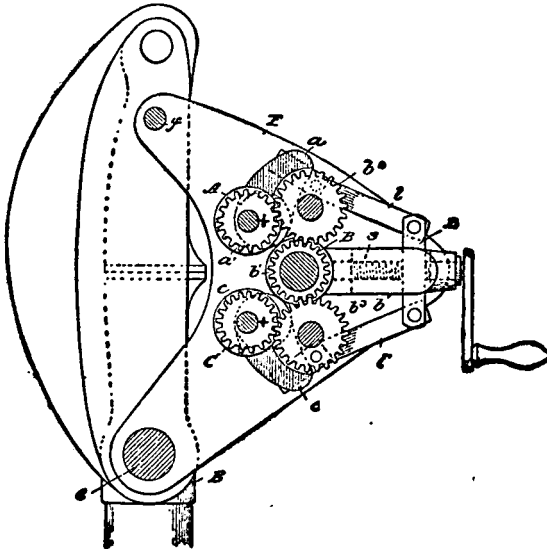
Taking up first the question of anticipation, some of the references are remote and inconsequent, and none of them is convincing. The Mosman (1869) is a tool for putting a coil around the edge of a lamp deflector, which is all that need be said of it. The Garland (1886) is a bag-sewing machine, in which the thread is carried by a tapering spiral needle, rotating between three grooved conical rollers, the lower two of which are set in a fixed frame, and the upper one in a movable frame, pivoted to it; all being tapered oppositely to the needle. If literalness be adhered to, points of similarity can be found between this and the patent in suit. Objection is made on the one hand that the coil tapers, and on the other it has been shown by experiments and exhibits that a tapering coil can be made to serve as a belt fastener, the same as one that is not, however awkwardly. We are little concerned with either contention. The purpose as well as the operation of the two machines is radically different. The Garland could not make a coil, nor yet insert one; and while the needle which it employs might, perhaps, be twisted into the edge of the material to be sewed, and left there, even if this were capable of producing any serviceable result, it would be something imposed upon the invention which is not to be found in it. In addition to this, the rollers do not intermesh with an intermediate gear-wheel, pivoted at the hinging point of the two frames,—an important feature, as we have seen, of the patent in suit, by which is preserved the operative relation of the rolls as adjusted to meet different thicknesses of material and sizes of coil. The Webster (1886) is an overedge sewing machine, somewhat similar in construction and action to the

**Garland.** A spiral needle is used, and it is rotated between grooved rollers, only that all are cylindrical, instead of tapering. The needle revolves, but does not advance; the material to be sewed being drawn forward upon it, and the thread carried through it in that manner. It may be said of this, as of the Garland, that it was not intended and is not adapted to do the work of the patent in suit, and could not be made to do so without radical reconstructive changes. In this case, also, there is no intermediate gear-wheel pivoted at the hinging point of separable frames, the materiality of which has been indicated. The Farnum (1888) is an intricate and ponderous machine for making heavy spiral steel springs for use on cars and locomotives. This, of itself, is almost enough to deprive it of any relevancy. But the defendants, by a cross-section at one end, are able to disclose two rollers geared with an intermediate gear-wheel, located at a point where the frames which carry the rollers may be said to be hinged or pivoted; the effect of this being to keep the rollers in gear during the slight adjusting motion which is capable of being given them. But a literal mechanical correspondence such as this is not necessarily an anticipation. The principles of mechanics are always the same, and, in the almost endless combinations of them which are possible, it is not to be expected that duplications will not occur. Where they appear, the question, as I understand it, is whether the new use is so closely analogous as to have been presumably brought about by what had preceded it, or whether it is so remote and different that the result cannot be ascribed to mere suggestion. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. Stated in another form, it may be said that the mere mechanical adaptation of an old device to an analogous use is not invention, while a new application in a different art, whereby a new and distinct result is produced, will be. In the present instance the similarity is incidental and unsuggestive. The two arts are only remotely related, all that can be said of them being that both have to do with the making of spiral coils. The Farnum is involved and powerful, designed solely for the manufacture of heavy car springs, and not in the least degree capable of forming a wire coil such as is made by the plaintiffs,—much less, of inserting it in the end of a belt or bag. It may be safely said that, if the alleged anticipating parts were removed from it, it would take something more than mere mechanical adaptation to evolve a wire-coil machine out of them, and that only by a strained construction can they be regarded as suggesting the device in suit. The *Entrekin* (1885) has given me more difficulty. Here we obviously have two rolls set, the one in a fixed and the other in a movable frame, hinged together; both being geared with an intermediate gear-wheel, pivoted at the hinging point. This, in terms, corresponds with the claim before us, and the only distinction that can be made is the art in which the two appear,—the *Entrekin* being a photograph burnisher; the other, a wire-coil machine. With not a little hesitation, I conclude that this is sufficient to differentiate them and sustain the novelty of the one in suit. You cannot say of it that it is simply a mechanical adaptation of the earlier invention, something more than that being required to make out of it the opera-

tive device which we have here. It may be a question whether the claim is not broader than it ought to be, and it must be confessed that it would be much easier to sustain it if it embodied some of the other features which were referred to at the opening of this opinion, and which enter, as it seems to me, into the real invention, such as the peripheral grooves of the rollers, or the intermediate space between them and the clamping plates in which the coil is formed. But taking the claim as it stands, I am not prepared to say that it is insufficient; being saved by the use, which is entirely novel, and unsuggested by this reference.

Finding no anticipation, therefore, in the prior art, the case turns on the question of infringement. With regard to this, it is to be observed that the words "in a wire-coil machine, substantially as described," which are found in the claim relied upon, carry nothing into it which is not specifically enumerated there, either for the purpose of narrowing it to avoid anticipation, or broadening it to make out infringement. *McCarty v. Railroad Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358; *Frederick R. Stearns & Co. v. Russell*, 29 C. C. A. 121, 85 Fed. 218. The defendants do not infringe, therefore, simply because they manufacture a wire-coil machine which operates in a general way like that of the complainants. It must appear that they employ in that connection the particular features of the claim in controversy, or a substantial equivalent. An examination of their machine discloses that it is made up of two separable frames,—a fixed upright one, in which are the jaws that hold the fabric while the coil is being inserted, and a movable one, hinged to it, in which the mechanism to effect the inserting is carried bodily.

This mechanism consists of three grooved rollers, geared together by two intermediate idlers; the idlers and the middle or rear roller being journaled in the sides of the movable frame, and the other two



rollers being journaled eccentrically in two small circular frames set in the same. By this construction the upper and lower rollers are able to be swung to and from each other and the third roller, so that the space between them may be adjusted to coils of different sizes. This motion, which is but slight, is effected by means of links or arms attached to the circular frames in which the rolls are set, and connected with a nut turning on a threaded shaft worked with a crank. These arms, being operated in this way, turn the circular frames on themselves, and thereby swing the rollers, eccentrically set in them, back and forth in the arc of a circle; this arc in each case being practically the same as would be described if each roller swung on the center of the adjoining idler, as a pivot. It is contended that this is the equivalent of that which appears in the claim in controversy, but of this I am not persuaded. As an essential feature of the claim, the inventor has tied himself to a train of gears, the intermediate and controlling one of which is pivoted at the hinging point of the movable with the fixed frame. Assuming, for the sake of argument, that the circular frames in which the upper and lower rolls are set are movable, within the terms of the patent, each is pivoted on its own center, at which, in order to infringe, we should have to have a concentric intermediate gear-wheel connecting the three rolls. It is obvious that this construction is not to be found in the defendants' machine. The most that can be charged is that, when the frames are rotated in the process of adjusting the rolls, each roll in the course of that adjustment is made to swing in the arc of a circle, the center of which is the pivot of the adjoining idler. It may, perhaps, be said that the rolls are severally pivoted at these two points, and at each, of course, we have one of a connecting train of gears; but the patent calls for one pivotal center, and not two, and this must be the pivotal or hinging point of the frames, and not of the rolls, as here. No doubt, by the ingenious mechanism which they have adopted, the defendants accomplish a somewhat equivalent result; but to that they are entitled, provided they effect it by practically different means. It is not the idea that is patented, but the particular mechanical combination devised for bringing it about. This includes, of course, all substantial equivalents, but not every other method imaginable. There must be some reasonable correspondence between the two, not only in the function performed, but in the way by which it is done, which cannot be said of the defendants' machine. In the present instance the only similarity is in the result, and that is not enough.

Let a decree be drawn dismissing the bill on the ground of non-infringement, with costs.

### On Application for a Rehearing.

(January 24, 1903.)

It is, no doubt, true, as suggested in the application by the plaintiffs for a rehearing, that the defendants do not escape infringement by a double construction, each half of which is imitative of the plaintiffs' invention; nor did I miss that part of their contention. It may be that I did not make it as clear as I should, but what I intended

to maintain was that, while the defendants accomplished the same result as the plaintiffs, they did it by a mechanism which was inherently different. They have rolls, and the rolls are set in frames, as they had to be; and there is a fixed frame, as well as a movable one. To that extent there is an apparent correspondence, but it is one of terms, merely; the essential thing of the plaintiffs' patent, that the frames pivot at the center of the connecting gear-wheel, being wholly absent. The truth is that the only movable frame, within the meaning of the patent in the defendants' machine, is the one which carries all the rolls bodily, and is hinged, entirely independent of them, to the upright form in which the jaws are. The small circular frames set in the sides of the main movable frame revolve on their own peripheries, and, in that sense, may be said to move; but they do not move to or from each other to accomplish the adjustment of the rolls and clamping jaws to the different thicknesses of material and sizes of coils, as in the plaintiffs' patent, and therefore they do not move in the sense that is there intended. The adjustment of the rolls is in fact accomplished by means of the eccentricity of the journals of the rolls with the circular frames that carry them, when the latter are rotated by the arms or links attached to them; the rolls being carried to or from each other. That they move in the arc of a circle somewhat coincident with that which has its center at the pivot of the adjoining idler is a mere happen-so. No doubt, they are kept in mesh while this is being done, but not because or by means of it, but, as you might say, notwithstanding it, for, if the arcs were a little longer, they would go out of mesh entirely. In securing the motion of the rolls by means of their eccentric setting, the defendants, therefore, employ a distinct mechanism, not found, in terms or in principle, in the plaintiffs' patent, and in no sense a mechanical equivalent of it, and do not, therefore, infringe. It is to be remembered, also, that in the plaintiffs' patent it is the frames that are hinged at the pivotal center of the intermediate gear-wheel, whereas in the defendants' machine it is the rolls that move about the alleged corresponding pivotal center, and not the frames,—a material distinction.

The so-called admission of the defendants' expert is not counter to anything which I have expressed. His statement is a very qualified one, and the qualification robs it of any benefit to the plaintiffs; and, even if it went further than it does, I would not feel myself necessarily bound by it.

The motion for a rehearing is refused.

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DIAMOND DRILL & MACHINE CO. v. KELLY BROS. (No. 3.)

(Circuit Court, E. D. Pennsylvania. January 24, 1903.)

No. 50.

1. PATENTS—COMBINATION—PATENTABLE INVENTION.

Where, in a machine for inserting wire-coil clasps in belt ends, the result to be attained is the successful insertion of the coil in the belt, that the different parts of the machine contribute to this each in its own time and way constitutes a true combination, which is patentable.

**2. SAME—EVIDENCE AS TO WHO WAS ORIGINAL INVENTOR—OLD MACHINE.**

Where, in a wire-coil machine, the invention claimed is separately operating jaws and rolls, an old operative machine, in which this arrangement appears, constructed by another party some three years earlier, according to the testimony of several who saw and examined it, is sufficiently substantiated to be received as an anticipation.

**3. SAME—ANTICIPATION—MACHINE FOR MAKING AND INSERTING WIRE COILS.**

The Templin patent, No. 593,406, for an improvement in wire-coil machines, whereby the clamping-jaws and coil-rolls are operated independently of each other, while disclosing a patentable device, is void for anticipation by a machine previously constructed by Henry M. Jackson, which embodied the essential and patentable feature of the improvement shown in such patent.

In Equity. Suit for infringement of letters patent No. 593,406, granted November 9, 1897, to Joseph H. Templin, for a wire-coil machine. On final hearing.

W. C. Strawbridge, for plaintiff.

Horace Pettit, for defendants.

ARCHBALD, District Judge.\* This suit is based on the patent issued to Joseph H. Templin November 9, 1897 (No. 593,406), for an improvement in wire-coil machines, whereby the clamping-jaws and coil-rolls are operated independently of each other. As decided in another case between the same parties (120 Fed. 289), the pioneer in this field was Calvin Jackson, who procured a patent for a wire-coil machine in September, 1892; but in his machine the fabric in which the coil was to be inserted was held in place by clamping plates carried in two separable frames, in which the upper and lower rolls were respectively set. To adjust these plates to different thicknesses of material and sizes of coils, liners had to be employed; and considerable difficulty was experienced in so doing this as to get just the right pressure at the same time on both coil and material; requiring different sizes of coils, and not a little care in selecting the size to be used. This is entirely obviated by having clamping-jaws and coil-rolls which are operated separately, each being thereby able to be independently adjusted; the clamping-jaws being also made to serve a further and important function of flattening down the coils upon the material after they have been inserted in it, where, as in the case of belt ends, this is desired. These features are embodied in the first claim of the patent, which is for:

"(1) A wire-coil machine having a series of rolls arranged to close upon and rotate an interposed wire-coil, clamping-jaws operating in connection therewith, and separate mechanism for independently opening and closing said rolls and jaws, substantially as set forth."

It is admitted by defendants' expert that this claim is generic in character, and includes any device in which a combination of rolls and clamping-jaws operating separately is to be found, and, as the defendants are manufacturing a machine of which this is true, there can be no question as to their having infringed upon it.

It is contended, however, that the claim sets forth a mere aggregation of parts old and well known, and reference is made to the Adt

\* Specially assigned.



(1876) and Gandy (1885) patents, where, as it is said, independent clamping-jaws, as well as adjustable and separately operating rolls, are to be found. These are not cited, as I understand it, to establish anticipation, but simply to show the well-known character of these particular parts. I shall not stop to consider whether they are effective for that purpose or not. It is sufficient to inquire, in response to the argument we are considering, whether the elements which we find in the claim in controversy form a true combination, amounting to a patentable device. It seems to me that they do. Having regard to the difficulties encountered in machines in which the rolls and clamping-jaws were operated in conjunction, already alluded to, it was a material advance, of marked usefulness, to escape from them by a mechanism whereby, as here, the two were operated separately. The result to be attained was the successful insertion of the coil in the belt end or other material, and to this the different parts of the machine contributed, each in its own time and way. This makes out a true combination, and that is all that needs to be said.

This brings us to the real question in the case, which is whether Templin, under whom the plaintiffs claim, was in fact the original and first inventor in a wire-coil machine, of independently operating jaws and rolls, or whether, as contended by the defendants, this distinction belongs to Henry M. Jackson, a brother of Calvin Jackson, already alluded to as the pioneer in this field. Each of these parties holds a patent; that to Templin having been issued, as stated above, on November 9, 1897, and that to Henry M. and G. M. Jackson, another brother, on November 30th of the same year. The one is three weeks after the other, but is based on an application which is five weeks earlier; the Jacksons having applied on March 31, 1897, and Templin not until May 4th following. Judged by the record, the later patent represents the earlier invention, and, to show it otherwise, the plaintiffs are therefore compelled to resort to further proof. To maintain their priority, they have accordingly introduced evidence which would carry the invention of Templin back to March or April, 1896, while, on the other hand, to overcome this, the defendants produce a machine alleged to have been constructed by Henry M. Jackson as early as March, 1893,—some three years previous. This old machine differs materially from that covered by the Henry M. and G. M. Jackson patent, and is not pretended to be the basis of it. But it has separately operating jaws and rolls, and, as that is the whole of the claim in suit (no particular form of mechanism being specified), it effectually anticipates the Templin patent, if sustained, and deprives the patentee of the right to claim that he was the original inventor of this idea. The case turns, therefore, on the view taken with regard to the evidence produced on the one side and the other upon this issue.

I am satisfied that Templin, when he sketched the rough drawings which have been exhibited, had at least a conception, and perhaps a working outline, of the features which are now found in the ponderous machine called the "Jumbo," afterwards completed according to his instructions, and eventually made the basis of the patent in suit. These drawings must have been as early as March or April, 1896,

for he went to the hospital in the latter month, and, before doing so, gave directions by which certain parts of the machine were started. It must be confessed, however, that the drawings are unintelligible to any one except the inventor, and are very crude and rudimentary, to be accepted as evidence of a definite and completed invention. He did not communicate his ideas to any one at the time, nor were his instructions such that they could be fully followed out in his absence, but admittedly had to await his return from the hospital, and even then very little progress was made with them for several months. According to his own statement, also, what he did was largely experimental; and the Jumbo, even after it was completed, in November, 1896, was still regarded in that light. It is also difficult to understand, if this important improvement in wire-coil machines was clearly developed in his mind in the spring of 1896, why he did not include it in the Templin & Ternstedt patent, which was applied for June 22, 1896, just about this time. It was known that Henry M. Jackson had a machine of some kind, and an effort was made to have him turn it over, so that there was strong reason for bringing forward everything to which the patentees could lay claim; and yet there is nothing in the application to suggest the separate operation of jaws and rolls which is now contended for. Were I put to it, therefore, I should find it difficult to hold that, at the time the drawings were originally laid out, the ideas of the inventor had advanced much beyond a mere beginning.

On the other hand, there can be no question as to the existence of the Henry M. Jackson machine as early as July 16, 1896, when he applied for his first patent, for the diagrams which accompanied the application show it exactly as it now is, except that the jaws are V shaped, instead of being serrated. No claim was made for the separate operation of the rolls and jaws, but that is not material. It was a feature of the machine, and that is enough for our present purposes. It thus appears that at the time when Templin was trying to work out something of this character, and long before he had actually produced anything definite or tangible, Henry M. Jackson had a complete working device in which such a combination as is found in the patent in suit was clearly employed. If, then, the plaintiffs are entitled, on their part, to rely upon the Jumbo in November, 1896, as evidence to support the claim that Templin was the original and first inventor, by the same consideration the defendants are entitled to bring forward the Jackson machine in July, 1896, if no earlier; and, of the two, the latter is four months in advance upon the scene. But the evidence does not stop there; and even if Templin is permitted to carry back his conception to the earliest point claimed for it, in March or April, 1896, the Jackson machine still anticipates him. Henry showed it to his brother Calvin in April or May of that year, according to the testimony of both these parties, and through Calvin the fact that he had an invention of some kind was brought to the attention of Templin, who, early in June, went to see him, and tried to get him to transfer his rights, first by persuasion, and, when that failed, by threats. The feature of the machine that particularly interested both Henry and Calvin was the corrugated jaws,

and the doing away with right and left hand coils, while the fact that they were separately operated does not seem to have impressed them. Some claim was made by Calvin that he was the inventor of these corrugations, and, on the strength of this, when it was supposed that Henry would turn over his rights, he proposed to join with Templin in the application which subsequently resulted in the Templin & Ternstedt patent. But when he found that his brother Henry held out, and that his interests were not taken care of, he withdrew; and Ternstedt, a draftsman in the plaintiffs' employ, who had furnished some suggestions, was substituted. This is not very material, but it is a part of the story, and it serves to show that prior to the negotiations leading up to the Templin & Ternstedt patent, in May and June, 1896 (that patent having been applied for on June 22d), Henry's machine was in existence, as he claims; thus carrying it back just so much farther, and establishing it as a perfected device close to the time when Templin, admittedly, had only begun to put his ideas into shape. This is not a case, it is true, in which there is a contest between two parties for the same patent, based on similar inventions, so that it involves no question as to reasonable diligence, or who first reduced his ideas to a practical form. It is simply whether, at the time that Templin conceived of having the rolls and jaws separately operated, the Henry M. Jackson machine, which shows such a separation, was already in existence; depriving Templin of the right to claim that he was the originator of that idea. Adhering strictly to this issue, and relying simply on the evidence so far alluded to, there can be little doubt that such was the case.

I am persuaded, however, that a much earlier origin is to be assigned to this old machine. A number of witnesses testify that they saw it in March or April, 1893, and I do not see why they are not to be believed. It is true that they are all relatives of Henry M. Jackson,—his wife, his father-in-law, Levi F. Noll, his brother-in-law, William Noll; and Charles A. Miller, his wife's cousin; but their testimony is too circumstantial to be set aside on the ground of mere relationship. This is particularly true of William Noll and Charles A. Miller,—the one a machinist and the other a fireman at the time on the Reading Railroad. I have carefully read what they have to say, and am convinced of its truth. It is no made-up story to fit the case, but a narrative of actual occurrences. The time when the machine was seen by each of these witnesses is also fixed by reference to other events, which lessens the chance of their having made a mistake; Miller, for example, stating that he wanted to lace a piece of leather with the machine, and show it to some of the railroad employes, and that he was not in the service of that railroad except in 1893. The machine itself lends countenance to all that is said of it. If it had been manufactured for the occasion, it would have been made to fit it better. Several arguments are advanced to weaken the evidence in its favor. It is said, for instance, that it is unreasonable to suppose that Henry M. Jackson would not disclose this machine to his brother Calvin, with whom he was closely associated for over three years after it was put together, while at the same time, as is testified, it was freely exhibited to others. But he

sufficiently meets this by the suggestion that he did not care to give away the invention even to his brother, especially in view of his association with the plaintiff company; and, as to those who say they saw it in the spring of 1893, they did so at his house, or when he was moving, when it could not be kept from view. Considerable stress is also laid on the fact that in April, 1896, as agent for the plaintiffs, in whose employ he then was, he sold to Deysher a machine which was to have the jaws corrugated; the contention being that if at that time he had this old machine, with the corrugations which are found in it, he would not be likely to let such a sale pass without comment. There is no doubt that he made the sale to Deysher, although he does not remember it; but that he was called upon on that account to say anything about his own affairs, I fail to see. It was, perhaps, to be expected that the apparent appropriation of his ideas in this way would lead him to prompt action in applying for the patent, and it is to be noted that it is not long after this that he does so. But that he kept his own counsel and said nothing is certainly of no significance. It is not nearly so marked a circumstance as the omission of Templin to include in the Templin & Ternstedt patent the idea of separately operating jaws and rolls, which he claims was fully developed in his mind at the time. The delay of Henry M. Jackson in applying for the patent is also urged, and if this were a controversy with others claiming the same invention, involving the validity of the patent which he subsequently obtained, the delay of over three years with which he is chargeable might operate seriously against him in favor of those who had meantime acted with greater diligence. Nor could it well be excused on the plea of not having the necessary means, since he could just as well have borrowed in the beginning as he did in the end. But that is not the question. It is merely whether the admitted delay discredits the age which is claimed for his machine, and I do not see that it necessarily does. It may tend in that direction, and, in a case of doubt or one less satisfactorily established, might be sufficient to turn the scale against it. But to my mind, the evidence is not doubtful, but convincing. The witnesses tell consistent stories, which bear the impress of truth, and it is merely a question whether they are to be believed. I am satisfied that they should be, and it would go against both my conscience and my judgment to hold otherwise. Even conceding to the plaintiffs, therefore, everything for which they contend with regard to the time when Templin conceived of separately operating rolls and jaws, we have in the Henry M. Jackson machine of 1893 a device of the same character, antedating Templin by over three years. This machine was not a mere experiment, but was tested and proved competent; a properly laced belt end being turned off from it by the inventor soon after it was put together. It stands as a complete anticipation, therefore, of the patent in suit; depriving it of its novelty and validity, and entitling the defendants to a decree.

Let a decree be drawn dismissing the bill, with costs.

## TRIPOLD v. MYERS.

(Circuit Court, E. D. New York. November 13, 1902.)

## 1. PATENTS—INFRINGEMENT—PACKING FOR PISTONS.

The Tripold & Davenport patent, No. 473,182, for packing rings for steam pistons, construed, and held not anticipated, and infringed as to both claims.

In Equity. Suit for infringement of letters patent No. 473,182, for packing for pistons, issued to Ambrose A. Tripold and Charles F. Davenport April 19, 1892. On final hearing.

Briesen & Knauth (Arthur v. Briesen and Henry M. Turk, of counsel), for complainant.

Arthur C. Fraser and Joseph A. Stetson, for defendant.

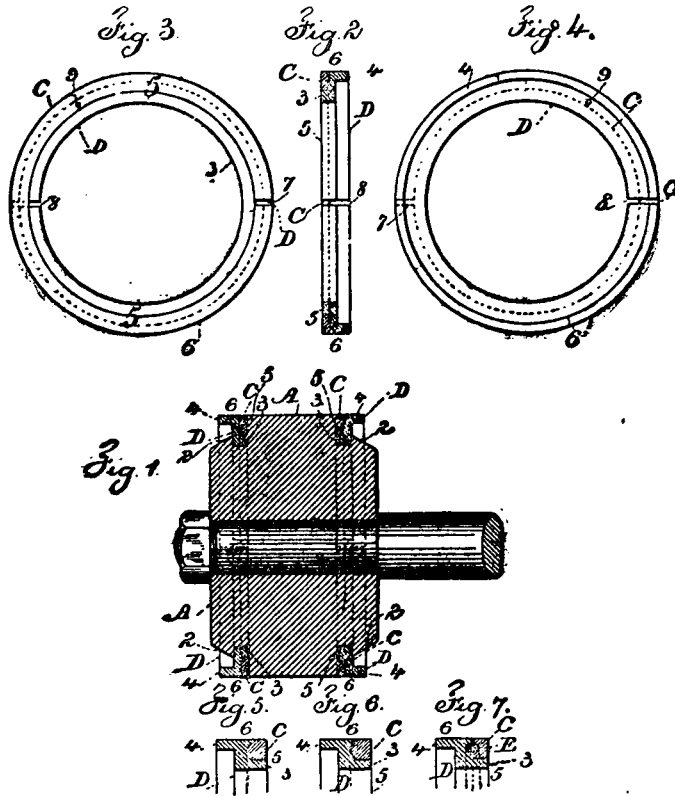
THOMAS, District Judge. The bill was filed to restrain alleged infringement of both claims of letters patent No. 473,182, issued April 19, 1892, upon an application filed December 17, 1891, for improvement in packing rings for steam and other pistons. The defendant was at one time a member of the firm to whom was given a license of the entire and exclusive right to manufacture, sell, and use articles under the patent, and as a member of such firm was responsible for a circular issued to the trade, in which it is stated that the packing covered by the patent—

“Is unquestionably the simplest, most economical, and consequently best method of packing pistons ever presented to engine users. It makes an absolutely tight piston, thereby utilizing to its fullest extent every particle of steam entering the cylinder. The friction is reduced to a minimum, with a consequent saving in fuel and an increase in power. It is self-adjusting, requiring no springs to set it out against the cylinder, and can be adapted to any form of piston, solid or otherwise. Each packing ring is formed of two split rings, one L-shaped, with a flange turned on the back, over which the second ring is fitted, the cut in each ring being placed opposite to that in the other, so that the joint is broken, and the steam prevented from blowing through. The exterior circumference of both rings, when placed together, form the face which comes in contact with the interior of the cylinder. In packing rings, where a tongue or filling piece is used to break the joint, there is danger of the tongue piece breaking and the fragments of it cutting the cylinder, but this danger is entirely averted by the second ring, which also gives greater flexibility and uniform expansion, thus preserving a perfectly round and true cylinder.”

The defendant's commendation and outline of the complainant's patent leaves occasion for brief supplementary description, which may be taken from the specifications:

“Each packing ring is composed of two parts, C and D. The ring C is flat, and the ring D is provided with two flanges, the flange 3 being annular to set within the ring C, and the flange 4 being cylindrical and standing in the opposite direction to the flange 3, and forming a wearing-surface against the interior surface of the cylinder. The contracting-surfaces of the rings C and D are accurately fitted, so as to be fluid-tight; and with this object in view it is preferable to turn the respective rings and set them together, and then true off the flat surface 5 and the cylindrical surface 6, after which the rings are to be split at one place, so as to be expansive, and the one ring is rotated upon the other, so that the split of one ring is adjacent to the plain portion of the other ring. Hence the flat surface 5 is made steam-tight against the corresponding surface of the piston, because the notch 7 of the ring C is adjacent to a plain portion of the flange 3, and the notch 6 in the ring D is opposite a plain portion of the ring C, and this is always true of the cylindrical

surface 6. Hence it is impossible for steam or other fluid to leak through between the rings and the cylinder, or between the rings and the piston; and it is to be observed that the packing-rings standing in opposite directions upon the piston, the steam-pressure tends to force the flat surface 5 of one packing against the piston when going in one direction, and when going in the other direction the pressure acts in a similar manner upon the other packing, and, in addition to this, the pressure of the steam or other fluid within the cylindrical flange 4 tends to press the packing ring D outwardly, and hold the same firmly against the interior of the cylinder, and in so doing the flange 3 acts to expand the ring C to the same extent, and cause both packing-rings to wear equally against the interior of the cylinder. The rings shown in Figs. 5 and 6 are to be made in precisely the manner before described, except that the surfaces that come together are in Fig. 5 double inclines and in Fig. 6 concave and convex. In Fig. 7 we have represented a third ring, E, as introduced into the annular grooves in the adjacent flat faces of the rings C and D. These modifications in the sectional forms of the rings do not change the operations of the parts. A pin, 9, may be provided to hold the rings from turning around one on the other."



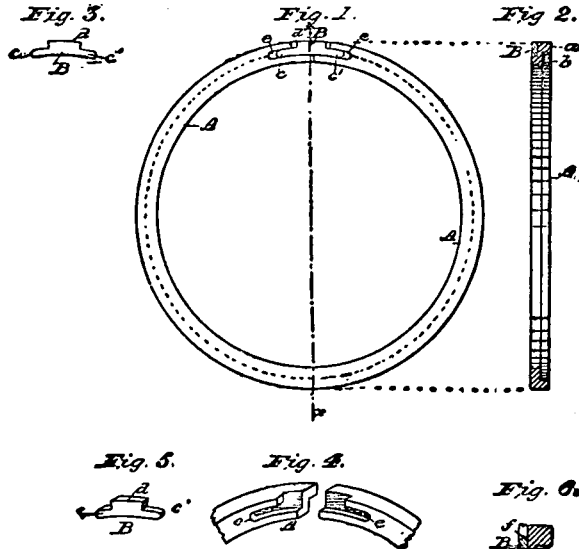
The defendant, either for the purpose of defeating the patent entirely, or limiting it, refers to letters patent for packing rings issued to Colebrook, Roth, Stevens, Dick, Youse, St. John, and Baker, with particular emphasis on the last two.

The Baker packing consists of a set of rings made of two members, each of which is split at one point only, and together making a contin-

uous ring, but the outer member is flanged on its inner side to receive the other, and the split in each member is covered by the other member. Thus adjusted, the two members, as a whole packing ring, turn around the chunk ring. This patent is unlike the one in suit in the following particulars: (1) There is no flange on the outer side of the outer member upon which the steam may exert a lifting force. (2) On both sides of the chunk rings recesses or chambers are made, within which are placed springs so as to press the packing rings outward against the surface of the cylinder. (3) There is no longitudinal thrust of the steam against the outer surface of the ring, which is faced by the piston, but the steam can reach the rings only through holes in the piston, and thereupon acting on the under side of the rings, it presses them out, to make an intended tight packing against the interior surface of the cylinder. (4) It is intended that the rings shall be free to constantly and slowly revolve around the chunk ring for the purpose of diminishing the tendency to uneven wear. The dissimilarity of the Baker device to that in suit is such as to preclude any further consideration of it.

The St. John patent consists of a single ring, with a flange on the outer side, "so that the steam against it will tend to set the ring out against the interior of the cylinder. This ring is cut at one side, and a filling-piece, B, of peculiar construction, is fitted into the recesses, e. This filling-piece has the ends, c c', which fit snugly into the said recesses, e, and a T-piece, d, which fits into a recess at the upper side of the rings."

Thereby it is intended that the joint shall be securely closed by the filling piece, and the ring freely allowed to expand. In other words, the packing consists of one ring, flat on the inner side and flanged on the outer side, and cut at one side, on either side of which split, for a short distance, is placed a key fitted into recesses on the interior side of the ring. The arrangement is shown by the subjoined figures:



The outer ring very much resembles that of the outer ring of the patent in suit, and the defendant claims that the recess and the key correspond in function with the inner ring of the complainant's patent and the inner flange in the outer ring into which the inner ring fits. This resemblance seems quite remote. The key does not perform the same function as the inner ring of the complainant's patent.

The complainant quite justly contends for his device that the steam, acting immediately upon the outer flange of the outer ring, as well as upon the under side of the rings, lifts the ring into close contact with the cylinder, and that the outside ring carries with it the inner ring, which has the following advantages in connection with the outer ring: (1) If there were a single ring, split at one point so as to permit expansion, there would, at the time of such expansion, be a leak, even though there were a key such as is used by St. John; but if within this outer ring there be placed another, also separated at a point, and the places of separation in the rings be not coincident, when they are conjoined, but be arranged, for instance, at opposite points in the circle, the two rings united will be free to expand, and will not suffer leakage. (2) The inside ring aids to distribute the strain when the rings are expanded by steam so as to present a truer surface to the inner face of the cylinder. (3) The inner ring presents a wider cylindrical surface, which is useful in preventing the leakage of steam between such surface and the inner face of the cylinder. (4) The inner ring prevents the outside ring from opening at the point of separation in such a way as to destroy its symmetrical adaptation to the cylinder, and from scraping or marring the cylinder at the point of separation. It is not perceived that the key in the St. John patent has any of these advantages, unless, to some extent, it may be the one last mentioned, nor do the key and recess seem in any practical degree to perform the same function as the complainant's inner ring, fitted upon the inner flange of the outer ring. It is considered that the St. John patent is not an anticipation of the patent in suit.

The other references seem too dissimilar for useful discussion.

The remaining question relates to the alleged infringement. There are two members of the complainant's packing described in the claims, although the specifications mention the use of three. The defendant's packing consists of three rings. The rings, as a whole, show similarity in the following respects: They present the same inner, outer, and cylindrical surfaces. This statement should be modified in this: The defendant's packing shows three notches in its cylindrical surface, while the complainant's shows but two, and the defendant's packing shows two notches in the surface of the exterior ring, while the complainant's shows but one. These differences arise from the fact that the defendant uses three rings, while the complainant uses customarily two. With these exceptions, when the members are conjoined, the defendant has an outer member with a flange upon which the steam lifts as it does in the complainant's packing. While in the complainant's packing the outer ring immediately lifts the inner ring from a contact with the under side thereof, the defendant's outer ring lifts an intermediate ring acting upon the superior end thereof, and this ring lifts the interior ring, acting upon both its inferior end and the superior portion thereof. That is, the complainant's outer ring, in the



form of a Z, receives the steam on the outer flange, whereby the outer ring is lifted, carrying with it the inner ring, which rests on the inner flange; while the defendant's outer ring lifts the inner ring in the form of an inverted T, which in turn carries the inner ring. The defendant has the ring with an outer flange, which is shown in the St. John patent, but he has the inside ring, which has all the advantages enumerated for the complainant's packing. The defendant's method of lifting this ring does not seem material.

But the real question is, is the defendant's structure differentiated by the interposition of the intermediate ring, which coacts with the two exterior rings, producing the same result as do the complainant's rings, and, so far as it is shown, doing it no better and by no different mode. The multiplication of rings may increase the cylindrical surface presented to the interior of the cylinder. This is not a new attribute, but the extension of the former advantage. The defendant contends that the intermediate ring so distributes the wearing points that instead of the main wear coming at two points it comes at six points, or is practically uniformly distributed around the rings. This would indicate an economy, but no change in function or mode of operation, and the same may be said of the claim that the defendant's innermost ring has an offset fitting into a rabbet in the outer surface of the T-shaped middle ring, which has the novel function of equalizing the outer wearing faces of the three rings so that they wear alike, and press equally against the cylinder. It seems to the court that the defendant's three rings do precisely the same thing as do the complainant's two rings, but, instead of the outer ring lifting immediately upon the inner ring, an intermediate ring, adjusted on one side to the outer ring and on the other to the inner ring, lifts the inner ring. The outer ring alone presents no patentable novelty. It was the conjunction of the two rings, one acting upon the other, and both rising to the surface of the inner surface of the cylinder that avoided the former mischiefs, and gave measurable perfection to the device. The defendant has the same conjunction of parts, except that he cuts the whole packing into three parts, and makes an internal adjustment, whereby such parts are fitted and held together. It is considered that this does not differentiate the device from that of the complainant.

It is concluded that the defendant has infringed both claims of the complainant's letters patent, and there should be a decree accordingly.

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## EDISON PHONOGRAPH CO. v. VICTOR TALKING MACH. CO.

(Circuit Court, E. D. Pennsylvania. January 30, 1903.)

No. 14.

### 1. PATENTS—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for infringement of three separate patents is not subject to demurrer for multifariousness where it alleges that the things patented are capable of conjoint use, and are in fact so used in the apparatus of defendant, and the patents, of which profert is made, contain nothing inconsistent with such averment.

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¶ 1. Pleading in infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

In Equity. Suit for infringement of patents. On demurrer to bill.  
F. L. Dyer, for complainant.  
Horace Pettit, for defendant.

ARCHBALD, District Judge. The bill is demurred to on the ground of multifariousness, because it involves the validity and infringement of three separate patents; but it is averred in the bill that the three are not only capable of being conjointly used, but that, in the apparatus of the defendant complained of, they are in fact so used. This is a distinct and positive averment, which the demurrer necessarily admits. It cannot be made to deny and question it, thus raising an issue of fact, even though that be one of the grounds of demurrer assigned. It may be that, as profert of the patents is made in the bill, if, on examination, it was obvious that the inventions which they respectively cover were not, and could not be, the subject of conjoint use, the court could disregard the averment, as inconsistent with the patents themselves, and so dismiss the bill. But there is nothing of that kind, so far as I can see, in this case. The patents here involved relate to the recording and reproducing of sound vibrations; one being for the method, the other for the apparatus for carrying it into effect, and the third for the blank or surface operated upon. The presence and co-operation of these devices in a single infringing machine is entirely possible, and that is all that seems to be necessary. Walk. Pat. § 417. There is nothing counter to this in Hayes v. Dayton (C. C.) 8 Fed. 702, because there no conjoint use was alleged. The case of Consolidated Electric Light Co. v. Brush-Swan Electric Light Co. (C. C.) 20 Fed. 502, which goes further than this, seems to me to stand on doubtful ground, and I cannot follow it.

The demurrer is overruled, with leave to defendants to answer over.

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REDGRAVE v. SINGER et al

(Circuit Court, S. D. New York. November 11, 1902.)

1. PATENTS—INVENTION—BAGATELLE BOARDS.

The Redgrave patent, No. 603,738, for a bagatelle board, is void for lack of patentable novelty.

In Equity. Suit for infringement of letters patent No. 603,738, for a bagatelle board, granted to Montague Redgrave May 10, 1898. On final hearing:

The following is the opinion of the examiners in chief:

The claims appealed are: "(1) In a bagatelle board, having a shooting trough provided with countersunk end, top plates having, in said countersunk top plate, a longitudinal slot, in combination with a spring-impelled block and a detachable handle, extending outwardly from said block through the slot, arranged to move reciprocatingly therein, said handle extending to the horizontal plane of the top plate, as and for the purpose intended, substantially as described. (2) In a bagatelle board, having a side shooting trough, the combination with a top plate, having a longitudinal inverted curve adjusted at one end of the trough, connected at its opposite side to

ledge, b, and a strip, a, said trough provided at its countersunk portion with a longitudinal slot, of a spiral spring, located in said trough, to actuate a movable block, i, and adjustable handle, the shank of which, extending through said slot, is connected to block, i, the upper end of said handle extending to the upper plane of the slotted plate, as and for the purpose intended, substantially as described." The references are patents to Redgrave, May 30, 1871, No. 115,357; Davies, December 24, 1872, No. 134,262; Steele, November 7, 1876, No. 184,184.

The specification states that the device of the appealed claims is an improvement on that of the United States patent granted to this applicant, which has been cited against the claims. By the expiration of that patent its device has become the property of the public. The change of the old device consists in transferring the handle for drawing back the spring-impelled block from the end of the shooting block and from a slot in the end of the shooting trough to the top of the shooting block and to a slot in the top of the shooting trough, and in countersinking it in that top. The function of the handle in its new place and that of the entire device after the change of place of the handle are unchanged. There are some advantages which are incident to the use of the handle in the new place, such as its increased strength because of its shortness, the power being applied nearer to the block; and the countersinking of the handle protects it from blows, and enables closer packing of several boards together for transport. These are all advantages resulting solely from rearrangement, without any change or advantage in the functions of the apparatus for its purpose. Mere location of an old element of an old device in one or another position in the device, without change of function, has long been held to be entirely within the province of the skilled workman, and we see no reason why this change is a new invention. This new position of the operating handle, relatively to block or bolt to be drawn back and its countersunk position, appear in the references, whose entire construction has been particularly used by this appellant.

There being in this change no new function imparted to the device, and no new idea of place or of construction to utilize that place for the handle, we fail to see that the claims contain anything inventive beyond what is in appellant's expired patent. The decision of the examiners is affirmed.

W. H. Babcock, for complainant.

Herbert Knight, for defendants.

WALLACE, Circuit Judge. I am of the opinion that the improvement specified in the claim of the complainant's patent (No. 603,738, granted to Montague Redgrave May 10, 1898, for an improvement in bagatelle boards) is destitute of patentable novelty, and consequently that the claim is invalid. The reasons for this conclusion are so satisfactorily set forth in the decision of the examiners in chief of the patent office, of December 14, 1893, rejecting the application for the patent, in which I fully concur, that an independent discussion would serve no useful purpose.

The bill is dismissed, with costs.

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### In re GRAND JURORS' MILEAGE.

(District Court, D. Delaware. February 6, 1903.)

#### 1. GRAND JURORS—MILEAGE—COMPUTATION.

The legal fiction that a term of court is but one day cannot affect the construction of section 852 of the United States revised statutes, as amended [U. S. Comp. St. 1901, p. 656], relating to the allowance of mileage compensation to jurors.

**2. SAME.**

Where grand jurors in obedience to due process attended the District Court of the United States in Delaware on the first day of the term, and were on the same day discharged by the court until the thirteenth day thereafter, on which latter day they duly attended and were finally discharged, *held*, that they were entitled to mileage compensation for two round trips, or four single trips, between their residence and the place of holding court.

(Syllabus by the Court.)

William Michael Byrne, District Attorney.

BRADFORD, District Judge. The point for determination arises on an objection taken by the District Attorney on behalf of the United States to certain items of mileage compensation for grand jurors at the present term, reported by the clerk to the court for allowance. The present term began January 13, 1903, on which day grand jurors duly summoned attended the court. After returning a number of indictments the jurors, in the afternoon of the same day, on the application of the District Attorney, were discharged by the court until January 26, 1903, on which day they again attended the court, returned a number of other indictments, and were finally discharged. It appears from the report of the clerk that in the case of each juror, not residing in Wilmington, mileage compensation was computed for his coming to and returning from the court in connection with his attendance January 13, 1903, and for his coming to and returning from the court in connection with his attendance January 26, 1903. It is suggested, rather than seriously argued, by the District Attorney, that mileage was erroneously computed in that each juror was entitled to receive mileage compensation for only one round trip, or for coming to attend the court on the first named day and returning from the court to his residence on or after the last named day. Section 852 of the revised statutes [U. S. Comp. St. 1901, p. 656], as amended, relating to jurors' fees and mileage compensation, in its application to the district of Delaware, provides "for actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, three dollars a day during such attendance", and with respect to mileage compensation, that "for the distance necessarily travelled from their residence in going to and returning from said court by the shortest practicable route, five cents a mile". There is a legal fiction that a term of court is but one day. Legal fictions are resorted to for the furtherance of justice; but must always yield to a statute the operation of which is inconsistent with the recognition of such fictions. The allowance of a per diem of three dollars for each day's attendance wholly excludes the application of the fiction referred to so far as compensation for attendance is concerned. And, in my judgment, such fiction is equally inapplicable to the allowance of mileage compensation. The question to be decided on the facts before the court is, not whether mileage compensation should separately be computed and allowed with reference to each and every day jurors may under due process be in attendance on the court, but whether jurors, who, having under such process been in such attendance January 13, 1903,

and having on that day been discharged until January 26, 1903, when they again attended court under such process, and having on the latter day been finally discharged, are not entitled to mileage compensation for two round trips to court. Any fair construction of the statute requires that the mileage compensation as reported should be allowed. To hold otherwise would not only be unwarranted by the language of the statute but would impose such hardship on the jurors as it is unreasonable to assume congress intended. I am not aware of any authority at variance with this conclusion. It is not intended in this opinion to decide any question relating to jurors' mileage compensation other than that presented by the facts disclosed in this case. For the reasons above given the mileage compensation as reported by the clerk must be allowed.

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CITY WATER SUPPLY CO. v. CITY OF OTTUMWA.

(Circuit Court, S. D. Iowa, E. D. January 27, 1903.)

No. 248.

**1. MUNICIPAL CORPORATIONS—SUIT TO ENJOIN CREATION OF ILLEGAL INDEBTEDNESS—PARTIES.**

To a suit by a taxpayer against a city to enjoin it from creating a debt beyond the constitutional limit, by carrying out a contract made with a person or corporation, such person or corporation is not an indispensable party defendant.

**2. SAME—LIMITATION OF INDEBTEDNESS—BASIS OF COMPUTATION.**

Under the provision of the Iowa constitution limiting the indebtedness which may be contracted by any municipality to 5 per cent. of the value of its taxable property, such per cent. is to be computed on the assessed value of the property for taxation, and not on the actual value, where the two are not the same.

**3. SAME—CONTRACT CREATING INDEBTEDNESS.**

That a city which is already indebted in excess of the constitutional limit has in its treasury a part of the money necessary to discharge the obligation it assumed in entering into a contract for a public improvement, and may be able to collect the remainder from taxes by the time the obligation matures, does not alter the fact that such contract creates an indebtedness within the constitutional inhibition, and is therefore one which the city was without power to make.

**4. FEDERAL COURTS—FOLLOWING DECISION OF APPELLATE COURT—CONFLICTING STATE AND FEDERAL DECISIONS.**

Where the circuit court of appeals in a suit by a taxpayer determined that a contract made by a city under an ordinance was void as creating an indebtedness, when the city was then indebted to the limit permitted by the constitution of the state, such decision is binding on a circuit court of the United States in a subsequent suit between the same parties, involving a different contract, but one which was made pursuant to the same ordinance, notwithstanding a contrary decision by the supreme court of the state.

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¶ 2. Constitutional and statutory limitations of municipal indebtedness, see note to *City of Helena v. Mills*, 36 C. C. A. 6.

¶ 4. State laws as rules of decision in federal courts, see notes to *Spokane Falls & N. Ry. Co. v. Ziegler*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

**In Equity.** On motion for a temporary injunction and motion by defendant to dismiss.

William McNett, for complainant.

W. H. C. Jaques and Charles D. Fullen, for defendant.

McPHERSON, District Judge. This is a bill in equity now pending on application for a temporary injunction to enjoin the city from creating a debt by carrying out contracts with the United States Cast Iron Pipe & Foundry Company, a corporation of New Jersey, and the Des Moines Bridge & Ironworks, a corporation of Iowa. The complainant owns real estate and other property in Ottumwa, and brings this bill as a taxpayer. It is a citizen of the state of Maine. The city proposes to construct what is called a system of waterworks, and the foundry company and the ironworks company above named are to furnish materials and do the work at an expense of about \$20,000. The two corporations named are referred to in the bill. Whether they are made parties is doubtful. The prayer is against them, and they were covered by the restraining order.

As counsel say that this court has no right to adjudicate the matters as against the city without their presence, I am met on the threshold of that which is equivalent to a jurisdictional question. The city is in debt to the constitutional limit, and complainant contends that, if the scheme of the city is carried out, an invalid indebtedness will be created, and therefore an injunction should be issued to enjoin the same. The main, if not the only, controversy is between the complainant, a citizen of Maine, and the city of Ottumwa, a citizen of Iowa. I fully agree with defendant's counsel that this court cannot, by any order or process, coerce the appearance of the pipe and foundry company, a citizen and corporation of New Jersey, or, if it does not appear, make a valid order against it as on default. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. And it does not voluntarily appear. And, if this case were in one of the Iowa state courts, jurisdiction could not be had in a case like this over the New Jersey corporation. Service of process on it in New Jersey could not enforce its appearance in an Iowa court, or authorize any order or decree against it, if it failed to appear. There is no Iowa statute which authorizes service by publication in a case like this. It therefore follows that neither this court nor the state court can take jurisdiction over the New Jersey corporation. And it also follows that, if it is an indispensable party, there is no court, either at home or elsewhere, in Iowa or New Jersey, that can take hold of the case. Because if the complainant were to go into a court, state or federal, in New Jersey, there could no way be found to coerce the appearance of the city of Ottumwa. If the contention of counsel for the city be correct, then complainant may have ever so good a cause of action, and ever so many grievances, and yet no court, state or federal, can be found to grant relief. If this be so, we have a novel, curious, and serious state of affairs. The city, and it only, is the necessary party.

Numerous cases, both federal and state, are found in the reports, wherein cases like this have gone to decree with the city only as

defendant. The contention of counsel for defendant herein, that **the point was not made** in those cases, is probably correct. But it is a matter of some weight. And the more so as to the federal cases, for the reason that such courts, on their own motion, are supposed to, and generally do, look into all jurisdictional phases of the cases before considering a case on its merits. But, if the New Jersey corporation were otherwise regarded as a necessary party, section 737 of the Revised Statutes [U. S. Comp. St. 1901, p. 587] and equity rule 47 fully authorize this court to go on to decree without the presence of the New Jersey corporation. By an amendment to the bill it is taken out of the case, if it were ever in.

The defendant city cites the following cases as to the point that the Des Moines and New Jersey corporations must be made parties, and that jurisdiction be acquired over them: *Ribon v. Railroad Co.*, 16 Wall. 446, 21 L. Ed. 367; *New Orleans Waterworks Co. v. City of New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. I do not care to review those, as well as other cases that could be cited. They are not in point, for the reason that those were cases wherein contracts and relations between the named defendants were the principal thing sought to be canceled or controlled by decree. In the case at bar the principal thing to be corrected and enjoined by decree is the creation of the alleged invalid indebtedness. And if a city is in debt up to the constitutional limit, and if the contention of the city be correct, all that a city need to do is to create the invalid indebtedness with some nonresident citizen, and then we have no court, federal or state, that can correct the evil or prevent the wrong. And the statement of the proposition is its own complete refutation. A constitution must not be whistled down the winds by that kind of a scheme.

The city, as it is claimed by the complainant, is about to create an invalid indebtedness. The action of the city, by its counsel, is not of a legislative character, but of a proprietary or business nature,—a distinction so admirably stated by Judge Sanborn in *Illinois Trust & Savings Co. v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271-282, 34 L. R. A. 518.

I do not believe that either of the corporations are necessary parties, or even proper parties, although as to the latter the question is not before me.

The complainant has no grievance, present or prospective, against either of the corporations. Its complaint is against the city of Ottumwa, acting through its officers, because of the threatened and contemplated act of a proprietary or business character. And the question before me is whether the city is about to create an illegal indebtedness, which if not enjoined the complainant and other taxpayers must pay. And the argument that, under a recent decision of the Iowa supreme court, these corporations, if the city is enjoined from paying them, will hold the city liable by suits in the state court, is an argument that I cannot follow. The federal as well as the state courts have their responsibilities, which they cannot evade, and I do not dare to refuse to follow the decision of the appellate court for this circuit, so recently rendered.

If the action of the city is illegal as viewed by the federal courts, then the complete answer to the argument is that the officers of the city have placed themselves in the position they occupy, and this by no act of complainant or of many other taxpayers, but have done so with full knowledge of the views of the federal courts as to the true meaning of the provision in question of the Iowa constitution. And it is not convincing to urge that while the city may have no defense in this case in this court, yet it should be allowed to go hence, with its costs, without day, because of fear that in some other court, in some other case concerning the same transaction, the city may be worsted. An answer pleading such an asserted defense would be nothing but words.

Complainant contends that notice, as required by law, was not given for the election. Whether it was or not is somewhat doubtful, and, at best, the matter is in confusion.

At the preceding general election for the election of a congressman and state and county officers there were 3,743 votes cast. At the special election in question there were 1,921 votes cast. There were newspaper discussions and communications with reference to the matter. The night before election there were some public meetings at which the matter was discussed. I therefore hold that the notice, which at most was defective, does not so nearly approach "no notice" as to invalidate the election. *Dishon v. Smith*, 10 Iowa, 212; *Page Co. v. American Emigrant Co.*, 41 Iowa, 115.

I have been furnished with many affidavits, and a great deal of literature, all of which I have read, both with interest and amusement. These affidavits and literature impress me with two things. The one is that, as complainant's charter has expired, it desires a renewal; because, of course, its plant cannot be removed, excepting at great expense, and confiscation will be the result. The other is that the city is not very anxious to put in its proposed and so-called system of waterworks, but is very anxious to either buy at its own price complainant's system, or enforce a renewal of its charter, and the city will dictate its own terms. One would think, at least I so think, that the parties could easily select an arbitrator who would readily adjust the differences to the satisfaction of all fairly disposed parties. Be these matters as they may, evidence relating to propositions and counter propositions, newspaper articles and speeches, at one place and another place, supply only the humorous phases of litigation, but furnish nothing upon which a decree of a court of chancery can rest.

As coming from the city attorney, Mr. Heindell, it is urged that since the adoption of Iowa St. 1898, c. 30, the legal or constitutional indebtedness of a municipality can be four times as great as before the adoption of that statute. The statute in question is as follows:

"All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value. Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made.  
\* \* \*

Neither of the counsel before me pressed the point, but presented the question for determination. Under a constitutional provision like



that of Iowa, limiting the indebtedness of a city, the Illinois supreme court, in a well-considered case, held, but recently, that it is the per cent. of the value of the property on which taxes were assessed that governs, and not the actual value of the property. *City of Chicago v. Fishburn*, 189 Ill. 367, 59 N. E. 791.

Believing that decision eminently sound and the reasoning unanswerable, I am content in referring to it as an authority on the question mooted, and as fully and correctly expressing the views I entertain upon the question. The people must not be taxed upon one basis of valuation, and the city go in debt upon another four times as great.

The taxable property of the city of Ottumwa, as ascertained by the last preceding tax list, is \$2,352,570; 5 per cent. thereof, \$119,128.50; the indebtedness of the city is \$122,690; the city has on hand of a two-mill water fund, \$13,746.51. It has other moneys in small amounts for various funds, and various appropriations against the same have been made.

That the city, over and above its other obligations for current expenses, does not have the money with which to pay on the contracts in question, is without doubt in my mind. It makes a showing that it can pay them out. But that is not the question. It hopes to pay out, and perhaps without interest. It is making a liability. It does not have the money with which to meet the liability. But it says it has part of the money, and the balance from time to time it will receive by the collection of taxes. That is going in debt, just as much as the farmer who buys the adjoining tract of land, who pays part of the purchase price at the time, and expects to pay the balance soon from his collections. Whether a party is in debt does not depend upon his net worth. That is one definition of "solvency," but not of "indebtedness."

I appreciate in full the force of the argument, that it is desirable, in the judgment of many, for a city to own its own system of water-works. I appreciate the fact that, if some arrangement is not soon made, the city will be embarrassed for want of a supply of water, although it is possible that, if these parties refuse to agree, a court of equity can solve the situation. I do not say this is so, but courts of equity have powers in addition to those usually exercised.

On the other hand, I appreciate the fact that, if those contracts are carried out but a part only of the business district will be supplied with water, and practically all of the residence portion of a city of 20,000 people cannot be supplied. And I also appreciate the fact that the water to be thus supplied would come from the river below, and almost immediately below, the mouths of the city sewers. But these are not questions for the court. Nor is the city bound by the precise question voted on by the voters at the election, as was recently held by the court of appeals in a case from this district. *City of Centerville v. Fidelity Trust & Guaranty Co.* (C. C. A.) 118 Fed. 332. But I am impressed that above and beyond all are the obligations of the constitutions, both federal and state.

But little over a year ago, in a case between these same parties, I had occasion to consider the question of when a city is prohibited

from creating a liability. I am not content with the way I then presented the matter, but I am wholly satisfied with the conclusion I then reached. Reading since then of what many others have said upon the question has given emphasis to my mind that there is no other logical or safe conclusion that can be reached.

It is true that the writer of the opinion of the circuit court of appeals, in affirming the decree of this court, could have placed the refusal of that court to follow the decision of the Iowa supreme court in *Swanson v. City of Ottumwa*, 91 N. W. 1048, upon another ground. The court of appeals could have said that when this court decided the case the Iowa supreme court had not then otherwise decided the question (*Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359); and this case within the last two months has been cited with approval by the United States supreme court in the case of *Security Trust Co. v. Black River Nat. Bank of Lowville*, 23 Sup. Ct. 52-57, 47 L. Ed. —. So that it is not true, as contended by many lawyers in recent discussions, that it is the duty of federal courts in all cases to follow the latest decision of the state supreme court in the construction of state statutes and state constitutions. But the court of appeals deemed it best to affirm the decision of this court, upon the broad ground that it was not the construction of a statute or constitution that was involved, but the construction of contracts and a matter of general jurisprudence. And by that this court is bound. Not only so, but did not that court then declare the law of the case, which is binding upon this and other courts in the subsequent litigation between the same parties upon the same subject-matter? And is this not in part the same controversy? Is not the same ordinance now invoked by the city?

And, if the correct rule has not been declared by the court of appeals, then there is no scheme but that can be carried through to be paid for hereafter. Under legislation as it now exists, or that may be enacted, any city may create parks, build sewers, a jail, city buildings, libraries, bridges, bathhouses, waterworks, street railroads, hospitals, and aid railroads, and so forth and so on, without check or hindrance, and create an indebtedness equal to or beyond the actual value of all the property within the city. And it is no answer to say that the people would not vote for the like, because, if that is to be the test, then we have no use for the constitution, but must trust to a majority vote.

It is made to appear in this case by the agreed statement of facts, with all the experience of Ottumwa and Wapello county, as shown by the judicial history of Iowa, that the city is now in debt \$37,000 to two railroads for aid voted; and \$34,000 of that sum was for aid to a railroad that was in existence but little longer than the time necessary to obtain the aid; and I have but little doubt but that earnest speeches were made in advocacy of that scheme, and that the proposition carried by a large majority vote. But it is not a question of how urgent the scheme seems to be, or what the majority therefor may be. It is a question of what the constitution means when it says that for any purpose, or in any manner, a city shall not create a debt above the 5 per cent.

Generally speaking, it is quite safe to follow Justice Samuel F. Miller on constitutional questions. And what he said in his opinion, speaking for the supreme court of the United States, in the case of *Litchfield v. Ballou*, 114 U. S. 190-192, 5 Sup. Ct. 820, 29 L. Ed. 132, is quite apt, and ought to be remembered by those who say the majority shall rule in such matters, and that minorities and individuals must submit, and that courts must keep hands off. Justice Miller, at page 192, 114 U. S., page 821, 5 Sup. Ct., and page 132, 29 L. Ed., said:

"But there is no more reason for a recovery on the implied contract to repay the money than on the express contract found in the bonds. The language of the constitution is that no city, etc., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not become indebted,—shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."

The motion to dismiss is overruled, and a temporary injunction will issue as prayed; to all of which the city excepts.

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BANK OF TIMMONSVILLE v. FIDELITY & CASUALTY CO. OF  
NEW YORK.

(Circuit Court, D. South Carolina. January 23, 1903.)

**1. COMPLAINT—SETTING OUT INSTRUMENTS—SOUTH CAROLINA PRACTICE.**

A plaintiff is not required, either by the Code of Procedure of South Carolina, or the practice of the federal courts, to set out in *hæc verba* a written instrument sued on in the complaint, but it is sufficient if he states its legal effect; nor is it essential, under the rules of the circuit court in that state, to attach a copy of such instrument as an exhibit.

**2. SAME—PARTICULARITY OF ALLEGATIONS.**

Under the Code of Procedure of South Carolina, which requires a complaint to contain a plain and concise statement of the facts constituting the cause of action, a complaint on a bond of fidelity insurance which alleges the giving of the bond by defendant, insuring plaintiff against loss through the fraud or dishonesty of an employé, and stating its terms in legal effect, is sufficiently definite and certain as to the losses sued for where it alleges that, within the time fixed by the contract, plaintiff discovered losses sustained by reason of the fraud and dishonesty of the employé during the term covered by the bond; that a statement and proof of such losses were immediately furnished to defendant; and the agents of both parties examined and adjusted the amount of such losses, and tabulated the same, after a full investigation; and that a copy of such adjustment was furnished to defendant. Plaintiff cannot be required in such case to set out the several items of loss, and the evidence in support of the same.

At Law. On rule to show cause why the complaint should not be made more definite and certain.

Willcox & Willcox and Mitchell & Smith, for plaintiff.  
Geo. H. Moffett and J. P. K. Bryan, for defendant.

SIMONTON, Circuit Judge. This case comes up on a rule to show cause why the complaint should not be made definite and certain in the particulars mentioned. The Code of Procedure of South Carolina does not prescribe the mode in which the object now sought can be attained. Code, § 181. The usual course is to do this by motion. *Nichols v. Briggs*, 18 S. C. 473. But the course now taken is just as effective. The action is brought by the plaintiff, the Bank of Timmonsville, against the Fidelity & Casualty Company of New York, upon a bond or policy of insurance issued by the defendant to plaintiff, whereby the defendant agreed, on certain conditions, to make good and reimburse any loss plaintiff might sustain by reason of the fraud or dishonesty of one Lechner, its cashier, committed during the term of the policy.

The particulars in which it is sought to make this complaint more definite and certain are:

(1) By setting forth in full the policy of insurance or bond mentioned in paragraphs 3, 5, 6, 8, and 10, of the complaint. Under the rules of Code pleading, it is not necessary to set out in *hæc verba* written instruments sued on. They may be set out according to their legal effect. 6 Cyc. Pl. & Prac. 263, and cases cited 4 Cyc. Pl. & Prac. 916, 3 Cyc. Pl. & Prac. 645. This, also, is the rule of pleading in the federal court. In *Sheehy v. Mandeville*, 7 Cranch, 217, 3 L. Ed. 320, Marshall, C. J., says:

"It is not necessary to recite the contract in *hæc verba*, but, if it be recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated. If there be a failure in the one respect or the other, an exception for the variance may be taken, and the plaintiff cannot give the instrument in evidence."

So in *Chitty*, Pl. 430:

"It is a principle of pleading that a party relying on a deed, etc., either as the foundation of a cause of action, or as a ground of defense or answer to the pleading of his opponent, shall make profert of the instrument; that is, produce it nominally in court. But in alleging the deed the plaintiff need not, in his pleading, show more of it than answers his own purpose, and even that part which he states may be set forth according to its legal purport or in substance."

If in such a case the opposite party wants the deed to be actually produced, he must pray over. *Chitty*, Pl. p. 429.

This complaint sets out the contract thus:

"That on the 18th day of March, 1891, the defendant, then engaged, among other things, in the business of fidelity and casualty insurance, in consideration of a premium of thirty-seven and  $\frac{50}{100}$  dollars paid to it by the plaintiff, then and now engaged in the banking business, made the plaintiff its policy of insurance, whereby it agreed that during a term beginning on the 17th day of March, 1891, and ending on the 17th day of March, 1892, and during any subsequent renewal thereof, it would, at the expiration of the three months next, after satisfactory proof to the said company of any loss, make good and reimburse to the employer, to the extent of the sum of five thousand dollars, such loss, if any, as the employer should sustain by reason of the fraud or dishonesty of the employed, F. C. Lechner, in connection with his duties as cashier of said bank, or the duties to which the employer might thereafter

assign or appoint him, provided such fraud or dishonesty should be committed during the continuance of said term, or any renewal thereof, and discovered during said continuance, or within six months thereafter, and within six months after the death, dismissal, or retirement of the employed."

This is sufficient.

Nor is it essential to good pleading that a copy of the instrument sued on be attached as an exhibit to the complaint. Rule 11 of the court says:

"It shall not be necessary for a party to set forth in a pleading, the items of an account therein alleged, but he shall deliver to the adverse party within ten days after demand therefor in writing, a copy of the account and every bond, deed or other writing sued on, which, if the pleading be verified must be verified by his own oath or that of his agent or attorney, to the effect that he believes it to be true or be precluded from giving evidence thereof."

The second particular in which it is sought to make the complaint more definite and certain is this:

(2) By setting forth particularly and in full the various acts of fraud and dishonesty on the part of F. C. Lechner, cashier, alleged in the sixth paragraph of the complaint, with the date and amount of each particular act of fraud and dishonesty. The allegations objected to are in paragraph 6 of the complaint, which is in these words:

"That on the 18th day of August, 1901, F. C. Lechner left plaintiff's employment, and immediately thereafter plaintiff discovered that, while said bond was in force, it has sustained loss by reason of various acts of fraud and dishonesty on the part of F. C. Lechner, cashier, and immediately gave notice of such loss to the defendant, the insurer under the bond or policy of insurance."

It must be read in connection with paragraph 7, as follows:

"That immediately on the discovery thereof, plaintiff gave the defendant proof of its loss by reason of the fraud and dishonesty of its cashier, and the loss was thereupon examined and adjudged by the agents of both plaintiff and defendant at the sum of ten thousand thirty-five and <sup>00</sup>/<sub>100</sub> dollars; such adjustment having been arrived at and tabulated after full investigation and acceptance by agents of both the plaintiff and defendant, and forwarded to the home office of the defendant on January 8, 1902."

A complaint must contain a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. Code, § 163. It states facts, not the evidence by which such facts are proved. Pomeroy, Rem. & Rem. Rights, § 517. As has been seen in our rule 11, in an action on an open account the amount due is stated; an itemized statement is not needed, and will not be furnished unless demand is made in a certain way therefor. Now, the cause of action in this complaint is this: Plaintiff alleges that defendant has agreed to make good and reimburse the plaintiff, to the extent of \$5,000, such loss as it should sustain by reason of the fraud or dishonesty of its cashier, upon certain conditions stated; that plaintiff has sustained loss by reason of various acts of fraud and dishonesty on the part of its cashier; that, immediately on the discovery thereof, plaintiff furnished defendant with proof of its loss by reason of such fraud and dishonesty (no other loss,—loss only by reason of fraud and dishonesty); and that the loss was then examined and adjudged by the agents of both parties. Here is a distinct allegation of what plaintiff claims, and of the fact that the items of this claim have been placed in the hands of

defendant, and have been examined by it. What more can defendant need, to learn the case of plaintiff? His motion now, in effect, requires the plaintiff not only to state its account, but to furnish it with all the evidence sustaining each item of the account; to set out the various acts of fraud and dishonesty, with the date and amount of each particular loss claimed on account of each particular act of fraud or dishonesty. The pleading would be filled with evidentiary matter, and would be swelled into a volume. In *Bender v. Fromberger*, 4 Dall. 436, 1 L. Ed. 898, it is held that in an action of covenant it is sufficient to assign the breach in terms as general as those in which the covenant is expressed. A similar rule was followed in *South Carolina v. Seabrook*, 42 S. C. 74, 20 S. E. 58. If the allegations of the complaint are true,—and, for the purposes of this motion, we must deal with them as statements which plaintiff believes to be true,—the defendant has been furnished with a full statement of all it now seeks, and by its agent examined and adjudged the same.

At the hearing the attention of the court was called to the allegation of the eighth paragraph, "The plaintiff has complied on its part with all the conditions of said bond or policy of insurance;" and it is charged that this is too vague and general, and clearly insufficient. Section 183 of the Code of Procedure of South Carolina says:

"In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance."

The rule is discharged.

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## BLANTON v. KENTUCKY DISTILLERIES & WAREHOUSE CO.

(Circuit Court, E. D. Kentucky. March 10, 1902.)

### 1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—SALE OF REAL PROPERTY BY ASSIGNEE—KENTUCKY STATUTE.

Under Ky. St. § 87, relating to sales of property by assignees in voluntary assignments for the benefit of creditors, since its amendment by Act March 16, 1898 (Sess. Acts 1898, p. 104), an assignee has power to sell real property at private or public sale, as he deems best, and to pass the title pursuant thereto, by virtue of the power of sale given in the deed of assignment;—the effect of the amendment being to repeal the limitation contained in the original section, requiring real property to be sold in the same manner as at decretal sales, which was by public auction.

### 2. SAME—NECESSITY OF APPRAISAL.

The provisions of Ky. St. § 2362 et seq., which require an appraisal "before any real estate shall be sold under an order or judgment of a court, other than an execution," have no application to a sale of real property by an assignee for the benefit of creditors pursuant to section 87 of such statutes, in which case the power of sale is not derived from an order or judgment of a court, but from the deed of assignment, and the court is vested only with a supervisory power to confirm or reject the sale when reported by the assignee.

### 3. SAME—IRREGULARITY IN APPRAISEMENT—EFFECT OF CONFIRMATION OF SALE.

Conceding that such statutory provisions do apply, and that an appraisal is required in such case, the fact that certain personalty used

in connection with the real property, and sold with it, was included in the appraisal, is merely an irregularity, which is cured by a confirmation of the sale as provided by the statutes, without any exception having been filed thereto.

**4. EVIDENCE—PROCEEDINGS OF STOCKHOLDERS' MEETING—PROOF BY ORAL TESTIMONY.**

The proceedings of a meeting of the stockholders of a corporation are facts which may be proved by the oral testimony of any witness who was present, and especially is such evidence admissible where it is shown that the record book containing the minutes of the meeting has been lost.

**5. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—CORPORATION.**

A deed of assignment conveying the property of a corporation for the benefit of creditors, executed pursuant to the action of the board of directors, although not previously authorized by a vote of a majority of the stock as provided by the articles of incorporation, will convey a good title to the assignee, where the corporation was admittedly insolvent, and after the lapse of four years, during which the assignee has been actively engaged in settling up its affairs, none of the stockholders have questioned the validity of the assignment.

**6. SPECIFIC PERFORMANCE—TITLE TO SUSTAIN SUIT—LIENS.**

An assignee for the benefit of creditors may maintain a suit for the specific enforcement of a contract by which he sold real property belonging to the assigned estate, covenanting to give a clear title, notwithstanding the existence of liens thereon, where it is agreed between him and the lienholders that they are to be paid from the proceeds of the sale, and they are made parties to the suit.

**7. SAME—DEFENSES.**

The revenue laws of Kentucky provide for the assessment annually of whisky in bonded warehouses, and require the warehouseman every four months to report all removals, and to pay the taxes previously assessed against the whisky so removed. But by virtue of Ky. St. § 4021, the state and county each have a lien on the whisky for the taxes assessed thereon, and section 4109 expressly gives the warehouseman who pays the taxes a lien thereon for the amount paid, with interest. Hence a purchaser of a distillery and warehouse in which whisky owned by others is stored cannot be subjected to loss on account of taxes due on such whisky, nor make such fact a defense against a suit for specific performance, whatever may be the conditions of the warehouse receipts, which cannot bind him in the matter of taxes.

**8. SAME.**

A purchaser of a distillery property, who, in making the contract, accepts the personal agreement of the vendor that he will retain in his hands sufficient money from the price to pay the state and county taxes on whisky of third parties stored in the warehouse, as the same shall from time to time be withdrawn, cannot make the fact that such payment is not required at the time of delivery of the deed a defense to a suit for specific performance.

**9. SAME.**

Where, at the time of the making of a contract for the sale of distillery property, there was a large quantity of whisky stored in the bonded warehouse, but no provision was made in the contract for any liability on the part of the vendor on account of the tax due the United States on such whisky, the purchaser cannot defend against a suit for specific performance on the ground that in case the whisky, from excessive outage, or other cause, should prove insufficient in value to pay the tax, the government may enforce a lien therefor against the premises.

**10. SAME—CONDITIONS PRECEDENT—TENDER OF DEED BY VENDOR.**

Where a contract for the sale of property consisting of both personality and realty provided that the purchaser should divide the consideration between the two deeds to be made, and should furnish the vendor with forms for such deeds, which it refused to do on demand, the vendor

was not bound to tender a deed, as a condition precedent to the commencement of a suit for specific performance.

11. SAME.

A tender of a deed by a vendor is not essential, to enable him to maintain a suit for specific performance, where the purchaser has notified him that he will not comply with the contract.

12. SAME—INSUFFICIENT TENDER.

A tender of a deed by a vendor which is insufficient, but was intended to be in compliance with the contract, will not defeat his right to a specific performance in equity, even where a tender is essential.

13. SAME—DEFENSE—WANT OF MUTUALITY OF CONTRACT.

The fact that a vendor at the time of the making of a contract for the sale of property was not in a position where he could be compelled to specifically perform a part of his agreement relating to a collateral matter, not of great importance, does not create such a want of mutuality as will defeat his right to a specific performance, where such fact was known to both parties, and the contract was made in good faith, and has not been rescinded on that ground by the purchaser, and where the vendor has since obtained the things which he agreed to procure and deliver, and has placed himself in a position where he can be compelled to fully perform by the decree of the court.

### In Equity. Suit for specific performance.

This is a suit to enforce specific performance of a contract of sale of the Edgewater Distillery plant, located at Lair, in Harrison county, Ky., and certain personal property connected with its operation and business. The contract is dated April 6, 1899. It includes claims for storage for whisky in the bonded warehouse, but does not include any whisky. The price to be paid is \$40,000 cash. The vendor in the contract is the complainant, J. I. Blanton, assignee of the T. J. Megibben Company, a Kentucky corporation, who acquired the property from it under a deed of assignment for the benefit of its creditors made July 1, 1898. When the contract was made, he had been authorized and directed by the county court of Harrison county, at its regular March term, 1899, held March 29th, to sell all of the property of his assignor at public or private sale, as he deemed most advantageous; the sale, if public, to be on certain specified terms, and, if private, to be reported in writing to the court for its confirmation. The vendee is the Kentucky Distilleries & Warehouse Company, a New Jersey corporation, organized February 3, 1899, to purchase and operate distilleries and warehouses in Kentucky. Its principal office has been in New York City. It has also had an office at Frankfort, Ky., kept by Mr. W. E. Bradley, its assistant treasurer, and highest official in the state, and one at Louisville, Ky., kept by Mr. Charles H. Stoll, its agent, up to July 1, 1899, to purchase for the distilleries and warehouses, close the contracts therefor, and cause them to be transferred to it, and its general solicitor in charge of its legal affairs in Kentucky since July 1, 1899, and whose residence during this time has been at Lexington, Ky. It has had as its general counsel the legal firm of Moran, Kraus & Mayer, of Chicago, Ill., with an office also in New York City. Mr. Alfred S. Austrian, a member of that firm, has spent a portion of his time at the Louisville office. It has also had in its employ the legal firm of Pirtle & Trabue, of Louisville, whose duty it has been to examine and pass upon the title to the various properties purchased by it, and Mr. Richard C. Stoll, a lawyer of Lexington, Ky., whose duty it has been to verify by personal investigation the abstracts of title furnished by the vendors. In addition, it has employed specially, with reference to particular litigation, the legal firm of which Judge A. P. Humphrey, of Louisville, has been a member.

At the time of the making of the contract involved herein, Mr. Charles H. Stoll had purchased in his own name for defendant between 50 and 55 distilleries in Kentucky, and was then engaged in closing those contracts, and causing the properties to be transferred to defendant. He did not make the purchase of the property in question herein. It was bought by another agent of defendant, and contrary to his judgment and advice. He, however, drafted



the contract, and executed it on defendant's behalf, in pursuance to written authority dated March 28, 1899, whereby he was directed to look after the transaction, see that it was properly closed, and that defendant got an absolutely good title to the property, and a subsequent telegram, dated April 17, 1899, urging him to execute it at once. This he did on April 20, 1899, when its execution became complete. The provisions of the contract, so far as material to the issues in this case, and stripped of their verbiage, are as follows, to wit: Within ten days, complainant was to deliver to defendant an abstract of title to the real estate sold, and within the same time report the sale to the county court of Harrison county, and recommend its approval. If it was approved, within ten days thereafter he was to execute and deliver to defendant, at its office in Louisville, upon a day to be fixed by him, two deeds for the property sold,—one, a general warranty deed, conveying an unincumbered fee-simple title to the real estate, and the other conveying the personal property,—of which day three days' previous notice was to be given to it or Mr. Charles H. Stoll at said office. The division of the consideration for the entire property sold between the two deeds was to be fixed by defendant, and, within three days after receipt of notice of confirmation of the sale, it was to prepare and deliver to complainant form of deeds required for the transfer. The property, at the time of the delivery of the deeds, was to be clear of all liens, charges, incumbrances, taxes, and assessments, and all taxes against the whisky in the bonded warehouse, save those due the United States, which could not be collected under the terms of warehouse receipts issued therefor, were to be paid at that time, or a sufficient fund was to be reserved in the hands of complainant to pay for same from time to time, as the whisky was taken out of bond. Complainant, without further consideration, was to procure and deliver to defendant, along with the distillery property, certificates for at least 90 per cent. of the capital stock of his assignor, the T. J. Megibben Company, and the resignation of its directors and officers, and to cause a meeting of its board of directors to be held at Cynthiana, Ky., at such time as defendant should indicate, for the purpose of receiving the resignation of the directors, one at a time, and installing a new board of directors, to be nominated by defendant, or by such person or persons as might become holders of said stock at its request; and complainant was to guaranty the storage claims to amount to as much as \$5,000, or he might elect not to transfer said storage claims when the contract was closed, and accept \$35,000 in cash, and within 90 days thereafter transfer them, with a guaranty to make good any shortage from \$5,000, and demand \$5,000 cash therefor, or with a guaranty to make good any shortage from \$3,600, and demand \$4,000 cash therefor. The sale was reported by complainant to said county court on April 22, 1899, with a recommendation that it be approved, which was within the stipulated 10 days. Chapter 7 of the Kentucky Statutes, in relation to assignments for the benefit of creditors, provides that a sale of real estate by an assignee under a voluntary deed of assignment, reported to it, may be confirmed at the second regular term of the county court after it is reported. This sale, so reported, was confirmed by said county court at its regular May term, 1899, held May 29th, which was the second regular term thereof after its report. The same day complainant mailed to Charles H. Stoll an abstract of title to said real estate. This was not within the time stipulated, but no point was ever made of the delay; and it seems to have been occasioned by time taken to procure certain deeds deemed essential to perfect the record title to the distillery plant, hereinafter referred to. Charles H. turned the abstract over to Richard C. Stoll, and so notified complainant by letter June 8, 1899. About that date Richard C. Stoll went to Cynthiana, the county seat of Harrison county, and made a personal investigation as to the title. He seems to have turned the abstract, with the result of his investigations, over to Pirtle & Trabue. June 23, 1899, they, by letter to the legal firm of Blanton & Berry, of which complainant was a member, notified him that certain things should be done "in order to perfect the title to the property." Those things were as follows, to wit: (1) The confirmation of the sale should be set aside, the property appraised, a resale had, and a new report of sale made within 10 days after this sale. This, because the property had not been appraised; it being their opinion that the

statute required an appraisalment, and that before a sale. (2) The deeds procured to perfect the record title should have revenue stamps affixed to them. (3) A mortgage, execution, and attachment lien in favor of Lewis Lebus, and three separate mechanics' liens in favor of J. T. Megibben, R. E. Hall, and P. R. Megibben, should be satisfied and released of record. (4) The assignor, the T. J. Megibben Company, should unite with the complainant in the deed, because said deeds to perfect the record title had been made to it since the assignment. They suggested that an agreement might be made whereby the lien creditors referred to would release their respective liens, and look to the proceeds of sale in complainant's hands for payment. Complainant went at once to Louisville, and on June 24, 1899, had a personal interview with Judge Pirtle. According to complainant's testimony, it was then and there agreed between them that it was not necessary that the appraisalment should have been made prior to the sale, but that it would be sufficient if the order of confirmation were set aside, the property appraised, a new report of sale, accompanied by the appraisalment, filed, and a confirmation thereof at the second regular term of the county court after the report was filed had. Judge Pirtle does not deny this conversation. He simply states that he has no recollection of it, and this after his attention was called, with some persistence, to an assumed inconsistency thereof with his letters before and after the interview. June 26, 1899, an appraisalment was had, and a new report of sale, with the appraisalment, was filed in the county court. The appraisalment is not dated. Even the officer's jurat is undated. There is nothing about it to show when it was made. The report does not state anything as to this. From a reading of the report, one would infer that it was made before the sale. Whether it was thought that in this way any trouble on account of the appraisalment not being before the sale would be obviated, and Judge Pirtle's objection was removed by a suggestion that this could be done, does not appear from anything in the record. It is obvious, however, that the time of the appraisalment was designedly kept from the record, and at least it was not allowed to appear that it had been made after the sale. At the regular July term, 1899, held July 24th, this new report of sale was confirmed. On the same day, complainant mailed a copy of the order of confirmation to Mr. Stoll, at Louisville, and inquired of him when it would suit to close the matter up, and expressed the hope, on account of the absence from home of his partner, Mr. Berry, that he could not make it convenient to do so for two weeks. Mr. Stoll was at the time in Michigan, on a vacation, and this letter was forwarded to him there. July 31st he acknowledged receipt thereof, with inclosure, and said:

"I am sending this to Pirtle & Trabue for their opinion. Upon its return, if satisfactory, a deed will be prepared, and I will be ready for settlement with you, though it will not be necessary for you to leave home, as arrangements will be made to settle there upon the execution of the deed."

This order of confirmation was premature, because the July term, 1899, was not the second regular term after the new report of sale, with the appraisalment, had been filed. It was not due until the regular August term, 1899. August 14th Mr. Stoll, after he had word from Pirtle & Trabue, wrote complainant's firm a letter, and inclosed therewith a copy of Pirtle & Trabue's letter to him. In it he said:

"I should be glad to have you take this matter up directly with Messrs. Pirtle & Trabue, and respond to the suggestions which they make in their letter to me. Will you not kindly favor me with carbon copies of your letter to them? They will send me copies of their letters to you, so that I will keep fully posted as to the negotiations between you,—unless Mr. Blanton may see fit to go to Louisville, and confer with Judge Pirtle, and reach a conclusion at once as to what is necessary to be done."

The letter of Pirtle & Trabue to Mr. Stoll, which was so inclosed, was dated August 2d. The only positive suggestion it contained was that the order of confirmation of the new report of sale was premature, and should therefore be set aside, and the report of sale lie over to the regular August term, 1899, for confirmation. The other suggestion it contained is in these words:

"In our letter to Messrs. Blanton & Berry, we suggested that, if there had not been a proper appraisalment of the property before the sale, the first sale

should be disregarded, and a new sale made and reported within ten days after the sale. While it may be that the provision of the statute that the sale shall be reported by the assignee within ten days after the sale is directory, and not mandatory, yet the provision of the statute regulating sales of real estate should be strictly followed. It would save time to have Messrs. Blanton & Berry report directly to us in this matter. We are not disposed to hold that the direction that the report of sale shall be filed within ten days after the sale is mandatory, but we have no question that the report of sale should lie over to the August term of court."

Defendant contends that Pirtle & Trabue, in this letter, renewed and insisted upon the suggestions contained in their letter of June 23d, that the appraisal should be before the sale, and, in aid of this position, would have attention directed exclusively to the first sentence of this extract therefrom. But when that sentence is considered in connection with what follows, it is at least ambiguous whether such was the case, and whether or not, notwithstanding the reference to their former suggestion, the sole matter they are considering was the effect of the fact that the report of sale had not been filed within 10 days after the sale. As to this, they state that, though they had no question that the report of sale should lie over to the August term of the court, they were not disposed to hold that the provision of the statute was mandatory. But complainant seems to have considered this letter as a renewal of the former suggestion. August 19th complainant's firm wrote Pirtle & Trabue in regard to the suggestions contained in the letter. In it they stated distinctly that the appraisal had not been made before the sale, but had been made afterwards, and filed with the new report of sale, and that that report would be confirmed on August 28, 1899,—the regular August term. They added:

"It seems to us that, under the order of sale and the contract of sale in this case, the sale of this property privately, when confirmed by the Harrison county court, would be valid without the appraisal ordinarily required prior to making the sale; but, if you gentlemen hold a different opinion in regard to this matter, then the only way an appraisal can be had prior to the sale will be for the assignee to have the property appraised, and then thereafter enter into another contract of sale with Mr. Stoll; but we would regret very much to have this matter delayed so long as this would require, as there had been no exceptions filed to the sale. We will be glad to hear from you at your earliest convenience on this point."

A letter was also written to Mr. Stoll, in Michigan, on this same date. In it was inclosed a copy of this letter to Pirtle & Trabue. Complainant seems to have been absent from home when these letters were written. August 21st, he having returned, his firm wrote another letter to Pirtle & Trabue, in which they explained that the report of sale was filed June 26, 1899, and the premature order of confirmation had been entered by mistake, and stated that it had been set aside, and the matter continued until the August term. They added:

"If there are any other defects, please advise us at once, as our county court day is next Monday. If you think the appraisal should antedate the date of sale, the only thing we can do now is to enter into a new contract of sale, as of a different date, subsequent to the appraisal. We do not, however, deem it necessary that this should be done."

August 22d Pirtle & Trabue answered both of said letters from complainant's firm at the same time. They said:

"We think, after the order of confirmation of the sale has been entered at the August term of the court, that the objections heretofore made will be cured. We think we have expressed this opinion heretofore, when we stated that it should not be necessary to begin over again from the beginning in this matter. We should like to have the order entered on the 28th day of August, approving and confirming the sale. The above opinion is given upon the assumption that the last report of sale shows that the appraisal was made prior to reporting the sale. We should like to see the last report of the sale. As soon as we hear from you that the order confirming the sale has been made, we will prepare a deed and send it to you."

The report of sale was confirmed at the regular August term, 1899, held

August 28th. August 29th complainant mailed to Pirtle & Trabue copies of the orders setting aside the order confirming sale at the July term, and continuing the case until the August term, and confirming the sale, and directing a deed to defendant. August 30th, Pirtle & Trabue acknowledged receipt of these copies. They added:

"These orders seem to us all that is necessary. We will prepare at once a deed, and send it to Mr. C. H. Stoll for his approval, with the request that, upon approving same, to forward it to you for execution, and he will then arrange for the delivery of the deed and the payment of the money."

September 5th Mr. Alfred S. Austrian, of the firm of Moran, Kraus & Mayer, wrote complainant a letter from Chicago, in which he said:

"I have been advised that you are now ready to turn over the Megibben plant. Will you kindly tell me how the matter stands, and when you will be ready to finally consummate the entire transaction?"

The record does not disclose how he had been so advised. The reasonable inference is that he had been so advised by Mr. Stoll, to whom Pirtle & Trabue had sent the deed which they had prepared. September 7, 1899, complainant answered this letter, and stated:

"Certified copies of the orders of court approving and confirming the sale, and ordering the deed executed by me, as assignee, were forwarded last week to Messrs. Pirtle & Trabue, who thereafter notified me that they had received the same, and that they approved the title, and that the orders were sufficient, and that they would prepare a deed, and send to Mr. Stoll, who is now in Michigan, for his approval. Since then we have heard nothing from either Messrs. Pirtle & Trabue or from Mr. Stoll. Most any old time will suit me, to consummate the trade, as we are not very busy at this time."

September 14th Mr. Austrian wrote complainant, acknowledging receipt of his letter, and stating:

"I expect to be in Louisville inside of the next week or ten days, at which time I will be pleased to take up the matter of the Megibben plant, and bring the same to a conclusion."

Before proceeding with the narration, it will be well to pause and take stock of the condition of things at this time. Defendant's attorneys, Pirtle & Trabue, after the personal investigation of Mr. Richard C. Stoll and examination of the abstract, had approved the complainant's title, save so far as stamping said deeds, and releasing the liens referred to in their letter of June 23d; and these matters, if not already attended to, could be, before or at the time of closing the trade. And Mr. Austrian, one of the defendant's general counsel, had informed them that within a week or 10 days he would be in Louisville, and bring the matter to a conclusion. It is claimed by defendant that Pirtle & Trabue had not authority to bind it by an approval of the title, and that their sole authority was to examine and report on the title. In the case of *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 48 C. C. A. 363, 109 Fed. 280, involving litigation as to another distillery, Mr. Stoll testified that their authority was to examine and pass on the titles to properties purchased. No limitation on their authority was intimated in that case. But as the question of their authority was not involved therein, no stress can properly be laid on this fact. However this may be, it is certain that Pirtle & Trabue did more than merely examine the title to the property involved herein, and report on it to the higher legal authority. They took up the matter of title with complainant; told him what, in their opinion, was necessary to be done to make the title acceptable to defendant; and, after he had complied with their suggestion, notified him that all had been done that was necessary. It is further certain that Mr. Stoll, who had been specially empowered to execute the contract on defendant's behalf, and to close it and see that it got a good title, and who was its general solicitor after July 1, 1899, and, as such, in charge of all its legal matters in Kentucky, knew that Pirtle & Trabue had done this, and did not inform complainant that they had no authority to do it, or to bind defendant by what they had done. And still further, in his letter of July 31st he informed complainant that, in the opinion of Pirtle & Trabue was satisfactory, he would be ready for settlement with him, and that it would not be necessary for him to leave home, as he would make arrangements to settle with him there; and in his letter

of August 14th he intimated to complainant that he might take the matter up with Pirtle & Trabue, and negotiate with them,—each side to send him carbon copies of their letters, to keep him posted,—or, if he saw fit, he might go to Louisville and confer with Judge Pirtle, and reach a conclusion at once as to what was necessary to be done. It is not unreasonable to infer that Mr. Austrian's inquiry of complainant as to when he would be ready to consummate the transaction, and subsequent notification as to the time when he would be in Louisville, and would be pleased to bring the matter to a conclusion, was due to some communication from Mr. Stoll after he had received a letter from Pirtle & Trabue to the effect that all that was necessary had been done, and inclosing the proper form of a deed.

There have been left out of the narration as to what transpired in connection with the sale in question herein certain acts on the part of certain agents of defendant indicating a purpose to take the property under the contract,—such as making contracts with certain persons to superintend the property, having it insured, and for telephone service in connection with it,—as we deem it unimportant to determine how far they were authorized by it, or what is their precise bearing in this case.

It must be accepted, therefore, as a fact in this case, that defendant, through its authorized agents, had by the middle of September, 1899, informed complainant that it was satisfied with his title, and would within a week or 10 days conclude the transaction with him. Whatever significance or value this fact is entitled to in this case must be given to it. The week or 10 days referred to in Mr. Austrian's letter of September 14th expired without any word from him. Indeed, complainant heard nothing from him until he received a letter dated December 13, 1899. This was after complainant had written him five letters in succession, dated, respectively, October 5th, October 7th, October 24th, December 2d, and December 11th; the first two being addressed to him at Louisville, and the last three at Chicago. In the first, complainant expressed a hope that he would not be wanted in Louisville before the latter part of the following week, in order to finally transfer the plant. In the next he withdrew this expression of hope, and stated that he would be ready to close up the deal any day that or the following week, and that he would be glad to hear from him. In the next he called Mr. Austrian's attention to the fact that since the letter of September 14th he had heard nothing from him; stated that the creditors were making constant and repeated inquiries regarding the sale, and he was anxious to complete it as soon as possible; and requested that he advise him what date it would suit him to turn over the property. Between this and the next letter, about the middle of November, 1899, complainant sent his partner, Mr. Berry, to see Mr. Stoll in regard to the matter; and Mr. Stoll informed him that he knew nothing about it, that he had no idea when defendant would accept the property, and that the matter was entirely out of his hands, and in fact had never been in his hands, inasmuch as the purchase was not made by him, but by others. In his next or fourth letter, complainant informed Mr. Austrian of this visit and its result, and requested him to fix a time, and take up the transfer of the property at once. In the last letter, which was answered, complainant again requested appointment of a day for the consummation of the trade. In his answer thereto, dated December 13th, Mr. Austrian stated that complainant's letter of the 11th had been referred to Mr. Levi Mayer, who was then out of the city, and that as soon as Mr. Mayer returned he would endeavor to give a reply. December 14th complainant wrote Pirtle & Trabue. He called their attention to their letter of August 30th, and to the fact that he had heard nothing from them or Mr. Stoll since then, and stated that his partner, Mr. Berry, had called on Mr. Stoll, and been told by him "that he was not informed in regard to the affair at all"; that he would be glad if they would act upon their suggestion of August 30th, and prepare papers, in order that he might close the matter up; and that he had written Mr. Austrian, who had written him subsequent to the date of their letter, that he would be in Louisville shortly and take the matter up, but that he had not seen fit to answer any of his letters of recent date. Pirtle & Trabue answered this letter December 15th, and stated that they had referred it to Mr. C. H. Stoll, at Lexington. December 18th Mr. Levi Mayer

wrote complainant, as Mr. Austrian had said he would do in his letter of December 13th. In it he said:

"We have carefully gone through the papers and documents connected with the Megibben property transaction, and have come to the conclusion, and have so advised our client, that you have not complied with the agreement, that the title is imperfect, and that there are several other substantial breaches of the conditions which were to be performed on your side. We have also had the matter gone over by local Kentucky lawyers, who have come to the same conclusion as we have arrived at. Mr. C. H. Stoll, of Lexington, has also investigated the matter, and is quite familiar with the details, and is not far from where you are. Doubtless you could arrange to have a personal conference with him. I am sending him a copy of this reply, and also of your letter of the 11th inst."

Complainant seems to have been loath to comply with Mr. Mayer's suggestion to take the matter up with Mr. Stoll. This, no doubt, was because Mr. Stoll's statement to Mr. Berry in the middle of November that the matter was out of his hands, and perhaps, also, because his letter of December 14th to Pirtle & Trabue had been sent to Mr. Stoll, as they wrote complainant, and had called forth no communication from him, and was therefore not unnatural. Instead, he kept up a correspondence with Mr. Mayer. He complained of his treatment; sought for detailed information as to wherein his title was defective, and he had failed to comply with his agreement; and inquired as to who was authorized to close the matter with him. Mr. Mayer, in his responses, adhered to the position taken in his letter of December 18th, and referred complainant to Mr. Stoll for the detailed information sought. Finally, finding that he could make no further headway with Mr. Mayer, complainant arranged with Mr. Stoll for a meeting at Lexington to confer about the matter. Pursuant to appointment, he met him there on January 16, 1900. According to complainant's account of the interview, Mr. Stoll notified him that defendant would not accept the plant, because there were such material defects in the title that defendant could not accept it, and, upon his request to name them, mentioned none that had not been referred to by Pirtle & Trabue, as to which an understanding had been had. According to Mr. Stoll's account of it, it was his purpose then to inform complainant as to all the defects that had been found to exist; and he began by telling him that it was defective because of the want of a proper appraisalment, and complainant refused to permit him to name any others. They agree that on that occasion complainant requested Mr. Stoll to furnish forms of deeds called for in the contract, so that he might prepare and tender them to the defendant, which he refused to do, and that Mr. Stoll, in effect, informed complainant that Mr. Bradley, the assistant treasurer at Frankfort, was the proper person to whom to make a tender. The information conveyed by the letters of Mr. Mayer and the interview with Mr. Stoll was the first that complainant had since the letter of Pirtle & Trabue, of August 30th, and Mr. Austrian, of September 14th, that a change had taken place in defendant's attitude towards complainant's title, and that it had determined not to accept a conveyance of the property and to comply with its contract. The record does not disclose the cause of this change and determination. Complainant's counsel would have it that it was due to the fact that defendant had come to Mr. Stoll's opinion that the purchase was not a good one, as a mere business venture, and the alleged defectiveness of title was put forward as an excuse to get out of the contract. There is reason, however, to suspect, at least, that defendant had come to a real doubt as to title, if not conviction that the complainant's title was not good, and, though it may have been glad to be released, that its claim as to defectiveness of title was a sincere one. Mr. Stoll testifies that he reached Louisville on his return from his vacation in Michigan about September 18th, and met Mr. Austrian there, and that between September 18th and November 13th he consulted with Judge A. P. Humphrey, who, as heretofore stated, was defendant's attorney in connection with certain special litigation about the title to this property; and thereafter, and before November 13th, he made a report in regard thereto to the general counsel, Moran, Kraus & Mayer. Judge Pirtle, in his testimony, also speaks of an argument with Judge Humphrey in regard

to the title, which was of such a nature as to blur his recollection as to what took place between him and complainant on June 24th as to the matter of appraisal. This consultation with Judge Humphrey, and this argument between him and Judge Pirtle, and subsequent report by Mr. Stoll to Moran, Kraus & Mayer, suggests that, as a result of this consultation and argument, a serious doubt, at least, as to complainant's title, arose, and defendant was affected by it. But however this may be, it is certain that defendant was very remiss in not letting complainant know the change of its attitude towards his title very much sooner than it did,—particularly in view of the letters of Pirtle & Trabue of August 30th, and Mr. Austrian's of September 7th and 14th. It did not seem to consider that it was incumbent on it to give complainant any information in regard to the matter of its own accord, and none was received by him until he had, by repeated efforts, tried to obtain it. However, it is entirely immaterial whether defendant refused to accept a conveyance from complainant and to comply with its part of the contract, because of a desire to get rid of a bad bargain, or because of a sincere conviction that it could not obtain a good title from complainant. The main thing to be considered is whether complainant is able to pass a good title, and defendant is bound to accept it. As said by Kekewich, J., in the case of *Wylson v. Dunn*, 34 Ch. Div. 569:

"The proceedings do not disclose the reason why she does not desire to purchase the piece of land. Possibly she does not wish now to build there, or to live in that neighborhood. But it is immaterial to me why that state of things has been brought about. If she is bound to purchase the piece of land, her wish to get rid of it will not avail her. If, on the other hand, she is not bound to purchase the piece of land, no consideration of her reasons ought to influence or will influence the court."

February 2, 1901, complainant made a tender of a deed to the property sold, and certain other papers, to Mr. Bradley, on behalf of defendant, at its Frankfort office, which he refused to accept. The details of this tender, so far as important, will be stated hereafter. And thereafter, on the same day, this suit was brought in the circuit court of Harrison county, from whence it has been removed to this court.

Blanton & Berry and Helm, Bruce & Helm, for complainant.

C. H. Stoll and Humphrey, Burnett & Humphrey, for defendant.

COCHRAN, District Judge (after making foregoing statement). It is now in order to consider the various defenses which the defendant relies on to defeat complainant's right to the relief he seeks, and they will be taken up and disposed of one at a time.

1. Inability of complainant to perform his part of the contract is urged, and many reasons are set forth for claiming that this inability exists. These reasons, and the court's views as to their sufficiency, are as follows:

(1) It is claimed that such inability exists because of the fact that the contract of sale was a private one. It is contended that an assignee for the benefit of creditors cannot make a private sale of the real estate held by him under a voluntary deed of assignment, and that, therefore, even though such sale may be authorized and confirmed by the county court, he cannot pass the title to such property in pursuance to such a contract of sale. The effect of this position, it will be noticed, is not only inability on complainant's part to perform his contract, but also that his contract is void. Prior to the act of March 16, 1894, entitled "An act relating to voluntary assignments" (Sess. Acts 1894, p. 189), and chapter 7 of the Kentucky Statutes, there were but two statutory provisions in Kentucky in relation to such assignments. One was what is known as the "statute of 1820,"

and contained in section 22, art. I, c. 63, Gen. St., and the other an act approved March 8, 1876, contained in chapter 109, Gen. St. (Ed. 1887). The latter statute provided for the assignee executing bond in the county court, and filing therein an inventory and report of the sales made by him, and nothing more. The former statute was in these words:

"No sale made of any real estate by a trustee by virtue of a deed of trust or pledge to secure the payment of debts shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge, unless the sale thereof shall be in pursuance to a judgment of court or the maker of such deed or pledge shall join in a writing evidencing the sale."

The effect of this statutory provision upon such instruments is thus stated by Judge Simpson in the case of *Ely v. Hair*, 16 B. Mon. 230:

"Mortgages and deeds of trust, with respect to a sale of the property embraced by them, are placed substantially upon the same footing by the laws of this state. No sale can be made under a deed of trust without the intervention of a court of equity, unless it be made with the consent of the grantor. A sale of the mortgaged property may be made in the same way, the mortgagor and mortgagee concurring therein."

To the same effect are remarks of the same learned judge in the case of *Lyons v. Field*, 17 B. Mon. 549. Though this is undoubtedly true, there is a difference between the terms of a voluntary deed of assignment for the benefit of creditors and those of an ordinary mortgage. The former contains a power of sale in the assignee. The latter contains no such power. The result is that, if the statute had not been enacted, the assignee, under such a deed, would have had the power to sell and convey the property covered by it independent of a court of equity or the assignor, and without any limit upon it other than what might be contained in the instrument itself, or put upon it by the principles of ordinary business prudence. In the case of *Hahn v. Pindell*, 3 Bush, 189, Mr. Chief Justice Robertson, in speaking of a special statute repealing the act of 1820 as to a certain corporation, said:

"The inevitable effect of the literal import of that legislative enactment is to restore the common-law right, without the intervention of a court of equity, to sell mortgaged property in execution of a power given in the mortgage, and so far as to abrogate the Kentucky statute of 1820."

He said further:

"There can be no judicial doubt that the common law legalized fair sales of mortgaged property, either real or personal, when made according to power to sell reserved in the mortgage. And it is historically true that such powers are the more prevalent in the most commercial cities and countries of the world."

In the case of *Shinkle's Assignee v. Bristow*, 95 Ky. 89, 23 S. W. 671, Pryor, J., said:

"It is plain the trustee has no power to sell or pass the title, except in the manner provided by the statute, and equally clear, but for the statute, the trustee could sell and pass the fee. \* \* \* The statute intervenes and places a limitation on the power of the trustee only for the benefit of the grantor and creditors, and prohibits a sale and conveyance by him, unless by the direction of the chancellor or the consent of the grantor. It does not divest the trustee of the title, but says, in effect, 'You have the title, but



shall not pass it, except in the mode prescribed by the statute.' It will not be contended that the trustee would be without power to convey in the absence of this statute, and the limitation placed on his right to sell by its provisions only requires the passing of the title from the assignee in a prescribed mode, for, without this limitation, the trustee, being intrusted with title, could sell and convey at his own will and pleasure."

The way, therefore, this statute placed voluntary deeds of assignment and mortgages upon the same footing, was by curtailing the power of sale contained in the former. After its enactment the power could only be exercised in pursuance to a judgment of court or in conjunction with the assignor. So exercised, there was nothing in the statute preventing the sale under the power being either public or private, as might be determined by the court or by the parties to the instrument; and, when the sale was made, it was in pursuance to the power. This statute remained unchanged until the act of February 25, 1893, entitled "An act concerning lands," which forms chapter 150 of the Acts of 1891-93, p. 495, and first five articles of chapter 76 of the Kentucky Statutes. By section 20, art. 2, of said Act, section 2356, Ky. St., it was provided:

"No sale made of any real estate by a trustee by virtue of a deed of trust, or pledged to secure the payment of debts, shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge, unless the sale thereof shall be in pursuance to a judgment of the court, or shall be made by an assignee under a voluntary deed or assignment, or the maker of such deed or pledge shall join in a writing evidencing the sale."

The effect of this change in the phraseology of the statute of 1820 was to restore the law in relation to voluntary deeds of assignment to what it was prior to the passage of that statute. There was this difference, however, between the law as it was before the statute of 1820 and as it became after the act of February 25, 1893: The power of the assignee to sell in pursuance to the power of sale under the deed of assignment before the statute of 1820 was without statutory recognition. It was dependent solely upon the unwritten law. As it became upon the enactment of the act of February 25, 1893, that power was recognized, and impliedly, at least, declared, by statute. After the passage of this act, therefore, the assignee, under such an assignment, had power to sell independent of court and assignor. He had full and ample power to sell publicly or privately, as he deemed best, and to pass the title by his own deed to the purchaser. Such was the state of the law when the act of March 16, 1894, entitled "An act relating to voluntary assignments," and constituting chapter 7 of the Kentucky Statutes, was passed; and in construing the provisions of that act in relation to the matter in hand, in order to a proper construction thereof, this must be borne in mind. By section 14 of that act, which is section 87 of the Kentucky Statutes, it was provided:

"Personal property conveyed shall be sold by the assignee at private or public sale, as the court may direct; and the assignee shall have power to pass title to the same as fully as the assignor could have done at the date of the assignment. Real property shall be sold in the same manner and upon the same terms as real property sold at decretal sale, and the court shall make such orders concerning the advertisement of the sale as it deems

proper, and the assignee shall have power to convey and pass all the right and title to the same, which the grantors in the deed of assignment had at its date. The report of sale shall be filed by the assignee within ten days after the sale. If no exceptions are filed thereto, the same shall be confirmed at the second regular term after it has been filed. If exceptions are filed, they shall be heard by the court and disposed of."

This section presupposes the law as it then existed in relation to such assignments, and as it continued in existence after the passage of that act. One provision of that law, which is presupposed, was that the assignee, under and by virtue of the terms of the deed of assignment, and the provision of section 20, art. 1, of the act of February 25, 1893 (section 2356, Ky. St.), had the power to make the sale and pass the title independent of court and assignor. Possibly another was the requirement of the act of March 8, 1876, requiring the assignee to report his sales to the county court. Hence there is no attempt in the section to provide that power to sell shall be conferred on the assignee by order of the county court, or that a report of sale shall be filed. It simply assumes that such power exists, and such filing shall be had. It provides that the exercise of the power of sale shall be under the direction and supervision, and subject to the approval, of the county court. As to personal property, it confers powers on the county court to direct whether it shall be sold at private or at public sale. As to real property, it provides that it shall be sold in the same manner and upon the same terms as real property sold at decretal sale. The manner and terms of sales of real property sold at decretal sales are prescribed by section 696 of the Civil Code of Practice. According to this provision, such sales must always be public. Hence the section in question required that real property sold under a deed of assignment should be sold at public sale, and cut off any power to sell such property at private sale. It conferred power on the county court to make such orders concerning the advertisement of the sale as it deemed proper. And it expressly conferred on the assignee power to pass title to the personal property sold by him as fully as the assignor could have done at the date of the assignment, and to convey and pass all right and title to the real property sold by him which the grantors in the deed of assignment had at its date. This, however, was simply declaratory of existing power, when exercised under the limitation prescribed by the section. This section was subsequently amended by an act approved March 16, 1898, found in Sess. Acts 1898, p. 104. That amendment added some words to the second sentence thereof, so as to make that sentence read as follows:

"Real property, when sold at public auction, shall be sold in the same manner and upon the same terms as real property sold at decretal sale, provided, the purchaser shall have the right to pay cash and the assignee to accept cash in payment of the purchase price at any such sale, and the court may make such orders concerning the advertisement of the sale as it deems proper, and the assignee shall have power to convey and pass all the right and title to the same, which the grantor in the deed of assignment had at its date."

The words so added, which affect the matter in hand, are contained in the conditional phrase, "when sold at public auction," inserted near the beginning of the sentence. Their addition removed the require-

ment thereof that real property sold by the assignee should be sold publicly. Before the addition, real property was to be sold in the same manner as real property sold at decretal sales, and therefore publicly. After the addition it was to be sold in that manner "when sold at public auction," or, in other words, it was to be sold publicly "when sold at public auction." Of course, this was an awkward way of removing that requirement. But there can be no doubt but that the object of the addition was to remove the requirement, and that it had that effect. If, then, this amendment had the effect of removing the requirement of this section of the act of March 16, 1894, that sales of real property by an assignee under a voluntary deed of assignment should be at public auction, does it not necessarily follow that since it became a law such an assignee has the right to sell publicly or privately, as he deems best, and pass the title thereto, in pursuance to such a sale? It would seem that it does. As we have seen, before the act of March 16, 1894, the assignee had the right to sell publicly or privately, and pass title in pursuance to such a sale, by virtue of the power of sale contained in the deed of assignment, and the implied recognition and declaration of section 20, art. 1, of the act of February 25, 1893 (section 2356, Ky. St.). The limitation put upon that power by that act being removed by the amendment thereto, it follows that since the amendment the assignee has the same power which he had before the act of March 16, 1894. The amendment leaves the power conferred by the terms of the deed of assignment, and impliedly recognized and declared by section 20, art. 1, of the act of February 25, 1893 (section 2356, Ky. St.), in full force and effect. The view that this amendment of the act of March 16, 1894, has this effect, is strengthened by another amendment thereto, made by the act of March 16, 1898. Before the act of March 16, 1894, the county court did not have jurisdiction over voluntary deeds of assignment, other than such as was conferred by the act of March 8, 1876, which, as we have seen, was quite limited. Extended jurisdiction thereof was first conferred on the county court by the act of March 16, 1894. But jurisdiction of suits to settle assigned estates had long been exercised by the circuit court under the provisions of sections 428-438, Civ. Code Prac. Section 23 of the act of March 16, 1894, provided that, notwithstanding the extended jurisdiction conferred by the act upon the county court over such estates, the circuit court should still have jurisdiction to settle them as before, and that, when a suit for settlement should be brought in the circuit court, the jurisdiction of the county court should cease, and all papers should be transmitted by the clerk of the county court to the clerk of the circuit court. This section, if it did not have the effect of depriving the assignee, after a suit for settlement had been brought in the circuit court, of selling any part of the assigned estate, except so far as he might be empowered to do so by the judgment of the circuit court, at least was liable to that interpretation. By the amendment of March 16, 1898, to prevent any such effect, these words were added to this section, at its close:

"And the said circuit court shall have all the power and authority to administer and settle up the assigned estate, conferred on the county court by

this act, in addition to its power and authority heretofore existing as a chancery court, and the assignee shall have full power and authority to sell the personal and real property belonging to the assigned estate at public or private sale, and to convey and pass over the right and title to the same, which the grantors had in the deed of assignment at its date; and said assignee shall, within ten days after such sale, report same to the circuit court in which the suit for settlement of the estate is pending, and such report shall thereupon be laid over for ten days for exceptions, and if no exceptions are filed within that time, same shall thereupon be confirmed. If exceptions are filed, then such exceptions shall be heard and determined by the court." Acts 1898, p. 105.

There can be no doubt but that the effect of this amendment was to declare, if not to create, power in the assignee to sell publicly or privately, and that without any order or judgment of court, after jurisdiction had passed to the circuit court; it being provided that that jurisdiction after the passage should be the same as the county court. This amendment would seem to clearly recognize that before that passage, and whilst the jurisdiction remained in the county court, the assignee had the same power to sell publicly or privately as after the passage, and no good reason has been or can be assigned why he should not have it.

Counsel for defendant feel put to account for the amendment adding the conditional phrase, "when sold at public auction," to the section relating to proceedings when jurisdiction is in the county court. They suggest that it was intended thereby to provide that a certain course should be pursued in case of a public sale after jurisdiction had passed to the circuit court by the bringing of a suit for settlement therein. But this is to mix up two provisions that are entirely distinct and relate to proceedings at two separate and distinct stages. Section 14 of the act of March 16, 1894, as amended by the act of March 16, 1898, relates to proceedings whilst jurisdiction is in the county court, and section 23 of that act, as so amended, relates to proceedings after jurisdiction has passed to the circuit court; and it would seem that there is no sound reason for holding that the provisions of one section have any relation to those of the other. They are entirely separate and distinct.

The conclusion of the court, therefore, is that the complainant had power to make the sale involved herein. The statute authorized him to make a private sale, and the terms of the deed of assignment were full and ample in this particular. This does away with the necessity of considering the effect of the confirmation of the sale, even though there may have been no original power to make a private sale. Probably it would have, in that contingency, no validating effect. Authority, however, is not wanting that it would. It was so held in the case of *Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183. The defense, it should be added, is without merit, other than such as belongs to any purely technical defense. *Pirtle & Trabue*, who had authority to examine the title, and to confer with complainant in regard to same,—as to what was necessary to be done by him in order to pass a good title,—indicated to complainant what they thought was thus necessary, and never intimated to him that a private sale would not do. On the contrary, after he had complied with their suggestion as to appraisalment and confirmation of sale, they informed

him that he had done all that was necessary to be done. Mr. Stoll, who had executed the contract on defendant's part, and had been directed to see that it got a good title, and who was in charge of its legal affairs in Kentucky after July 1st, was aware, to complainant's knowledge, of the negotiations between Pirtle & Trabue and complainant, and their result, informed complainant that, if their opinion was satisfactory, he would be ready for settlement, and, again, that they and complainant might reach a conclusion as to what was necessary to be done, and did not until January 16, 1900, express a contrary opinion, or disapproval of their course. Mr. Stoll does testify that he was always of the opinion that complainant had no power to make a private sale, and that he so informed complainant when the contract was being drawn. This, however, is denied by complainant, who says that he expressed the opinion that he could make a private sale. But however this may be, complainant had a right to infer from his subsequent course either that he had changed his mind, or that defendant was willing to go ahead notwithstanding his opinion. And it is hardly natural that he would go ahead, with this opinion, without calling defendant's attention thereto, and receiving further direction from it, in view of the authority under which he executed the contract, which directed him to see that it got a good title.

(2) Again, it is claimed that such inability exists because there was no valid appraisalment of the real estate covered by the contract prior to making of the contract. It is claimed that the law requires an appraisalment to be had of real estate held by an assignee under a deed of assignment, before making a sale of same, either publicly or privately, and that the appraisalment which was made was invalid, because it was an appraisalment of both the real and personal estate sold, without a separate appraisalment of the real estate, and because it was made after, and not before, the sale. This defense, like the former one as to the sale being a private one, is not meritorious. It is true that Pirtle & Trabue, in their letter of June 23d, took the position not only that the real estate should be appraised, but that it should have been appraised prior to entering into the contract, and that in their letter of August 2d to Mr. Stoll there is reference to this position, somewhat ambiguous. But complainant's testimony that as a result of his personal interview, on June 24th, Judge Pirtle agreed that an appraisalment after the contract would do, is not denied by him. In the letter of Blanton & Berry to Pirtle & Trabue of August 19th, the former said to the latter that, if they still adhered to their former opinion as to the necessity of the appraisalment prior to the sale, the only way this could be done was for the assignee to have the property appraised, and thereafter enter into another contract of sale with Mr. Stoll, and expressed a desire to hear from them as to this at their earliest convenience. And again, in the letter of Blanton & Berry to Pirtle & Trabue of August 21st, they repeated:

"If you think the appraisalment should antedate the date of sale, the only thing we can do now is to enter into a new contract of sale as of a different date, subsequent to the appraisalment."

A copy of the letter of August 19th, at least, was sent to Mr. Stoll. In answer to both letters, Pirtle & Trabue said:

"We think, after the order of confirmation of the sale has been entered at the August term of the court, that the objections heretofore made will be cured. We think we have expressed this opinion heretofore, when we stated that it would not be necessary to begin over again from the beginning in this matter."

A copy of this letter, no doubt, was sent to Mr. Stoll. In view of this, it does not come with good grace, if everything else should be all right, for defendant to urge a defective appraisal as a reason why its contract should not be enforced. If the fact that the appraisal included some personal estate rendered complainant unable to pass a good title to defendant, no objection could be urged to defendant's relying on this, as it does not seem to have seen the appraisal until after this litigation. But it would hardly be held, if an appraisal was necessary, that because it included some personal property, which was essential to the operation of the distillery and the carrying on of the business, and, with the real estate, constituted a distinct whole, the appraisal was so defective that complainant was unable to pass title to defendant after confirmation of the sale.

Was, then, an appraisal required? Defendant contends that it was, by the act of April 9, 1878, entitled "An act providing for the redemption of real estate sold under an order or judgment of a court" (1 Acts 1877-78, p. 122), re-enacted by Article 2 of the said act of February 25, 1893, entitled "An act concerning lands," heretofore referred to, and found in sections 2362, 2365, Ky. St. Section 2362 provides that "before any real estate shall be sold under an order or judgment of a court other than an execution, the commissioner or officer, whose duty it may be to sell the same, shall cause it to be valued" in the manner pointed out therein. Section 2363 provides that the valuation so made shall be in writing, signed by the persons making it, and returned by such commissioner or officer to the court which made the order or rendered the judgment for the sale of the property, and the same shall be filed among the papers of the cause in which the judgment was rendered or the order made, and also spread upon the records of the court. Section 2364 provides that, if the real estate which may be sold in pursuance of such judgment or order does not bring two-thirds of such valuation, the defendant and his representatives shall have the right to redeem the same within the time and in the manner therein provided. Section 2365 provides that, "if the judgment in pursuance of which such sale is made be not satisfied by such sale, the right of redemption herein provided for may be sold in satisfaction of the residue of such judgment; and the said right of redemption shall also be liable to sale under execution," with additional provision as to method of redemption in such case, and as to filing report of sale.

Now, it must be acknowledged that before the act of February 25, 1893, removing the bar to the assignee's making a sale of the assigned property without the assignor's written consent, in case of a sale by the assignee with the assignor's written consent, and after that act; and before the act of March 16, 1894, in case of a sale by the assignee alone, publicly or privately, this appraisal statute had no application, and no appraisal was essential. That for the reason that the sale was not under an order or judgment of a court, but

in pursuance of the deed of assignment, and the statutory permission of a sale by the assignee with the assignor's consent in the one instance, and without his consent in the other instance; that the assignee was not a commissioner or officer, the mere fact that by the act of March 8, 1876, he was required to execute a bond and file an inventory and report of sale being hardly sufficient to constitute him an officer; and that the sale was not had in an adversary proceeding between parties, and in which there were defendants. Such a sale was not within the purview of the act. The court of appeals of Kentucky held in the case of *Woolridge v. Jacob's Guardian*, 79 Ky. 350, that where real property was sold under judgment of court, for reinvestment of the proceeds, the sale, though within the letter of the statute, was not within the intent of the statute, and hence not affected by it. In the case of *McKee v. Stein's Guardian*, 91 Ky. 242, 16 S. W. 583, it was held that the statute did not apply to a resale of real property purchased by the defendant debtor to satisfy purchase price of first sale; and it was said that, if the purchaser at the first sale had been a stranger, a sale to satisfy the sale bonds would not be within the statute, because "he would not have been a defendant, in contemplation of the statute." On the other hand, in the case of *Cantrill v. Perry's Adm'r*, 7 Ky. Law Rep. 446, it was held that, where an administrator sued to subject the real estate of the decedent to the payment of debts, the act in question applied, and that a sale had therein could not be sustained, because the property had not been previously appraised. And in the case of *Graves v. Association*, 87 Ky. 441, 9 S. W. 297, that, in a suit brought in the circuit court for a settlement of an estate assigned for the benefit of creditors under provisions of sections 428-438 of the Civil Code of Practice, a sale in pursuance to a judgment therein was within this appraisement statute. In each of these two cases the sale was under a judgment of court, was by a commissioner of the court, was in an adversary proceeding to which there were defendants, was coercive, and was to pay debts.

There is no room for claiming that the act of March 16, 1894, made any change in the application of the appraisement statute to a sale of real property by the assignee under a voluntary deed of assignment. The sole effect it had upon such a sale was to require that it be in the same manner and upon the same terms as real property sold at decretal sale, and that it be reported to and confirmed by the county court, and perhaps, also, to cut off all power on part of the assignee to sell it under the deed of assignment after jurisdiction of the assigned estate had passed to the circuit court by the filing therein of a petition to settle that estate. The effect of the amendment of March 16, 1898, was to restore to the assignee the power to sell the real property privately whilst the county court had jurisdiction, and to confer upon the assignee the right to sell privately or publicly after jurisdiction had passed to the circuit court. The act of March 16, 1894, as amended by the act of March 16, 1898, expressly provides that the assignee, both whilst the county court has jurisdiction and after the circuit court has acquired jurisdiction, shall have the power not only to sell, but to convey to the purchaser the right and title of the assignee. The only connection which the county court, in the one instance, and the circuit

court, in the other, has with the sale, is simply supervisory, to confirm or reject it, and perhaps, also, in case of delay on the part of the assignee, to compel him, upon a proper showing, to act. In no event is his sale a sale under or in pursuance to the judgment of the court, but under and in pursuance of the deed of assignment. And there is no intimation anywhere that it was the intention of the legislature that the appraisement statute should apply to such a sale. It may be difficult to find any good reason why it applies to a sale of the assigned estate by a commissioner under a judgment of the circuit court rendered in a suit brought to settle the estate, pursuant to the Code provisions, before the amendment of March 16, 1898, and not to a sale by an assignee, under the supervision of that court, after that amendment was passed. Suffice it to say, the former sale comes within the letter of the appraisement statute, and the other does not, and there is no reason for holding that it was the intent of the legislature that a sale by an assignee, after jurisdiction had passed to the circuit court, should be governed by the appraisement statute, when it was not so governed if made before jurisdiction had so passed. But however this may be, this was the case of a sale by an assignee before jurisdiction had passed to the circuit court, and there has never been any ground for claiming that a sale so made was within the appraisement statute. It was not so before the act of February 25, 1893, when the assignor had to give his written consent thereto. It was not so after that act, when he had power to make a sale without consent. If so, there is nothing to indicate that it was intended that a sale after the act of March 16, 1894, which permitted him to sell without the assignor's consent, but required sale to be public or after the amendment of March 16, 1898, which permitted it to be private, should be within the appraisement statute. The court is therefore driven to the conclusion that no appraisement was required in this case. And even if one was necessary, it feels that the failure to have a proper appraisement was simply a ground of exception to the sale, and not a ground for holding that the sale, after confirmation, was void.

But if it be conceded that the law required an appraisement, and that it should have been made prior to the sale, and of the real estate alone, it does not follow that because the appraisement was made after the sale, and included the personalty connected with the operation of the distillery and the carrying on of its business, that there has been any flaw in complainant's title on this score since the confirmation of the sale. Counsel for defendant cites authorities to the effect that a failure to comply with a statutory requirement as to appraisement will invalidate the sale. But it will be found that most, if not all, of those authorities, are cases of sales by a sheriff under execution, whose sole authority to act depends upon statute, and whose action is not reported to a court, and subject to exception and confirmation. It would seem that in a case like this, where the statute requires the sale to be reported to the court, and permits exceptions to be taken to the sale for irregularities, and provides for confirmation, if valid exceptions are taken, a failure to except to a sale for want of an appraisement, or of a regular appraisement, by a party in interest, and confirmation of the sale by the court, put an end to any invalidity on this score. The fail-



ure to except to the sale on this ground by the parties in interest should be treated as a waiver of any irregularity in that particular. The object of requiring the report to be made and to lie over until the second regular term of the county court, and of conferring on the parties in interest the right to except, is in order that such and like irregularities may be corrected, and failure to except to the sale on such ground amounts to a consent that the same may be confirmed notwithstanding them. In the case of *Anderson v. Briscoe*, 12 Bush, 344, it was held that the failure of a sheriff to have property sold under execution properly appraised may be waived. Judge Lindsay said:

"As the life estate of Gray was subject to levy and sale, the next question for consideration is whether the mistake of the appraisers in valuing the fee simple, instead of the life estate of the debtor, renders the sale absolutely void. The provisions of the statute concerning the sales of land under execution, requiring them to be advertised, the lands to be valued, and the officer to return the valuation with the execution, and to refer to and explain the proceedings, are not so mandatory that a failure to observe them literally will necessarily render the sale void and of no effect. The valuation is for the benefit of the defendant, and to secure to him the legal right to redeem in case the estate should not sell for two-thirds of its value. This legal right may be waived, at the election of the defendant; and, if he chooses to waive it, the purchaser cannot, on account thereof, avoid his purchase, as he might undoubtedly do if the sale was null and void."

There is nothing in the cases of *Cantrill v. Perry's Adm'r* and *Graves v. Association*, *supra*, to the contrary. In each case exceptions were filed to the report of sale before it was confirmed, and the sale was set aside on these exceptions. And in the case of *Cantrill v. Perry's Adm'r* it was held that the heirs of the deceased debtor could not affect the right of the creditors of the decedent to except to the sale because of irregularity in the matter of appraisal by any contract on their part. In neither case was there any question as to the right of anybody to complain of the sale after its confirmation because of any such irregularity.

(3) A third reason for defendant's position as to complainant's inability to perform is that the deed of assignment from T. J. Megibben Company to complainant did not pass the title. That deed was executed on behalf of said company by its president, J. W. Megibben, and recited that it was insolvent and unable to pay its debts in full, and that at a meeting of its board of directors, at which all were present, a resolution was adopted reciting that it was to the best interests of said company and its creditors that a deed of assignment be made, and directing its said president to execute and deliver such a deed to complainant. The ground upon which it contended that said deed of assignment so executed did not pass the title is that by the articles of incorporation of said company it was provided that the board of directors or officers could not sell, mortgage, or otherwise dispose of any real estate belonging to the corporation unless authority therefor was first given by a vote of a majority of the stock, and that there is no admissible evidence in the record of a meeting of the stockholders at which any authority was given for the execution of the deed of assignment, and such evidence as there was shows that there was not a majority of the stock represented. It is shown conclusively that the

record book of the company, containing minutes of the meetings of the stockholders and directors, is lost; and the sole evidence of what took place at the meeting is the testimony of the complainant, who was present, but who had no connection with the company. It is urged that this is not admissible evidence, especially as the testimony of the officers of the company as to what took place was obtainable. The point is not well taken. In McKelvey, Ev. p. 344, it is said:

"There is a distinction between proving a fact which has been described in a writing, and proving the writing itself. Because a fact has been described in a writing does not exclude other proof of the fact. For example, the proceedings of a corporate meeting of stockholders or directors are facts. They are ordinarily reduced to writing in the minutes of the meeting. Yet they may still be proved by independent oral testimony. But suppose the dispute be as to the minutes themselves; then the writing becomes the best evidence of what the minutes are, and must be produced."

In this case the minutes were lost, and much more so, therefore, was oral testimony admissible as to the proceedings had at the meeting. We are aware of no rule which requires a preference between those present at the meeting, as to who shall prove what took place.

Then as to the point that the testimony of complainant shows that a majority of the stock was not represented at that meeting: It shows that 334 shares were represented there by E. J. Megibben, 158 by J. W. Megibben, and 8 by P. R. Megibben; making, in all, 500 shares, which complainant claims was the entire stock of said company, so represented. Defendant contends, however, that the shares represented by E. J. Megibben and J. W. Megibben were not owned by them, but by Lewis Lebus, and he was not present at the meeting, and E. J. Megibben and J. W. Megibben were not acting for him. It contends, further, that in addition to this stock there were 500 more shares of stock in said company held by the estate of T. J. Megibben, which was not represented at said meeting. If either position is correct, then it is true that a majority of the stock did not take part in the meeting which authorized the making of the deed of assignment. But inasmuch as these two contentions of defendant arise in connection with another aspect of the defense of inability to perform on complainant's part, the determination of their validity will be deferred until we come to consider that aspect thereof. Assume, however, that a majority of the stock was not represented at that meeting, and that the making of the deed of assignment was without the authority of the stockholders; does this render the deed of complainant's assignor, admittedly an insolvent corporation, executed on its behalf by its president in pursuance to authority of the board of directors, ineffectual to pass the title to complainant? The authority of the board of directors of a corporation to make an assignment for the benefit of creditors is thus stated by 3 Thomp. Corp. § 3986:

"There is much authority for the view that the directors of an insolvent corporation may, without the consent of the stockholders, make an assignment in good faith of all its assets to a trustee for the payment of its creditors, though, as the exercise of this power generally has the effect of putting an end to the corporation, its existence is denied by some courts. And clearly the directors have no such power where the governing statute prescribes a different mode for winding up the affairs of the corporation and liquidating its debts. The statutory mode is exclusive. The reason is that the statute

forms a part of the security of the public, and one of the conditions upon which corporations subject thereto take their chartered powers."

Such being the law as to the right of the board of directors to authorize an assignment for the benefit of creditors, in view of the provisions in the articles of incorporation of the T. J. Megibben Company there may be some question as to the authority of its board of directors to authorize the deed of assignment made to complainant. But it is unnecessary to determine this question. The same work (volume 5, § 6473) states the law in relation to such assignments in another particular to be as follows, to wit:

"It is scarcely necessary to add that such an assignment, even if made without original power on the part of the directors, would be validated by the subsequent assent or acquiescence of the stockholders, and, on the other hand, that a stockholder may be precluded by his laches from questioning such an assignment."

The assignment in question herein was made nearly four years ago,—July 1, 1898,—and since then much has been done by complainant, outside of the making of the contract of sale involved herein, towards winding up the estate which has passed into his hands under the deed of assignment. It is stated somewhere in the testimony that as much as \$160,000 has passed through his hands. Lewis Lebus, who, as defendant contends, is the owner of the stock represented by E. J. Megibben and J. W. Megibben at said meeting, is a defendant to this suit, and is seeking herein to have the lien which he holds on the property covered by the contract satisfied out of the moneys to be paid by defendant, if it is enforced by the decree herein. E. J. Megibben, J. W. Megibben, and P. R. Megibben, who were at said meeting and authorized said sale, are the widow and two of the heirs at law of T. J. Megibben, to whose estate it is claimed that the alleged additional 500 shares belong. No stockholder, so far as this record shows, has ever raised his hand against the assignment, and it is certainly too late for him now to do so. It must be adjudged, therefore, that this point is not well taken.

(4) A fourth reason for claiming that inability to perform on complainant's part exists is that such title as the T. J. Megibben Company had to the premises was acquired from T. J. Megibben by deed made 7th day of December, 1888, and the title of T. J. Megibben thereto was defective. T. J. Megibben claimed title thereto under deeds from the heirs of John Lail, Sr. He had ten children, and, at the time he claimed to have acquired title, two of these, to wit, Nancy Bell and George Lail, were dead, each leaving seven children. The deeds filed as exhibits in this case from the heirs of John Lail, Sr., to said T. J. Megibben, range in date from 1857 to 1863; and they cover the entire interests of those heirs, except several of the individual one-seventh interests of the children of Nancy Bell and George Lail. It is conceded that, at the time the contract in suit herein was made, there were no deeds of record for said interests. But immediately after the making of said contract, in April and May, 1899, before the abstract of title was delivered in pursuance to the contract, deeds were obtained for said interests from the proper parties, and put to record. The obtention of these deeds is what delayed delivery of

abstract, and they were the deeds which Pirtle & Trabue, in their letter of June 23d, insisted should be stamped. Of the children of Nancy Bell, there was a married daughter, named Sarah Righter, who made a deed to said T. J. Megibben for her interest October 1, 1862. Her husband did not unite with her, and hence her deeds passed no title. To cure this defect, she made a quitclaim deed for her interest in February, 1901, she being then a widow. These deeds seem to cover the entire interests of the heirs of John Lail, Sr., in the land. If any interest is not covered by them, it has not been pointed out by counsel. They quote from the deposition of complainant the statement that:

"Some of the heirs of the former owner of this property have never conveyed their interest to Mr. Megibben. \* \* \* We subsequently secured the release of all the heirs of old man Lail, except possibly  $\frac{1}{70}$  part of the undivided interest in the property."

It is this possible  $\frac{1}{70}$  interest, if any, that is not covered by the recorded deeds, but we have been unable to make out that there is an outstanding  $\frac{1}{70}$  interest that has not been conveyed. And however this may be, the evidence in the cause establishes beyond question that T. J. Megibben, T. J. Megibben Company, and complainant have been in the exclusive, continuous, open, and adverse possession of the real estate covered by the contract of sale herein for a period of well-nigh 50 years; and this possession is sufficient to bar any outstanding  $\frac{1}{70}$  interest, and was sufficient for that purpose, as to the interests covered by the deeds obtained after the making of the contract of sale herein, so that the obtaining thereof was really a matter of extra precaution. The court must conclude that there is no inability to perform in this particular.

(5) A fifth reason for claiming inability to perform on complainant's part, urged, is that there are on the distillery premises a mortgage and attachment lien for \$23,000 in favor of Lewis Lebus, a mechanic's lien for \$809.03 in favor of J. T. Megibben, and a similar lien for \$3,154.89 in favor of P. R. Megibben, and a lien for \$—— in favor of R. E. Hall. This is undoubtedly true. But this does not render complainant unable to pass a title to defendant clear of said liens. They are parties defendant to this action, and provision can be made in the decree for paying and discharging them out of the money coming to complainant. This will but be carrying out the suggestion of Pirtle & Trabue in their letter of June 23d, pointing out what was necessary to be done in order to clear up the title,—that an agreement might be made whereby the lien creditors referred to would release their respective liens, and look to the proceeds in complainant's hands for payment.

(6) A sixth reason is that there is a lien on the property for state and county taxes for the year 1900. It was developed in the testimony in the cause that the taxes for the year 1899 had not been paid by complainant before the bringing of this suit, because of a failure to assess the property in 1898, after the deed of assignment had been made. But since then the property has been assessed and the taxes paid. As to the taxes for the year 1900 due on the assessment made September 15, 1899, it would seem that defendant is

bound to pay them. At that time defendant was the equitable owner of the property, and by section 4023, Ky. St., it is provided:

"The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property on the fifteenth of September of the year the assessment is made, shall be liable for the taxes thereon, but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession, or not, at the time of the payment."

But even if complainant were bound to pay said year's tax, provision can be made for its payment out of the purchase price, as in the case of the other liens, and the lien removed from the property in this way.

(7) A seventh reason is that the defendant will become liable for all state and county taxes assessed against the whisky contained in the bonded warehouse since its manufacture, upon the removal thereof from the warehouse, without right to obtain from the owners of the whisky so removed funds to meet such liability, unless, by the terms of the warehouse receipts issued for same, such taxes can be collected from such owners, and that there is a large quantity of whisky in said warehouse, the taxes on which cannot be so collected. It is not made clear whether it is thought that this liability will be a mere personal one on defendant's part, by virtue of its ownership of the distillery premises and warehouse, or whether that property itself is, and will continue to be, subject to a lien therefor. This liability is deduced from the peculiar method of assessing whisky in bonded warehouse, and collecting the taxes thereon. The revenue laws of Kentucky provide for the annual assessment of whisky in bonded warehouse as of September 15th in each year, by a state board of valuation and assessment, and for payment of the taxes due thereon for all the years it has been assessed, when taken out of bond, and, further, that on the 1st day of January, May, or September next after the whisky has been removed from the warehouse, the owner or proprietor of the bonded warehouse shall report to the auditor of public accounts and the clerk of the county court the quantity of spirits removed from the warehouse during the preceding four months, and certain other information, and shall at the same time pay all taxes and interest due the state, county, taxing district, city, or town, to the officer entitled to receive the same. Because of this statutory provision, it is claimed that the defendant, as owner and proprietor of the bonded warehouse on the premises in question, upon the completion of its purchase will become bound to pay all state and county taxes assessed against the whisky contained in said warehouse since its manufacture, within four months after its removal therefrom. Is this true, and, if so, will it, or not, have the right to collect such taxes from the owners of the whisky, whatever may be the terms of the warehouse receipts? It is given by defendant as a reason why it is important to it that the stipulation in complainant's contract that he should procure for and deliver to it 90 per cent. of the capital stock of his assignor, the T. J. Megibben Company, and the resignation of its board of directors and officers should be performed, notwithstanding said corporation is now without assets of any kind or de-

scription, and is practically an exhausted corporation, that the United States government will not permit the defendant, or anybody else than the original distiller, or complainant, its legal representative, to remove the whisky from bond; and it desires to be in a position so that it can, by obtaining and keeping up the organization of the defunct corporation, through it, facilitate the removal of whisky from said warehouse. It does not want to be dependent upon complainant. The good will of the concern is interested in the owners of whisky in said warehouse being able to remove their whiskies promptly. If such is the case, it is difficult to understand how the defendant or its property would become liable for the state and county taxes, notwithstanding the phraseology of the statute. That phraseology must mean that the liability is affixed to such person as is recognized by the United States government, as the owner and proprietor, and has a right to remove the whisky and turn it over to the owner thereof. If removed by complainant, then he is the owner or proprietor referred to by the statute; if removed by the defunct corporation, then it, notwithstanding it has no assets out of which such a liability could be enforced. But even if such liability would be affixed to defendant in case its contract is enforced herein, it will be in a position to obtain funds from the owners of the whisky with which to meet it. The state and county have each a lien on the whisky in the bonded warehouse in question for all taxes due them, respectively. This is by virtue of section 4021 of the Kentucky Statutes, which provides that:

"The commonwealth and each county \* \* \* shall have a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien."

And by section 4109, Ky. St.,—one of the sections of article 5 of the chapter on "Revenue and Taxation,"—in relation to "assessment of distilled spirits," it is provided as follows:

"Any person or corporation having the custody of such spirits on the fifteenth day of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interest and penalties which may accrue; and any warehouse-man or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from the date of payment."

If this section does not indicate an intent that the warehouseman who is made liable for the taxes is the warehouseman at the time the assessment was made, it certainly does indicate an intention that the warehouseman, who is bound to pay the taxes and does so, shall have a lien on the spirits for them. So we see that the state and county both have liens on the whisky in the warehouse in question, to secure the taxes assessed in their favor, respectively; and if defendant should become bound to pay them, by reason of the acquisition of the title to the bonded warehouse, it has a lien on them, also, for the amount it may have to pay. Its right to this lien will in no way be affected by the warehouse receipts which have been issued by the T. J. Megibben Company, no matter what the terms of those receipts may be. It never issued them, and is no party to them, and

is not bound by them to any extent. The holder will have to look to the T. J. Megibben Company and complainant for a compliance with the terms. But though this is so, it was expressly provided in the contract sought to be enforced herein, in clause 2 thereof, that all taxes assessed against the whisky in the bonded warehouse, except the taxes assessed by the United States, shall either be paid at the time of delivery of the said deed, or sufficient funds shall be preserved in the hands of the first party to pay same from time to time, as the whisky is taken out of bond, except to the extent that such taxes can be collected by the said second party under the terms of the warehouse receipts which have been issued for the whisky in said bonded warehouse, and that, though defendant may not be bound to pay these taxes, it can be urged that he is entitled to have this stipulation carried out, as it is to its interest, for the good will of the business, that the terms of the warehouse receipts issued be carried out to the letter in this particular. Granting that this is so, there is nothing in this in the way of complainant's right to a specific performance. He is not bound to pay those taxes when the deed is delivered. If he does not do so, the contract is that he will reserve sufficient funds to pay them from time to time, as the whisky is taken out of bond. This is purely a personal contract on the part of complainant, and, as defendant was satisfied with it when the contract was made, he can ask no more now.

(8) An eighth reason is that there were in the bonded warehouse, at the time performance was tendered, about 7,500 barrels of whisky, the United States government tax upon which amounted to as much as \$330,000, and that there must still be a large amount of whisky stored there, upon which a very large tax is due the United States government. This tax is primarily a lien on the whisky, but, if the whisky is not sufficient to meet it, the distillery premises are liable therefor. Defendant apprehends danger from this source for two reasons: The evidence discloses that J. W. Megibben, president of the T. J. Megibben Company, before the assignment, had issued duplicate, and even triplicate, warehouse receipts for whisky in the bonded warehouse, and had removed from it whisky for which warehouse receipts had been issued, without the consent of the holders thereof, and had thus rendered himself liable to criminal prosecution. It is suggested that in order to take away evidence of the absence of the whisky removed, and protect himself from conviction for its removal, J. W. Megibben may cause the bonded warehouse and its contents to be destroyed by fire, and in this way the government lien may be thrown upon the distillery premises. This is so improbable, as shown by defendant's own presentation of the matter, that no heed need be given to it. The other ground for such apprehension is that what is termed the "out-ages" from the whisky remaining in the bonded warehouse may be so greatly in excess of what is allowed by the government that what is left may not be sufficient to pay the tax, so that the lien on the distillery premises may have been enforced to make up the deficiency. It does not seem to the court that the evidence in the record warrants such a conclusion. The defendant does not seem to have apprehended much danger from this source when the contract was made, for it then knew, through its agent, Mr. Stoll, who drafted the contract and

executed it on its behalf, of the former fraudulent practices of J. W. Megibben, out of which defendant's present apprehensions principally grow, and no provision was inserted in the contract in view of it. On the contrary, it was recognized by clause 2 of the contract that the taxes on the whisky assessed by the United States were not to be paid by the complainant, and the lien therefor on the distillery premises was to remain. It is true that in the same connection it was stipulated that the property sold should, at the time of the delivery of the deeds, be free and clear from all liens, charges, and incumbrances, taxes and assessments, whatsoever. But this was not intended to include the lien of the United States for taxes assessed on the whisky, as is shown by the fact that, in providing for the payment or retention of funds to meet the taxes on the whisky, those due the United States are expressly excepted from the provision. Counsel would have it that the stipulation as to freeing the property sold from liens requires the complainant either to pay or give security for the United States taxes on the whisky, estimated to amount to as much as \$330,000, or to export the entire whisky to a foreign country before he can have specific performance, in the face of the express provision that said taxes are not to be paid, or sufficient funds retained by complainant to meet them. The court cannot accede to this contention.

(9) A final reason for claiming inability on complainant's part to perform its part of the contract is that complainant is not supplied with 90 per cent. of the capital stock of the T. J. Megibben Company to deliver to defendant upon the execution of the contract. The ground upon which this claim is based has been theretofore referred to. It is, in brief, that the 492 shares which complainant claims to have, obtained from E. J. Megibben and J. W. Megibben, belong to Lewis Lebus, and not to them, and the total number of shares in said company is 1,000, instead of 500, as claimed by complainant. As to the 492 shares, the evidence shows that certificates therefor were issued to E. J. Megibben and J. W. Megibben March 1, 1892,—334 to one, and 158 to the other; that thereafter those certificates were transferred to Lewis Lebus as collateral security for debt; and that on February 1, 1900, he delivered to E. J. Megibben and J. W. Megibben a paper reciting that he had surrendered said certificate to them; that the transfer of them to him was null and void; and that they were owned by them, respectively. It is not necessary to consider in detail the grounds upon which it is claimed that, notwithstanding these facts, said certificates belong to Lewis Lebus. Suffice to say that the court does not think them well taken. So far as the point made that the paper so delivered by said Lewis Lebus should be stamped is concerned, that objection, if valid, can be met by stamping them, which can be provided for in the decree. In regard to the claim that the total number of shares of stock which have been issued by said company are 1,000, instead of 500, as claimed by complainant, there is this to be said: The sole evidence for the issuing of 500 shares in addition to the 500, as claimed by complainant, is the statement on the stub of the stock certificate book that on March 1, 1892, a certificate was issued for 500 shares to the estate of T. J. Megibben. But the same stub that contains that statement contains the additional statement that



the certificate had been canceled. It is questionable, to say the least, whether a certificate issued to the "estate" of a dead person can be said to have been issued at all. Besides this, there are various evidences in the record which show that the stock of said company was only \$50,000. The contention in regard to inability to perform as to the stock is not well taken. This disposes of every ground upon which it is claimed that complainant should be denied the relief he seeks because of inability to perform on his part.

2. Another defense relied on to defeat complainant's effort to obtain specific performance herein is that complainant did not make a good tender of performance of his part of the contract before he brought suit. It is conceded that he made a certain tender to Mr. Bradley, the defendant's assistant treasurer, and chief official in Kentucky, at its Frankfort office, on February 2, 1900, before the suit was brought; but it is contended that that tender was not good, and that in several particulars. It was not made within the time stipulated in the contract, and time was of its essence. The deed tendered recited that, under the contract, complainant was entitled to \$39,000, without any guaranty as to the storage claims to be transferred, and transferred them without any such guaranty, when the contract provided that, to entitle complainant to that much, he should guaranty the storage to amount to as much as \$3,600. And no tender was made of the resignation of the directors, and the stock tendered did not amount to 90 per cent. of the entire capital stock. What, if any, tender was complainant bound to make, and when was he to make it? The contract provided, it is true, that the complainant should, within 10 days after approval of the sale by the Harrison county court, "execute and deliver" to the defendant, "at its office in the city of Louisville, Kentucky, deeds in accordance with the terms of the agreement, upon a day to be designated by him, notice of which should be given to defendant, or to Charles H. Stoll, at the Columbia Building, in the city of Louisville, Kentucky, three days before the time of delivery of said deeds." But this provision as to time and place of delivery was subsequently waived by defendant, through its attorneys, who had full charge of the matter. In Mr. Stoll's letter to complainant of July 31st, he stated that, if Pirtle & Trabue's opinion as to the title should be satisfactory, a deed would be prepared, and he would be ready for settlement with complainant, and that it would not be necessary for him to leave home, as arrangements would be made to settle there upon the execution of the deed. In Pirtle & Trabue's letter of August 30th, expressing satisfaction with what had been done by complainant in the county court, they stated that they would at once prepare a deed, and send it to Mr. Stoll for his approval, with the request that upon approving it he forward it to complainant for execution, and he would then arrange for the delivery of the deed and the payment of the money. Thus it was that the place of delivery was changed to complainant's home, at Cynthiana, and the time to be arranged by Mr. Stoll. In view of this, it is hardly to be contended that it was complainant's duty to tender performance to defendant at Louisville within 10 days from August 28th, the date of the approval of the sale by the county court, or at any time or place, until de-

defendant should be heard from further. And defendant's counsel do not so contend with any degree of earnestness. They insist, however, that it was complainant's duty, within 10 days after the receipt of Mr. Mayer's letter of the 18th of December, notifying complainant that his title could not be accepted, or at the very farthest within 10 days after Mr. Stoll's notification to the same effect on January 16th, to tender performance at Louisville, first giving three days' notice thereof. Certainly the notification from defendant from these sources had no such effect, but, as we shall show presently, an entirely different one; and, if tender of performance was necessary at all, the tender at Frankfort on February 2d was sufficient, so far as time, place, and notice were concerned. It seems to the court, though, that at no time or place before suit brought was it necessary for complainant to tender defendant deeds for the property agreed to be conveyed and transferred, and that for two good and sufficient reasons:

One is that the contract expressly provided that the division of the consideration for all the property between the two deeds was to be made by defendant, and the deeds were to be drawn according to forms prepared by defendant. In other words, the deeds to be executed and delivered by complainant were to be prepared by defendant. It follows from this that it was impossible for complainant to comply with his contract in regard to execution and delivery of deeds without defendant's taking the initiative, and tendering him the deeds to be executed and delivered by him. Complainant's execution and delivery of deeds was necessarily conditional upon their preparation and delivery by defendant to complainant, to be executed by him. He could not have been sued by defendant for their nonexecution and delivery without previous preparation and tender of them to him by defendant for execution. Langdell's Summary of the Law of Contracts, § 41, says:

"A covenant or promise which cannot be performed, except upon the happening of a certain event, is necessarily conditional upon the happening of that event, and the condition may be said to be implied in fact. The necessity for making the implication may be found either in the language of the covenant or promise, or in its subject."

In *Ranay v. Alexander*, *Yel.* 76, it was held that the defendant's promise, being to deliver to plaintiff 15 tods of wool, to be chosen by the plaintiff out of 17 tods in defendant's possession, was necessarily conditional upon plaintiff's making the selection. In *Coombe v. Greene*, 11 *Mees. & W.* 480, it was held that the defendant's covenant, being to lay out £100 under the direction or with the approbation of some competent surveyor, to be named by plaintiff, could not possibly be performed until the plaintiff named a surveyor. In *Rae v. Hackett*, 12 *Mees. & W.* 724, defendant's promise was that a certain ship should sail and proceed in ballast to a safe and convenient port near Cape Town. It was held that, as the voyage was to be made on plaintiff's account, it necessarily followed that the port was to be selected by the plaintiff, and not by the defendant, and as the vessel could not sail direct to a port selected by the plaintiff, near to Cape Town, unless the port was selected and notice of it given to the defendant before the vessel sailed, it necessarily followed that the

selecting of a port by the plaintiff, and giving notice of it to the defendant, was a condition precedent to the vessel's sailing. In the case of *Armitage v. Insole*, 14 Q. B. 728, it was held that the defendant's promise, being to give the plaintiff yearly 20 tons of coal, to be put free on board ship at Cardiff for the use of plaintiff, could not be performed until a ship was provided by the plaintiff, and the notice of it given to the defendant. In the case of *Ellen v. Topp*, 6 Exch. 424, the defendant covenanted that a certain apprentice should serve the plaintiff as an apprentice to the trade, which he was to be taught, namely that of an auctioneer, appraiser, and corn factor. It was held that the apprentice could not so serve unless the plaintiff continued to follow that trade, and the whole of it, and that hence the following of that trade by the plaintiff was a condition precedent to the defendant's obligation that the apprentice should serve.

And on the other hand, complainant had the right to sue the defendant for noncompliance with its contract after the expiration of the 10 days, without tendering the deeds. An authority expressly in point is the case of *Poole v. Hill*, 6 Mees. & W. 835. That was a suit at law by a vendor against the purchaser to recover damages for his failure to comply with his contract. In England where this case arose and was decided, the presumption is that the deed of conveyance is to be prepared by the buyer, and tendered to the seller for execution,—the same thing which was a matter of express stipulation in this case. The declaration did not allege that the plaintiff had tendered a conveyance to the defendant. It did allege a readiness and willingness to make a deed of conveyance. On demurrer to the declaration, it was held to be good. Lord Abinger said:

“On a contract for the sale of lands, unless it be expressly stipulated otherwise, the conveyance is to be at the expense of, and to be prepared by, the purchaser. Here it was for the purchaser to make out the conveyance in the usual course. That being done, his agreement is, on a given day, to pay the purchase money; and the plaintiff's, to execute the conveyance and complete the title. The defendant could not have maintained an action for the noncompletion of the purchase without averring that he had tendered a conveyance. He was to perform the initiative before the plaintiff could be called upon to offer a conveyance, and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tendered it for execution. The declaration is, therefore, good, and the judgment will be for the plaintiff.”

The correctness of this position was presupposed by Mr. Justice Story in the case of *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405. He there said:

“Now, the plain import of the words of his [vendor's] contract is that he will make the deed. The excuse for the omission is that it was the duty of the other side to prepare and tender a formal deed to him for execution. And authorities are relied on, principally from the English courts, to show that in all cases of this sort the established rule is that the vendee shall prepare and tender the conveyance. This is certainly the rule in England,—founded, doubtless, upon the general understanding and practice among conveyancers, as well as upon the peculiar circumstances attendant upon conveyances in that country. The same rule does not seem to have been adopted generally in America, although it may be adopted in some states. In Ohio the rule as stated by the learned judge who decided the present case ought not to prevail, and the local practice in a case of this sort ought certainly to constitute the proper guide in the interpretation of the terms of the contract.”

The cases of *Kelsey v. Crowther*, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017, and *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 48 C. C. A. 363, 109 Fed. 280, are not contra here. In this case, complainant's contract to execute and deliver deeds to defendant could not be performed without a preparation and delivery by defendant, first, of the deeds to be executed by complainant, because the deeds which he was to execute were the deeds which defendant was to prepare for him. There the delivery of the abstracts of title by the vendors was not an event which it was necessary should happen in order that the purchasers might comply with their promise to pay the money.

The other reason why the complainant was not bound to tender deeds before suit brought was the fact that before then the defendant had set complainant at defiance by notifying him that it would not accept his title. This it did by the letters of Mr. Mayer, beginning with that of December 18th, and by the personal interview with Mr. Stoll on January 16, 1900, at Lexington. Defendant would have it that the contents of these letters and the statements of Mr. Stoll in this interview did not amount to an absolute refusal on its part to comply with its contract, but only a qualified refusal, i. e., unless the complainant cured the defects in its title, it would not accept it, and that it desired to inform complainant what the defects were, in order that he might cure them, and he would not permit Mr. Stoll to do so. But there was no intimation to complainant that the defects which it claimed in the title could be cured by him. Nor is there any such intimation now. On the contrary, the contention now is that they are incurable, and that such was defendant's view of the matter was the reasonable deduction to be drawn from Mr. Mayer's letter and Mr. Stoll's statements. Indeed, the only defect which Mr. Stoll succeeded in conveying to complainant, according to his account of the interview on January 16th, if acceded to, meant an end to the contract of sale between complainant and defendant. That was the fact that the property had not been appraised prior to the making of that contract. In order to cure this defect, if it was a defect, it would have been necessary to have set that contract aside, and had a resale, so that an appraisement could be had before it; and, upon the contract being set aside, it would have been entirely with defendant whether it would have entered into another contract with complainant. So no other interpretation can be put upon defendant's statements, written or oral, through its attorneys, than that they amounted to an absolute refusal to comply with their contract. That being the case, it is well settled that complainant was relieved from any tender of performance on his part before suit brought. In the case of *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878, suit for specific performance was brought by vendee against the vendor of a contract of sale for an undivided one-sixth interest in certain land in consideration of \$10 cash and \$240 to be paid subsequently. Mr. Chief Justice Fuller said:

"It is true there is no offer to pay the balance of the purchase money, but the case shows that a tender would have been but an empty show; and as the court had it in its power to require payment of the \$240 note, thus completing performance by Moore, and as it did this by its decree, the allegation would have been merely formal, and became immaterial."

And in the case of *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, Mr. Justice Harlan said:

"A party filing a bill submits to do everything that is required by him; and the practice of the court is not to require the party to make the formal tender, where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money."

No tender at all, therefore, being necessary before suit brought, it is entirely immaterial that the tender which was made was defective. The stipulation in the deed which was tendered to Mr. Bradley that it was without guaranty of storage, of course, rendered the tender defective, because the contract of sale provided that, in the event complainant demanded \$4,000 for the storage claims, he should guaranty them to amount to as much as \$3,600. But it was purely a mistake that the deed contained such a stipulation, it being intended to conform to the requirement of the contract in the matter of the guaranty as to storage. And such a mistake is not sufficient to deprive a party of his right to specific performance, even where a tender is essential. In the case of *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501, the contract sought to be specifically performed therein, according to the construction put upon it by the supreme court of the United States, required the purchaser to pay the purchase price in gold. He tendered greenbacks at a time when they were much depreciated. It was held that he was entitled to specific performance, notwithstanding the defective tender, and would be acquired by the decree to pay gold. Mr. Justice Field said:

"The kind of currency which the complainant offered is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court of equity to enforce specific performance of a contract if he seasonably and in good faith offers to comply and continues ready to comply with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required."

As to the claim that the tender was defective for failure to tender 90 per cent. of the stock of said company, it is not denied that the complainant tendered 492 shares of stock under the title of E. J. and J. W. Megibben. The sole claim is that this stock did not belong to them, but to Lewis Lebus, and that, because of the existence of 500 shares of stock belonging to the estate of T. J. Megibben, it was not 90 per cent. of the entire capital stock. This claim has been heretofore disposed of, so that the tender was not defective in this particular. But as to the resignations of the directors, it is conceded that they were not tendered at that time, and that they were not even procured until after this suit was brought. It is doubtful, to say the least, whether the contract required that the resignations of the directors should be procured before the making of the deed and payment of the purchase price. Clause 10 provided that certificates for 90 per cent. of the stock, and the resignations of the directors, should be delivered "along with said distillery property,"—phraseology which is somewhat indefinite. It is further provided that complainant should cause a meeting of the board of directors to be held to receive the resignations, and install a new board, and that at such time as the defendant might

indicate. There is room to hold that it was not contemplated that the resignations should be procured at any time before the time which defendant should so indicate, and therefore that it was not necessary to tender them with the deed. It may be said, however, that, though it may not have been necessary for complainant to have made a tender before suit brought, it was necessary that he should have been able and willing to comply with his contract at the time suit was brought, and that he was not able then to do so, however willing in certain particulars, as to which there can be no question. However this may be, in a suit at law, where no tender is necessary before bringing suit, it is not an invariable rule in equity in suits for specific performance. Ability to perform at any time before decree is often sufficient in such suits. The only particulars in which it can be claimed, in view of what we have already held, that inability to perform on complainant's part existed when suit was brought are in the matter of Sarah Righter's, and the possible  $\frac{1}{10}$  interest in the property and possibly, also, of the resignations of the directors, and it is not necessary to cite authorities to show that such slight inability is sufficient to defeat complainant's right to specific performance.

We therefore conclude that the defense of failure to make a proper tender of performance before suit brought, and possible slight inability to perform at that time, is not sustained.

3. Again, defendant urges that complainant is not entitled to a specific performance of the contract of sale herein, because of want of mutuality in it. This want of mutuality is not in matter of obligation, but in matter of remedy. The contract on complainant's part was, as we have seen, not only to convey to defendant, by general warranty deed, an unincumbered fee-simple title to the distillery plant and personal property referred to, but to procure and deliver to defendant, at the time of the delivery of the deed, 90 per cent. of the capital stock of complainant's assignor, the T. J. Megibben Company, and the resignation of its board of directors. This latter part of complainant's contract it was not within his power to comply with when the contract was made, as the stock and resignations had to be procured from the parties who held the stock and offices, and could not be obtained from them without their consent. Defendant therefore could not enforce specific performance of this part of complainant's contract, and it contends that as it is a principle of equity jurisprudence that equality is equity, and, as it could not have specific performance of the entire contract on complainant's part, complainant is not entitled to specific performance of defendant's part of the contract. This position assumes, for the sake of the argument, that complainant has procured the stock and resignations, and has made a proper tender thereof, and claims that, from the mere fact of this original want of mutuality in the matter of remedy, the contract is not specifically enforceable on complainant's part. It merits careful consideration on our part. It is undoubtedly laid down as a general rule that contracts are not specifically enforceable unless they are mutual in the matter of obligation and remedy, both. The books, however, recognize numerous exceptions to the rule, and it is quite difficult to understand the exact extent and limitations of the doctrine of mutuality in specific performance of con-

tracts. Mr. Pomeroy, in his work on Specific Performance of Contracts, p. 237, says:

"I think it very clear that the rule was applied with much more strictness and severity in the older than in the later decisions. Indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency; and the arguments in its support are often mere repetitions of time-honored verbal formulas, which, when closely analyzed, are found to have little or no real force or meaning."

Mr. Parsons, in his work on Contracts (6th Ed.) 409, note "t," says:

"The meaning of the rule is not very clear, nor is it easy to make a satisfactory classification of the cases in which it has been announced as the ground of decision."

And a master of equity jurisprudence and equity pleading (Prof. Langdell) is quoted in 1 Harv. Law Rev. p. 104, as having said in a lecture:

"The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and remember."

Perhaps as good a way as any of approaching a determination of the question whether the want of mutuality, in the particular stated, is sufficient of itself to defeat complainant's suit, is to consider the authorities cited by defendant's counsel on this point, and see if this case comes within the principles recognized and enforced in those cases. They cite, *Bronson v. Cahill*, 4 McLean, 19, Fed. Cas. No. 1,926; *Ross v. Railway Co.*, 4 Woolw. 26, Fed. Cas. No. 12,080; *Marble Co. v. Ripley*, 10 Wall. 359, 19 L. Ed. 955; *Pullman's Palace Car Co. v. Texas & P. R. Co.*, 11 Fed. 630, 4 Woods, 317; *Duff v. Hopkins* (D. C.) 33 Fed. 608; *Norris v. Fox* (C. C.) 45 Fed. 406; *Strang v. Railroad Co.*, 41 C. C. A. 474, 101 Fed. 516; *Blackett v. Bates*, 1 Ch. App. 125; *Ikerd v. Beavers*, 106 Ind. 487, 7 N. E. 326.

The cases of *Ross v. Railway Co.*, *Pullman's Palace Car Co. v. Texas & P. R. Co.*, *Strang v. Railroad Co.*, *Blackett v. Bates*, and *Ikerd v. Beavers* are alike in their essential characteristics. In each case the plaintiff was denied specific performance of the contract involved therein. The ground upon which the denial was based was that plaintiff's part of the contract was of a nature that specific performance thereof could not be decreed. It consisted in doing, and not in giving. The decree in suits for specific performance, where specific performance is granted, always decrees performance on both sides, and that without a cross-bill on part of defendant. Prof. Langdell, in his *Brief Survey of Equity Jurisdiction*, 1 Harv. Law Rev. 361, says that:

"Courts of equity \* \* \* make it a condition of giving relief to the plaintiff that he shall submit to a decree made against him, also; and, indeed, they treat a plaintiff as so submitting by implication. Accordingly, whenever a decree is made for the performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, the court will, if necessary, appoint a time and place for performance, and will require both parties to perform at such time and place concurrently; and, if either of them refuses or neglects so to perform, he will be punished for contempt on the application of the other."

This being so, it is readily seen that, if specific performance of plaintiff's part of the contract cannot be decreed, the defendant's should not be.

In the cases of *Ross v. Railway Co.* and *Strang v. Railroad Co.*, the plaintiffs, respectively, had contracted to build a railroad; and the suits were brought against the defendants to compel them to permit them to build the railroads under the contracts, and to pay for same in accordance with the contracts. It is well settled that a court of equity will not decree specific performance of a contract to build a railroad, and, as decrees could not be entered compelling the plaintiffs to comply with their part of the contracts, plaintiffs were not entitled to such decrees against the defendants.

In the case of *Strang v. Railroad Co.*, Simonton, J., said:

"The bill, in purpose and substance, is for the specific performance of a contract to build the road. If the court could undertake to order the defendant, on its part, to fulfill all the parts of its contract, it must order the plaintiff, on his part, to fulfill his contract; that is, to build the road. A contract, to be specifically performed, must be mutual. Fry, Spec. Perf. § 266. So the bill called upon the court to compel one party to build the railroad, and the other party to pay for it. This the court cannot do. A contract to build a railroad will not be enforced."

The case of *Pullman's Palace Car Co. v. Texas & P. R. Co.* was a suit to specifically enforce a contract for the lease of sleeping cars, to be run by defendant on its own trains over its own road. Pardee, C. J., said:

"No such decree or order should be rendered when there is not a mutuality of remedy between the parties, obtainable from the court. If the position of the parties were reversed, it does not seem that there could be any order for the Pullman Company to comply, because the court could not compel that company to build cars or purchase cars, or furnish cars sufficient to meet the requirements of travel over the extensive lines of the railroad company."

The case of *Brackett v. Bates* was a suit to enforce specific performance of an award of a certain lease. Lord Cranworth stated the ground of refusing the relief in these words:

"Had it been an agreement, would there have been a case for specific performance? I think not, and for this short and simple reason: That court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks,—the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by plaintiff of daily duties during the whole term of the lease. The court has no means of enforcing the performance of those duties. All it can do is to punish the plaintiff by imprisonment or fine if he does not perform them. The form of the decree itself shows want of jurisdiction." And again: "In order that the court may interfere, there must be mutual rights, capable of being enforced by the court. Now, here, if defendant had been willing to perform the award, and the plaintiff unwilling, could the defendant have filed a bill for specific performance of the agreement to keep the road in repair, or to supply the engine power? It is clear that such a bill could not be maintained. This disposes of the case. There is no mutuality."

The case of *Ikerd v. Beavers* was a suit to enforce specific performance of a contract to convey a certain tract of land in consideration of the agreement on the part of the vendee to take care of and support the vendor, during his life, on said land. Mitchell, J., thus stated the ground for refusing the relief sought:

"Besides being complete and definite, it [the contract] must belong to a class capable of being specifically enforced, and be of a nature that the court can decree its complete performance against both parties without add-



ing to its terms." And again: "Unless a contract can be specifically enforced as to both parties, a court will not interfere. Being unable to execute the contract against the plaintiff, nothing remained for the court in this instance except to decline to compel the execution of a deed in his favor."

It is thus seen that these five cases were all cases where at the time of the hearing a decree could not be entered, enforcing specific performance of the contract on plaintiff's part as well as the defendant's. This was not because it was not within plaintiff's power to do the thing which he had agreed to do. It was because of the nature of that thing. It was such that equity could not decree its specific performance. As, therefore, specific performance on plaintiff's part, as well as defendant's could not be decreed, it was inequitable, and contrary to the settled form of decrees in such cases, to decree specific performance on defendant's part alone. These cases, therefore, can have no application in the case in hand. Here, though want of mutuality existed when the contract was made, because complainant did not then have the stock and resignations which he agreed to deliver with his deeds, it has been removed, if the assumption on which we are proceeding, that he now has the stock and resignations, is correct. This contract can now be specifically enforced on both sides by the decree herein.

The cases of Marble Co. v. Ripley and Duff v. Hopkins may likewise be considered together.

In the case of Marble Co. v. Ripley, the latter had conveyed to the former property, including a large marble quarry. The contract provided that the Marble Company, as part of the consideration for the conveyance, should furnish Ripley with a certain amount of marble annually. Ripley claimed that the company had broken its contract, and brought the suit for specific performance. Mr. Justice Strong gave many reasons for the holding of the court that Ripley was not entitled to the relief he sought; said that "another" one was found "in the want of mutuality." The particular in which there was want of mutuality was that the contract provided that Ripley had a right to terminate it at any time on giving one year's notice. It was a case, therefore, of want of mutuality in point of obligation, and such want of mutuality would have continued to exist, had specific performance on the Marble Company's part been decreed. Granting specific performance under such circumstances would have been clearly inequitable.

The case of Duff v. Hopkins was a case where an assignee in bankruptcy entered into a contract with another for the release and conveyance to the estate of the bankrupt of certain real estate acquired from the bankrupt under execution sales against him, in consideration of certain payments to be made by the assignee. The suit for specific performance was against the vendor and his subsequent grantee. It was held that the assignee was not entitled to the relief sought, because of want of mutuality. The particular in which there was nonmutuality, and why it was sufficient to defeat the assignee's suit, is indicated by the following quotation from the opinion of Judge Acheson. He said:

"No one pretends that the assignee incurred individual liability, and, to give the agreement in question any binding effect against him in his repre-

sentative character, the consent of the bankrupt court was a *sine qua non*. Now, the assignee alone could invoke the authority of that tribunal. The bank has no standing in that forum for such purpose. It is idle to speculate as to what might have been the result had the assignee made a timely application to the court, and obtained its sanction to the proposed compromise. The fact is that he did not move in the matter until after the expiration of the year within which the contemplated settlement should have been carried out to full completion. In the meantime the attitude of the parties had become one of antagonism."

This, therefore, was a case of nonmutuality in the matter of obligation and repudiation of the contract before any attempt had been made to remove the nonmutuality.

These two cases are certainly not applicable to the case in hand.

The remaining two cases cited by defendant, of *Bronson v. Cahill* and *Norris v. Fox*, may also be considered together. Both were cases of specific performance sought of a contract of sale of land, brought by vendor against vendee.

In *Bronson v. Cahill*, one of two joint owners of a tract of land made a contract to sell the land, as if he were the sole owner. The vendee did not know that it was owned by him jointly with another. He claimed to be acting for himself and as agent for his co-owner. After considerable delay, but within what was alleged to be a reasonable time, a deed was tendered, executed by both owners. The vendee refused to accept it, and a suit for specific performance of the contract was brought by the vendor and his co-owner. It was held that they were not entitled to the relief. There was some question as to whether the deed tendered was properly executed, and as to whether it was tendered within a reasonable time. But the decision was based "chiefly on the fact that there was a want of mutuality in the contract." The court said:

"There was nothing on the face of the agreement which could give the defendant a claim against Wood for his interest in the land. There was then a want of mutuality in the contract, and this is essential to a decree for a specific execution of the contract. *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282; *German v. Machin*, 6 Paige, 288."

This is the extent of the consideration given to this question in the opinion. It is not entirely certain that the court realized the fact that the vendor's contract embraced his co-owner's interest in the land, as well as his own, and that the joint deed tendered was in performance of that contract on his part. It is possible that the court looked upon the transaction as if the vendee had no obligation for the co-owner's interest in the land, and that it was a case of nonmutuality in the obligation. It is certain that the co-owner who made no contract to convey his interest was a party seeking the enforcement of the vendee's contract, and the authorities relied on were cases of want of mutuality in obligation. But however this may be, it must be conceded that this case does decide that a half owner of land, who has made a contract of sale of the whole land, and in performance thereof has tendered a deed from himself and co-owner before any repudiation of the contract, is not entitled to specific performance of the contract.

In the case of *Norris v. Fox*, *Norris* agreed to procure for *Fox*,

from one Robbins, a warranty deed for certain land owned by Robbins, in exchange for certain land to be conveyed to him by Fox. Norris subsequently procured the deed from Robbins to Fox, and tendered it to Fox. Fox refused to accept it, and Norris brought suit for specific performance. It was held that he was not entitled to it. The ground upon which the decision was put by Judge Thayer was "want of mutuality in the contract, so far as the remedy for its enforcement is concerned." He said further:

"The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties, at the time it is executed, have the right to resort to equity for its specific enforcement." And again: "And where a contract, when executed, is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific enforcement against the other party." And again: "In the case at bar the agreement of Norris to procure a warranty deed of the land, at the time belonging to another, was of that nature that an action at law would lie for a breach of the agreement. As Fox could not compel specific performance of the contract when made, and only had his remedy at law by a suit for damages, the complainant must resort to the same remedy."

In regard to this case, it is to be noted in the first instance that the authorities cited by Judge Thayer in support of the first proposition quoted from his opinion were all authorities holding that a contract will not be specifically enforced where there is want of mutuality in obligation. Those cited in support of the second proposition so quoted are the case of *Hope v. Hope*, 8 De Gex, M. & G. 731, and *Fry, Spec. Perf.* (3d Am. Ed.) § 443. The latter authority is based upon the case of *Hope v. Hope*, so that really that case is the sole judicial support which that proposition has, other than the indorsement given to it by Judge Thayer. That was a suit by a wife against a husband to enforce specific performance of a contract entered into after a separation between them, whereby he was to pay her certain sums of money at certain stated periods. A part of the consideration for said contract was an agreement on the part of the wife not to oppose a suit for divorce instituted by him against her in the English courts. In answer to the position that this consideration was illegal, and therefore the contract based upon it could not be enforced, it was urged that, whatever objection there may have been to the agreement in its inception, part of it had been performed, and what remained to be performed was legal and unobjectionable. To this Lord Justice Turner responded:

"To hold that an agreement so objectionable as that this court would not perform it can be rendered capable of performance by the objectionable part of it having been carried into execution is a doctrine to which I cannot assent."

This is certainly not an authority for the proposition in support of which it is cited. It does not follow that, because the performance of an illegal contract will not entitle the party who has performed it to specific performance by the other party of his part of the contract, the performance of a contract not specifically enforceable when the contract was made, but entirely legal, may not entitle the party performing to specific performance of the other's part. It is thus seen that the authorities upon which the case of *Norris v. Fox* is based are

not cases whose facts were similar to the facts of that case. The mutuality cases relied on are all cases of want of mutuality in matter of obligation, and not of remedy, and the sole authority cited to the effect that performance of a nonenforceable contract, on one side, does not give right to specific performance on the other side, was a case where its nonenforceability was due to its illegality. It is to be noted further that it has been held, in cases whose facts were of a similar character to the facts of that case, that the sole effect of the nonmutuality, due to the inability of one party to perform his part of the contract when made, is to entitle the other party to rescind the contract at any time before the former has put himself in position to perform his part of the contract, and that, if the latter has not availed himself of this right before then, the former will be entitled to specific performance, notwithstanding the original want of mutuality. It has been so held in these cases, to wit: *Farrer v. Nash*, 35 Beav. 167; *Wylson v. Dunn*, 34 Ch. Div. 569. In *Farrer v. Nash* the plaintiff had contracted September 2, 1864, to make the defendant a lease of certain real estate for the term of 21 years. The former's sole interest in the premises was a lease for 20 $\frac{1}{4}$  years, and by reason of covenants therein he had no power to assign it or to sublet. September 22, 1864, he had tendered the defendant a lease, which he refused to accept because of such want of power. October 7, 1864, suit for specific performance of the contract was brought; and pending that suit, and before the hearing, the plaintiff obtained his landlord's consent to the lease to defendant, thus removing his want of power to make it. It was held that he was not entitled to specific performance. Lord Romilly, Master of the Rolls, said:

"It is to be observed that there was no mutuality, for the defendant could not have had a decree against the plaintiff to perform that contract, because the court does not attempt to compel a person to do what is impossible. The plaintiff had no power to grant the lease, and neither the court nor the defendant could have compelled him to do so."

He said further:

"The case was like that of a person undertaking to sell a property which does not belong to him. \* \* \* If he [landlord] had made this statement in September, 1864, and Farrer had communicated it to Nash, there would have been an end to the question. But how long was Nash to go on, and wait to know whether Farrer could make out a good title? Farrer filed his bill in October, 1864, and it is proved that in January, 1865, he was not able to grant the lease he had agreed to grant; and he does not show that he was ever able to complete his contract until April, 1865. Is a person entitled to keep another in suspense during that time? If so, it may go any length of time."

And again he said:

"I am of the opinion that when a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait and see whether the vendor can induce some third person (who has the power) to join in making a good title to the property itself."

In the case of *Wylson v. Dunn* the vendor did not own the land which he contracted to sell, or any interest in it, at the time of the making of the contract. This fact was known to the vendee. Subse-

quently the vendor obtained full ownership thereof, and tendered a deed to the vendee. The latter refused to accept it, and the former brought suit for specific performance. It was held that he was entitled to the relief sought. Kekewich, J., in speaking of the doctrine of mutuality, said:

"It is a technical doctrine, but, like many other technical doctrines, founded on common sense. It comes simply to this: that one party to a bargain shall not be held bound to that bargain, when he cannot enforce it against the other. If the contract is not mutually enforceable, it is a voidable contract; that is, it may be avoided as soon as the person who has a right to avoid it discovers that the cause or occasion for so doing occurs."

He said further:

"If a man contracts to sell an agreement for a lease, and it turns out that he has not got an agreement for a lease, the purchaser, when he finds that to be so, may say: 'I will not enter into it. I am entitled to be off, and I am off. I have contracted to buy that which you have not to give, and therefore you cannot enforce any contract against me.' That is one of the cases, and a very simple case. \* \* \* But there arises the question whether this power of avoidance for nonmutuality is applicable to the case where the nonmutuality is apparent in the first instance, and is an essential part of the bargain. \* \* \* But the doctrine of nonmutuality—the doctrine that a purchaser may avoid a contract when he discovers that his vendor has not got that which he contracted to sell—seems to me altogether inapplicable to a case where the vendor in the first instance tells the purchaser, and the purchaser knows from the circumstances of the case, that the vendor has no title, and is not likely to have one for some time. Is not such a contract as I have just described determinable by the purchaser on notice? I think it is. I think that a purchaser, having entered into such a contract as I have suggested, is entitled at any time to say: 'You have not got that land, yet I hoped you would have got it by this time. I do not care now to have the land, and I determine the contract.' If in the meantime the vendor had incurred expense, it may be that he would have a right of action against the purchaser for expenditures incurred and labor bestowed at the purchaser's request, but that is not specific performance. The purchaser might, I think, in the case I am suggesting, get off the contract by notice, and say: 'You are not in a position to convey or perform your contract, and therefore I am off.' But when must the notice be given? Must it be given some time before the vendor gets that which enables him to perform his contract? Must not the purchaser be active, and bring the matter to an end before it has been brought to an end on the other side? That is certainly my conviction, applicable to such a case."

The obiter expressions in the opinion in case of *Farrer v. Nash*, and its implication, and the decision in the case of *Wylson v. Dunn*, are therefore to the effect that the original nonmutuality in such contracts as were involved in those cases is not sufficient, in and of itself, without regard to and irrespective of other considerations, to defeat the vendor's right to specific performance. It is necessary, in addition, that the vendee should, before the vendor has put himself in position to comply with his contract and to demand performance on the part of the vendee, to notify the vendor of the fact that he will not accept the property if procured. If the vendor obtains the property, and places himself in such position before receipt of such notice, he is entitled to specific performance, notwithstanding the original nonmutuality.

In regard to the case of *Norris v. Fox*, it is still further to be noted that certain authorities, which may be considered to be in line with

it, do not lay stress upon the original inequality between the vendor and vendee in the particular in question, as the ground of the rule which they lay down, but upon the speculative character of the vendor's contract.

In the case of *Townshend v. Goodfellow* (Minn.) 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736, Vanderburgh, J., said:

"The defendants contend that the court ought not to enforce the contract in favor of the plaintiff vendor, because it appears that at the time the contract was made he had no title to the premises, and that equity will not actively interfere to aid a party who makes a contract to sell lands of which he is not the owner."

The rule as insisted on by the defendants is only applicable where a party has no interest in the lands which he agrees to convey, but volunteers to enter into a contract as a mere venture. Such a transaction will not be sanctioned by a court of equity, because it is a mere speculation, and one who speculates upon that which he has no contract, or the means of acquiring it, is not a bona fide contractor. Bisp. Eq. p. 437, says:

"But this doctrine will not be carried to the extent of holding that a vendor is entitled to specific performance if he had no title at the date of the contract, although he may have subsequently acquired one; for one who speculates upon that which is not within his control is not a bona fide contractor, and there is no mutuality between the parties."

Eaton, Eq. p. 548, says:

"But if the vendor had no title at the time the contract was executed, equity will not interfere to compel specific performance of the contract, even if the vendor subsequently acquires a title. Such a transaction is speculative, and the vendor is not a bona fide contractor."

But whatever may be the extent of the rule in such cases,—whether the vendor in no contingency will be entitled to specific performance, or will be entitled to it if he obtains the property before time of performance, and notification from the vendee that he claims the right to be off from the contract, and whatever may be the foundation of the rule, the original nonmutuality of the contract, or its speculative character, it is certain that the rule has application only to cases where the vendor is without that which he agreed to convey or any interest in it. It has no application to a case where the vendor has title to some extent, but it is defective or incumbered in some particular. This is recognized in the opinion rendered by the supreme court of Minnesota, and by the text-writers from which we have just quoted; and, in immediate connection with that which we have quoted, Vanderburgh, J., continues the above statement of the law as follows:

"But the general rule is that, where a contract is entered into in good faith, it is not necessary that the vendor be actually in the situation to perform it at the time it is entered into, provided he be able at the proper time to place himself in that situation. Imperfections in the title when the contract is made will form no ground of objection thereto, if removed before the time of completing the purchase."

Bispham precedes the above statement quoted from him by this:

"It may be added here that it has been decided that a court of equity will decree specific performance if the vendor is able to make a good title at any time before final decree."

Eaton precedes that quoted from him by this :

"And a court of equity will compel a purchaser to complete his contract for the purchase of lands if the vendor is able to make good the title at any time before the final decree of the court is pronounced, and the vendor will be permitted to remedy the defects in the title if he can do so within a reasonable time."

Of course, these authorities, in laying down this proposition of law, assume that it is only applicable where time is not of the essence of the contract. And they go to the extent of enforcing specific performance, even though the nonmutuality exists at the time suit is brought, and hold that it may be cured at any time before defense. Support of it may be found in the following decisions of the supreme court of the United States, to wit: *Hepburn v. Auld*, 5 Cranch, 262, 3 L. Ed. 96; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Watts v. Waddle*, 6 Pet. 402, 8 L. Ed. 437. It has also found recognition in the following recent decisions of the court of appeals of Kentucky, to wit: *Logan v. Bull*, 78 Ky. 607; *Smith v. Cansler*, 83 Ky. 371; *Tapp v. Nock*, 89 Ky. 414; 12 S. W. 713; *Collins v. Park*, 93 Kv. 6. 18 S. W. 1013.

Holt, J., in *Smith v. Cansler*, said :

"Mutuality of obligation is, in general, necessary to the validity of a contract; and it is a general rule that, in order to be binding, it must be enforceable by either party. If, however, one is not invested with such a title as he undertakes by his contract to make to a purchaser, yet if time be not of the essence of it, and he is able to make title when the time for performance arrives, and tenders the deed, then it will be enforced, although his title was defective at the date of the contract; and in such a case, if a rescission be asked by the other party, and the vendor is not able at the time of the institution of a suit for this purpose to comply with the contract, yet, if he can perfect the title within a reasonable time, the court will afford him an opportunity to do so."

Indeed, it has received well-nigh universal recognition by the courts and text-writers, and is involved in the proper practice as to putting title in issue and ascertaining it. That practice is thus referred to by Prof. Langdell in his *Brief Survey of Equity Jurisdiction*, 1 Harv. Law Rev. p. 369:

"The court takes upon itself the burden of ascertaining whether the vendor has such a title as the vendee is bound to accept; and that, too, whether the vendor or the vendee be plaintiff in the suit. Thus, if the vendor be plaintiff, he is not required either to allege or prove that his title is good, nor is the vendee required to allege or prove the contrary, but the pleadings and proofs assume the plaintiff is able to make a good title; and, if the questions raised by the pleadings and proofs be decided in the plaintiff's favor, a decree is made that the contract be specifically performed, provided the plaintiff be able to make a good title, and that the cause be referred to a master, to report whether a good title can be made. So, though the vendee be the one who seeks specific performance, he is not regarded as submitting to perform on his part, except upon condition that he can have a good title; and, therefore, if a decree be made in his favor, it must be in the same form as when the vendor is plaintiff, unless the vendee declare himself satisfied with the vendor's title, and waive any reference to a master in regard to it. The result is, therefore, a reference as to title is an incident to every specific performance in equity of a contract for the purchase and sale of land, unless such reference be waived by the vendee."

How far the case of *Bronson v. Cahill* is reconcilable with these authorities, it is not necessary to determine. The authorities go even

further than this. They hold that in certain cases, though that which is necessary to make that which is sold complete has not been obtained at all, and the nonmutuality remains to the end, the vendor is entitled to specific performance. They are cases where that which is lacking is not material to the enjoyment of that which is not lacking, and compensation can be awarded for it. In the case of *Foley v. Crow*, 37 Md. 51, Alvey, J., said:

"There is no doubt that the vendee of an estate in an unexecuted contract is entitled to have that for which he contracts, before he can be compelled to part with the consideration he agreed to pay, and that the ability of the vendor to convey should exist when his duty by the contract arises to convey, or at the time of a decree for a conveyance, where time is not of the essence of the contract. \* \* \* But it does not necessarily follow from this general rule that there is no case of specific execution at the instance of the vendor unless he has ability to convey in strict and exact compliance with the contract as to the quantity or extent of the subject-matter sold. On the contrary, notwithstanding the general rule thus stated, there are many cases, owing to special circumstances, where the vendor may obtain specific performance of the contract in equity, although he may not be able to convey to the vendee to the full extent bargained for. And if in any case the contract be one that is fit and proper to be thus executed on the application of the vendor, it is clear the vendee can have no option to rescind it, in view of a court of equity, whatever may be his right at law. In a case where the vendor is unable, from any cause not involving mala fides on his part, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part that cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, there the vendor may insist on performance, with compensation to the purchaser, or a proportionate abatement from the agreed price of what has not been paid. This cannot, however, be done where the part in reference to which the defect exists is a considerable portion of the entire subject-matter, or is in its nature material to the enjoyment of that part about which there is no defect. To this effect the authorities are abundant and decisive."

Of course, specific performance will not be granted in such cases unless compensation can be made for what is not conveyed. But there is an absence of strict mutuality in them; it being considered inequitable to deny specific performance where compensation can be had, and the part not conveyed is not essential to that which is.

It is evident, therefore, that the case of *Norris v. Fox* is not applicable to the case in hand, either in the point decided, or in the ground upon which it was so decided, even conceding that it was correctly decided. This is not a case where complainant was absolutely without title to that which he agreed to sell to the defendant. So far as the defense at present upon consideration is concerned, it must be accepted that complainant has, and since the execution of the contract has had, an absolute and unincumbered title to the distillery plant and personal property sold, which was the principal subject of the contract. The only particular in which he was lacking when the contract was made, as to the stock in, and resignations of the directors of, his assignor, the T. J. Megibben Company, and the nonmutuality in point of remedy existing at that time, was as to a matter entirely collateral. This case, therefore, is not the case decided in *Norris v. Fox*. Nor is the ground upon which that case was decided, to wit, nonmutuality in matter of remedy existing at the time when the contract was made, applicable to this case, because applied there. As



we have seen, though it may have been applicable to that case, it is not a principle of universal application. There are cases where it does not apply.

The result, then, of our consideration of the authorities cited by counsel for defendant in support of the position that complainant is not entitled to specific performance, because of nonmutuality in the particular stated, is to show that they do not uphold that position. And we are not aware of any that do. On the contrary, it seems to the court that the principle applied in the authorities cited, to the effect that a court of equity will enforce specific performance when time is not of the essence of the contract, even though the vendor's title is defective when suit is brought, is against that position. Likewise the general rule applicable to suits for specific performance, as stated by Mr. Justice Field in the case of *Willard v. Tayloe*, supra, in these words:

"In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice, and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties."

And also the rule which guides courts of equity in all suits, as laid down in the following language of Mr. Justice Campbell in the case of *Secombe v. Steele*, 20 How. 106, 15 L. Ed. 833:

"Courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and, if it find that by insisting on form the substance will be defeated, it holds it inequitable to allow a person to insist on such form, and thereby defeat the substance."

To hold that the mere want of mutuality existing at the time the contract was made, in matter of remedy, as to something that was entirely collateral to the main subject of the contract, and not of very great value to the defendant, is to defeat complainant's right to specific performance of the contract, would, in view of all the circumstances of this case, be to adhere to the matter of form, and lose sight of matter of substance. Counsel for defendant suggests that it will be a great hardship to defendant, after the lapse of nearly three years without operation of the distillery, and probable consequent deterioration of the property and depreciation in value, to have to take the property and pay for it. That may be true, but it is a matter of defendant's own bringing about. On the other hand, it will be a hardship to complainant to have to keep the property under such circumstances, and hunt up another purchaser, when the present condition of things was brought about through no instrumentality of his. If any one is to suffer for the delay, it should be that party who is responsible for it.

For these reasons given, the court does not think that defendant has made good any of its defenses, but that complainant is entitled to a decree.

**WESTERN UNION TEL. CO. v. PENNSYLVANIA R. CO. (two cases).**

(Circuit Court, W. D. Pennsylvania. January 15, 1903.)

Nos. 3, 18.

**1. EMINENT DOMAIN—REAPPROPRIATION OF PART OF RAILROAD RIGHT OF WAY.**

The question of the future needs of a railroad in fulfilling its chartered purpose and performing its public duty as a common carrier is one which should be given full consideration by a court before it undertakes to deprive the railroad company of any part of its right of way in condemnation proceedings instituted by another corporation.

**2. SAME—PROCEEDINGS BY TELEGRAPH COMPANY.**

A telegraph company, which for a term of years has maintained its lines on the right of way of a railroad under a contract by which it paid rental, and expressly covenanted to remove its lines and surrender possession at the end of the term, acquired no rights or equities by reason of its tenancy which give support to a subsequent petition seeking to condemn the demised premises under the power of eminent domain.

**3. TELEGRAPH COMPANIES—CONTRACT FOR RIGHT OF WAY—VALIDITY.**

The provision of the constitution of Pennsylvania (article 16, § 12) that "no telegraph company shall \* \* \* acquire, by purchase or otherwise, any other competing line of telegraph," has no application to a contract between a telegraph and a railroad company by which the latter is to supply the telegraph company with pole facilities for its wires on the railroad right of way, the intention being to substitute the lines of such company for those of another company whose lease with the railroad company had expired.

**4. SAME—RIGHT OF EMINENT DOMAIN—FEDERAL STATUTE.**

Act July 24, 1866, embodied in substance in Rev. St. §§ 5263, 5264 [U. S. Comp. St. 1901, pp. 3579, 3580], which authorizes any telegraph company to construct, maintain, and operate its lines over any portion of the public domain, and over and along any military or post road of the United States, confers an interstate franchise, but does not confer upon telegraph companies the right to exercise the power of eminent domain to condemn right of way over private property.

**5. SAME—CONSTRUCTION OF CHARTER—IMPLIED POWERS.**

When the express powers conferred upon a telegraph company by its charter, granted by a legislative act, are sufficient to effect the charter object, no power can be implied therefrom to condemn for the use of the company property already actually held and used for another public use. By the general rule, which is also established by decision as the rule in Pennsylvania, property devoted to one public use cannot be taken for another without legislative authority expressed in clear terms or by necessary implication.

**6. SAME—PENNSYLVANIA STATUTE.**

Act Pa. March 24, 1849, chartering the Atlantic & Ohio Telegraph Company, and authorizing it to construct and maintain telegraph lines by one or more routes between the cities of Philadelphia and Pittsburg and intermediate places, and "to erect and construct works, edifices, fixtures, and structures along and across any of the roads, highways, streets, and waters within the state, the said works to be so placed as not to interfere with the common use of said roads, highways, streets, and waters," was a grant of right of way along and over such roads, etc., which, under the Pennsylvania decisions, are the property of the state; but did not confer upon the corporation, either expressly or by implication, the right to appropriate, by the exercise of the power of eminent domain, right of way for its line over the right of way of a railroad.

**7. SAME—OCCUPANCY OF RIGHT OF WAY UNDER LEASE—ESTOPPEL TO DENY LANDLORD'S TITLE.**

A telegraph company, which for more than 20 years has occupied and used by its lines a part of the right of way of a railroad under a lease, and during such time has paid rental monthly, so long as it continues such occupancy is estopped by the relation of landlord and tenant to deny the title of the railroad company, or its right to re-enter and take possession of the ground so occupied after the lease has been terminated in accordance with its terms, on the ground that when the lease was made the telegraph company was already in possession under the right of a third party, paramount to that of the railroad company, which it had no power to release.

**8. PARTIES—CORPORATIONS—SUIT TO DETERMINE RIGHTS UNDER CONTRACT.**

A telegraph company, which is using all the lines, property, and franchises of another company under a lease terminable on notice at the will of either party, cannot maintain a suit in equity to determine the rights of its lessor under a contract between it and a railroad company without making such lessor a party; nor is the rule different because complainant may own all or a majority of the stock of its lessor.

**9. PRELIMINARY INJUNCTION—PROTECTION OF TITLE—SUFFICIENCY OF ALLEGATIONS.**

Under the rule that, where the right to an injunction depends upon title, such title must be clearly shown, a court of equity will not grant a preliminary injunction to restrain a railroad company from re-entering and taking possession of a portion of its right of way occupied by a telegraph line under a lease which has been terminated, on the ground that an absolute title to the telegraphic right of way was vested in a telegraph company by a contract made prior to the lease, where it is shown by the plaintiff's bill that defendant has been in open possession of such telegraphic right of way, through its tenant for more than 21 years, which, under the law of the state, would give it title by adverse possession.

**10. LANDLORD AND TENANT—NOTICE TO QUIT—WAIVER.**

A valid notice terminating a lease given by a landlord or tenant cannot be withdrawn except by consent of both parties which amounts to a new agreement and creates a new tenancy, and the acceptance of rent by a landlord after the giving of a notice to quit is not in itself a waiver of such notice, but is merely evidence to be considered with all the other facts of the case.

**11. SAME—EVIDENCE CONSIDERED.**

Pursuant to the action of its board of directors, a railroad company served notice on the telegraph company of the termination of a lease under which the latter company had maintained its lines on the right of way of the railroad. By the terms of the lease the telegraph company had six months after the notice within which to remove its poles and wires, and during such time the payment of rent by such company and the payment by the railroad company for telegraphic service were mutually waived. After the notice, one or two monthly payments of rent were made in the usual course by the treasurer of the telegraph company, and accepted by the treasurer of the railroad company. The correspondence between the parties with respect to the termination of the lease was carried on between the presidents of the two companies, and continued for some months. It did not appear that either knew of the rent payments, but it did appear from the letters of the president of the railroad company that he was at all times standing on the notice to quit, and that such fact was recognized by the other company. *Held*, that the acceptance of such rent, and the failure to return it,—the telegraph company in the meantime having continued to operate its lines,—did not constitute a waiver on the part of the railroad company of the right to insist on the termination of the lease, which entitled the telegraph company to an injunction restraining it from re-entering and taking possession of the right of way at the expiration of the six months, it not being shown that its treasurer had any power to make such waiver, even if such had been his intention.

Proceeding at Law to Condemn Right of Way and Suit in Equity for Injunction. Heard together on petition in the former case, and on motion in the latter for a preliminary injunction.

A. M. Neeper, Rush Taggart, and Henry D. Estabrook, for plaintiff.

Patterson, Sterrett & Acheson and John G. Johnson, for defendant.

BUFFINGTON, District Judge. This opinion concerns two cases brought in this court by the Western Union Telegraph Company against the Pennsylvania Railroad Company,—one, a petition on the law side to condemn part of the railroad's right of way, and appropriate it to telegraph purposes; the other, a bill on the equity side, praying for an injunction to restrain the railroad from dispossessing the telegraph company during the pendency of said condemnation proceedings. Briefly summarized, the relations of the parties are as follows: The Atlantic & Ohio Telegraph Company is a corporation chartered by the state of Pennsylvania. On June 20, 1864, it entered into a contract with the Pennsylvania Railroad Company, whereby the latter granted permission to the telegraph company to place a telegraph line on the railroad's right of way. On April 15, 1864, the Atlantic & Ohio Telegraph Company had leased to the Western Union Telegraph Company, a corporation of the state of New York, all its property for 10 years, the lease to be terminated after that time by either party on 6 months' notice. Thereafter the Western Union Telegraph Company operated the Atlantic & Ohio's telegraph lines on the railroad right of way. On September 20, 1881, the Western Union Telegraph Company and the Pennsylvania Railroad Company entered into a new contract covering this telegraph line. This contract was for 20 years, at the end of which time it could be terminated by the railroad on 6 months' notice. On May 15, 1902, the railroad gave the telegraph company notice of the termination of the lease, and to remove its lines on December 1, 1902. On November 26, 1902, the Western Union Telegraph Company brought its petition and bill in equity in this court as noted above. As the two are interrelated, we will dispose of the questions arising under each in one opinion, which may be considered as filed in each case.

We first take up the petition. By it the Western Union Telegraph Company seeks to condemn and appropriate to its use for telegraph purposes a strip of ground located on the right of way of the Pennsylvania Railroad from Pittsburg to Philadelphia, and upon numerous branches or connecting side lines as well. The total appropriation thus sought, indicated by an accompanying map, covers upwards of 1,500 miles of railroad right of way. The petition prays that this court approve a tendered bond in the sum of \$100,000, and order the same to be filed "for the use and benefit of the Pennsylvania Railroad Company in its own behalf, and as the owner, lessee, or operator of the railroads over whose properties the rights of way sought to be appropriated by the Western Union Telegraph extend"; that proceedings be had to determine the compensation to be paid; that upon payment of said sum into court or to the railroad possession be adjudged of

said "use, rights, and interests"; and that "the title to the said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company." An examination of the prayers of this petition in connection with the resolutions of the Atlantic & Ohio Telegraph Company and those of the Western Union Telegraph Company, its lessee, and in pursuance of which resolutions this proceeding is begun, shows that what is here sought to be appropriated is the ownership of and title to a part of the ground constituting the general right of way of the railroad company. It is true there is in the resolutions a clause stating that what is appropriated shall be "subject to such reasonable changes of location of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use and travel upon said railways." We find no statutory provision or limitation for a condemnation of land which subjects it to such shifting and transient ownership and occupation as above suggested. If the petitioner is entitled to condemn and appropriate, it would seem it is entitled to have and to hold what it acquires and pays for. But it is, in any view, clear that this clause, if enforceable, would only permit the railroad to shift upon, but never remove from, its right of way, the telegraph lines of the appropriating company. If the railroad's future needs should demand the occupation hereafter of the whole of its present right of way for additional tracks, or if its own telegraphic necessities required it to duplicate on the north side the private telegraph lines it now has on the south side of its right of way, it is evident that it could not exclude from such north side, or at all events from its right of way generally, a telegraph company that had condemned and acquired what is here sought. Whether, then, the land appropriated be a definite, fixed line, or a shifting strip, subject to relocation by the railroad, it is certain it is some part of the railroad's right of way, and that to such part the telegraph company could acquire exclusive, adverse ownership. Indeed, as we have seen, this is the object sought, viz., that "the title to said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company"; and that a fixed location is, in effect, sought under this proceeding, is shown in the prayer of the bill in equity for a permanent injunction: "That, upon due payment of said compensation by your orator to the defendant, this court will order, adjudge, and decree that your orator is entitled to a perpetual injunction against the defendant herein restraining it from in any manner interfering with the location, construction, maintenance, and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendant." Under any view, as to the part so taken and occupied, even for the time being, by the petitioner's poles, the railroad is excluded from the use thereof for its tracks, for its own telegraph lines, and for the lines of other telegraph companies, whose tenancies might be highly remunerative and desirable, or whose facilities would substantially aid in the transaction of the railroad's business. This question of the future needs of the railroad, its unhampered control and sole use of its right of way to enable it to fully perform its public duty of a common carrier, is

one of grave importance. A railroad's right of way is the artery of its life; its acquisition and construction difficult and costly; the extent to which it can be used for additional track room the limit of the railroad's development. In taking from it any part of such ground, due regard should, therefore, be had to its future needs. It was well said by Judge McKennan in a case in this court, later referred to:

"Every reasonable intendment must be made in favor of the primary rights of the complainant [in this case, the case of a railroad seeking to prevent part of its right of way being reappropriated]. \* \* \* No actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its freight business."

We deem the question therein mentioned as to the future needs of a railroad in fulfilling its chartered purpose such as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way.

Now, whatever the scope of the appropriation sought, and however the ownership thereof may be possibly qualified under the clause relating to relocation, it is clear that what is sought is an adverse, in invitum appropriation covering many hundred miles of railroad property, and that "the title to said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company." Indeed, the absolute and exclusive character of telegraph appropriation, with reference to a street,—and the same may be said, *mutatis mutandis*, to the occupation of a railroad,—is stated by the supreme court of the United States in *City of St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380:

"But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It is effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportations of messages, that space is, as far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies for the transportation of messages."

The present question of the filing and approval of the bond tendered is, on the surface, of seemingly small import, and might be regarded as a formal preliminary step in a legal contest. In reality, under the Pennsylvania decisions, as applicable to the facts of this case, approval by the court of the bond vests in the appropriating company as clear and perfect a title to the easement sought as though it had been bought and paid for. As was said in *Appeal of Hoffman*, 118 Pa. 512, 12 Atl. 57:

"The privilege of taking private property for public use may, therefore, be constitutionally exercised by those invested therewith in one of two ways,—either by actual payment, or by giving security for the payment of compensation to the owner of the property taken. For example, if a railroad company agrees with and pays to the landowner for right of way, it thereby acquires a clear right to the easement. On the other hand, if the parties fail to agree,

the same right may be acquired by complying with the other constitutional alternative, viz., giving security for the payment of just compensation in the manner prescribed by law. When the latter alternative is resorted to, and sufficient bond, with sureties approved by the court, has been given, the company acquires as clear and perfect right to the easement as if it had paid therefor in cash."

The approval of this bond being, then, a decree which adjudges the right of the petitioner to take and the duty of the railroad to surrender, and being, in substance, a compulsory judicial conveyance to the telegraph company of title to property which may prove indispensable to the future needs of the present railroad owner, the duty—indeed, the obligation—resting upon a court to be well assured of its right so to do before taking such a far-reaching and irretrievable step is apparent.

Now, the land here sought to be appropriated is to be regarded in two different relations,—one public, the other private; for, while it is private in ownership, it is public in use and duty. As constituting a part of a railroad right of way, it is by federal as well as state law and decision deemed a public highway, and as such dedicated or set apart to a public use. Const. of Pa. art. 17, § 1, says, "All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers;" and by the act of congress of June 8, 1872 (17 Stat. 308, § 201), it is provided "that all railways and parts of railways which are now or may hereafter be put in operation are hereby declared to be post roads." "The question," says the supreme court of the United States (*Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 657, 10 Sup. Ct. 971, 34 L. Ed. 295, "is no longer an open one as to whether a railroad is a public highway established primarily for the convenience of the people, and to subserve public ends." But not only is a railroad made a public highway, but under the laws of Pennsylvania land of a railroad or other corporation, necessary to the full enjoyment and exercise of a public use, is, by virtue of being dedicated to such use, excepted from some of the liabilities incident to private property, in being exempt from levy and sale and incapable of corporate alienation, unless such power of alienation is conferred by the state. This "exemption," as is said in *Railroad Co. v. Colwell*, 39 Pa. 339, 80 Am. Dec. 526, "rests on the public interests involved in the corporation. Though the corporation, in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out." Such limitation exists not by reason of corporate ownership (*Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 142 Pa. 580, 21 Atl. 902, 989), but because of the public right to the public use, which ordinarily cannot be gainsaid or withdrawn by the owner.

But while the use to which such property is subjected is public, yet ownership thereof remains private. Thus Mr. Justice Grier, in *Rundle v. Canal Co.*, 1 Wall. Jr. 275, 21 Fed. Cas. p. 11 (No. 12,139) says:

"In the popular meaning of the term nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet if the whole interest does not belong to the government, or if the corporation is not created

for the administration of political or municipal power, it is a private corporation. Thus all bank, bridge, turnpike, railroad, and canal companies are private corporations. In these and other similar cases the uses may in a certain sense be called public, but the corporations are private, as much so as if the franchises were vested in a single person. *Dartmouth College v. Woodward*, 4 Wheat. 669, 4 L. Ed. 629."

Freem. Ex'ns, § 126a, says:

"The property of certain quasi public corporations is held by them for the purpose of private gain, and has, so far as its ownership is concerned, all the advantages of private property."

Seeing, then, that what is here sought to be appropriated is not only private property, and of great value to its private owners, but that it is impressed with a federal obligation and public use as a federal post road, and with a state one as a highway and a common carrier, it is evident that the right of the petitioner to divest private ownership and divert public use must be clear and free from uncertainty. Such right the petitioner claims to have by virtue of a power of eminent domain in it vested, first by the act of congress of July 24, 1866, and, secondly, by the constitution and statutes of Pennsylvania. Whether such powers and rights are so vested constitutes the underlying question of this case; but, before considering it, we deem it proper, so far as concerns the petition to condemn, to refer to and dispose of some other phases of this controversy.

At the argument it was contended on behalf of the railroad, *inter alia*, that such right of eminent domain as a telegraph company could exercise in Pennsylvania was confined to corporations chartered by that state; that whatever right was exercised in the present case could be exercisable only by the Atlantic & Ohio Telegraph Company, a Pennsylvania corporation, the lessor of the Western Union Telegraph Company; that the former company was a necessary but non-joined party in the petition, and that, if made a party therein, the jurisdiction of this court would be ousted; that the Pennsylvania Railroad Company, having its principal office and being located in the Eastern district of Pennsylvania, could not be sued in this case in the Western district; that the present application to file and approve the bond was not a suit or action of law of which this court has jurisdiction; and that the right of eminent domain could only be exercised after a bond had been filed and approved in the state court in accordance with the Pennsylvania statutes. It is obvious, however, that, unless the right of eminent domain is vested in the petitioner, it will not be necessary to pass upon these and other questions involved. We will, therefore, for present purposes, assume, without deciding, that all these questions are with the petitioning company, and address ourselves to those of alleged federal and state rights of eminent domain.

It is also proper to here remark that this proceeding to condemn is in no wise affected by the past or present relations between the Western Union Telegraph Company and the Pennsylvania Railroad Company. By the contract of September 20, 1881, noted above, the Pennsylvania Railroad Company granted to the Western Union Telegraph Company the "right to place, maintain, and use upon the line of the right of way of the Pennsylvania Railroad and of the



railroads owned, operated, or leased by it, \* \* \* a single line of telegraph poles, \* \* \* with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company." It provided for the payment of an annual rental by the telegraph company. It was "to continue in force for and during the term of twenty years" from its date; that the telegraph company should, "at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires, and, if not so removed, the railroad company may remove them at the expense of the telegraph company." It also provided that "any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railway company shall be such only as are granted by this agreement, and shall cease with its termination."

Now, whatever may have been the prior rights of the Western Union Company, which, as noted above, it expressly surrendered, it is clear its possession of the railroad property when this petition was filed, was under the contract of September 20, 1881. That contract created a rental relation. As stated in *City of St. Louis v. Western Union Tel. Co.*, supra, it was "in the nature of a charge for the use of the property; \* \* \* that which may properly be called 'rental.'" Having entered into the contract of tenancy, and its possession of the locus in quo being under an expressed covenant and an implied obligation to surrender at the termination of the tenancy, it is clear, as shown later in this opinion, that the tenant can avail itself of no pre-existing adverse rights to defeat the owner's dominant title. Nor can any rights enjoyed by the tenant under the lease and pursuant thereto be made a ground for denying the landlord the implied and covenanted right to have possession yielded, and his dominant estate restored. In view, therefore, of the tenancy of the Western Union Telegraph Company under this contract, of the well-recognized legal duty and "implied obligation on the part of the tenant to redeliver the possession of the demised premises to his landlord upon the expiration of his term," (18 Am. & Eng. Enc. Law [2d Ed.] p. 403), and of the express provisions for surrender, the petition of the tenant, the Western Union Telegraph Company, to appropriate by eminent domain the property of its railroad landlord, should be treated as one wholly independent of the question of tenancy. If it be vested with the right of eminent domain, that right is neither dependent upon, increased by, nor detracted from by its tenancy. In other words, while the right of the telegraph company to begin, during the tenancy, a proceeding to condemn the demised premises, may, for present purposes, be assumed, it is equally ob-

vious that such proceeding must stand wholly on the right to condemn, and that no rights or equities to such adverse proceedings can be based on the servient contract relation of tenancy under which the petitioner is in possession. The right, therefore, of this petitioner to appropriate by eminent domain will be considered precisely as in the case of any third corporation vested with the petitioner's corporate rights, seeking like relief. It is obvious, also, the suggestion that some permanent right was vested in the Atlantic & Ohio Telegraph Company under the prior contract does not affect this petition to condemn. The resolution of that company approving the resolutions of the Western Union Telegraph Company to appropriate by condemnation this right of way is based upon the implied assumption of ownership by the railroad of the property so sought to be appropriated. It is a resolution to acquire by virtue of the public right of eminent domain; not to enforce or suggest any private right or claim. It is obvious, therefore, that the averment of possible right in the Atlantic & Ohio Telegraph Company has no pertinency to this petition.

Another preliminary matter should be referred to. The Pennsylvania Railroad Company, prior to the beginning of this proceeding, entered into a contract with the Postal Telegraph Cable Company, dated June 25, 1902, whereby the railroad in substance agreed, in consideration of certain rentals, to furnish that company with pole facilities upon its rights of way for 15 years, and permit the telegraph company to use the same for its wires. Inasmuch as the private telegraph lines of the railroad now occupy the south side of its right of way, and to furnish the pole facilities provided for in this contract the railroad intends to place poles owned by itself on the north side, and occupy the location now used by the Western Union Telegraph Company, it is contended the contract in question violates article 16, § 12, of the constitution of Pennsylvania, which provides: "No telegraph company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph company owning a competing line or acquire, by purchase or otherwise, any other competing line of telegraph." This clause has no reference to this case. Certain it is, by this contract the Postal Telegraph Cable Company did none of the acts thereby inhibited. It has not consolidated with the petitioning company; it has no proven controlling interest in its stock or bonds; nor has it acquired, by purchase or otherwise, any competing line. It further appears the railroad company notified the Western Union Telegraph Company to remove all of its poles, wires, and property from its right of way, so that neither directly nor indirectly is it proposed that the Postal Telegraph Cable Company shall, in the fulfillment of this contract, "acquire, by purchase or otherwise, any other competing line of telegraph." Moreover, it is apparent that the validity or nonvalidity of such contract can in no wise affect the question whether prior legislation vests the right of eminent domain in this petitioner.

Turning, then, to the underlying question, let us ascertain what powers of eminent domain, state or federal, are vested in the petitioning company. Eminent domain is one of the highest attributes of

sovereignty. By it the sovereign power, state or federal, is enabled to take private property and appropriate it to public use. But, subject to this sovereign power, private ownership is absolute, and such absolute ownership is safeguarded by a twofold constitutional protection, viz., it can only be taken away by due process of law, and then on payment of just compensation. Amendment 5 of the constitution of the United States provides: "No person shall \* \* \* be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." It is also true that the sovereign state or nation can, by virtue of its superior dominion or eminent domain, reappropriate to an additional or secondary public use property it has once set apart to public use; for it must be apparent that the sovereign power cannot, by dedicating property to one use, preclude itself from rededicating the same property to some other public need. To do so were to defeat the purpose for which alone sovereignty exists,—to promote the public good. "Salus populi est suprema lex." It will, therefore, be apparent that the federal government, in promoting federal constitutional powers, and the state in its sphere, have the sovereign right to appropriate private property to public use, and to reappropriate property once set apart to public uses to other and additional ones.

Now, as a telegraph line is a recognized factor of commerce (*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708), and therefore a public use, the right of the nation and state to exercise the power of eminent domain to appropriate property for telegraph purposes is clear. But while the right is undoubted, its enforcement affects the otherwise absolute right of private property, protected, as we have seen, by constitutional safeguards. The right to take, in invitum, the property of the subject, is the most absolute power of sovereignty,—the surrender of ownership, the abridgment of fundamental and constitutional right. It is manifest, therefore, that one who claims a delegated right to exercise this sovereign power must show a clear right, and that whatever is not expressly given, or ex necessitate implied, must be deemed withheld. And where not only private property, but public uses, are affected, the right to appropriate should be certain in that regard. *Inhabitants of Springfield v. Connecticut R. R. Co.*, 4 Cush. 73; *In re City of Buffalo*, 68 N. Y. 171; *In re Boston & A. R. Co.*, 53 N. Y. 577.

Let us then inquire whether congress has delegated the power of eminent domain by the act of July 24, 1866. Section 1 of that act (14 Stat. 221), now embodied, though not in exact words, in sections 5263 and 5264 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3579, 3580], enacts:

"That any telegraph company now organized, or which may hereafter be organized under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under or across the navigable streams or waters of the United States: provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the

navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

The declared object of this act is "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes." These expressed purposes are fulfilled by the act even if the right of eminent domain is not delegated. The statute was passed at a time when transcontinental rail and telegraph lines through the public domain were in construction or contemplation. No special ground calling for legislation so far as existing lines of railroad were concerned is shown to have then existed. Indeed, the record in this case shows that both prior thereto and since, railroad companies were contracting with telegraph companies in order to secure the installation of telegraphs along their lines as a help to railroad operation. Material property, and aid by the way of privilege, were given by the government in the right to "construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States," and "over, under or across the navigable streams or waters of the United States"; in the free right to use necessary stone, timber, or other materials from the public land, and to pre-empt 40 acres of land for each station. An interstate franchise, free from state interference, was conferred in the right "to construct, maintain and operate lines of telegraph \* \* \* over and along any of the military or post roads of the United States, which may have been or may hereafter be declared such by act of congress." *Pensacola Tel. Co. v. Western Union Tel. Co.*, supra. It will, therefore, be seen that in these substantial and valuable property and franchise rights the expressed purposes of the act were fulfilled, and there is no necessity to superadd the right of eminent domain. Such grant is not essential to the enjoyment of the franchise conferred. Moreover, since the constitutional inhibition to which reference has been made provides that "no person shall \* \* \* be deprived of \* \* \* property without due process of law, nor shall private property be taken for public use without just compensation," thus coupling the right to take by "due process of law" with the tender of just compensation, it would seem that, if congress intended by this act to empower the taking of private property, it would have made provisions for ascertaining compensation. In the absence of any imperative demand for an implied grant of the right of eminent domain, the omission of provision for compensation is an argumentative, if not, indeed, a cogent, reason for concluding that no grant of the right to take private property was contemplated. Provision for compensation may imply power to take. *Linton v. Bridge Co.*, 1 Grant, Cas. 415. Absence thereof suggests no power to take was intended. *Chamberlain v. Cordage Co.*, 41 N. J. Eq. 43, 2 Atl. 775. Moreover, the express grant of

public, and the nonreference to private, property is pregnant proof that private property rights were not meant to be affected. Mention of the one was exclusion of the other. In *Murphy v. Railway Co.*, 11 Ont. 582, it was held that St. 46 Vict. c. 64 (D), which empowered a railroad company "to own and hold land in any municipality through or in which the main line or any branch was carried, for the erection and maintenance thereon of stations, sidings, etc., as might be necessary for the purpose of the company," did not empower them to expropriate against the will of the owner.

There being no express grant of the right of eminent domain in this act, it is clear there is no implied one. The grant, outside of federal property, was, as we have seen, "to construct, maintain and operate lines of telegraph \* \* \* over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by the act of congress." While it is true that a right to condemn may be implied of necessity when the grant itself would be defeated unless such power were implied, yet such necessity is one arising not from the act of the party seeking to avail himself of the right, but from the law itself. It is one proceeding from the nature of things over which the party has no control, and not from mere convenience or economy. *Lewis, Em. Dom.* § 240. Now, the conformation of a country in the way of defiles, rock formation, and streams might be such that two authorized roads—rail, highway or turnpike—would be physically required to use in common a sole permissible grade and location, or to be compelled to make an unreasonable detour. But grade is not a necessary factor in telegraph construction. There is no physical reason why a telegraph company cannot as well use for its line a strip of land along or within reasonable reach of a roadway or railroad as place them upon the perpendicular ground already appropriated by such road. Such being the case, it is manifest that an attempt by a telegraph company to use the entire length of a railroad for its lines, as is here sought to be done, is not based upon imperative necessity, without which its grant "to construct, maintain, and operate" would be defeated, but that such proposed location is a matter of economy and convenience. It is clear, therefore, that from the nature of things, no implied grant of a federal power of eminent domain is essential to the enjoyment of the franchise conferred by this act. Indeed, the case of *Pensacola Tel. Co. v. Western Union Tel. Co.*, referred to above, notably illustrates the efficacy of the act to secure to a telegraph company, even against hostile legislation, full enjoyment of the right to operate its lines "over and along any of the military or post roads of the United States," without delegation of the right of eminent domain.

Out of deference to the earnest argument of counsel representing the telegraph company, who contend the construction of the act of 1866 in that regard is an open one, we have discussed it as such, and indicated our independent views. But, as we read the decisions, we think the question has been settled by the supreme court of the United States. This statute first came before that tribunal in *Pensacola Tel. Co. v. Western Union Tel. Co.*, supra. An ex-

amination of that case shows that its construction was there involved. The appellant, in the argument of counsel, contended the statute simply conferred on telegraph companies "a right of way over the public domain"; that it extended "only to such military and post roads as are upon the public domain"; and therefore had no application to the case in hand,—that of a telegraph line constructed on a railroad not on the public domain. The court, however, held the act extended to military and post roads generally, in addition to those on the public domain, but that no attempt was made thereby to confer rights to private property. In defining what the law did provide and mean, the court, to meet criticism of it, stated what it did not provide. It showed it extended to all military and post roads of the United States, and therefore to the railroad on which the telegraph in controversy was located, but that it did not affect private property. It was there said by Chief Justice Waite:

"No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is acquired, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted."

In the case of *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 243, 20 Sup. Ct. 867, 44 L. Ed. 1052, the construction placed upon the statute in the *Pensacola Case* was restated and approved. The right of the telegraph company in the *Ann Arbor Case* to a review by the supreme court was in question, and such right depended on the existence of a federal question. In the complaint in the state court, where the case was originally brought, the allegation of the bill was that the telegraph company had accepted the provisions of the act in question, and that, independent of the contract made with the railroad, it had "a right to maintain its telegraph line on what was formerly said *Frankford & Southeastern Railroad* under the provisions of the statute of the United States." If this allegation of a property right independent of the contract, and based on the provisions of the act of 1866, did not, as the court said, "really and substantially involve a dispute or controversy as to the effect and construction of the constitution or laws of the United States, upon the determination of which the result depends," then it was "not a suit arising under the constitution or laws," and the judgment of the state court was not reviewable by the supreme court. It was accordingly held that the cause of action was one based on contract, and that the construction of the act of 1866 was not involved, and the judgment not reviewable. As we read the decision, one reason why the complaint could not be regarded as raising a federal question was that the court would not, in view of its construction of the statute in the *Pensacola Case*, permit it to be asserted as a ground of federal jurisdiction. In that regard, the court, speaking by Chief Justice Fuller, said:

"It has long been settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; but it does

provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of the privileges." *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708. \* \* \* As we have said, it was not asserted in argument that the telegraph company had the right, independently of the contract, to maintain its line on the railroad company's property; and, in view of the settled construction of the statute, we could not permit such a construction to be raised as a basis of jurisdiction."

If the construction thus given this statute is the supreme law of the land, and binding upon all inferior tribunals, as it unquestionably is, we must hold, as we do, that the act of 1866 does "not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business," and no such federal right of eminent domain as this particular petitioner claims is vested in it thereby.

We next inquire whether a right of appropriation is vested in the Atlantic & Ohio Telegraph Company, the lessor of the Western Union Telegraph Company, by the constitution and statutes of Pennsylvania. As stated above, we have assumed for present purposes that any right of eminent domain possessed by the Atlantic & Ohio Telegraph Company is vested in the Western Union Telegraph Company. What, then, are the terms of the statutory and constitutional grant to the former company, and what is the construction given such grants by the supreme court of Pennsylvania? Is the Atlantic & Ohio Telegraph Company authorized to appropriate land already appropriated for the use as a railroad right of way? The Pennsylvania act of March 24, 1849, incorporating that company, constitutes it a body corporate "for the purpose of making, using and maintaining telegraph lines and communication by one or more routes between the cities of Philadelphia and Pittsburg and intermediate places." By certain other legislation, not necessary to here specify, it was empowered "to purchase, make, use and maintain any connecting or side lines." It should be noted in passing that the route between Philadelphia and Pittsburg, the termini of the charter, covers some 350 miles of the total right of way sought to be appropriated. Section 5 of the charter provides:

"That it shall and may be lawful for the said corporation hereby created, to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this state; the said works to be so placed as not to interfere with the common use of such roads, highways, streets and waters."

It further provides that:

"The said corporation and all other persons by them authorized, appointed or employed, shall have power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing the said telegraph lines, and using, repairing, maintaining and enjoying the same, upon which the same may be located, or which may be necessary or convenient for the location of the same."

Now, this section, it will be observed, consists of two parts. The first makes it lawful for the corporation to construct "along and across any of the roads, highways, streets and waters within this state"; the second confers power and authority "to enter into and

upon, hold, occupy and enjoy any land for the purpose of locating and constructing the said telegraph lines, and using, repairing, maintaining and enjoying the same, upon which the same may be located, or which may be necessary or convenient for the location of the same." Several things are clear in the construction of this early statute, for it was passed in the early stage of both railroad and telegraph development. As the act contemplated the construction of one or more routes between the cities of Philadelphia and Pittsburg, there was no implication that any one route was essential to the enjoyment of the franchise to construct. Not only is no mention made of a railroad or railway in the act, but it was not until a later period that these charter termini were connected by rail. But when the charter was granted the two cities named were connected by systems of public roads or highways. It is obvious, therefore, that in the grant of a corporate franchise to construct one or more routes the legislature did not contemplate the then use of railroads, for there was then no such connecting railroad line, but provided other means by which one or more routes could be secured across the state and fully enjoyed. These means consisted in the free grant—for no provision was made for compensation therefor—"along and across any of the roads, highways, streets and waters within this state," and the other in the power "to enter into and upon, hold, occupy and enjoy any land for the purposes," etc., making compensation, of course, to the owner. It will thus be seen that the purpose of the grant could be fulfilled without embracing railroads. They are not mentioned, and very probably were not at that early date meant to be included in the generic terms "roads, highways and streets." At that time no legislation in Pennsylvania defined them as highways, and the context shows that the roads, highways, and streets contemplated were such as were open to common use,—i. e., the public property,—for it was enacted that the telegraph was to be placed so as "not to interfere with the common use of such roads, highways, streets, and waters." Evidently this language referred to public property of a kind the public had a common right to use. While a railroad is a public highway in the sense it is a common carrier and has a public use to fulfill, yet it never becomes a public highway in the sense it is subject to common use. It is public in the common duty it owes the public, but private in operation and use to fulfill such duty. The authorities are clear that the public cannot make common use of it as a public passageway, and that one doing so subjects himself to the liability of a trespasser. *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 378, 84 Am. Dec. 457. The most that can be said of this charter is that it leaves it a debatable question whether it extends to railroads. We have seen it does not by express words. We have seen it expressly grants the privilege of entering upon certain property already subjected to a public use, and its mention of specific kinds of such public use as rights of way upon which the telegraph company might enter implies noninclusion of property in other and different kinds of public use. We have seen that the use of a railroad was not essential to the enjoyment of the franchise, and that express provision was made for its enjoyment in



other ways. It would seem, therefore, that neither in express terms nor by imperative implication to fulfill the charter object is the right to enter upon a railroad given by this charter; and that a power to appropriate railroad property was not essential to the franchise to construct a telegraph line between Philadelphia and Pittsburg is evidenced by the charter. Indeed, that instrument itself shows that prior to its grant, and therefore without its aid, or the exercise of the power of eminent domain, there was (vide section 2 of the charter) a "telegraph line now in use between the cities of Philadelphia and Pittsburg, \* \* \* [which] shall be taken and considered to be the capital of said corporation." The claim for an implied power is met by the fact that the expressed power is sufficient to effect the charter object. "The implication does not arise if the powers expressly conferred can, by reasonable intendment, be exercised without the appropriation of property already actually held and used for another public use." In *re Boston & A. R. Co.*, supra; *Inhabitants of Springfield v. Connecticut R. R. Co.*, supra.

The general principles and rules of construction applicable to such charters are fairly stated in 10 *Am. & Eng. Enc. Law* (2d Ed.) p. 1054, as follows:

"Since the exercise of the powers of eminent domain—the taking of a man's property without his consent—is against common right, it cannot generally be implied from a grant of authority to construct a public work. In order for a corporation to exercise the power, the right must be granted by express terms or by necessary implication. Therefore all acts relating to the taking of private property are to be strictly construed, and not extended by implication. \* \* \* But in some cases it has been said that, if the implication in favor of the intended exercise of the power is very strong,—for example, that the grant itself would be defeated if the company were not allowed to condemn,—the right to condemn may be exercised, on the theory that an implied right has been granted."

This statement is in accord with the federal view. *Charles River Bridge Co. v. Warren Bridge Co.*, 11 *Pet.* 425, 9 *L. Ed.* 773, 938, and with the Pennsylvania decisions. Thus, in the *Appeal of Pennsylvania R. Co.*, 93 *Pa.* 159, where that company sought to take the property of a street railway, the supreme court, in an able opinion by Chief Justice Gordon, announced the rule, which has since been followed, where a corporation seeks to construe a corporate grant so as to interfere with a previous grant of the same kind. It was there said that the plea of necessity "must be tested by the rule, now of universal acceptance, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be held in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind." In the later case of *Appeal of Groff*, 128 *Pa.* 632, 18 *Atl.* 431, the same doctrine was reannounced by that court in an opinion by Mr. Justice Mitchell, wherein he said:

"It has been settled, since the cases of *In re Plan of Third Division of Dist. of Kensington*, 2 *Rawle*, 445, and *In re Philadelphia & T. R. Co.*, 6 *Whart.* 25, 36 *Am. Dec.* 202., that property devoted to public uses, including franchises, is subject to eminent domain, and may be taken for other public

uses; but it is equally settled that it cannot be so taken without legislative authority expressed in clear terms, or by necessary implication. \* \* \* In the long line of decisions from *Stormfeltz v. Turnpike Co.*, 13 Pa. 555, down to Appeal of *Pittsburg Junction R. Co.*, 122 Pa. 511, 6 Atl. 564, 9 Am. St. Rep. 128, the rule itself has never been questioned. \* \* \* The imperative and inevitable nature of the implication requisite has been laid down in all our cases, and nowhere more strongly than in some of the most recent and carefully considered. See Appeal of *Pittsburg Junction R. Co.*, 122 Pa. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Appeal of *Pennsylvania R. Co.*, 93 Pa. 150; Appeal of *Pennsylvania R. Co.*, 115 Pa. 517, 5 Atl. 872; *Stormfeltz v. Turnpike Co.*, 13 Pa. 555; *Cake v. Railroad Co.*, 87 Pa. 307; Appeal of *Tyrone School Dist.*, 22 Wkly. Notes Cas. 513."

In Appeal of *Pittsburg Junction R. Co.*, 122 Pa. 526, 6 Atl. 564, 9 Am. St. Rep. 128, the right of one railroad to extend its line through a yard of another arose. Such taking was there enjoined, the court citing and relying upon the opinion of Judge McKennan in this court in the case of *Lake Shore & M. S. R. Co. v. New York, C. & St. L. Ry. Co.* (C. C.) 8 Fed. 858, that "every reasonable intendment must be taken in favor of the primary right of the complainant. At the points of the alleged conflict no actual encroachment upon their rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future, as well as the existing necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business,"—and restating the law as declared in the Appeal of *Pennsylvania R. Co.*, 93 Pa. 159, which we have cited above. The cases of Appeal of *Sharon R. Co.*, 122 Pa. 533, 17 Atl. 234, 9 Am. St. Rep. 133, and *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 142 Pa. 581, 21 Atl. 902, 989, are to the same effect.

Such being the limitations placed by the Pennsylvania decisions upon appropriating railroads, we see no reason forbidding, and every reason suggesting, the same limitations should be enforced in the case of telegraph companies. In railroad location, as we have noted above, grade is an essential factor; in telegraph construction it is at most a mere convenience. In railroad construction, the narrowness of defiles, the opening of gorges, the location of streams, the general topography of the country, or the lack of curve space may, under certain circumstances, render it imperatively necessary that a second road should trench upon a primary location. None of these factors ordinarily create imperative necessity in the case of telegraph lines. With them grades may be ignored, gorges avoided, hills or mountains crossed. In other words, there is no necessity, in the nature of things, that ordinarily requires a telegraph line to be placed on a railroad right of way. Its location there is obviously a matter of convenience and economy. Indeed, an examination of the petition in this case shows that no allegation is made, and it is quite apparent from the nature of things none could be made, that there is any imperative necessity for the location by the telegraph company of its poles on the railroad right of way. While the petition avers the patent fact that "it is necessary for continued maintenance and operation of its said lines of telegraph" that it should have the right to use and maintain poles along the right of way, yet it does not,

and of course could not, aver that such occupation is necessary to the enjoyment of its franchise. Under the laws of Pennsylvania, public roads, being the property of the state, are subject to its direction and control. "In England a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania," says the supreme court in *Re Philadelphia & T. R. Co.*, 6 Whart. 43, "it is the property of the people, not of a particular district, but of the whole state; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the state, are subject to its absolute direction and control." Such being the case, it is manifest that in its grant to the Atlantic & Ohio Telegraph Company of a right to construct "along and across any of the roads, highways, streets and waters within this state" the state has, to the extent of its ability in that regard, made provisions by its highway system for that company to exercise its corporate franchise of constructing a line or lines from Philadelphia to Pittsburg. It is therefore apparent that there is no necessity to read into this charter, as a power requisite to the fulfillment of the charter object, an implied right of eminent domain enabling it to reappropriate property already subjected to public use as a railroad right of way, inasmuch as the state has conferred an express grant of a right of way over public property in its roads, highways, streets, and waters sufficient to enable the company to effectuate the object of its creation. In the case of *New York City & N. R. Co. v. Central Union Tel. Co.*, 21 Hun, 261, a substantially similar charter grant to the one here in question was held not to authorize entry on a railroad. It was there held a "special authority to a telegraph company to build upon, over, or under any public road, street, or highway, is to be construed strictly, and does not authorize construction over a railroad." From these authorities, as well as from independent reasoning, it would, therefore, seem clear that no right of eminent domain to enter upon the rights of way of railroads was conferred upon the Atlantic & Ohio Telegraph Company by its charter.

This court being, then, of opinion from its own independent examination that no federal right of eminent domain was vested in the Western Union Telegraph Company by the act of 1866 authorizing it to appropriate the right of way of the Pennsylvania Railroad Company, and that no state right of eminent domain was vested in the Atlantic & Ohio Telegraph Company which warranted the appropriation of said right of way, and such conclusion being in accord with the decisions of the supreme court of the United States and of the supreme court of Pennsylvania severally relating thereto, the duty of this court to refuse to approve this bond and to order this petition dismissed is clear.

We next consider the bill filed on the equity side of the court, wherein the Western Union Telegraph Company seeks a preliminary injunction against the Pennsylvania Railroad Company "pending the determination of the said action at law," and "such other and further relief as the case may require." The action at law referred to is the petition to condemn, which, being dismissed, constitutes no ground

for relief under this bill. In considering the question involved in the general prayer for relief, it will be noted that our jurisdiction in this bill rests on the diverse citizenship of the two parties litigant, the Western Union Telegraph Company, a corporation of the state of New York, and the Pennsylvania Railroad Company, a corporation of Pennsylvania, and it will be further especially noted that these parties hold to each other the relation of landlord and tenant. The Western Union Telegraph Company, since September 20, 1881, has been in possession of the right of way in question as a tenant of the Pennsylvania Railroad Company under lease. It has attorned to the railroad during that long period, and acknowledged its paramount title by the payment of rent. When this bill was filed, November 26, 1902, the notice to quit on December 1, 1902, had not matured, and the telegraph company was then in lawful possession as a tenant under the lease. Moreover, it will be observed that one of the grounds for relief here urged is that by an alleged extension of the lease by waiver of the notice to quit this relation of tenancy continued after December 1, 1902, or, as stated by complainant's brief, "complainant bases its right to ultimate recovery in this controversy upon any one of the following propositions: First, that respondent waived its notice to quit by its subsequent unqualified acceptance of an aliquot monthly payment of a specified yearly rental reserved in the contract, which sum it still retains and does not offer to refund." It will, therefore, be seen that this bill is one between landlord and tenant, and relief is asked by reason of the existence and continuance to the present time of the relation of tenancy. It is the case of a tenant seeking to enjoin the landlord from re-entry, and the general legal principles applicable to a suit between landlord and tenant apply thereto. Now, there is probably no principle of law more firmly settled than that a tenant is not permitted to attack or impeach his landlord's title. It is based on sound and wholesome reasons. The possession of the tenant is in law regarded as that of the landlord, and, where a relation of tenancy has once been fairly and advisedly established between parties, the law will not permit the tenant, so long as he holds possession of the property, to litigate to retain possession on the basis or averment that the title is not in the landlord. The tenant's mouth is not closed to assert the truth. If the tenancy was procured by fraud, deceit, or misrepresentation of the landlord, the tenant is allowed to prove such fraud, and show that the relation of landlord and tenant never in fact existed. *Baskin v. Seechrist*, 6 Barr, 163; *Smith v. McCurdy*, 3 Phila. 488. If, after becoming a tenant, he desires to assert a title adverse to that of the landlord, he can do so; but he must first repudiate his tenancy, and, if called upon, surrender possession. So long as he remains a tenant, the relation of tenancy estops him from attacking the landlord's title. The grounds for the rule are well summarized in 11 Am. & Eng. Enc. Law (2d Ed.) 443:

"The principle upon which this doctrine is based is that the title of the lessee is in fact the title of the lessor. He comes in and holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of

the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration; and hence he cannot deny the lessor's title without breach of good faith and common honesty."

While the rule is recognized as a general abstract principle of law, and as one which courts enforce, yet in cases like this, where large interests are at stake, and its enforcement might seem to preclude a litigant from asserting supposed rights, it is well to turn to some of the master minds of the law, and from their words learn the sound reasons and just grounds whereon this "long-settled and salutary rule," as it was styled by the supreme court of the United States in *Stott v. Rutherford*, 92 U. S. 107, 23 L. Ed. 486, rests. These reasons not alone vindicate the rule's existence, but serve to show that its enforcement prevents litigation, and exactly awards to both parties to a tenancy the results they expected when they assumed that relation. In *Blight v. Rochester*, 7 Wheat. 547, 5 L. Ed. 516, Chief Justice Marshall says:

"This principle originates in the relation between lessor and lessee, and, so far as respects them, is well established, and ought to be maintained. The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtains and holds possession; and breaking the faith which he has pledged, and the obligation of which is still continuing, and in full operation."

The Pennsylvania rule, and the ground on which it stands, are well stated by Judge Black in *Thayer v. Society*, 20 Pa. 62:

"A lease given in good faith by one party and accepted by another with his eyes open is valid and binding on both, though the actual occupancy be not changed. It creates the relation of landlord and tenant. It is a solemn admission of the lessor's title. It disarms him of the power to take possession during the term, and therefore ought to be conclusive of his right to do so afterwards. The mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud, or accepted by mistake. The lease is not rendered void by proving title in the lessee. To make the law otherwise would be to say that the tenant shall not set up title in himself when he has none, and that the lease shall be no evidence of the landlord's rights except when he can prove them without it."

Now, the spirit of the rule requires its application not only where possession is first acquired by virtue of the tenancy, but where there has been a prior adverse possession, and such adverse possession is changed to one under a tenancy evidenced by lease. *Rankin v. Simpson*, 19 Pa. 475, 57 Am. Dec. 668, as well as the case last cited, so rules:

"If a purchaser by parol take possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement. And where the agreement, as in this case, is reduced to writing in terms perfectly inconsistent with the idea of a parol sale, it becomes the most faithful memorial which ingenuity can devise or the law adopt."

In the present case such rule of estoppel applies. Indeed, the facts show the case is a peculiarly proper one for its enforcement. Whatever may have been, on September 20, 1881, the rights of the Atlantic & Ohio Telegraph Company,—and to these we refer later,—or those of the Western Union Telegraph Company, as its lessee, the latter company on that day entered into a contract with the Pennsylvania Railroad Company, whereby the relation of landlord and tenant was created. As a badge and incident of such tenancy, it agreed to pay a rental, and, as a fruit of such tenancy, it had had undisturbed possession of and used a telegraphic right of way for 21 years on the land of the railroad company. No fraud or misrepresentation is alleged in the making of the lease, or in the creation of this relation of landlord and tenant. Indeed, from the terms of the lease it is clear that one of its objects was to put an end to all prior claims by placing the parties thereto in the relation of tenancy, and that, as stated in the lease, “the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination.” The purpose to accept a servient, terminable tenancy is made clear in the contract of September 20, 1881, wherein the Western Union Telegraph Company stipulated:

“This agreement is to continue in force for and during the term of twenty years from its date. \* \* \* If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter upon receiving written notice from the railroad company, remove, within six months from the receipt of said notice, all of its poles and wires, and leave the property of the railroad company in good condition, and free from the incumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company; and, if not so removed, the railroad company may remove them at the expense of the telegraph company.”

The purpose to forego all other claims and relations is evidenced by its release in these words:

“Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination.”

The contention of the tenant, the Western Union Telegraph Company, that it had no right to surrender or release the telegraphic right of way of its lessor, the Atlantic & Ohio Telegraph Company, because such right was inalienable, and its act in that regard was *ultra vires*, cannot, even if well taken, affect the present case. In effect, this is but to attack the landlord's title. In substance it says no title was vested in the railroad by such release or conveyance. This, as we have seen, the law, so long as the tenant holds possession under the lease, will not permit. Moreover, the estoppel in this case, be it observed, does not depend upon the capacity of the Western Union Telegraph Company to release the rights of the Atlantic & Ohio Telegraph Company and the validity of such release. The

estoppel the law here enforces is not an estoppel by deed. It is not based on the validity of this release. It stands on higher ground. It is one created by the relation of the parties,—landlord and tenant. It “originates in the relation between lessor and lessee” (*Blight’s Lessee v. Rochester*, supra); and it may exist even though the lessor or lessee be incompetent to contract (*Wilson v. James*, 79 N. C. 349; *Helmes v. Stewart*, 26 Mo. 529; *Ramires v. Kent*, 2 Cal. 558; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187). In view of the relation of tenancy existing between these parties (a relation running over a period of more than 20 years, and reaffirmed and acknowledged each month by the payment of rent), and the absence of any repudiation of such relation during all those years, we are firmly of opinion that a court of equity should, in support of this wholesome rule, hold, as we do, that the tenant is estopped from setting up in this bill as a ground for denying the landlord re-entry that the latter has no title to that which the complainant still holds under the lease.

But apart from the estoppel of the tenant, there is another and insuperable objection to this court in this case passing upon the rights which are alleged to have vested in the Atlantic & Ohio Telegraph Company by virtue of its contract of June 20, 1864, with the Pennsylvania Railroad Company. It is manifest that, where a court of equity is required to ascertain and determine rights vested by a contract, the parties to such contract, if they have not disposed of their interests thereunder, should be made parties to such litigation. *Railroad Co. v. Crane*, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. Ed. 1064; *Gregory v. Stetson*, 133 U. S. 586, 10 Sup. Ct. 422, 33 L. Ed. 792; *West v. Randall*, 2 Mason, 181, Fed. Cas. No. 17,424; *Land Co. v. Elkins* (C. C.) 20 Fed. 545; *Florence Sewing Mach. Co. v. Singer Mfg. Co.*, 8 Blatchf. 113, Fed. Cas. No. 4,884; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; 15 Enc. Pl. & Prac. 611. The Atlantic & Ohio Telegraph Company is not a party to this suit, and, being a Pennsylvania corporation, it cannot be made one without ousting jurisdiction. If, by its contract of June 20, 1864, a perpetual telegraphic right of way was acquired by that company from the Pennsylvania Railroad Company, no conveyance or assignment thereof by it is shown to have been made. It is true that previous thereto, to wit, on April 15, 1864, the Atlantic & Ohio Telegraph Company had made a lease with the Western Union Telegraph Company wherein it leased “to the party of the second part, for the term of ten years, commencing on the first day of April, A. D. 1864, and to continue thereafter until terminated by six months’ notice, at the option of either party, all their telegraph lines, instruments, property, offices, and franchises, with the right to work said lines at the expense of the said party of the second part, and enjoy the profits of the same as fully and effectually as heretofore done by the party of the first part, and the party of the second part agreeing to assume all the present indebtedness, liabilities, contracts, and obligations of the first part.” But this was simply a lease of, and it did not pretend to assign or convey, the property or franchise of the lessor. After 10 years it was revocable by either party on 6 months’ notice. Now, whatever equitable rights may exist between the two

telegraph companies by reason of said prior lease or the ownership of stock in the lessor company by the lessee, it has not been shown that the title and reversionary ownership to any interest in land vested by the contract of June 20, 1864, has been conveyed by the Atlantic & Ohio Telegraph Company. Presumptively, ownership thereof continues in that corporation. Ownership of its corporate stock does not vest the title to the Atlantic & Ohio Telegraph Company's property in the complainant, and under its lease the latter is a tenant at will, revocable on notice of six months. In view of these facts and of the prayers for relief, in the determination of which the Atlantic & Ohio Telegraph Company is interested, we are of opinion not only that the last-named company is a necessary party, but that the railroad company has a right to the presence of such company upon the record that the rights of all parties might be concluded by one decree. But while the Atlantic & Ohio Telegraph Company is not before us, and its rights cannot be determined and decreed, it is proper to here refer to the showing of such alleged rights as bearing on the motion for a preliminary injunction. Where the right to an injunction depends on title, it is generally necessary that the title alleged to justify the issue thereof be set forth with clearness. (*Whitelegg v. Whitelegg*, 1 Brown, Ch. 57; *Davis v. Leo*, 6 Ves. 784); and, unless the complainant's right be clear, a court of equity refuses to interfere (*Field v. Jackson*, 2 Dick. 599). Without, then, passing upon or deciding as to the validity of the right of way vested in the Atlantic & Ohio Telegraph Company, it would hardly seem the bill sets forth such showing of title in that company as should lead a court of chancery to grant a preliminary injunction, and enjoin the respondent from re-entry. Assuming the Atlantic & Ohio Telegraph Company, prior to September 20, 1881, had acquired a permanent telegraphic right of way upon the right of way of the railroad in pursuance of its charter, which gave it power to "purchase, receive, have, hold, and enjoy, to them, their successors and assigns, such lands, tenements, and hereditaments, goods, chattels, and all estate, real, personal, and mixed, of what kind and quality soever, as may be necessary for the purposes of the company," yet the charter provides further: "And the same from time to time may sell, convey, mortgage, grant, alien, dispose of." Having, then, the power to dispose of what it acquired, it would seem that, if it had permitted the Pennsylvania Railroad Company to hold adverse possession of such right of way, as that road has done by its tenant, the Western Union Telegraph Company, for more than 21 years, the title thereto has been acquired by the latter company. In Pennsylvania the right of possession is acquired by 21 years' possession, and constitutes a positive title on which one may recover in ejectment. *Pederick v. Searle*, 5 Serg. & R. 240. It would seem, therefore, that the title alleged is not of such certain character as to warrant the grant of a preliminary injunction.

The landlord's title, as between it and the tenant, being assumed, we next inquire whether the tenant has shown any reason why re-entry should be enjoined. The provisions of the contract in relation to length and termination have been set forth above. On May 14,



1902, the Pennsylvania Railroad Company, in pursuance thereof, through its board of directors, and acting by its president and secretary, gave notice, under its seal, to the Western Union Telegraph Company, as follows:

"You are hereby notified to remove within six (6) months from the first day of June, 1902, all of your poles, wires, and property from the right of way and property of this company and of the other companies named in a certain agreement between this company and you, dated the twentieth day of September, Anno Domini 1881 (a copy whereof is hereto attached), or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and the other companies referred to in good condition and free from the incumbrance of your said poles, wires, and other property, to the satisfaction of the general manager of this company. And you are also notified that, if not so removed, and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires, and other property occupying the right of way or property of this and the other companies referred to to be removed, and said property left in good condition, free from the incumbrance of the said wires, poles, and other property, to the satisfaction of the general manager of this company."

Under this notice the tenant had six months leeway from June 1, 1902, to remove, and during such leeway the monthly rental of \$6,250, payable by the telegraph company, and the monthly payment of \$1,250, payable by the railroad for special telegraphic service, were mutually waived; the monthly payments to be made by the telegraph company of one-half the cash receipts for telegraphic service rendered the public not being waived, presumably conditioned during the six-months leeway. This notice, under the contract provisions, entitled the landlord to resume possession December 1, 1902. It is, however, contended by the complainant that the notice to quit was waived, and that a tenancy under the lease still continues. It will be observed that withdrawal of a notice to quit is not, like a waiver of forfeiture, the act of one party, but requires the assent of both; and, when such joint assent is given, it creates a new tenancy. The question, then, whether there was a waiver of a notice to quit is one of intent on the part of both parties to the tenancy. "When a valid notice to quit is given by the landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties. If such consent is given, there is a new agreement between the parties, and a new tenancy is created, which exists only under that new agreement." 1 Wood, Landl. & T. § 44, citing *Murrell v. Milward*, 3 Mees. & W. 328; *Tayleur v. Wildin*, L. R. 3 Exch. 303; *Blyth v. Dennett*, 13 C. B. 178. See, also, *Fitzpatrick v. Childs*, 2 Brewst. 365; *Cheny v. Batten*, 1 Cowp. 243. In the present case the facts alleged to evidence such waiver are undisputed, and are found in written communications between the parties, the sufficiency of which can be determined by the court as well as on final hearing. What are those facts? The notice to quit was, as we have seen, given May 15th, and was addressed to the Western Union Telegraph Company. It was replied to by the president of that company, who addressed his letter to the president of the railroad. Thereafter all correspondence in reference to the lease and the position of the parties with relation thereto was conducted by

these two men. On May 20th the president of the telegraph company wrote as follows:

"I am in receipt of a letter from Louis Neilson, secretary, dated May 15th, in relation to the termination of the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company, dated September 20, 1881. \* \* \* I understand that for some time prior to my election as president of this company in March last negotiations had been in progress between the officers of our respective companies for a renewal of these contracts on terms satisfactory to both parties; and Vice President Clark has recently turned over to me a draft of proposed new agreement, in connection with which I believe we have been awaiting some figures from your company. I shall be glad to take up the matter actively, either here or at Philadelphia, at your convenience."

On the same day the treasurer of the telegraph company, following the usual form and practice evidenced by the vouchers for the preceding months, sent to the comptroller of the railroad a voucher for "payment due May 20, 1902, as per contract, \$6,250." This payment, it will be observed, covers five days subsequent to the notice to quit. We would not be justified, without convincing proof, in finding this payment for five days (a transaction following the ordinary course of monthly payments between the treasuries) was meant by the heads of these companies, who were conducting these negotiations, to be a waiver of the formal notice of termination which was authorized by a vote of the directorate, and evidenced by the seal of the railroad company. Under the circumstances we are justified in regarding it as a routine payment, such as was sent and received during a contract running more than 20 years. But payment and acceptance of rent, even after the expiration of a notice to quit,—a much stronger case than the present,—is not in itself a waiver on the part of the landlord, but is merely evidence to be considered in connection with the circumstances of the case. *Fitzpatrick v. Childs*, supra; *Cheny v. Batten*, supra; *Prindle v. Anderson*, 19 Wend. 391. Moreover, there is no proof whatever that the two treasury officers who made and received this payment had authority to renew a lease of this nature. Since action to terminate was by the board of directors, presumptively executive officers would not have authority to renew; but, if such authority to renew existed, it is sufficient to say it is not shown. If the payment was known to the president of the telegraph company, who was making answer to the notice to quit, he did not treat it as evidencing an intention to renew a tenancy under the old contract, for he expressed the desire to actively take up the consideration of the new contract, which had been prepared, and which he evidently thought would be adopted. If representing his company in this matter, he did not know of the payment, and it was simply a routine one, clearly it should be treated as such by the court. The action and reply of the president of the railroad the next day shows the railroad stood on the notice to vacate. He says:

"In reply to your favor of the 20th instant, I beg to say that none of the companies named in your letter desires to renew or extend its contract with the Western Union Telegraph Co. As you are aware, the contract between the Western Union Telegraph Company and the Pennsylvania R. R. Co. terminated, under its terms, on the 20th of September, 1901, and the notices to which you refer, for the removal of the poles within six months, were

given in accordance with a provision of the contract. If your company desires to discuss any temporary arrangement which may be necessary during the time allowed for the removal of your poles, we shall be glad to take up these matters with you at your convenience."

It will thus be seen that on May 21st the railroad refused to renew or extend the old contract, and stood on the notice to quit. The payment of the five days of rent was treated by the heads of neither of these companies as evidencing a waiver of the notice to quit, or as constituting a renewal of the contract. On June 20, 1902, a similar monthly payment was made, and received by the respective officers of the company. There is no evidence that the heads of either of these companies knew of either of these payments. Moreover, it will be observed that they were wholly voluntary. There is no averment that the railroad company paid or the telegraph company demanded the monthly charges provided by the eighth section. After both these payments were made, the president of the telegraph company, on June 26, 1902, wrote as follows:

"I have your favor of May 21st, in which you state that none of the companies named in my letter of the 20th desire to renew or extend its contract with the Western Union Telegraph Company, and that the contract between the Western Union Telegraph Company and the Pennsylvania Railroad Company terminated under its terms on the 20th of September, 1901, and that the notices which were referred to for the removal of the poles within six months were given in accordance with a provision of the contract, and that, if my company desires to discuss any temporary arrangement which may be necessary during the time allowed for the removal of its poles, you will be glad to take up those matters with me at my convenience. Replying thereto, I have to state that this company will be glad to have a conference with your company with a view of adjusting amicably any and all differences that may be found to exist between them, thus avoiding litigation, and any possible interference with the duties which this company owes to the government and the public. I request and urge that you fix a time and place for such a conference, which seems to be the more necessary because your letter appears to be based on a material misunderstanding of the facts in relation to the termination of the contracts and the rights of this company, since some of the contracts referred to in your letter are perpetual in their terms, or run during the life of the parties, and therefore cannot be terminated by one party without the consent of the other. As bearing on the subject, I inclose a copy of a letter which I sent and delivered yesterday to the Postal Telegraph Cable Company; also copies of two letters, dated June 24th, to James McCrea, Esq., vice president, Pittsburg, Pa., which letters were sent only after a careful examination of the contracts and the legal rights of the parties by our counsel. It seems proper to add that such a conference as we ask ought to be had before your company concludes any arrangement adverse to this company which would necessitate litigation by this company to enforce its rights. Under the contracts by which the lines of this company on the roads mentioned in your letter of May 21st were brought into existence, the laws of congress, and the constitution and laws of Pennsylvania, this company is advised that it is entitled to maintain and operate its lines of telegraph on the said railroads, subject, only, at most, to make a fair and reasonable compensation to the railway companies for this right; and this company is willing, and hereby offers, to make such compensation. If your company declines further to contract with this company, I respectfully request a meeting for the purpose of agreeing upon the amount of such compensation, and, if no such agreement can be made, that the matter be submitted to arbitration, your company selecting one arbitrator and this company another, and the two arbitrators thus selected to choose a third; or to have the amount of such compensation determined in any other equitable manner. I shall appreciate an answer at your early

convenience, and I venture to express the wish that, in view of the large public and private interests which we represent, you will meet this company in its earnest endeavor to avoid unnecessary and wasteful litigation."

This letter clearly shows that the telegraph company recognized the railroad was standing on the notice to quit, and claiming the contract was terminated; that the telegraph company asserted the original contracts, which antedated that of September 20, 1881, were in force in perpetuity, and "cannot be terminated by one party without the consent of the other." No mention is made of the payment of rent, or any claim made that thereby a new tenancy was created. On the contrary, the ground is taken of rights under the old contracts, and that the notice to quit was without effect. The letter in reply, dated July 5, 1902, was as follows:

"I beg to acknowledge the receipt of yours of the 26th ultimo. In my letter of the 21st of May I suggested a conference, which I thought you might possibly desire to have for the purpose of making any temporary arrangements you might find necessary under the notice which has been given to your company. This conference, I infer, you do not care to have. A conference concerning the matters you suggest would be useless, as your company asserts rights upon the lines of railroad of the companies I represent which they cannot concede. Noting your reference to the Postal Telegraph Cable Company, I beg to advise you that a contract has been concluded with that company covering the railroads included in the contract which terminated on September 20th last, under the terms of which the Postal Telegraph Cable Company will at once begin to transact a commercial telegraph business at the stations of the railroad companies; and, while the right of your company to do business at such stations has ceased, yet, as we are desirous of causing you as little inconvenience as possible, we will permit our operators to continue to receive and transmit such messages as the public may desire to send by your lines until September 30th next; the operators to be considered as acting as your agents in that respect, and you to account to the railroad companies for their compensation on a basis equal to that fixed by the former contract. To avoid unnecessary loss to your company incident to the removal of your poles and wires, we are willing to purchase, at a fair valuation, such of the lines as we can make use of; and, if you desire to take up this question, Mr. Charles M. Sheaffer, superintendent of telegraph, will hold himself in readiness to meet a representative of your company to agree upon the price of such lines."

It will thus be seen that the heads of the two companies, who conducted these negotiations, did not regard, claim, or even suggest that these payments were a waiver of the notice, or constituted an agreement for a new tenancy. As the creation of such a relation is a question of mutual intent, and as there was no such mutual intent, we are justified in finding, as we do, that there was no waiver of the notice to quit. The omission of the railroad company to pay or tender back this money cannot be regarded as evidencing an intention on its part to waive its notice and renew the contract. There is no proof why it has not returned the money, but, in view of the provisions of the contract whereby the telegraph company was bound to pay the railroad monthly one-half its cash receipts for public service, and the claim made in the last-mentioned letter for payment therefor, we are justified in concluding the retention of this voluntarily paid sum was not necessarily a conclusive act, but an equivocal one, and possibly referable to the liquidation of such indebtedness.

After careful examination of all the questions raised, and due con-

sideration thereof, we find no ground for the grant of a preliminary injunction. Let orders in accordance with this opinion, dismissing the petition to condemn in one case and refusing an injunction in the other, be drawn, and submitted to the court.

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HELMS v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, D. Minnesota, Sixth Division. January 28, 1903.)

**1. MASTER AND SERVANT—NEGLIGENCE OF SERVANT—GROUNDS FOR MASTER'S LIABILITY.**

The liability of a master arising out of an act of negligence committed by his servant does not rest upon the ground that the master himself was negligent, but upon considerations of public policy, which hold him responsible for the acts of his agents when acting about his business.

**2. SAME—JOINT ACTION AGAINST MASTER AND SERVANT—MISJOINDER OF CAUSES OF ACTION.**

A joint action cannot be maintained against a railroad company and an employé to recover for an injury resulting solely from the negligence of the employé, the causes of action against the two defendants being separate and distinct, and based on different grounds; and this is especially true where the person injured was a fellow servant of the individual defendant, and the liability of the railroad company for the injury is wholly statutory.

**3. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—MISJOINDER OF CAUSES OF ACTION.**

Where the cause of action alleged in a complaint against a railroad company and one of its employés is based solely on the alleged negligence of the employé, no concurrent negligence of the company being charged, the cause is removable by the company as involving a separable controversy, the requisite diversity of citizenship and amount involved being shown.

At Law. On motion to remand to state court, and on demurrer to complaint for misjoinder of causes of action.

Michelet & Michelet, for plaintiff.

C. W. Bunn and Emerson Hadley, for defendants.

AMIDON, District Judge. This action was brought in the district court of Becker county, Minn., against the Northern Pacific Railway Company and Fred Ames, an engineer in charge of one of its engines, to recover damages for the death of Johan Frederick Helms, caused, as is alleged, by the negligent operation of the locomotive. The plaintiff and the defendant Ames are both citizens of the state of Minnesota, and the other defendant was organized under the laws of Wisconsin. The railway company caused the action to be removed into this court upon the ground that it involves a separate controversy as between it and the plaintiff. Thereafter it demurred to the complaint for the reason that it improperly unites several causes of action, and at the same time the plaintiff interposed a motion to remand the case to the state court.

¶ 3. Separable controversy as ground for removal of cause from state court to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Mineral Co.*, 35 C. C. A. 155.

That portion of the complaint which sets forth the charge of negligence reads as follows:

"Said Johan Frederick Helms received injuries by reason of the negligence of the defendant, its servants and employés, as hereinafter alleged: That on said 27th day of November, 1901, at the said company's coal shed in said Detroit, when in the discharge of the duties of such employment in then and there assisting in filling the coal tank of locomotive No. 344 of said corporation, and when assisting to hold in place a chute leading from the coal shed to said coal tank, the said deceased, by the negligence of said Fred Ames, engineer, then and there the servant of said railway corporation, and by the negligence of other employés of said corporation on and about said locomotive, was crushed between the said chute and the cabin of said locomotive by suddenly, recklessly, and negligently driving the locomotive against the said chute."

The question now submitted for decision is, in effect, whether this complaint sets forth a single cause of action against both the defendants jointly, or two separate causes of action against each of them severally; for in the one case the motion to remand should be granted, in the other denied. It is urged by counsel for plaintiff that the supreme court has decided this question in his favor in *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. A careful examination of the opinion in that case does not sustain this contention. It will first be noticed that the complaint in the present suit does not, as in the case referred to, charge that the negligence alleged was the joint negligence of both the defendants, nor are there any facts averred justifying an inference that the corporation itself was guilty of any direct participation in such negligence. But, even if it were stated in general terms that the injury was caused by the joint negligence of both defendants, this ought not to be conclusive upon them; on the contrary, the plaintiff should at least be required to make his pleading definite and certain by a statement of the facts upon which the charge of joint negligence is based. Here, however, there is no such charge. The responsibility of the company, if any, is not for negligence of its own, but for that of its servants.

Turning, now, to the opinion in the *Dixon Case*, it will appear not only that the question here raised was not passed upon there, but that that decision was rested solely upon the ground that the railroad company and its employés were guilty of concurrent negligence. The court holds (page 139, 179 U. S., page 70, 21 Sup. Ct., and page 121, 45 L. Ed.) that the complaint justified the inference that the train was run at too great a speed, and that, if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular would be the negligence of the company. It is also held that the complaint justified the inference that the accident was caused by the omission of the employés in charge of the train to give the statutory signals on approaching the highway crossing, and that this omission constituted negligence on their part. For the reason that both these grounds of negligence were fairly charged in the complaint, the decision of the state court in holding the cause of action to be single as to both the company and its servants is sustained. While many other points are adverted to in the opinion, this is the only question actually decided. The fact that the court is at considerable

pains, and indulges in a liberal construction of the complaint, in order to thus rest its decision upon the charge of concurrent negligence, affords persuasive evidence that it was of the opinion that a complaint against both master and servant for the negligence of the servant alone would contain two distinct causes of action. Otherwise the case would have presented no difficulty. If negligence of the servant alone would sustain a joint action against him and his master, such negligence was there charged in unmistakable terms. We are not, however, left to inference in determining that the supreme court did not intend, in the Dixon Case, to pass upon the question now under consideration. After referring to the conflict of authorities on the subject as to whether both the master and his servant could be proceeded against in the same action for the negligence of the servant, the court says that it is not called upon to revise the decision of the highest court of Kentucky on this subject, "as the disposition of this case turns on other considerations." Language could not make it more plain that the court did not intend to pass upon this controverted question.

In the decision in the Dixon Case it is stated that Chief Justice Gray, in the opinion in *Mulchey v. Society*, 125 Mass. 487, remarked that the question whether the master and his servant could be held jointly liable for the negligence of the servant was "a somewhat nice one." This is evidently a slip, as Chief Justice Gray used no such language in the case referred to, but, on the contrary, asserted in unqualified terms that such an action could not be maintained. I quote his words in full on this branch of the case:

"But the jury should have been instructed, as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intentment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers, and therefore liable jointly."

The phrase quoted is evidently taken from the opinion of the supreme court of Maine in *Campbell v. Sugar Co.*, 62 Me. 553, 16 Am. Rep. 503. It is there used in a decision which sustains the Massachusetts doctrine. The language of the court is as follows:

"But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but there are substantial reasons assigned in *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury. The proper adjustment of the final responsibility as between themselves cannot well be effected if one who has distinct grounds of action against them—against the agents for their own negligence, against the principals because the law makes them responsible for the negligence of their agents—is permitted to recover against both in one suit."

Inasmuch as Chief Justice Gray, the writer of the opinion in the *Mulchey Case*, 125 Mass. 487, was, at the time of the decision in the *Dixon Case*, a member of the supreme court of the United States,

this mistaken reference has possibly more importance than would otherwise attach to it.

The nearest the supreme court came in its opinion to deciding the question now presented is in the following language, beginning at the bottom of page 138, 179 U. S., page 70, 21 Sup. Ct., and page 121, 45 L. Ed.:

"The contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part of all the defendants, but counted merely on the negligence of the employés.

"If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election or defeat the action as to one of the parties.

"The cause of action manifestly comprised every fact which the plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And, on the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its codefendants, being its employés, could not. At all events, a judgment against all could not afterwards be attacked for the first time on this ground."

This is not decision; it is simply a stating of the question with an intimation as to some matters bearing upon its determination.

The question now presented is therefore an open one so far as the supreme court is concerned.

It has been frequently said that there is a conflict of authority on the question whether the master and servant can both be sued in the same action for the negligence of the servant alone in the course of his employment. Judge Taft, in the opinion in *Warax v. Railroad Co.* (C. C.) 72 Fed. 637, sets the authorities in about equal array on this subject. A careful examination of the cases, however, will show that the conflict is, in the main, more apparent than real. The leading authority cited in support of the single action is *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507. All that is said in that case on the subject, however, is purely obiter. The real ground of decision was that the negligence of the servant there was willful. For this reason the master was held not liable, and the decision of the lower court, in which judgment had been rendered against both the master and the servant, was reversed. That was the only question decided. The obiter language of the court is as follows: "In case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time and under the same circumstances; the servant in fact, and the master constructively by the servant, his agent." No court at the present time, so far as I am aware, holds that the master and servant "are both guilty of the same negligence at the same time and under the same circumstances." On the contrary, the master is not held liable because he is negligent, but solely upon considerations of public policy. This doctrine, first stated by Chief Justice Shaw in *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, now has the approval of the leading courts of this country and England. See *Pol. Torts* (4th Ed.) p. 70; *Railway Co. v. Dixon*, 179 U. S. 136, 21 Sup. Ct. 67, 45 L. Ed. 121. The master is responsible, but he is not negligent.



The case of *Wright v. Compton*, 53 Ind. 337, arose out of the following facts: The defendant Wright owned a quarry adjacent to a public highway, where he was carrying on blasting operations through the other defendants as employés. The plaintiff, a traveler, was injured by one of the explosions. It does not appear from the case whether Wright himself was personally present, but it is expressly alleged in the complaint that the manner of doing the work was pursuant to his knowledge and consent. The facts thus make out a clear case of joint negligence on the part of both the master and the employés.

In the case of *Newman v. Fowler*, 37 N. J. Law, 89, the plaintiff sought to recover damages from the defendant for his want of skill and care as architect in supervising the erection of a building. It appeared from the evidence that the injury was also attributable to the negligence of the contractor who did the work. The court says: "The loss comprised in the present cause of action has arisen, therefore, by reason of the default of these two persons, the contractor and the defendant. The suit is against the latter solely." The defendant sued complained that the other tortfeasor was not joined with him. The court holds that the plaintiff had his right to elect whether he would bring suit against both defendants jointly or each separately, and that is the only point that was decided on this subject. It is also manifest that the facts make out a clear case of joint negligence. The subject of master and servant is in no way involved.

In the case of *Greenberg v. Lumber Co.* (Wis.) 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911, a joint action was brought against the defendant corporation and its general manager. As to the corporation, the negligence charged was that it furnished a defective machine upon which the plaintiff, a minor, was assigned to work. As to the other defendant the ground of complaint was that he set the plaintiff to work on the defective machine with full knowledge of its dangerous condition and without giving him any warning or instruction. This is manifestly a case of concurrent negligence on the part of both the master and the employé.

The case of *Phelps v. Wait*, 30 N. Y. 78, is directly in point, and sustains the affirmative of the question now under consideration. That decision, however, is rested upon the case of *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507. It is also greatly weakened by the fact that the adverse decisions were not called to the court's attention, as appears from the following language:

"The case was retained for examination principally upon the other point,—the supposed misjoinder of parties,—and to enable the defendants' counsel to supply a reference to authorities showing that in analogous cases principal and agent could not be sued together. The current of authority is certainly the other way, and in favor of the right to join these parties; and I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine."

No reference whatever is made to the decisions in England, Massachusetts, Maine, New Hampshire, and Connecticut, in which a contrary doctrine was held, and the court seems not to have examined these cases before rendering its decision.

The case of *Railroad Co. v. Cook's Adm'r* (Ky.) 67 S. W. 383, is rested mainly upon the statute of Kentucky. In so far as it discusses

the question on principles of common law, it is not in accordance with any well-considered case. The above are all the appellate decisions referred to as supporting the single action. In addition to what has already been said, it should be noticed that in most of these cases the question of joint liability is not discussed, but is only adverted to by way of illustration.

In the *Warax Case* (C. C.) 72 Fed. 642, Judge Taft cites and learnedly reviews the numerous decisions which support the other side of this controverted question. Little can be added to his discussion of the subject. The opinions upon which he rests his decision are carefully considered, and base their denial of a joint cause of action upon fundamental differences as to the ground of liability as between the master and the servant, and the necessity of separate actions in order to work out justice between the two. It has been sometimes said that the reformed procedure has rendered these decisions inapplicable; but on this subject no change is made by the Codes. Pomeroy, in his work on *Code Remedies* (at section 307), says:

"The common-law doctrines concerning the liability of tort feorsors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure. It is unnecessary to repeat these ancient rules; that they are still in operation, with their full force and effect, is sufficiently shown by the following particular instances: In general, those who have united in the commission of a tort to the person or to property, whether the injury be done by force, or be the result of negligence or want of skill, or of fraud and deceit, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. \* \* \* In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as codefendants; the injury must in some sense be their joint work. It is not enough that the injured party has on certain grounds a cause of action against one, for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another, for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

The same doctrine is stated in *Bliss on Code Pleading* (at section 83), as follows:

"Persons are not jointly liable for a tort merely because they have some connection with it, even if it be such as to give a cause of action against them. There must be some co-operation in fact. There must be some community in the wrongdoing among the parties who are united as codefendants. The injury must be in some sense their joint work."

In considering the cases cited by Judge Taft, it should also be borne in mind that, although the states to whose decisions he refers had not at the time adopted the reformed procedure, still in all of them the common-law refinements as to pleadings and forms of action had long before been abolished by statute. *Hewett v. Swift*, 3 Allen, 420. From the foregoing review, I think it fairly appears that, independent of the federal decisions, the clear weight of authority sustains the defendant's contention that the case presents two distinct causes of action.

On this question, however, the federal courts are also in conflict. In support of the plaintiff's position are *Charman v. Railroad Co.* (C. C.)

105 Fed. 449; *Riser v. Railroad Co.* (C. C.) 116 Fed. 215. To the contrary are *Warax v. Railroad Co.* (C. C.) 72 Fed. 637; *Hukill v. Railroad Co.*, Id. 745; *Beuttel v. Railroad Co.* (C. C.) 26 Fed. 50; *Ferguson v. Railway Co.* (C. C.) 63 Fed. 177; *Hartshorn v. Railroad Co.* (C. C.) 77 Fed. 9.

In considering these authorities, it is important to get clearly in mind the precise question that is presented on this motion to remand. Much is said in the opinions of misjoinder of defendants and misjoinder of causes of action. These matters can have only an indirect bearing upon the question now under consideration. If the cause of action is single, the misjoinder of a defendant presents no ground for removal in his favor. There is no separable controversy as to him. His objection goes to the merits of the case, and his only redress is to defeat a recovery in the state court. On the other hand, if there is a misjoinder of two distinct causes of action, the fact of misjoinder is wholly immaterial on the question of the right of removal. A plaintiff who improperly unites two causes of action, one of which presents a controversy justifying removal, subjects himself to the liability of having the entire cause removed into the federal court. Whether, in fact, the causes of action are properly or improperly joined goes to the merits, and a defendant who has the right to remove the cause has also the right to have this question, like any other arising in the case, determined by the federal court. For this reason all these questions as to the misjoinder of parties or causes of action are immaterial, except as they throw light upon the primary question whether there are or are not two causes of action presented by the complaint. *Deere, Wells & Co. v. Chicago, M. & St. P. R. Co.* (C. C.) 85 Fed. 876.

In the cases at common law, including those cited by Judge Taft, the opinions are usually directed to the question of misjoinder of defendants. Very little is said as to whether the cause of action is single or double. A careful reading of the opinions, however, shows that the charge of misjoinder of defendants was sustained because of the fundamental difference in the ground of liability as to the master and servant. The misjoinder in fact went to the cause of action rather than the parties. It was uniformly conceded that both defendants were liable for the injury, and from this the conclusion is irresistible that the misjoinder condemned related, not to the parties, but to the causes of action.

For the purpose of determining the liability of the master for the negligence of the servant, it is common to say that the negligence of the servant is the negligence of the master. This, however, is a convenient rather than an accurate statement. The master is in fact negligent only when he participates in the wrongful act of his employé. This he can only do in one of three ways: (1) By direct participation; (2) by previous direction; (3) by subsequent adoption. In the case at bar, as is usual in suits of this character, there is no contention that the corporation was in fact a party in either of these respects to the negligence complained of. To say that because the master is responsible for the negligence of his agent he is therefore himself negligent is to confuse things that are widely different.

The reasoning in *Charman v. Railroad Co.* (C. C.) 105 Fed. 449,

is not satisfactory. The court begins with the statement that because the master is liable he must be negligent, thus excluding the possibility that he might be liable because of the negligence of his servant. To satisfy this assumed negligence, a "duty" is built up which no court ever considered in fixing a master's liability, and which does not fit into the facts of the case or the language of the statute. The learned judge says:

"The statute of this state has made it the duty of the railroad company to place a person in charge of its switch yard who should be free from fault resulting in injury to a fellow servant. This duty was a positive and continuing one. The negligence of the person in charge of the switch yard gave rise to a twofold breach of duty, namely, that of the person in charge of the switch yard and that of the railroad company. The breach of the master's duty arose from its failure to keep in charge of its switch yard a person who would not by his negligence injure a fellow servant. \* \* \* The liability of the company does not grow out of the breach of the servant's duty by the servant on the principle of respondeat superior; it grows out of the breach of the company's duty by the company failing to keep a person in charge of its switch yard who would not by his negligence injure a fellow servant. If the employer fails in the performance of his duty, his responsibility does not arise out of the servant's breach of the servant's duty towards the injured party, but it grows out of the employer's breach of the employer's duty towards the decedent."

Now, is not all this "duty" of the master a mere figment, devised for the purpose of fitting the liability of the master into the category of personal negligence? Statutes like the one there under consideration do not attempt the metaphysical feat of making the master negligent; they simply provide that he shall be "liable in damages" for injuries caused by the negligence of his servants. This comports with the common law. The language of the decisions is that the master is "liable," "answerable," "responsible," for the negligence of his servant, not that he himself is negligent. Is there any such necessity as the following statement assumes: "In order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to be existing some obligation or duty towards the plaintiff which the defendant has disregarded or violated." If the master is liable for the negligence of his servant, surely an action may be maintained against him on that liability without imputing to him personal negligence. Hitherto the ground of the master's liability has been that the wrongdoer was his servant and about his business. This fits the facts and fully justifies the liability. Whatever is more than this comes of quitting the facts and pursuing fictions. Further on in the opinion the reasoning at times seems to confound the liability of the master to answer in damages for the negligence of his servant, with his positive duty to exercise reasonable care in the selection of those whom he employes. Of course, the ground of liability in each of these cases is widely different. In the one case, the master himself is guilty of negligence in his failure to exercise care in the selection of his servants; in the other case, he is liable though he is himself entirely free from negligence. The illustration cited as to an injury to a passenger by the collision of two trains owned and operated by different railroads does not cover the case. There each of the defendants would be negligent, and the negligence of each would

be a proximate cause of the plaintiff's injury. But in the case then under consideration the master was himself free from negligence. By statute simply he was made responsible for the negligence of another.

The case of *Riser v. Railroad Co.* (C. C.) 116 Fed. 215, proceeds upon the ground that "when the servant of a railway company is guilty of negligence in the course of his employment his negligence is the negligence of the railway company." This, however, is not the real ground of liability. As I have already said, the master is responsible, but he is not negligent. He is made liable out of considerations of public policy, but not because of any wrongful act on his part.

It is uniformly held that, in order to justify a removal, the case must present two or more distinct causes of action. Little attempt, however, has been made to define what shall constitute a "cause of action" within this rule. In many of the cases it is said that the cause of action must be one upon which "a separate and distinct suit might have been brought." But in actions for tort this rule will furnish no guidance, for there the liability is several, and a separate suit may be maintained against every party who is legally liable for the wrong.

Another rule that is frequently laid down to determine when causes of action are distinct is to ascertain whether they are constituted of the same facts and could be supported by the same evidence. In actions to enforce the master's common-law liability for the negligence of his servant, the only element to distinguish such an action from an action against the servant would be that in the former suit the fact of the relationship between the master and the negligent servant would have to be established, and that the wrong was committed in the course of the employment. In suits like the present, however, brought under a statute to recover damages for the negligence of a fellow servant, there are other distinguishing elements, as will be pointed out later.

Another rule that has been often prescribed for determining whether causes of action are distinct is whether the ground of liability is the same. *Kronshage v. Railway Co.*, 45 Wis. 500; *Skoglund v. Railway Co.*, 45 Minn. 330, 47 N. W. 1071, 11 L. R. A. 222, 22 Am. St. Rep. 733; *Brunsdon v. Humphrey*, 14 Q. B. Div. 141. If this feature of distinction is sufficient to satisfy the rule as to the removal of causes, the present case is plainly removable, for the ground of liability on the part of the master is widely different from that of the servant.

I think the weight of reason as well as the majority of decisions, not only in the federal courts, but wherever the question has been raised, is in favor of holding the liability of the master to be a distinct cause of action from that of his servant.

There are, however, in the present case, peculiar reasons for treating the causes of action as separate. The deceased was the fellow servant of the engineer and the other persons in charge of the engine whose negligence caused this injury. At common law, therefore, the corporation would not be liable. As against it, the plaintiff must rest her cause upon the statute of Minnesota, doing away with the so-called "fellow servant rule" as to railroad companies in certain cases. This statute is identical with that of Iowa, which Judge Shiras had under consideration in the case of *Beuttel v. Railroad Co.* (C. C.) 26 Fed.

50, and what he there says is directly in point in passing upon the present case. To sustain her action against the railway company, the plaintiff must prove at least three things, which would be wholly immaterial as to the other defendant. She must show (1) that Ames and the other employes guilty of negligence were employes of the defendant railway company; (2) that they were engaged in operating the railroad; and (3) that the particular thing they were doing involved some risk peculiar to the operation of railroads. *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. 974; *Johnson v. Railroad Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419. These features separate the cause of action as against the master more widely from that against the servant than would be the case in a suit by a third person to charge the master on his common-law liability for the negligence of his employe. Such a suit would rest, as against both the defendants, upon the common law; whereas the present suit is founded as against the master upon statute, but as against the servant upon common law.

It is intimated in the case of *Railway Co. v. Dixon*, 179 U. S., at page 140, 21 Sup. Ct. 67, 45 L. Ed. 121, that it would be proper for federal courts to follow the decisions of the state courts in determining whether the cause of action was joint or several. If that course were pursued in this case, it would be fatal to the motion to remand, as the supreme court of Minnesota, in *Trowbridge v. Forepaugh*, 14 Minn. 133 (Gil. 100), held that a joint action could not be maintained to enforce such a liability.

The disposition of the motion to remand indicates clearly the proper disposition of the demurrer.

An order will be entered denying the motion to remand, and granting the plaintiff 15 days in which to dismiss the action as to one of the defendants. Otherwise the demurrer will be sustained.

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**STATE TRUST CO. v. KANSAS CITY, P. & G. R. CO. et al. (BREUEL et al., Interveners).**

(Circuit Court, W. D. Missouri, W. D. February 7, 1903.)

No. 2,331.

**1. RAILROADS—FORECLOSURE OF MORTGAGES—INTERVENTION.**

General creditors of a railroad company, who permit all its property to be taken possession of by receivers appointed in a foreclosure suit, and a decree to be entered subjecting such property to the payment of preferential debts, receivers' liabilities, and the mortgage indebtedness, and the property to be sold under the decree, and the sale confirmed, without taking any steps to assert their claims, although they matured prior to the commencement of the foreclosure suit, are precluded by laches from thereafter maintaining petitions of intervention to compel payment of their demands from the fund in the hands of the receivers on the ground that such receivers took into their possession property which was not subject to the lien of the mortgage.

**2. SAME—MORTGAGE INCLUDING PERSONALTY—EFFECT OF FAILURE TO RECORD AS CHATTEL MORTGAGE.**

Where, as under the Kansas statute, as construed by its courts, an unrecorded chattel mortgage is valid as between the parties, and, if delivery to the mortgagee takes place at any time before a levy or sei-

zure is made in behalf of those persons as to whom it is void, the defect will be cured, and the mortgagee's lien will be protected, notwithstanding his failure to record, or to file the annual affidavit required, a mortgage covering all the property of a railroad company, real and personal, although not recorded as a chattel mortgage, is valid, as against general creditors of the mortgagor, as to personal property which was taken possession of and sold by receivers in a suit to foreclose, and passed into the possession of the purchaser before suit brought by such creditors.

**8. SAME—RIGHTS OF GENERAL CREDITORS—LACHES.**

General creditors of an insolvent railroad company, whose demands are unliquidated, and who take no steps to enforce payment until after all the property and funds of the company subject to their claims have been disbursed through a receivership in payment of other liabilities, have no equity to require payment from the proceeds of mortgaged property on the ground that the receivers took possession of money in the treasury of the company, and received the net income from the property.

**4. SAME—RIGHT OF FORECLOSURE.**

The fact that by the terms of a railroad mortgage the trustees therein are not authorized to enter and take possession of the property until six months after a default does not preclude a court of equity from entertaining a bill of foreclosure before that time, and appointing receivers, when it is found necessary for the protection of the mortgaged property, and to insure the due performance of the obligations which the mortgagor owed to the public.

**5. SAME—RIGHT OF INTERVENTION—IMPEACHMENT OF DECREE.**

After a court of equity has entered a decree foreclosing a railroad mortgage, and has sold the property free from all demands against the mortgagor, except an obligation on the part of the purchaser to see that the costs of suit, the receivers' liabilities, and preferential claims which may be allowed are paid, if not discharged by the proceeds of sale, it will not entertain petitions of intervention by unsecured creditors of the mortgagor, whose claims are not preferential, to compel the purchaser to pay the same on the ground that it is, in effect, a reorganization of the old company, and liable for its debts. Such a proceeding seeks to impeach the validity of the decree and sale, which cannot be done by an intervener, but only by an original suit.

**In Equity.**

Stephen H. Allen and Otis S. Allen, for interveners.  
Lathrop, Morrow, Fox & Moore, for respondents.

THAYER, Circuit Judge. The questions to be determined in this case arise in the following manner: After a decree of foreclosure and sale had been entered in the above-entitled cause, and in pursuance thereof all the property of the Kansas City, Pittsburg & Gulf Railroad Company had been sold, which sale took place in March, 1900 (the bill of foreclosure having been filed on April 28, 1899, and receivers appointed at that time), John Breuel and others filed petitions of intervention in the above-entitled cause; claiming the right to do so under certain provisions of the decree of foreclosure. These intervening petitions were referred to the special master theretofore appointed in the cause for hearing and a report thereon. The Kansas City Southern Railway Company, the purchaser at the foreclosure sale, filed a demurrer to the several intervening petitions before the master, and, after a hearing had thereon, the master reported that the demurrers should be sustained. Except-

tions were taken to such report, and the question now before the court is whether the action of the master should be approved.

The various intervening complaints, which were identical in form, stated, in substance, that when the Kansas City, Pittsburg & Gulf Railroad Company constructed its railroad across the valley of a creek in Bates county, Mo., near the eastern boundary line of the state of Kansas, it erected an embankment across the valley, thereby obstructing the natural flow of the waters in said creek, and caused them to overflow the petitioners' lands, situated in the state of Kansas. The petitioners alleged that 'as a result of said overflow their crops had been damaged to a certain extent during the years 1896, 1897, and 1898; the embankment, as it seems, having been erected as early as the year 1894. For the amount of the damages so sustained they claimed an allowance against any funds then or thereafter in the hands of the receivers, derived from any source, and that, in case there were no funds in the hands of the receivers, the property which had been sold at the foreclosure sale, and was then in the hands of the Kansas City Southern Railway Company, be charged with a lien for the damages which the interveners had severally sustained, and that, unless these damages were paid, the property be retaken and sold to liquidate their several demands. This relief was prayed for on two principal grounds: In the first place, it was claimed that the receivers, when appointed, in April, 1899, had taken possession of certain personal property of the Kansas City, Pittsburg & Gulf Railroad Company, the mortgagor, which was located at Ft. Scott, Kan., and consisted of materials and supplies for the operation of a railroad—the same being of large value—which personal property, although described in the mortgage that had been foreclosed, yet, by virtue of the fact that the property was not delivered to the mortgagee, and by virtue of the fact that the provisions of Kansas laws relating to the recording of chattel mortgages had not been fully complied with, was not, as the interveners claimed, subject to the lien of the mortgage, so far as general creditors of the mortgagor were concerned. It was also alleged by the petitioners that no default had occurred under the mortgage when the receivers were appointed, such as authorized the trustees in the mortgage to take possession of the mortgaged property, and that the money on hand at that time, in the treasury of the mortgagor company, which came to the possession of the receivers, as well as the income which was derived by the receivers from the operation of the mortgaged property up to October 1, 1899, was not subject to the lien of the mortgage, but was subject to the claims of general creditors. The interveners insisted that their claims should be paid out of the two funds last described, because, as respects them, they were not subject to the lien of the mortgage. In the second place, the interveners allege that the stockholders and bondholders of the Kansas City, Pittsburg & Gulf Railroad Company, prior to the foreclosure sale, placed their stock and bonds in the hands of a reorganization committee upon the understanding and agreement with said committee, which was subsequently carried into effect, that a new company should be formed to purchase the property of the mortgagor com-



pany at the foreclosure sale, and that this new company, when it was formed and had made the purchase, should issue its bonds and common and preferred stock, in certain proportions, in lieu of the bonds and stock of the Kansas City, Pittsburg & Gulf Railroad Company that had been deposited with the reorganization committee. On account of this alleged arrangement, which was made in expectation of a sale under the decree of foreclosure, it is claimed, in substance, that the new company, namely, the Kansas City Southern Railway Company, which purchased at the foreclosure sale, is the successor of the mortgagor company, or, in other words, is the same company under a new name, and that it is liable for the mortgagor's debts, including the claims of the interveners.

Counsel for the interveners concede that the claims which they present were filed pursuant to paragraph 19 of the final decree, which ordered the special master to give a notice "requiring the holders of any claims against the Kansas City, Pittsburg & Gulf Railroad Company, or the receivers thereof, to present the same to him for allowance \* \* \* within the period of six months after the first publication of such notice." The object of this provision of the decree was to require the holders of what are known as "preferential demands" and demands contracted by the receivers, to be presented for allowance within the period named, to the end that the aggregate amount of the debts which were entitled to payment in advance of the mortgage debt might be ascertained, and paid out of the fund realized at the mortgage sale before the fund was distributed among bondholders. The provision in question had reference solely to "preferential demands" and debts created by the receivers, as is clearly disclosed by the notice subsequently published by the master, the form of which notice was submitted to the court, and by it approved, before it was published. The notice in question called for the presentation of claims or demands against the receivers and against the property of the Kansas City, Pittsburg & Gulf Railroad Company, which had been theretofore sold pursuant to the decree of foreclosure, "which claims or demands are alleged to be of a preferential character, and to be such as the purchaser at the foreclosure sale is required to pay under and by virtue of the provisions of the decree of foreclosure." This notice, and the paragraph of the decree in conformity with which it was drawn, required parties to file such claims only, existing against the mortgagor company, as were entitled to payment out of the proceeds of the foreclosure sale before any distribution was made among bondholders; the object being to ascertain the net amount applicable to the payment of the mortgage debt. The provision of the decree that claims not thus presented should not be enforceable against the receivers, or against the property which had been sold, only operated to bar preferential demands and demands contracted by the receivers. It was not intended to bar the rights of creditors holding claims of a different character, nor did it have that effect. That paragraph 19 of the decree was inserted for no other purpose than the one last indicated, and had reference to preferential demands and those contracted by the receivers, is further shown by paragraph 15 of the decree and by paragraph 6 of the

order appointing receivers. Paragraph 15 of the decree only required the purchaser at the foreclosure sale to take the property subject to the payment of costs, debts contracted by the receivers, and such indebtedness of the mortgagor as was paramount in lien to the mortgage bonds, if it so happened that these claims were not paid out of the proceeds of the sale; the intent being to pass the property to the purchaser free from all other claims; and, by paragraph 6 of the order appointing receivers, they were given authority to pay, out of any income or revenue coming to their hands, such claims only as, according to all the authorities, are deemed to be of a preferential nature. The record discloses the fact that the foreclosure suit was administered throughout upon the theory that the court would only undertake to adjudicate and direct the payment of claims presented by interveners which were of a preferential character, and that it would not undertake to audit claims against the mortgagor that were not secured by any lien, legal or equitable, upon the property in the hands of its receivers.

Now, the claims involved in the present controversy are claims for unliquidated damages against the Kansas City, Pittsburg & Gulf Railroad Company. They have never as yet been reduced to a judgment in any court. Some of them accrued three years prior to the filing of the bill of foreclosure, and all of them had accrued before the bill was filed. It is obvious, therefore, that they are not preferential demands, in the sense in which that term is used in the decree, but are merely general claims against the mortgagor company, and are not supported by any lien, legal or equitable, against any of its property. *Trust Co. v. Riley*, 16 C. C. A. 610, 70 Fed. 32, 30 L. R. A. 456; *Bank v. Doud*, 44 C. C. A. 389, 105 Fed. 123, 52 L. R. A. 481. In view of these facts, the master was invested with no authority to hear and adjudicate these claims by virtue of paragraph 19 of the decree, and the notice issued in conformity therewith; and while it is true that some of the intervening petitions were referred generally to the master for hearing and report, by an order made on June 5, 1900, yet this order must be understood as having been made under and subject to the specific powers that had been conferred upon the master by the decree. It was entirely proper, therefore, for the master to decline to enter upon a hearing with respect to the merits of these unliquidated demands against the Kansas City, Pittsburg & Gulf Railroad Company, when it became apparent that they were in no sense claims of a preferential character or demands contracted by the receivers, and when it further appeared that their allowance and payment was pressed on the ground that some property had come to the possession of the receivers, to which the lien of mortgage possibly did not extend, and when it further appeared that, whether the mortgage lien did or did not extend to such property, the court, by its final decree, had in fact adjudicated that the mortgage did cover such property, and had directed its sale for the satisfaction of the mortgage indebtedness.

It is urged, however, in behalf of the interveners, that it is competent for the court to grant the relief now prayed for, even if it be true that the master properly rejected the interventions when he discovered that they were not founded upon preferential demands or debts contracted

by the receivers. It is said, in substance, that as the court assumed control of all the property of the mortgagor company, including some to which the lien of the mortgage did not extend, thereby putting it beyond the reach of unsecured creditors, it is, in equity, bound to protect creditors of the latter class to the extent of ascertaining the validity of their claims, and the amount thereof, and requiring their payment to the extent of the value of such property of the mortgagor as was sequestrated in the foreclosure proceedings, to which the lien of the mortgage did not extend. It is undoubtedly true that, when a court takes possession of property through the agency of a receiver, it is bound to protect the rights of any third party who has an interest in or a lien upon the property, and to entertain intervening petitions which may be filed to protect such an interest or to enforce such a lien, since it will not suffer the possession of its receiver to be disturbed by process emanating from any other court. But in the case in hand the interveners had no specific interest in or lien upon any of the property which came to the possession of the receivers, as the interveners were merely general creditors of the mortgagor, and, as such, had no lien upon its property. It was their privilege, doubtless, to have intervened in the foreclosure proceedings, and to have suggested the facts which they now allege, at any time prior to the entry of the final decree, which subjected all of the property in the receivers' hands to the payment of preferential demands, receivers' liabilities, and the mortgage indebtedness. They might have brought the facts which they now allege to the attention of the court, namely, that the receivers had inadvertently assumed possession of property which was not covered by the mortgage, so far as general creditors were concerned; and they might have asked that such property be released from the custody of the receivers, or at least that the proceeds thereof, if sold, should not be applied to the satisfaction of preferential demands, receivers' liabilities, and the mortgage indebtedness, as was in fact done. If such intervening complaints had been filed at the proper time, it would have been possible to have instituted an inquiry concerning the alleged facts, and to have released any property which was not covered by the mortgage or was not rightfully in the custody of the receivers, if such a course had seemed necessary or proper for the protection of general creditors. But no such action was taken by the interveners, nor is any sufficient reason disclosed why such action was not taken. The pendency of the foreclosure proceedings was well known, being a matter of public notoriety. The claims of the interveners had accrued when the foreclosure suit was instituted, and some of them were of long standing. Nevertheless, as before stated, the interventions were not filed until after the entry of a decree which, in effect, subjected all the property then in the receivers' hands to the payment of preferential debts, receivers' liabilities, and the mortgage indebtedness. Indeed, the interventions were not filed until after the property to be affected was sold under the decree, and the sale had been duly confirmed. At that late day the interveners appeared, and prayed that their demands might be allowed and paid; basing their right to relief on the ground that the decree rendered was erroneous, in that it had subjected property of the mortgagor to the payment of preferential

demands, receivers' liabilities, and the mortgage indebtedness, which was not, in fact, covered by the lien of the mortgage, so far as the interveners were concerned. In view of these considerations, the court is of opinion that the interveners are precluded by laches, if for no other reason, from obtaining the relief sought, in so far as such relief is based on the allegation that certain property was appropriated by the receivers which was not covered by the mortgage. This was substantially the view taken by the Circuit Court of the United States for the Eastern District of Michigan in *Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co.*, 71 Fed. 29, 35, 36, where an analogous question arose, and a general creditor of a mortgagor company was denied relief because he had failed to file his intervention in due season.

The case has been treated thus far upon the assumption that certain personal property, described as materials and supplies incident to the operation of a railroad, and located at Ft. Scott, Kan., has been subjected to the payment of the mortgage indebtedness, or has been consumed in a manner which was beneficial to the mortgage bondholders, to which the lien of the mortgage did not extend, so far as the interveners are concerned. But this assumption seems to be erroneous. The mortgage in controversy was filed and recorded as a real estate mortgage in Crawford county, Kan., where the personal property in dispute was located, but it was not filed, it seems, as a chattel mortgage in said county; nor was an annual affidavit afterwards made, showing the amount due and unpaid thereon, as the local law (sections 4244, 4246, Rev. St. Kan. 1901) requires. It is conceded that the mortgage in question sufficiently described the property in controversy, and intended to convey it as security for the mortgage debt; but it is contended that for want of an actual delivery of the property to the trustees in the mortgage, and because of the failure to comply with local laws concerning the registry of chattel mortgages, it was void as to creditors such as the interveners. The question has been mooted whether the law relating to the recording of chattel mortgages is applicable to railroad mortgages, such as cover an entire railroad and all personal property connected therewith and appurtenant thereto, and the authorities on that point have been collected by counsel with some care. *Hammock v. Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111; *Southern California Motor Board Co. v. Union Loan & Trust Co.*, 12 C. C. A. 215, 64 Fed. 450; *Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co.* (C. C.) 71 Fed. 29. But it is deemed unnecessary on this occasion to express an opinion with relation to the point thus raised. Under the laws of Kansas an unrecorded chattel mortgage is only void as to creditors and subsequent purchasers and mortgagees in good faith. It is valid as between the mortgagor and mortgagee, and, if a delivery to the mortgagee takes place at any time before a levy or seizure is made in behalf of those persons as to whom it is void, the defect will be cured, and the mortgagee's lien will be protected, regardless of his failure to record the instrument or to make the annual affidavit. *Dayton v. Bank*, 23 Kan. 421, 423; *Cameron v. Marvin*, 26 Kan. 612; *Dolan v. Van Demark*, 35 Kan. 304; *Leech v. Manufacturing Co.* (Kan.) 56 Pac. 134. Now, it is undeniable that the receivers took possession of the personal property in controversy un-

der the order appointing them; that it was sold by the special master, or such part thereof as had not at the time been consumed, under the decree of foreclosure, as a part and parcel of the mortgaged estate; and that the purchaser assumed possession thereof, and had it in his possession for at least two months before these interventions were filed. Under these circumstances, the fact, if it be a fact, that the mortgage was not duly recorded, lends no support to the interveners' claims. The possession taken by the purchaser at the foreclosure sale (it having been sold as a part of the mortgaged property) is as effectual to cure any defect in the matter of recording the instrument as possession actually taken by the mortgagee or trustee in the mortgage. *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. 921.

The right of the interveners to have their unliquidated demands for damages inflicted by the mortgagor company allowed and paid because the receivers took possession of some money in the treasury of the mortgagor company when they were appointed, and received the net income of its property until October 1, 1899, when the second default in the payment of interest accrued, and when the trustees in the mortgage, by virtue of its provisions, were entitled to take possession of the mortgaged property without the aid of legal process, rests upon no better ground and is supported by no higher equity than their right to relief predicated upon the ground which was last considered. The mortgage which is involved in the present case, in broad terms, pledged all "revenues, rates, tolls, incomes, rents, issues, profits, and sums of money arising from or to arise from" the operation of the mortgagor's railroad to the payment of its bonded indebtedness. The bill under which the receivers were appointed charged that there had been a default on the part of the mortgagor in the payment of an interest installment amounting to \$575,000, which fell due April 1, 1899; that the mortgagor owed floating debts and accrued taxes to the amount of about \$575,000, which it was unable to pay; that it owed nearly \$2,000,000 on account of rolling stock, which sum it was required to pay at the rate of \$40,000 per month; that a large sum of money would soon become due to its employes on account of wages; and that the mortgagor company was unable to meet these obligations, and was in fact insolvent. These allegations proved to be well founded. It is within the personal knowledge of this court that the funds which came to the possession of the receivers, and all the income which they derived from the operation of the road, up to October 1, 1899, were insufficient to pay off floating debts and meet current obligations and keep the railroad in operation, and that large sums of money were borrowed by the receivers, by direction of the court, to supply the deficiency, which loans were subsequently paid by or in behalf of the bondholders or other persons interested in the property. The fact is that the railroad, at the time the receivers were appointed, was in many respects incomplete and unfitted for operation. It was not in a condition, without further large expenditures of money and labor, to earn any net income. The funds to complete it and to make good any deficiency in operating expenses were raised, by means of receivers' certificates, on the credit of the property in their hands, and, by an order of this court, were made a special lien on the property, paramount

to the mortgage. Moreover, these interveners, while the foreclosure proceedings were pending, made no effort to impound the money that was in the treasury of the company when the receivers were appointed, or the net income, if there was any, which came to their hands prior to the second default, on October 1, 1899. In view of these facts, it seems to the court manifest that the claim of the interveners that the amount of funds in the treasury at the time the receivers were appointed, and the net income, prior to October 1, 1899, should be ascertained and paid to them, is without merit. Whatever the amount of such fund or income may have been, it was disbursed in the course of the receivership, in the discharge of liabilities of the mortgagor company, that were at least as meritorious as the claims of the interveners. In all probability, the fund which they seek to reach, and upon which they found their equity, was expended in the payment of liabilities of the mortgagor that were of a preferential nature, namely, for the wages of employes and for materials and supplies. But be this as it may, the court is of opinion that inasmuch as the mortgagor company was in an insolvent and failing condition when the receivers were appointed, and had defaulted in the payment of one of its interest installments, and was unable to discharge its duties to the public in consequence of its insolvent condition, it was entirely competent for the court, through the agency of its receivers, to take possession of the funds in question, and of the net income, and to make such application of the same as was in fact made, and that no equity arises in favor of the interveners in consequence of what was thus done. The fact that by the provisions of the mortgage the trustees therein were not entitled, of their own volition, to take possession of the mortgaged property until six months subsequent to a default, surely did not preclude a court of equity from entertaining a bill to foreclose, and appointing receivers thereunder, when it was found necessary to do so for the protection of the mortgaged property, and to insure the due performance of those obligations which the mortgagor owed to the public.

With respect to the second ground of relief which is relied upon in the several interventions (being the ground heretofore stated), it is to be observed that this court has heretofore decided that it would not entertain an intervening petition which was filed in this cause by an unsecured creditor of the Kansas City, Pittsburg & Gulf Railroad Company with a view of compelling the Kansas City Southern Railway Company, the purchaser at the foreclosure sale, to pay his demand upon the ground that no foreclosure of the mortgagor's interest in the mortgaged property had in fact been effected by the foreclosure suit, and that the legal proceedings taken in that behalf had merely operated as a reorganization of the mortgagor company; leaving the property to which the proceeding related in the purchaser's hands, subject to the payment of the mortgagor's debts. No sufficient reasons are disclosed for departing from that rule on the present occasion. The foreclosure suit was heard and determined in the usual way, and according to the established course of procedure in such cases. An upset price (\$12,500,000) was fixed by the court, which, considering the then condition and value of the mortgaged property, was deemed ade-

quate to insure a fair sale, and protect the interests of all persons who had either a legal or an equitable claim on the property. The decree expressly provided that the sale, when made and confirmed, should operate as "a perpetual bar, both in law and equity, to the Kansas City, Pittsburg & Gulf Railroad Company, and the defendants in this suit, and each and every of them, and all persons claiming by, from, or under them, or any of them, in or to or in respect of said premises, property, or franchises so sold and conveyed, and each and every part thereof." The same decree, in effect, adjudged that the purchaser at the foreclosure suit should take the property purchased free from all demands against the mortgagor company, save an obligation to see that the costs of the suit and all of the receivers' liabilities and preferential demands were duly paid, if these were not discharged by the proceeds of the sale. The agreement that had been entered into between the bondholders and stockholders of the mortgagor company, to which allusion is made in the intervening petitions, was not exhibited to the court in the course of the foreclosure proceedings; nor did the court deem it any part of its duty to inquire into the arrangement that had been made by the purchasing company to obtain the means wherewith to make the purchase, or to inquire on whose account the purchase was made, or how the purchasing company had disposed of its stock, or concerning the amount of the bonds and stock which it proposed to issue, or to whom such bonds and stock had been issued. The mortgage that was foreclosed contained an express agreement, in the eighth article, that the trustees therein, or their successors, might "bid for and purchase [the mortgaged property] or cause the same to be bid for and purchased for and in behalf of the holders of the bonds hereby secured, \* \* \* in proportion of the respective interests of said bondholders, at a reasonable price." The manner in which the purchasing company had been organized, and had disposed of its stock and bonds, seemed to be a matter which was foreign to any issue raised in the foreclosure suit, and of no concern to the court, provided the purchaser faithfully complied with the terms of the purchase, as it subsequently did. In view of these considerations, the court concludes that, even if it be true, as now claimed, that because the new or purchasing company issued its stock and bonds, in certain proportions, to the stockholders and bondholders of the old company, in pursuance of an agreement to that effect, which was made before the sale, and before the new company was organized, it thereby placed itself, notwithstanding the purchase, in a situation where it became legally or equitably chargeable with the debts of the old company, then and in that event the right or equity in question should be enforced by an original proceeding against the Kansas City Southern Railway Company, and such other parties as may be entitled to be heard with respect to such equity, rather than by an intervention in the foreclosure suit. In so far as the interveners ask for relief on the ground last mentioned, they manifestly seek to impeach the decree by depriving it of the effect of a decree of foreclosure, which it was intended to have, and by imputing to it an entirely different effect. They seek in this way to overthrow the decree, although they came into court subsequent to its rendition, and ostensibly, at least, for the purpose of

availing themselves of some of its provisions. This they should not be permitted to do, especially as they can readily enforce the rights which they now assert by an original bill, if such rights exist. As the interveners were not parties to the foreclosure suit, they are not bound by the decree therein, if that action was not brought in good faith to secure the foreclosure of a mortgage, but was brought, by collusion between the bondholders and stockholders of the old company, for the fraudulent purpose of enabling the stockholders to appropriate a part of the corporate assets, to the prejudice of the corporate creditors. If the decree is to be assailed on that ground—and such seems to be the second ground of assault—then it should be made by an original bill, inasmuch as the general rule is that one who is not a party to a suit, but who intervenes, comes in in subordination to the record as he finds it, and will not be permitted to raise new issues or delay final action in the case, or insist upon a change in the form of the proceedings. 11 Enc. Pl. & Prac. 509, 510, and cases there cited. If this is the rule as respects an ordinary intervention filed in advance of a final judgment or decree, much greater reason exists for requiring one to proceed by an original bill who comes forward after a final decree, and after third parties have acquired rights thereunder, and proposes to impeach it for reasons de hors the record.

Touching the final paragraph of the decree, on which counsel for the interveners seem to lay some stress, as containing a reservation of power in the court to modify or amend the decree at the instance of a party or an intervener, it is to be observed that this clause was inserted in the decree solely for the purpose of reserving the power to make such modifications in the conditions of the sale and as to the distribution of the proceeds as might be deemed necessary, intermediate the entry of the decree and the occurrence of the sale. It was not intended as a reservation of power to overturn the decree and rights acquired thereunder after the sale of the mortgaged property, and the delivery of the same to the purchaser, at the instance of any third party who might come forward and suggest that the decree was in some respects erroneous.

The result is that the exceptions to the master's report will be overruled, his report will be confirmed, and an order will be entered dismissing the several interventions.

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In re DOSCHER et al.

(District Court, E. D. New York. December 24, 1902.)

**1. BANKRUPTCY—INSOLVENCY—PROPERTY TO BE EXCLUDED FROM ASSETS.**

Where property has been transferred in payment of or as security for a just debt, the mere fact that it may involve a preference in bankruptcy, should bankruptcy proceedings be instituted against the debtor, does not exclude it from consideration in determining his solvency under the provisions of Bankr. Act, § 1, subd. 15 [U. S. Comp. St. 1901, p. 3419].

**2. SAME—PROOF OF INSOLVENCY—ADMISSION OF CORPORATION.**

A petition filed in a state court by the directors of a corporation, alleging its insolvency, and praying its dissolution and the appointment of



a receiver, is not a sufficient ground for a finding of insolvency by a court of bankruptcy in involuntary proceedings subsequently instituted against it, where a different rule as to what constitutes insolvency obtains in the state courts from that prescribed by the bankruptcy act, and especially when the schedule attached to such petition showed an apparent excess of assets over liabilities.

In Bankruptcy. Hearing on petition in involuntary bankruptcy.

Henry F. Cochrane, for petitioners.

Hamilton & Beckett (William H. Hamilton, of counsel), for respondents.

THOMAS, District Judge. The Malcom Brewing Company, organized about 12 years ago for brewing business, owns land on which there is a well-equipped brewery and malthouse, and stable buildings, in the borough of Brooklyn, mortgaged for the sum of \$200,000, to secure 6 per cent. bonds due January 1, 1906. For the last several years the business of the corporation has declined largely, and the stockholders have made loans to the company to the amount of \$150,000, for which were given notes, upon which no interest has been paid for two years. These notes have been renewed from time to time, and finally to February, 1903, except those aggregating a few hundred dollars, which were paid in 1901, and excepting, also, the three notes known herein as the "Doscher Notes," amounting to \$11,798. In addition to such indebtedness, one Claus Doscher, the father of Henry Doscher, one of the petitioners, holds a note for \$10,000, for money loaned the company November 27, 1900. In December, 1900, and January and February, 1901, William Dick, father of J. Henry Dick, one of the present directors of the company, made a cash loan to the company amounting to \$40,000, which was represented by notes due in the summer of 1902. In June, 1902, William Dick issued a summons and complaint against the company, to recover this \$40,000; but the company obtained forbearance, and no judgment was entered therefor. On July 14, 1902, Henry Doscher sued the company for the cash loan of \$10,000 which had been made to the company by Claus Doscher, and also upon various stockholders' notes issued to the Doscher family; the claim, in all, amounting to about \$24,000. On July 15, 1902, all the directors of the company joined in a petition to the supreme court, praying for a voluntary dissolution of the company; but such petition was not presented to the court until July 28th, which was shortly before the time when Doscher was entitled to enter his judgment. On April 23, 1902, the directors of the company passed the following resolution:

"The officers of this company be, and are hereby, authorized to borrow, at the best rate of discount possible, the sum of \$45,000, for the purpose of procuring liquor tax certificates for the company's customers for the year beginning May 1, 1902; and that said officers be, and are hereby, authorized to re-assign all the assignments of said liquor tax certificates held by the company to secure such loan, and that said officers, if necessary, procure the indorsements of individual stockholders to notes given for said loan, and that said officers be, and are hereby, authorized to execute assignments of all chattel mortgages held by the company to the Manufacturers' National Bank, as

trustee, for the purpose of further securing such stockholders' indorsements to above-mentioned notes."

Christian M. Meyer, one of the directors present when such resolution was passed, and the William Dick hereinbefore mentioned, indorsed notes aggregating \$45,000, issued pursuant to such resolution, for the purpose of procuring their discount at the Manufacturers' National Bank and the Nassau Trust Company. The money so obtained on April 30, 1902, together with \$10,000 of the company money, was on or about May 1st used in procuring various licenses, which were at about the same time transferred in blank to the various saloon keepers as licenses, and these transfers were delivered to the company, and, to the amount of \$40,257, reassigned to the Manufacturers' National Bank as security for the money so borrowed. Shortly after the passage of the resolution of April 23d, the attorney of the company was instructed to prepare the authorized assignment of these chattel mortgages. The preparation and execution of this assignment were delayed or neglected until July 1, 1902. The Manufacturers' National Bank, as trustee, had custody of the various transfers of liquor licenses, and of the chattel mortgages under the assignment thereof, until about October 1, 1903, when, pursuant to an order of the supreme court, the temporary receivers in dissolution proceedings redeemed the same by paying the sum of \$37,500; \$7,500 having been paid on such indebtedness by the company in the month of June preceding. The face value of the chattel mortgages assigned was about \$93,423.14. The petitioners in this proceeding in bankruptcy, instituted July 30, 1902, charge that the company, while insolvent, conveyed and transferred all of its property with intent to hinder, delay, and defraud its creditors, by instituting dissolution proceedings, and by procuring therein the appointment of receivers, in whom was vested the property of the company, and that the institution of such proceedings would preclude the petitioning creditors from taking proceedings to set aside the transfer of the chattel mortgages and liquor taxes made as hereinafter stated, as well as preferential payments made on the 26th day of July to J. Henry Dick, a director, stockholder, and creditor of the company, for \$695.84; also that the company, while insolvent, and on the 26th day of July, 1902, transferred to J. Henry Dick, a director, stockholder, and creditor of said corporation, and one of the petitioners for the voluntary dissolution thereof, the sum of \$695.84, with the intent to prefer him over other creditors, and with the knowledge on his part of the insolvency of said corporation; also that in or about the month of May, 1902, and within four months of filing the petition herein in bankruptcy, the company transferred certain chattel mortgages and liquor tax certificates, aggregating \$91,000, to the Manufacturers' National Bank, in trust for the benefit of William Dick and Christian M. Meyer, directors, stockholders, and creditors of the brewing company, with intent to prefer said directors, stockholders, and creditors over the other creditors of said company; also that the company, while insolvent, with intent to prefer the creditors hereinafter named, over the other creditors of said Malcom Brewing Company, transferred certain property, consisting of money, on the several days and to the several persons following:

Thomas Morgan, July 26, 1902.....	\$ 301 70
Freminger Sign Company, July 12, 1902.....	188 00
S. K. Nester, July 3, 1902.....	3,102 30
J. F. Walsh, June 15, 1902.....	360 00
Freminger Sign Company, June 12, 1902.....	215 00
S. K. Nester, June 4, 1902.....	3,102 30
Thomas Morgan, June 4, 1902.....	311 70
B. H. Turle & Co., May 13, 1902.....	3,878 07
S. K. Nester, April 5, 1902.....	3,085 76
S. S. Steiner, March 31, 1902.....	1,506 02

The petition for the dissolution proceedings in the state court contains the following allegation:

"Second. That your petitioners have discovered that the stock, effects, and other property of said corporation are not sufficient to pay all just demands for which it is liable, or to afford a reasonable security, and that heretofore William Dick brought two several actions on five promissory notes made by said corporation to him for moneys loaned, amounting in the aggregate to fifty-two thousand dollars (\$52,000), besides interest and costs, which actions proceeded to judgment, but judgment has not been entered thereon against said corporation, but is likely to be at any moment, and that other creditors of said corporation, particularly Henry Doscher, is about to institute an action against said corporation to recover the sum of twenty-one thousand seven hundred and ninety-eight dollars (\$21,798), with interest upon three promissory notes held by him; that the entry of said judgment would so far affect the credit of the company as to practically prevent it from doing business; and that for these reasons your petitioners deem it beneficial to the interests of the stockholders that said corporation should be dissolved."

The petition in the state court also contains a statement of the debts of the company, and an inventory of its property, as it was carried on the books of the company.

The inventory of property is as follows:

Plant consisting of real estate, etc.....	\$420,928 08
Horses, trucks, harness.....	17,846 69
Cooperage, kegs, and barrels.....	19,424 20
Bar fixtures in brewery.....	4,349 99
Book Account, viz.:	
Chattels and real estate mortgage account.....	\$101,064 49
Loan account to liquor dealers.....	35,254 29
License account.....	44,519 86
Accounts as per lager beer.....	\$22,529 78
Less discounts.....	6,758 93
	15,770 85
Accounts as per ale ledger.....	\$21,874 37
Less discounts.....	6,452 94
	15,421 43
	212,030 92
Accounts as per bills receivable book.....	3,009 08
Personal accounts for mdse. sold and loans.....	25,003 05
Stock account manufactured and unmanufactured.....	44,185 09
Brewers' supplies.....	1,799 87
U. S. revenue stamps.....	599 68
Unexpired insurance.....	4,755 19
Ferry tickets.....	26 70
Bottling department inventory.....	797 06
Cash in banks and on hand.....	2,838 83
	\$757,594 42

The specific incumbrances upon such property are stated as follows:

Mortgage by said corporation to the Nassau Trust Company of Brooklyn, as trustee, to secure bonds of the denomination of \$1,000 each, issued to various persons at the time of the execution thereof, interest at 6%, amount.....	\$200,000 00
Assignments of liquor licenses held by said corporation to the Nassau Trust Company & Manufacturers' National Bank as collateral securities on indorsements of notes of said corporation, and discounted by it on them.....	40,237 57
Assignments of chattel mortgages held by said corporation to the Nassau Trust Company and to the Manufacturers' National Bank of Brooklyn, as trustee, to secure indorsements on notes of said corporation held by it on them.....	93,423 14
<b>Total incumbrances .....</b>	<b>\$333,660 71</b>

The schedule states the indebtedness of the company as \$317,571.57, exclusive of unsatisfied engagements, and also the mortgage of \$200,000, making the total indebtedness \$517,571.57.

The respondents claim that the evidence shows the following statement, based on the valuations both of their witnesses and those of the petitioning creditors:

<b>Liebmann (creditors' witness):</b>	
Land and buildings .....	\$214,000 00
Machinery, etc. ....	94,960 00
	<u>\$308,960 00</u>
<b>Amounts as shown by schedule:</b>	
Mortgages and current accounts.....	\$212,030 00
Personal accounts and bills receivable.....	28,000 00
Stock, supplies, cash, etc.....	55,000 00
	<u>295,030 00</u>
<b>Total valuation .....</b>	<b>\$603,990 00</b>
<b>Coleman (creditors' witness):</b>	
Buildings, machinery, etc. (including land, though the minutes say excluding land).....	\$295,000 00
Schedules show as above.....	295,030 00
	<u>\$590,030 00</u>
<b>Taylor (respondents' witness):</b>	
Machinery, etc. ....	\$171,965 00
<b>Lamb (respondents' witness):</b>	
Land and buildings .....	\$302,300 00
Schedules as above .....	295,030 00
	<u>\$769,295 00</u>
<b>Kleinert (respondents' witness):</b>	
Land and buildings .....	\$252,744 00
<b>Frank (respondents' witness):</b>	
Machinery .....	\$110,000 00
Schedules as above .....	295,030 00
	<u>\$657,774 00</u>

The debts being certain, it is claimed that these valuations show an excess of assets over liabilities ranging from \$75,000 to \$250,000, independent of the alleged good will of the business. The petitioning creditors allege that there is a deficiency of assets, and arrive at the result by the following method of computation, claimed to be based upon the evidence and law applicable to the case:



Subdivision 15, as regards the property to be excluded, has evident reference to the act of bankruptcy stated in section 3a (1) and not to the acts of bankruptcy relating to preferences. Where property is transferred in fraud of creditors, the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is insolvent. Where property is transferred in payment of or as security for a just debt, the mere fact that it may involve a preference in bankruptcy, should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency. The property in the present case was pledged as security in due course of business, pursuant to a resolution of the board of directors passed at an earlier period, and did not involve fraud; nor is that charged. The computation of the petitioning creditors erroneously excludes a consideration of this property. If it be included, by the petitioners' own computation the company was not insolvent at the time of the various acts of bankruptcy alleged in the amended petition, if the rule for ascertaining insolvency provided by the bankruptcy act be observed. The court is forced to this conclusion by the state of the evidence, and by the technical definition of "insolvency" contained in the act. If it were within the province of the court to forecast the results of marshaling the assets of the company, the statement might be made, safely, that the property will fall far short of equaling the liabilities of the company, unless there shall be some arrangement by which the creditors undertake a reorganization of its affairs. But while experience leaves no doubt that the company was actually insolvent, the condition of its assets makes proof thereof a task of insuperable difficulty for the ordinary litigant. The present situation is peculiar. The company relies upon insolvency, as defined by the state statute, for the purpose of winding up its affairs, and thereafter proves its solvency in this court; that is, the company is solvent in this court, and insolvent in the state court. It is true that the petitioners urge that the statement in writing, as above quoted, made by the directors as the basis of their petition for proceedings for dissolution, is prima facie evidence of the insolvency of the corporation, and sufficient to sustain a finding against it on that issue, unless overcome by countervailing proof, and, in support of this proposition, cite *In re Lange* (D. C.) 97 Fed. 197. If the suggestion be that this statement shifts the burden of proof, it cannot be accepted, as that burden remains with the petitioners to the end. If it be admitted that this statement of the directors may be regarded as that of the corporation itself, within the meaning of the decision cited, nevertheless it is to be observed that the petition was accompanied by an inventory which shows an apparent surplus of assets to the amount of \$240,000. Moreover, the statement in the petition closely follows the words of the statute, and such meaning is to be given to the statement as has been judicially attributed to the statute itself. The respondents insist that the meaning of the statute is shown in the opinion in *Sterrett v. Bank*, 46 Hun, 26, where it is stated:

"Solvency imports adequate means of a party to pay his debts, which embraces within its meaning the opportunity, by reasonable diligence, to convert and apply to such purpose. In other words, a person is deemed

insolvent who at the time in question is unable to pay his debts in the ordinary course of business."

This decision involved proceedings by attachment, but is quoted as illustrating the definition of insolvency in *Re Lenox Corp.*, 57 App. Div. 515, 68 N. Y. Supp. 103. Such is not the meaning of "insolvency" as the term is used in the present bankruptcy act. *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666; *In re Gilbert* (D. C.) 112 Fed. 951. While the statute of the state has not been definitely interpreted as claimed by the respondents, yet the decision in *Re Lenox Corp.* tends in that direction, and it is considered that the language of Judge Bradley in *Sterrett v. Bank* is properly applicable to the statute under which the dissolution proceedings were initiated. Moreover, there has been an extended research into the affairs of the company in the present proceeding in bankruptcy, and the evidence presented with reference to the various items of assets shows an excess of such assets over liabilities. Therefore it is concluded that the statement of the directors, rightly interpreted, taken with the inventory shown in the schedules, is not sufficient to overcome the detailed evidence presented upon this hearing.

It follows from these views that the petition must be dismissed.

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NATIONAL ENAMELING & STAMPING CO. v. HABERMAN.

(Circuit Court, D. Connecticut. January 29, 1903.)

No. 1,095.

**1. CONTRACTS—LEGALITY—RESTRAINT OF COMPETITION.**

A restrictive covenant, made by one capable of contracting, which is unlimited as to time, in area covers the entire United States, is ancillary to the main lawful contract (being in part consideration of the payment for good will sold), and is reasonable and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid, may be enforced.

In Equity. On demurrer to bill.

Guggenheimer, Untermeyer & Marshall, for complainant.

Gross, Hyde & Shipman, for defendant.

PLATT, District Judge. Aside from a minor objection, raised by the defendant with evident seriousness, which will be disposed of hereafter, the broad contention arising in the case at bar which I am asked to consider is this: The plaintiff claims that a restrictive covenant, made by one capable of contracting, which is unlimited as to time, and in area covers the entire United States, and is ancillary to the main lawful contract, being in part consideration of the good will sold, and is reasonable, and is no broader than is necessary to save to the covenantee the rights and privileges for which he has paid, may be enforced. The defendant urges that such a contract is

¶ 1. Monopolistic contracts—validity as affected by public policy, see notes to *Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 9 C. C. A. 666; *Cravens v. Carter Crume Co.*, 34 C. C. A. 486.

See *Contracts*, vol. 11, Cent. Dig. §§ 559, 565-567.

in general restraint of trade, and therefore void. It is not thought that any case can be found in the federal courts which sustains flatly and unequivocally the position taken by the plaintiff. Before entering upon the discussion, it may be well to suggest that no case appears, so far as I am informed, in the courts of England, or of this country, including federal and state, where the controlling feature upon which the contract was declared void has been purely and simply, without more, its unlimited extent. If I am right about this, it follows that all which has been said about such contracts has been obiter dictum, and is peculiarly sensitive to the reasons which have always obtained for scanning such opinions with unusual care. It cannot be disputed that the age of such dicta entitles them to great respect, and that by constant repetition they have become ingrained into the fabric of English and American law and equity. Despite this fact, dicta they are, and can be investigated and analyzed as every dictum ought to be. They will be treated with the veneration and respect due to their distinguished ancestry and extensive service, and such treatment should be the more emphasized, since the critic is a modest explorer in the paths which have been hewn out by those whom he reveres and emulates.

Passing over the immortal immorality of Hull, J. (2 Hen. V, fol. 5, pl. 26), and the general discussion of the subject to be found in the famous judgment entered by Chief Justice Parker (later Lord Macclesfield) in *Mitchel v. Reynolds*, 1 P. Wms. 181, and taking up the matter at the point where our own courts began to scrutinize it with care, no better statement of the objections to such a contract can be found than the one expressed by Morton, J., as the unanimous conclusion of the famous Massachusetts court over which the late and lamented Shaw presided as chief justice. *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119:

"(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market."

And even then, in 1837, in the midst of the stern and inexorable environments which nature provided for the asylum to which our Pilgrim Fathers fled, the court quoted with approbation the language of Chief Justice Best in *Homer v. Ashford*, 3 Bing. 322, from which the following excerpt is culled: "Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void, *because no good reason can be imagined for any person imposing such a restraint upon himself.*" The italics are mine. Omniscience is not a prerogative of the earthly judiciary; no human brain could



conceive, no earthly eye could penetrate, the possibilities which steam and electricity have already converted from the vagaries of the dreamer into practical everyday facts.

In the *Addyston Pipe & Steel Co.'s Case*, 29 C. C. A. 141, 85 Fed. 284, 46 L. R. A. 122, Judge Taft, with the wave of a wand which in 1837 would have been deemed that of a magician, sweeps away a large portion of the fancied objections presented in *Alger v. Thacher*.

Before we come to that let us see what Massachusetts has done in the way of reparation. *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, was decided in 1866. In that case the facts disclosed that Blanchard, as one of the copartners of Taylor & Blanchard, agreed not to carry on the business of manufacturing and selling shoe cutters in the commonwealth, except with the copartnership, nor to interfere in any way with the business; and further that he would not divulge secrets, etc. The court held the contract void, but in that year and day some glimmering light, shed by the approaching effulgence, entered the eyes of the judges. The plaintiff contended that in this country a contract ought not to be held void unless it extended throughout the United States. "No," they said, "we cannot accede to that. A monopoly extending throughout the state may be as really injurious to the people of the state as if it extended throughout the whole country." And they add this significant and pertinent thought:

"Whether the principle extends to a case where, by means of traveling agents, one has extended his business through a large part of the country, or a large part of the state, and sells the good will of the business with a restriction merely coextensive with that good will, and not extending beyond the actual sphere of the business of the vendor, we need not discuss. The law regards the good will of a particular trade as property having a market value, and protects it to a reasonable extent, depending somewhat upon the nature and character of the business."

And very soon thereafter (in 1869) along came the case of *Machine Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513. The court therein held a contract valid in which the defendant agreed "at no time to aid, assist, or encourage in any manner any competition" against a business sold with its good will, and told him that he had sold the good will, which was valuable, and had been well paid for it, and that he could not have so sold it if he had not agreed never to interfere with it, and that by his acts he was taking back a part of what he had sold. The court very distinctly affirms in the opinion that the case does not turn upon the point that a patent is concerned in the contract, and, aside from that consideration, it is very instructive and enlightening, and very much like the one at bar, and I express with pleasure my acknowledgments for its helpful influence.

And again, on May 18, 1898, in deciding *Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403, the court was unanimous, speaking through Knowlton, J., in an opinion which seems to give practical assent, certainly not violent dissent, to the broader rule toward which many courts, at home and abroad, are advancing.

The question at issue has received little attention at the hands of the federal courts, but the inferences which may be legitimately drawn

from certain bits of reasoning which come to the surface here and there should encourage and in no sense dishearten the plaintiff.

Our eyes always turn with deep interest to the case of *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315, which was decided in 1873. That decision certainly settles the proposition that a contract in restraint of trade is not to be governed by state lines. Up to that time there had been decisions in state courts maintaining what might be called an offshoot of the state rights doctrine, and placed upon the ground that to enforce the contract to abstain from meddling within any particular state would compel the covenantor to transfer his residence and allegiance to another state if he would pursue his vocation. The country had become one country, and citizenship of that country had come to mean a great deal; and parenthetically I may say that it has to-day come to mean vastly more than it did in 1873. Cases must be judged according to their circumstances, the supreme court said, and can only be rightly judged when the reason and grounds of the rule are rightly considered. The shopworn dictum is again laid down (and I am compelled with all due respect to so characterize it), that the evils of restraint appear whenever one has agreed not to carry on his trade at all, or not to pursue it in the entire realm or country. But, after assuming that axiom, the court says "that a stipulation by a vendee of any trade, business, or establishment that the vendor shall not exercise the same trade or business, or erect a similar establishment, within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid." And the same rule is applied to a vendor. And, later: "It is clear that a stipulation that another shall not pursue his trade or employment, at such a distance from the business of the person to be protected as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions that the other party be not prevented from pursuing his calling and that the country be not deprived of the benefit of his services." And so the court practically sustains this plaintiff's contention, except for the axiom, which curtails the reasoning front and rear. Some axioms, especially those to be found in the exact sciences, have continued for ages. Other axioms, so called, are subject to revision as the facts upon which they were founded yield to the advancement of accurately ascertained truth. I respectfully condemn this one to the latter class.

My reading of the *Oregon Steam Nav. Co. Case* convinces me that I am only carrying coals to Newcastle as I work at this problem. It would seem that the solution must be obvious to those better equipped to solve it than myself, and I have only taken up the burden so that my conscience may assure me that I have shirked no duty imposed upon me by the enforced situation.

In *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979, decided in 1888, although the case turned upon other points, Mr.

Chief Justice Fuller, speaking for the court, referred to the question of contracts in restraint of trade. He says that the rule laid down in *Mitchel v. Reynolds*, 1 P. Wms. 181, was made under a different condition of affairs and state of society than that which existed at the time of the opinion, and had been even then considerably modified. "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable."

*Carter v. Alling* (C. C.) 43 Fed. 208, was decided by Circuit Judge Blodgett in 1890. Plaintiff had an ink and mucilage business extending throughout the United States and Canada, and the defendant, their employé, agreed not to work for any competitor for three years after leaving the employ of the plaintiff. The contract was held valid. Several of the expressed views of the judge are enlightening, to say the least of them. I insert two quotations:

"In later years a further relaxation of the old rule has grown up both in England and America, and the courts have repeatedly recognized the validity of contracts in restraint of trade throughout the entire state or country when such restraint was not unreasonable, in view of the nature and extent of the business of the covenantee."

"The modern agencies of commerce have enlarged the field for the manufacturer and salesman to, or even beyond, the limit of the continent; and to whatever extent a manufacturer or dealer has by his energy or enterprise made a market for his wares, to that extent he has the right to protect his business from piratical competition by contracts like the one under consideration."

In *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122, decided in 1898, Judge Taft, then circuit judge of the Sixth circuit, whose later career is known and applauded of all men, wrote the opinion, and it sheds a flood of light upon this contention. The opinion enforces, in an admirable way, the impropriety of the claim then advanced, that, if a contract has "no purpose but to restrain competition and maintain prices," it will be held valid if reasonable. That was the doctrine, which, if established, would lead courts "to set sail on a sea of doubt." But the learned court maintains that in cases where the main contract is legal, as, for example (and this is my own illustration), in the case of the sale of a going plant, with the good will attached, and as ancillary thereto a covenant is entered into that the party will do nothing which in any way shall compete with or diminish the value of the thing sold, such covenant shall be enforced.

The very late case (*Harrison v. Refining Co.*) decided by the circuit court of appeals in the Seventh circuit (opinion by Circuit Judge Jenkins, May 6, 1902; 116 Fed. 304), indicates a disposition to take a view somewhat similar to that which has been adopted herein, although the exact issue which confronts me was not there involved. I avail myself of the learning therein displayed, and commend the authorities cited to those interested in the general discussion.

The third reason in the statement from *Alger v. Thacher*, does not

seem to have been taken up by Judge Taft in the Addyston Pipe Steel Co.'s Case, except inferentially. That reason is that industry and enterprise are discouraged, and the products of ingenuity and skill diminished, by the enforcement of general restrictive covenants. It would seem, however, that such contracts would encourage rather than discourage industry and enterprise. The utmost exercise of those and other talents is required to bring a business into such a condition that capital seeks to absorb it, and certainly the addition of fresh capital to its exploitation does not tend to diminish its product. Such contracts do not eliminate competition. The vendor simply puts up a barred fence between himself and the competitive field. To the mind of the court it is a far cry to monopolism and engrossing from such a case as the one before us. The nature of things itself provokes competition. Whenever a field, no matter how large, yields abundant harvests under the present improved methods, fresh capital is envious, and eager to enter and share the fruits. The wise investor will enter the territory at the earliest prudent moment. Cheap production, cheap delivery, and wise management almost inevitably bring large profits. The open door leads to boundless possibilities. No one band of associated capitalists can control a market very long. Any attempt to abuse the public confidence must result in public indignation and determined resistance. The truth of these words has been lately demonstrated. It may be that I trench upon political economy, which is more directly within the domain of the legislative function of our government; but if, with these observations, is coupled the doctrine that, in reaching a judicial conclusion as to the propriety of an unlimited restrictive covenant which is ancillary to the main lawful covenant, the monopolistic tendencies of such a covenant shall have the greatest weight in determining whether the ancillary covenant is valid; in other words, that the court shall not only see to it that the restriction is no greater than the need which demands it, but further, and especially, that it does not carry with it monopoly, even as an incidental attachment,—the danger to the country will be doubly checked.

The New York court of appeals, in the case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, canvassed the general question of contracts in restraint of trade with much care and ability. The decision almost covers the present contention of the plaintiff, and leads the candid mind to accept the belief that the same logic, followed to its inevitable conclusion, would without question reach the desired haven. Defendant's counsel frankly admits that he would dislike to follow his contention into that forum. Later New York decisions establish, beyond cavil, the force of the *Diamond Match Co.* Case in that jurisdiction.

I have examined, with some care, all the opinions which have been promulgated by the highest courts of the various states since the *Diamond Match Co.* Case decision was published. Without question, a number of courts have been visibly disturbed at the contemplation of the far-reaching effect which it is feared that it may hold concealed within its bosom, but in every case of that kind the perturbation is plainly due to the decided bias toward monopoly.

which the facts of the particular case disclosed. The reasonableness of the restrictive covenant, be the restraint partial or general, is clearly a question of law, and the only concession required is that the monopolistic taint shall be a prime factor in the search for the reasonableness. Conceding that, it is not clear why any tribunal should be perturbed. It will be quite as easy for the courts to protect the public under the broader doctrine as to be forced to seek refuge under the now practically worthless distinction between general and partial restraint. I suspect that monopoly will have its innings under any rule. "Many littles make a mickle," says the old proverb; a sufficient number of seemingly harmless partial restraints might, when combined, produce a downright monopolistic and engrossing general restraint. If the general restraint can be searched at the outset to discover whether or not it is reasonable, it is hoped that monopoly could be with the greater ease suspected and detected.

England has become, with New York, an equally agreeable forum for this plaintiff to seek. *Nordenfelt v. Ammunition Co.*, [1894] App. Cas. 535. It is unnecessary to do more than cite that case with the comment I have made. A perusal of the opinions of the law judges in the house of lords will well repay the studious and thoughtful.

Tindal, C. J., in deciding *Horner v. Graves*, 7 Bing. 735, thus characterizes the so-called rule of Lord Macclesfield:

"The lord chief justice says, 'A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on in a particular place is good;' which are rather instances and examples, than limits of an application, of the rule which can only be at last what is a reasonable restraint with reference to a particular case."

Lord Ashbourne gives the double quotation the sanction of his name in the house of lords case.

In the strife for commercial supremacy which the nations of the world have now entered upon it would seem suicidal for this government, through its judiciary, to lag one whit behind the marching squadrons. In business transactions undeviating honesty is a prime factor. If that factor is eliminated, or even suspected, the handicap upon enterprise, advancement, and material progress will be serious, if not intolerable. The parties made the contract in suit with painstaking care. Why should the defendant not occupy the position into which he cramped himself by his own act? The answer, most vociferously enunciated, is that the public will be the loser thereby. Many ways in which it cannot lose have been adverted to. If there is danger at all, is it not much less dangerous to lay down the hard and fast rule that freedom of contract will always be sustained, provided such freedom is reasonably exercised? Freedom without that exception degenerates into license. In any event, would the anticipated harm be at all comparable to the enormous advantages which must accrue when it shall have become for all time the settled law that every man must abide by his bargain honestly made, when no lingering smirch of guilty design or harmful purpose clings thereto? It should not be so that a bargain which, upon every principle of justice, equity, and decency ought to be rigidly enforced, shall in any case be rejected because of some lingering respect for tradition.

It is suggested that the contract in suit might properly be designated as one in partial restraint. Such treatment would seem to the court to contain the weakest of sophistries, and the veriest trifling with a great matter. As affairs advance in the newly acquired portions of our territory, it is not unlikely that those of us who are permitted to live out the years allotted to us by the psalmist will see the day when such a distinction will have been consigned to the obscurity from which it emerged, but such a day has as yet given no more than a promise of dawning. Nor would it have been wise on the part of the plaintiff to have excepted Nevada or Montana, any more than it would have been wise to except the top of the most inaccessible mountain peak. In my opinion, the exception in the Diamond Match Co. Case was colorable. Such an exception does no more than to furnish a loophole for the stickler after custom and precedent. Others may call the contract in suit what they will; for my part, I choose to call it a contract in general restraint of trade.

Beyond this, it is only necessary to touch lightly upon the other contention of the defendant. With the main problem solved, the further objection is trivial. I cannot regard with favor the claim that the defendant was a mere stockholder in the vendor company, and, therefore, was not concerned in the good will at all. He has all the qualities which render his restrictive covenant of great value, and, that fact being recognized by the parties, he received \$50,000 in addition to his stockholder's share of the fruits of the sale. Possibly his dangerous proclivities were suspected; be that as it may, his superior value was clearly recognized and very well paid for in advance. He ought to be the last man on the list of covenantors to find fault with the bargain which he made, presumably, in the best of faith.

Let the demurrer be overruled, with costs.

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## INTERSTATE BUILDING & LOAN ASS'N v. EDGEFIELD HOTEL CO.

(Circuit Court, D. South Carolina. February 2, 1903.)

### 1. BUILDING AND LOAN ASSOCIATIONS—CONTRACT OF BORROWING STOCKHOLDER—LAW GOVERNING.

The contract of a borrowing stockholder in a building and loan association is governed by the law of the state in which the association is incorporated and has its home office, although the security may be situated in another state, where the subscription to stock was made and accepted at the home office, and the stock installments, which are ultimately to extinguish the loan, are there payable, as well as the interest by the terms of the bond given for the loan.

### 2. SAME—CONSTRUCTION OF CONTRACT—ACCOUNTING BETWEEN ASSOCIATION AND BORROWING STOCKHOLDER.

The bond of a borrowing stockholder in a building and loan association provided that his payments of installments on his stock and of interest should continue until the stock was matured by reaching par value. It also contained the following provision: "It is further understood that, upon final settlement with the association, it shall retain as installment on the said stock and interest no greater sum than the

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¶1. What law governs usury in contracts of building and loan associations, see note to *Kirlicks v. Association*, 51 C. C. A. 319.

amount actually advanced, with interest thereon at the rate of eight per cent. per annum." *Held* that, the association having become insolvent before the maturity of the stock, the borrower was entitled to make final settlement under such provision, being charged with the loan and 8 per cent. interest thereon, and credited with installments of stock and interest paid as partial payments thereon.

**3. EQUITY PLEADING—AFFIRMATIVE RELIEF TO DEFENDANT—NECESSITY OF CROSS-BILL.**

A defendant in equity can only be given affirmative relief on a cross-bill.

In Equity. Suit to foreclose a mortgage.

W. A. Wimbish and Mitchell & Smith, for complainant.

Tompkins & Alston, Tompkins & Wells, and N. G. Evans, for defendant.

SIMONTON, Circuit Judge. This is a bill for the foreclosure of a mortgage executed by the Edgefield Hotel Company, a corporation of the state of South Carolina, to the Interstate Building & Loan Association, a corporation of the state of Georgia. In this opinion the complainant will be styled the "Association," and the defendant will be spoken of as the "Hotel Company." The home office of the complainant is the city of Columbus, in the state of Georgia. It is a building and loan association, pure and simple. On the 16th of September, 1892, the hotel company made application for 120 shares of the capital stock of the association; payment therefor to be made according to its by-laws. The application was made at the home office of the association, at Columbus, and was there granted, after consideration by the board of directors. A certificate of stock was issued on the 20th of September, 1892, to the hotel company, for 120 shares in the association, par value of each \$100,—in all, \$12,000; the certificate, upon its face, stating that it was subject to certain terms. These terms and conditions are: First. The shareholder agrees to pay 60 cents monthly on each share until such share matures or is withdrawn. Second. That moneys from members to the association, or from the association to members, shall be due and payable at the home office, in Columbus, Ga. If members of any local branch exercise the rights given them to elect a local treasurer, they may make payments to him for transmission to the home office. In such case the local treasurer shall be deemed the agent of the member, and not the agent of the association. Third. Fifty cents of each monthly payment on each share shall go into the loan fund; the remainder, to the expense fund. No part of the loan fund to be used for expenses. Fourth. Provides for fines for failure to pay monthly payments. Fifth. Provides for cases of default after six months. Sixth. Provides for transfer of stock. Seventh. Provides for reduction of stock. Eighth. Provides for withdrawal of stock. If a member die within one year after a subscription, his personal representative may withdraw his shares. This is the only case in which shares not held one year can be withdrawn. If a share be withdrawn at any time after one year from date of certificate, and within two years, the withdraw-

¶ 3. See Equity, vol. 19, Cent. Dig. § 450.

ing member shall be entitled to receive a sum of money equal to the amount he has paid in by monthly payments on loan fund. If he withdraw at any time after two years, he is entitled to receive all sums paid by him monthly on the loan fund, with 6 per cent. annual interest, upon 60 days' notice. Stockholders who borrow money cannot withdraw their shares until the loan is paid. All matured shares can be withdrawn at any time, with all profits. Ninth. Once a year, profits will be ascertained, and apportioned among shares in good standing. Tenth. When a loan is made to a shareholder, he must transfer his certificate to the association as collateral for the loan, to be held until the loan and interest are paid, or such share has matured. When this is done, the certificate shall be canceled. Eleventh. The certificate contains a contract between the association and the holder of the shares, and no agent has authority to change it in any way.

Being the owner of 120 shares in the association, the Edgefield Hotel Company on the 15th of September, 1892, made application for a loan of \$6,000; proposing, as security therefor, the transfer of the 120 shares as collateral, a personal bond for \$12,000 for the payment of the installments and interest on the shares of stock; said bond to be secured by a mortgage of the property set out in this bill. The application was granted. The loan was made, and all the papers were executed. At the date of this loan the hotel company had paid \$120 admission fee, and one payment of its stock of \$72. After the loan was made, it made 74 payments, of \$102 each, to wit, \$72 on 120 shares, at 60 cents each, and \$30 interest. These payments were made promptly each month until the month of December, 1898, for which month payment in full was made. Thereafter nothing was paid. In March, 1901, this bill was filed. It is, as has been said, for the foreclosure of a mortgage of realty. The bond given with the mortgage on whose default is based the right of foreclosure, is for the penal sum of \$12,000. This condition will be commented on hereafter. Among other things in the bond, it is provided that, in case of failure to fulfill any of its conditions, the whole sum becomes due and payable. The bill charges default, and prays foreclosure thereon. The answer, which is not artistically drawn, after admitting the corporate character of the two parties, and the loan of the money, and the execution of the papers securing it, avers payment of the entire sum legally due on the contract by the installments paid by it from month to month as alleged. It also avers that it was induced to make the loan by that portion of the contract wherein it appears as follows: "And upon final settlement with the association, it is to retain, as installments of said stock and interest, no greater sum than the amount actually advanced thereon, at the rate of eight per cent. per annum"—and that, persuaded that it would not be called upon to pay more than this, it made the loan; that it has paid more than this on the bond. It also charges that the construction put on the contract by the complainant made it usurious, and so in conflict with the statute law of the state of South Carolina, which law entered into and controls the contract. The rest of the answer is for affirmative relief, and cannot be considered. *Fost. Fed. Prac.* § 170; 3 *Daniell, Ch. (Perkins' 3d Am. Ed.)* p. 1647.

The first question made in this case is by what law the contract is to



be construed—that of Georgia or of South Carolina. The relations between the complainant and the defendant grow out of the fact that the defendant is a shareholder in the complainant corporation. In order to secure this relation the defendant made application to the complainant for 120 shares of its capital stock, at Columbus, in the state of Georgia. That application was received, considered, and granted at Columbus. The subscription was made in that city; the admission fee paid to it there. The certificate of stock which completed and crystallized the subscription is a contract, and its conditions are stated in it. Among these are the payments of monthly installments on the stock at Columbus, Ga. When the loan was effected and the bond given, the condition of the bond required payments to the complainant at its principal office, in the city of Columbus, Ga., on a certain day therein mentioned, each month; that is to say, \$72 of the monthly installments on the shares, and \$30 as interest on the loan. The prompt payment of these sums secured the final payment of the bond. It is clear that, whatever may have been the place where this contract was made, the place of its performance was Columbus, in the state of Georgia. In *Bedford v. Association*, 181 U. S. 242, 21 Sup. Ct. 597, 45 L. Ed. 834, the supreme court quotes with approval the language of *Miller v. Tiffany*, 1 Wall. 298, 17 L. Ed. 540:

"The general practice in relation to contracts made in one place, to be performed in another, is well settled. They are to be governed by the law of the place of performance; and, if the interest allowed by the law of the place of performance is higher than that permitted by the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

The same case quotes with approval the case of *Loan Co. v. Cannon*, 96 Tenn. 599, 36 S. W. 386, 33 L. R. A. 112, 54 Am. St. Rep. 858. A note and mortgage were given to a building and loan association, and made payable at Minneapolis. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of the state. In this court the law is fully stated, and the cases sustaining it quoted, in *McIlwaine v. Ellington*, 49 C. C. A. 446, 111 Fed. 584, 585, 55 L. R. A. 933, Fourth circuit, and the same doctrine established. It would seem clear, therefore, that this contract, even if made in South Carolina, inasmuch as it expressly provides for performance in Georgia, must be construed according to the law of Georgia, and this is in consonance with the decisions of the supreme court of South Carolina. *Pollock v. Association*, 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683. In a case on all fours with this (*Investment Co. v. Alexander*, 96 Fed. 872), this court said:

"The application for membership in the complainant corporation was with the intent and purpose of obtaining this loan. The application was made to the company at Washington, District of Columbia, the home office; was considered and granted there. The certificate of the stock, the result of the application and the basis of the loan, was signed and issued at Washington, the home office. The application for the loan was prepared in South Carolina, but it was forwarded to Washington to be passed upon there. Until it was passed upon and accepted, it was no contract. It was accepted in Washington, and so the contract was completed and made in Washington."

7 Am. & Eng. Enc. Law (2d Ed.) 137; *Shattuck v. Insurance Co.*, 4 Cliff. 589, Fed. Cas. No. 12,715.

Under the law of Georgia, a contract like this is not usurious. Code Ga. 1895, § 2401; *Cook v. Association*, 104 Ga. 814, 30 S. E. 911.

What, then, is the contract? The bond and mortgage were drawn in South Carolina, and are being enforced in that state. The law of South Carolina will be followed in this court, so far as it may concern the proceedings for foreclosure, and manner and terms of the sale, the redemption of the land from the sale, and all things incident thereto. *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648. The present question is not as to the mode of enforcing a contract by foreclosure, but what is the amount due under the contract, decided by the law of the state of Georgia, and the contract itself. The contract is set out in the bond as follows:

"Whereas, the said corporation, the Edgefield Hotel Company, is a member of the said association in the branch at Edgefield, and owns in its own right 120 shares of the capital stock, and has, under the terms and conditions of the charter and by-laws, procured from the said association a loan of \$6,000 on the said 120 shares of stock, and a mortgage on certain real property; and whereas, under the condition prescribed in the by-laws, said loan is to be paid to the association in monthly installments upon the said stock, and the interest on the sum loaned also to be paid monthly, as may be provided in its charter and by-laws, and rules and regulations, in direct reference to which this bond is made [that is to say, we assume, the by-laws in force at the date of the contract], and is in all cases to be construed as making said by-laws, rules, and regulations, when the same are applicable, as a part thereof, the payments of which installments and interest are to continue until the said shares of stock mature (that is, until each share of the stock borrowed shall, by the installments paid on it, together with its declared proportion of profits, reach the par value of \$100.00), and to pay all taxes and keep all houses on the lot mortgaged insured until the said shares mature."

There is a further clause in the bond, as follows:

"It is further understood that upon final settlement with the association it shall retain as installment on the said stock and interest no greater sum than the amount actually advanced, with interest thereon at the rate of eight per cent. per annum."

There thus appear two alternatives to the borrower: He is, in addition to the amount fixed for interest, to repay said loan to the association in monthly installments on the said stock, and to do this until each share of the stock matures; that is, until each share of stock borrowed upon shall, by the installments paid on it, with its proportionate share of profits, reach a par value of \$100. Or he can have a final settlement with the association if the installments on stock and interest paid equal the sum actually lent, with interest thereon at the rate of 8 per cent. per annum. In the case at bar the defendant has paid on its first subscription \$72, and has made subsequently 74 other payments of \$102 each, beginning December, 1892; that is, in all, \$7,548; the last payment having been made for December, 1898. But the interest on \$6,000 from November, 1892, to December, 1898, six years and one month, at 8 per cent. per annum, is \$2,920, making a total due on that account of interest of \$8,920. So, if we take the date of refusal to pay installments as a date of final accounting, this provision of the bond has not been fulfilled. As under the other alternative the

obligor binds itself to go on and pay on the loan by installments on the stock, \$72 each month, the loan not having been repaid in this way, it was bound to pay until the loan was repaid, or until the sums paid on each share of the stock reached its par value of \$100. This term "the par value of each share of stock" is ambiguous. If it means until each share is of the value of (that is, was worth) \$100, the payments might go on indefinitely. For, as the shares were entitled to profits, each share was also liable for losses. So it may happen (indeed, in the case at bar it did happen) that no share ever reached the value of \$100. The association has proved insolvent. The proper construction of the phrase, as used here, is when the whole sum of \$100 per share has been paid. For this reason, doubtless, the alternative provision was inserted in the bond. The bill was filed in March, 1901. From December, 1898, all the months of 1899, 1900, January, and February, 1901, the defendant was in default—26 months, at \$102 per month; that is to say, for \$3,652. In this court, however, the defendant will be allowed to take the most favorable alternative, and to make a final settlement by estimating the amount due on the loan, with interest from its date at 8 per cent. per annum until day of settlement, and crediting it with all payments made on account of interest and stock. It is contended that these payments on account of interest and stock cannot bear interest, and to this point is quoted *Buist v. Bryan*, 44 S. C. 129, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787. For this rule the learned justice who delivered the opinion of the court gives no reason whatever. Apart from this, the rule he lays down is the law of South Carolina, and is an exception to the general law. But as we have seen, the contract is governed by the law of Georgia. There is nothing in the record to show that the law of Georgia is the same as in South Carolina. At all events, the law which governs this case is the law of partial payments, and must be applied here. The complainant also charges counsel fee under the contract. But this, too, is under the law of South Carolina, which validates such contracts. It was said at bar, and not disputed, under the law of Georgia such a contract is invalid. If this be so, this being a Georgia contract, the clause is disallowed. This point is reserved.

It is ordered that the standing master state the account between the complainant and defendant; that in doing so he charge the defendant with the sum loaned, \$6,000, with interest at the rate of 8 per cent. per annum from the date of the loan, crediting it with each monthly payment, including the first payment made by it, and following the rule of partial payments (that is to say, including interest up to the first payment; if the amount then paid exceeds interest, deducting it from the amount then due, and using the results as a new principal, to be disposed of in the same way). He will report the result of this to the court.

The defendant claims credit for the withdrawal value of the shares, and it is expressly stipulated that a shareholder who has borrowed money cannot withdraw his shares, and so it is not entitled to the withdrawal value. It also claims that it is entitled to a share of the profits. Nothing appears in the record as to the profits,—certainly for several years last past. The fact that the association is insolvent

indicates that there are no profits. Those portions of the answer which seek affirmative relief, and so were not considered, proceed entirely on the proposition that the contract was usurious. This proposition has not been accepted.

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BENJAMIN et al. v. BROOKLYN UNION EL. R. CO. et al.

(Circuit Court, E. D. New York. December 4, 1902.)

**1. FEDERAL COURTS—STAYING PROCEEDINGS IN STATE COURT—PRIORITY OF JURISDICTION.**

Where a property owner, entitled to compensation under the law of New York for the building and maintenance of a street railroad in front of his property, has been guilty of such laches in permitting the building and maintenance of such road without compensation having been made that he is not entitled to enjoin its continuance, he is still entitled to maintain a suit in equity for an injunction as an alternative remedy in case the railroad company fails to pay compensation as fixed by the court; but the commencement of such a suit in a federal court does not give that court such exclusive jurisdiction as will authorize it to stay proceedings subsequently commenced by the railroad company in a court of the state to condemn the easement, in the exercise of the power of eminent domain conferred upon it by the state, since that proceeding does not deprive the court of equity of the power to award any past damages to which complainant may be entitled.

In Equity. On motion to stay proceedings in a state court.

Edward Wade Benjamin and Frank Benjamin, in pro. per.

George V. S. Williams (Alex. S. Lyman, of counsel), for defendants.

THOMAS, District Judge. The bill charges that the complainants in 1899 acquired title to certain land in the city of Brooklyn, by devise of Wade, to whom conveyance was made in 1887 by Coyle, whose title antedated 1885, when there was "unlawfully erected without claim of right" an elevated railroad along Fulton street, past and over part of the property by the Kings County Elevated Railroad Company, and that in 1899 the Brooklyn Union Elevated Railroad Company, by consolidation with the first-named company, "acquired all the franchise and property of the former," and at a later time sold in fee or leased the same to the defendant the Brooklyn Heights Railroad Company. The bill further charges that the companies severally have operated the railway, and by smoke, noise, and obstruction of light and air impaired the value of complainants' property to the extent of over \$5,000; that none of the said railways have caused the land to be condemned, or acquired the right to do the acts charged. The prayer is as follows:

"And your orator further prays that the said Brooklyn Union Elevated Railroad Company or the Brooklyn Heights Railroad Company be decreed to hold the right of easement in said property, subject to the payment of a just and reasonable compensation, and said compensation to be fixed by the court, and to pay the same, with interest thereon from the time of taking

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¶ 1. Federal courts enjoining proceedings in state courts, see notes to Gardner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575.

the property, and also damages resulting from the use as aforesaid, and your orators to have execution of such decree and all other just and equitable relief in the premises."

After the bill was filed, the Union Elevated Railroad Company commenced proceedings in the Supreme Court of the state of New York to condemn the complainants' right of easement for the purpose of its railway, upon making compensation therefor, pursuant to the statute of the state of New York, which proceedings the present motion seeks to enjoin permanently, to the end that the complainants may obtain the relief demanded in their bill.

The complainants' position is that in the present suit in equity (1) they may not ask for a permanent injunction against the maintenance and operation of the railway in front of their premises, and over the street on which it abuts, because they have been guilty of laches (*New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820); (2) that they may maintain such suit to recover compensation for their land; (3) that such compensation should be fixed as of the time of the company's appropriation thereof, with interest from that date. The argument is: The complainants have from 1885 to 1902 permitted the operation of the railway on the street in front of their premises. This precludes them from enjoining its continuance; but the same laches qualifies them, upon the authority of *New York City v. Pine*, to invoke a court of equity to award them compensation as of the time when their cause of action arose, and interest on such compensation during the time their laches was perfecting. If there had been no laches, the bill would lie for an injunction; the laches existing, does the bill lie for compensation; that is, simply for a decree for money? This would enable a person, disabled by laches from filing a bill for injunctive relief, to maintain a suit in equity in substitution for an action at law, which would be an unmerited reward of indolence. But it is earnestly contended that this is the holding in *New York City v. Pine*. The landowner in that case charged that the city of New York had tortiously taken his property (impairment of riparian rights) situated in Connecticut, and that it had and could have no public authority so to do, but stood in the position of a mere trespasser, and this trespass the complainant below sought to enjoin, and thereby prevent the city from taking the water, and also from making compensation either in the suit or in any proceeding. The complainant invoked the time-honored rule that, when the defendant was a mere trespasser, a court would enjoin absolutely, but would not make the injunction conditional upon payment of compensation found, and it was so held by the Circuit Court of Appeals. But the Supreme Court considered that, when the complainant was guilty of laches in asserting his right of property and permitting the defendant to construct its works at a large expense, his remedy by injunction would be allowed only in case the defendant failed to pay the compensation fixed by the court. This appears from the opinion, wherein it is directed that the case be remanded to the circuit court "with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to pro-

ceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible—a proposition upon which we express no opinion—and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill, without prejudice to an action at law.” The result of the decision was to remit the complainant to the rights commonly accorded by the courts of the state of New York, to persons seeking to restrain the operation of elevated railways over streets, to the injury of easements to abutting property. Such are the rights of the complainants in the present suit. The suit is essentially for an injunction, avoidable by payment of the compensation fixed; but such decree neither carries the title to the railway company, nor is it enforceable by execution.

But the vital question upon this motion is whether this court gained such exclusive jurisdiction that the railway company, which is an agency of the state, may not exercise the power of eminent domain conferred upon it by the sovereign power. Such a holding would mean that if a public corporation, authorized to operate a railway and acquire property therefor, appropriate such property, it cannot exercise the power of eminent domain after a bill has been filed by the owner to recover compensation, and, in lieu of its payment, for injunctive relief. Such a rule would limit the right of the state, acting through its enabled agents, to exercise one of its great prerogatives, and deprive it thereof, unless its exercise anticipated the owners coming into a court of equity. The magnitude of this constraint upon the right of a public agent of a sovereign state to take property upon making due compensation in the manner provided by it is obvious, and this court should not approve the contention, unless its power and duty so to do clearly appears. The practice in the courts of the state of New York furnishes no authority for such holding. The law respecting the rights and remedies of abutting owners has progressed for over 30 years, and has been applied in a great number of instances; and while courts of equity have, in cases numbering into thousands, afforded a remedy where the railway has not acquired title, yet in no instance has any court stayed affirmative action by the railway company pending suit by the owners of the property involved. Proceedings for condemnation and suits in equity have proceeded *pari passu*, and each party has been left to enforce the remedy that the law provided. Indeed, in the case that declared the right of abutting owners to compensation (*Story v. Railway Co.*, 90 N. Y. 122, 179, 43 Am. Rep. 146), the Court of Appeals directed suspension of the injunction “until the defendant has had a reasonable time after this decision to acquire the plaintiff’s property by agreement, or by proceedings to condemn the same.” In *Mead v. Railway Co.*, 24 N. Y. Supp. 908, the Superior Court of the city of New York refused to restrain proceedings for condemnation at the instance of the property owner, who had filed previously the usual bill in equity, while in *Re Metropolitan*

El. Ry. Co. (Sup.) 2 N. Y. Supp. 278, 284, and 12 N. Y. Supp. 502, 504, it was decided that the pendency of a suit in equity was not a defense to such proceedings. The whole current of practice and authority in the state of New York indicates the judicial disposition to leave undisturbed the exercise of this right on the part of public corporations regarded as mere arms of the state itself. The present question is not whether the federal court has power to furnish a remedy in equity, but whether it will suspend the exercise of the power of eminent domain. The complainants clearly establish their right to come into equity. Indeed, the right is undoubted, but the remedy afforded the railway company for acquisition of the title and ascertaining and making due compensation therefor remains. The complainants vigorously assert that this court is the more favorable tribunal, inasmuch as it will award compensation as of the time of entry, with interest thereon, while in the proceedings under the state statute the compensation will be as of the date of the award. Assuming that the complainants' contention is correct, it furnishes no ground for depriving the railway company of the ability vested in it by the state. The allowable suit in equity is not primarily to recover compensation, but to restrain the invasion of the complainants' rights, and the ascertainment of compensation is incidental, and its payment an alternative. The court will not enter a decree for compensation, but for an injunction, if the ascertained compensation shall not be paid. When the suitor asks for damages alone, he is relegated to his action therefor, and his laches cannot convert a court of equity into a court of law. The railway company has deferred proceedings for many years; the complainants have deferred action equally long. The law has furnished them at all times a remedy for damages for use and occupation, and concurrently a remedy against the continuance of the invasion. They have not availed themselves of either remedy until the present bill was filed. Meantime the statute of limitations has run against a portion of the claim for damages for occupation. They would avoid the embarrassment caused by their delay by recovering compensation as of the date of the first occupation, with interest, upon the theory of an implied contract or some rule of damages that does not accord with that obtaining in the courts of the state. It is not easily apparent that the complainants can predicate their cause of action upon an implied contract to pay, accruing to them in 1885, upon the theory that such contract is subject to no limitation. But it is not necessary to consider what rule of damages the complainants may invoke. Their long neglect to assert a right does not increase their equity to such an extent that this court should stay the exercise of the power of eminent domain to the end that they may obtain advantages in this court, that would fail in part as to past damages if the proceedings for condemnation be continued. If it shall appear upon the trial that the company has obtained the title through such proceedings, this suit may be continued, at least for the purpose of ascertaining such past damages for use and occupation as the law permits.

These views require that the motion to stay the proceedings of the defendant railway company should be denied.

**GILCHRIST TRANSP. CO. v. 110,000 BUSHELS OF NO. 1 NORTHERN WHEAT.**

(District Court, W. D. New York. February 6, 1903.)

**1. SALVAGE—VESSELS OF COMMON OWNERS—RIGHT TO COMPENSATION FROM CARGO.**

The fact that the owners of a salving ship were also owners of the ship salvaged does not preclude them from recovering salvage compensation from the cargo saved, where the peril which rendered the service necessary did not arise through any breach of the contract of carriage.

**2. SAME—SERVICES RENDERED TO TOW.**

An arrangement by one vessel to tow another belonging to the same owners, which had become disabled, did not include an agreement to render salvage services to the cargo of the tow, by extinguishing a fire which occurred without fault of either vessel, so as to preclude a recovery for such services.

**3. SAME—SERVICES IN EXTINGUISHING FIRE—AMOUNT OF AWARD.**

The steamer *City of Genoa*, while proceeding from Duluth to Buffalo, laden with wheat, became disabled, and was overtaken and taken in tow by the *Mecosta*, belonging to the same owners and bound for the same port. While in Lake Erie the *City of Genoa* caught fire forward, without fault on her part, and in response to her signal for assistance the *Mecosta* made fast to her, and for seven hours the crews of the two vessels fought the fire, until it was under control. The work was skillfully done, and the fire confined to the forward part of the vessel, which was held before the wind by the *Mecosta*, and the cargo was not damaged, except to some small extent by smoke and water. The *Mecosta* was in some peril; her bulwarks being scorched, and the lines by which she was made fast being burned. The fire was in the night, but the weather was calm, with little wind. The *Mecosta* was worth \$70,000; the *Genoa*, after the fire, \$60,000; and her cargo, \$79,000. *Held*, that the *Mecosta* was entitled to salvage compensation from the cargo to the amount of \$3,800, being about 5 per cent. of its value; \$1,500 of the amount to be distributed among the crew.

In Admiralty. Suit to recover for salvage services.

Potter & Wright (George Starr Potter, of counsel), for libelant.

Harvey L. Brown (John C. Shaw, of counsel), for respondents.

**HAZEL**, District Judge. The libel in this cause was filed against the cargo of the *City of Genoa* to recover \$7,500 for salvage compensation. The alleged services were rendered by the libelant's steamer *Mecosta* and crew in extinguishing a fire on the steamer *City of Genoa* on the 30th day of September, 1901. The disaster occurred about 30 miles west of Long Point, on Lake Erie, and continued from 8 o'clock in the evening to 3 o'clock the next morning. The facts as disclosed by the hearing are not denied. No testimony was given by respondents. The *City of Genoa* and the salvor, the *Mecosta*, were owned in common by the libelant corporation. The length of the *Mecosta* is 281 keel, 40 beam, and at the time of the fire she carried 100,000 bushels of wheat—her full capacity. Both vessels were built of wood, and, heavily laden with grain, were bound down on a voyage from the port of Duluth to the port of Buffalo. The *Genoa* left Duluth September 25, 1901. Her cargo, which has been libeled, consisted of 110,000 bushels of No. 1 Northern wheat, under bill of lading. On Lake Huron, about 5 miles from St. Clair river, her machinery



became disabled, and she was taken in tow by the Mecosta, assisted by a steam tug through the rivers and channels. The tug left the tow on reaching Lake Erie. No claim is made for towage services. The fire started on the main deck in the forward chain locker of the City of Genoa. She immediately signaled to the Mecosta ahead for assistance, and then cut the tow line. The Mecosta immediately rounded to. Her fire apparatus was placed in readiness, and she made fast to the Genoa's port side. The Mecosta's stern during the progress of the fire was abreast of the Genoa's texas deck house. While in this position, hazardous to her own safety, the Mecosta and 10 or 12 of her crew, out of a complement of 17—all who could be spared from the actual navigation of the vessel—energetically and successfully aided in allaying the progress of the flames. The fire, which had gained considerable headway when the Mecosta came alongside, was finally extinguished, owing to great exertions by the crews of both steamers. By their efforts and the vigilance of the Mecosta, the fire was confined to the main deck forward, and did not reach the cargo. Two lines of two-inch hose and a large number of fire buckets were used by the salving crew, who boarded the imperiled ship to subdue the flames. The lines of hose were handled interchangeably by the crews of the two vessels. In addition to the services mentioned, the Mecosta kept under way, and held the stern of the Genoa to windward. The spreading of the flames aft was thereby practically prevented, and the fire confined to the forward portion of the ship. The wind from the south was light, and at the rate of 5 miles per hour. The weather was calm. Witnesses for libelant testify that the heat was intense, and the Mecosta was in a perilous position. The master of the Genoa testifies that the crew of the Mecosta fought the fire valiantly, and that, if the Mecosta had not kept the Genoa before the wind, the fire could not have been confined forward. The Mecosta's bulwarks were scorched. Lines which held her to the Genoa were burned. On account of the heat, her master experienced difficulty in remaining on the pilot house. In extinguishing the fire, there was no serious risk or injury to the life or limb of any of the salvors. The Genoa's cargo sustained damage from water and smoke amounting to \$3,627.11. Her pilot house was destroyed, and the forecastle and main decks burned away, causing her steering machine and windlass to fall to the deck below. The fire was at its height at about 10 o'clock at night, and under absolute control at 3 o'clock in the morning. No presumption of negligence is attributable to the City of Genoa. Her master and crew rendered efficient service in attempting to check the progress of the fire. Fortunately, 130 gallons of water in a tank on board the City of Genoa facilitated in arresting the fire's advance. Indeed, as I understand the argument, it is not claimed that the ship was at fault. It is claimed that signals of distress were sounded to passing vessels during the night, but none offered assistance. At about 5 o'clock in the early morning of the 30th, the passing steamer Uganda came alongside, and was requested to aid the salvor in towing the City of Genoa. She did so, leaving the City of Genoa, however, in the exclusive care of the Mecosta about 20 miles west of Buffalo. The Mecosta then towed her into port. The proofs sufficiently disclose that

the services rendered by the Mecosta and crew were meritorious, and went far to prevent the fire from reaching the City of Genoa's cargo, which was of the stipulated value of \$79,300. The value of the City of Genoa immediately after the fire was stipulated at \$60,000, and the Mecosta at \$70,000.

It is contended by counsel for respondents that the general rule of awarding salvage compensation to a ship giving succor to another overtaken by unforeseen accidents or perils of the sea does not apply where both belong to the same owner, or where the salvaged ship was in tow of the salvor, and where, as here, both crews were under contract of employment with a common owner. This contention is based upon the theory that both ships were financially interested in safely transporting the cargo which each carried, and that the crew of the salvor owed a duty to their employer to save his property, though it be another vessel, whenever endangered by the casualties of the sea, and that the saving of the cargo was an incident to the performance of such duty for which no compensation as salvage should be allowed. This contention is not strictly maintainable. It is well established by authority that, where salvage services are performed by one vessel to another, both vessels belonging to the same owner, the crew of the salvor are entitled to recover salvage remuneration. The reason for the rule is founded upon the contract of employment. Salvage services rendered by the crew in aid of a disabled ship have never been regarded as within the scope of their employment. Such services entitle the crew to additional compensation, based on merit, hazard, and risk, and it is immaterial whether the salvaged and salving ships belong in common to the same owner. In *A Lot of Whalebone* (D. C.) 51 Fed. 916; *The Colima*, 5 Sawy. 181, Fed. Cas. No. 2,996; *The Sappho*, L. R. 3 P. C. 690. The mere fact of employment by an owner of more than one vessel does not carry with it an obligation to perform any other or different services than those called for by his shipping articles. The meritorious labor performed by the seamen of the Mecosta in saving the City of Genoa and her cargo was for the benefit of the owner of the ship and the cargo owners. In *The Sappho*, supra, it was decided that where one ship performed salvage services for another, both ships belonging to the same owner, the crew of the ship rendering the salvage services were entitled to recover salvage remuneration. Lord Justice Mellish, in announcing the decision of the court, said that the rule governing salvage services performed by the crew was based, first, upon whether the services rendered are in themselves such as would entitle them to remuneration on a basis of increased compensation for the hazardous undertaking; and, second, are such services within the scope of the contract of employment? In *Pacific Mail S. S. Co. v. Ten Bales of Gunny Bags*, Fed. Cas. No. 10,648, the precise question here involved was considered by the court. The salving and salvaged vessels belonged to the same owner, a corporation, which libeled a portion of the cargo and the steamship Colima for salvage. The circumstances, briefly stated, were that the Colima was disabled by reason of the loss of three blades of her propeller, which rendered her unseaworthy. She anchored and dispatched a boat in search of assistance, which, after several days, fell in with the steamship

Arizona. The Arizona proceeded to the assistance of the Colima, and towed her to port. It was held that the services rendered by the Arizona were in the nature of salvage services, and were to be compensated as if rendered by a stranger vessel. In *A Lot of Whalebone*, supra, after an exhaustive review of the authorities, it was declared to be the law "that the owners of a salving ship, who are also the owners of the salved ship, may obtain salvage remuneration from the owners of the salved cargo, provided the circumstances which cause the necessity for the salvage services do not amount to a breach of the contract of carriage between the shipowners and the owners of the cargo which is on board the salved ship." In the case at bar the salvage services were not required by a breach of contract of carriage on the part of the City of Genoa. As we have seen, the proofs in the case disclose the performance of valuable services by the Mecosta and crew in extinguishing the fire on the City of Genoa. Such services were accompanied by some risk to the safety of the Mecosta. True, the fact that the Mecosta had entered into an arrangement to tow the City of Genoa to Buffalo, as well as the common ownership of both vessels, may properly be considered in awarding salvage compensation. The prior arrangement made to tow the City of Genoa to Buffalo cannot be construed to include the rendering of any salvage services to the cargo by extinguishing fires, or of rescuing the City of Genoa from unforeseen and extraordinary perils. Such was the holding in *The Connemara*, 108 U. S. 357, 2 Sup. Ct. 754, 27 L. Ed. 751. Considering the law applicable to this case well settled as herein announced, I have no hesitation in deciding that salvage remuneration, as distinguished from a quantum meruit, was earned by the Mecosta and crew for the services performed on the night of September 30, 1901, and set out in the libel.

The next question to be decided is the rate of salvage to be awarded, in view of the circumstances of this case. I have no doubt that the compensation allowed should be on a basis of percentage of the value of the cargo salved. The services performed were salvage services, pure and simple. The rule in such cases, although the amount allowed is largely in the discretion of the court, is founded upon the nature and extent of the services rendered, and upon the circumstances surrounding the performance of such salvage services. In *The Sandringham* (D. C.) 10 Fed. 573, the elements which enter into the allowance of an award are concisely stated as follows:

"(1) The degree of danger from which the lives or property are rescued. (2) The value of the property saved. (3) The risk incurred by the salvors. (4) The value of the property employed by the salvors in the wrecking enterprise, and the danger to which it was exposed. (5) The skill shown in rendering the service. (6) The time and labor occupied."

"Salvage" is defined in *Sonderburg v. Ocean Towboat Co.*, Fed. Cas. No. 13,175, to be "a reward for meritorious services in saving property on navigable waters, in peril, and which might otherwise be destroyed, and is allowed as an encouragement to all persons engaged in business at sea or on navigable waters, and others, to bestow their utmost endeavors to save vessels and cargoes which are in imminent peril."

The libelant, by its libel, asks for an award of 10 per centum of the value of the cargo of the City of Genoa. Such an allowance would seem excessive under the facts of the case. The fact that the Mecosta was towing the City of Genoa must be considered in arriving at a just and proper award. The circumstances here are not analogous to a case where a vessel voluntarily or pursuant to solicitation goes out of her course to render a service to a disabled ship. Both vessels were bound down for the port of Buffalo. The fire does not appear to have greatly delayed the arrival of the Mecosta at her point of destination. She was delayed about nine hours. Inasmuch as both vessels were owned and controlled by the libelant, it can hardly be reasonably contended that the remuneration should be as large as for the services of a stranger. The night of the fire was not tempestuous. It was a still night, with scarcely a ripple on the water. The salving crew diligently performed services which checked the progress of the fire. In this, however, they were assisted by the full complement of the Genoa's crew—about 16 in number—who cannot recover salvage compensation for services rendered in the saving of their own ship. The elements were favorable to a successful outcome of the faithful, though not hazardous, services performed.

My conclusion is that a decree should be entered in favor of the libelant for \$3,800, which is approximately on a basis of 5 per centum of the value of the salvaged cargo. In making a distribution of this award among the salvors, I deem it equitable that the Gilchrist Transportation Company, owner of the Mecosta, should have and receive the sum of \$2,300. The balance of the award, \$1,500, will be divided among the crew in the following proportions. The total allowance to master and crew will be divided into twenty-five parts as follows:

Master, four parts .....	\$240
Two mates, two and one-half parts (each).....	300
Two engineers, two parts (each).....	240
Twelve crew at \$60 each.....	720

The names of the crew do not appear of record. Unless these may be inserted in the decree by agreement, the amount of the award to them may be paid into court, and proof taken as to their identity before distribution. The *Flottbek* (C. C. A.) 118 Fed. 954.

Let a decree in favor of the libelant, with costs, be entered accordingly.

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In re SENTENNE & GREEN CO.

(District Court, E. D. New York. January 17, 1903.)

**1. CHATTEL MORTGAGES—CONSTRUCTION—AFTER-ACQUIRED PROPERTY.**

A chattel mortgage described as covered thereby a lithographic press "and all and singular each and every of the tools, implements, furniture, equipments, and appliances \* \* \* now in my said lithographic establishment, \* \* \* and constituting the plant with which said business is now carried on, and \* \* \* all of the new lithographic machinery, presses, tools, implements, and appliances of every kind that I shall hereafter put into said establishment and plant for the purpose of improving the same or keeping it as good as it is at present." *Held,*

that such mortgage did not cover machinery and appliances subsequently placed in the establishment by the mortgagor for the purpose of adding a new branch of business, and not used in the business of lithographing.

**2. BANKRUPTCY—AVOIDANCE OF LIENS—SUBROGATION OF TRUSTEE.**

Where, under the law of the state, a chattel mortgage on after-acquired property is valid between the parties, but void as against attaching creditors, a trustee in bankruptcy will not be subrogated by the court to the rights of an attaching creditor, to enable him to defeat the lien of a mortgagee of such property whose mortgage was of record, and who has the superior equity, because the new property was added for the purpose of keeping the mortgaged plant in as good condition as when the mortgage was given.

**3. CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY—ADDITIONS MADE BY PURCHASER FROM MORTGAGOR.**

A chattel mortgage of a mechanical plant, covering additions made to maintain or improve its condition and efficiency, which is valid against the mortgagor, will be enforced as to additions made to the plant for that purpose by a purchaser from the mortgagor, who assumed all his obligations under the mortgage.

In Bankruptcy. On petition of chattel mortgagee to enforce his lien upon property in the hands of the trustee.

J. E. Ludden, for petitioner.

Latson & Bonyng (Paul Bonyng, of counsel), for trustee.

THOMAS, District Judge. March 22, 1900, John E. Green, to secure the payment of money, executed to T. Ellett Hodgskin, trustee, a chattel mortgage, which was duly filed, as were the successive statements thereof. In July, 1901, the Sentenne & Green Company, organized under the laws of New Jersey, succeeded to the business of Green, and to the ownership of the property covered by the mortgage, and duly assumed the payment of the mortgage debt, and the mortgagor's obligations respecting the same. On August 19, 1902, the E. W. Bliss Company, a creditor of the bankrupt, through the sheriff of the county of Kings, levied an attachment upon the entire plant of the company, and on August 22d two other creditors levied junior attachments thereon. On August 26, 1902, while the sheriff was still in possession of said property, the mortgagee assumed to take possession thereof, put a keeper in charge, and duly advertised a sale thereof. On the 28th day of August, 1902, a petition in bankruptcy was duly filed, and the Sentenne & Green Company were adjudicated bankrupt on the 16th day of September, 1902. On the 29th day of August, 1902, a temporary receiver of the property of the bankrupt was appointed, and on the 28th day of October, 1902, a trustee was elected, and subsequently duly qualified. All the property covered or claimed to be covered by the chattel mortgage came into the possession of the receiver so appointed, and later into the hands of the trustee. Thereupon the mortgagee came into this court, and asked that the question of the lien of his mortgage be ascertained. As the property has been taken by the court, and is now subject to its control and direction, it has, upon the alleged lienor's application, power to determine the question of the mortgage lien, notwithstanding the objection of the trustee.

The mortgage states that John E. Green, the mortgagor, has sold to the second party "one Koch lithographic press, and all other goods and chattels mentioned in the schedule hereto annexed, and now in the lithographic establishment owned and conducted by me," to secure the payment of certain indebtedness therein particularly described; and it is further provided that, until there should be default in such payment, the mortgagor should remain in possession of the goods and chattels and the full and free enjoyment thereof, without right, however, to cause or permit the same, or any part thereof, to be sold or removed from the premises therein described. The schedule referred to in the mortgage, signed by the mortgagor, gives, in 15 typewritten pages, all the property upon the premises, and concludes as follows:

"And all and singular, each and every of the tools, implements, furniture, equipments, and appliances, of every name and nature, now in my said lithographic establishment at Nos. 95, 97 and 99 Hudson Street, and Nos. 171 and 173 Franklin Street, Borough of Manhattan, in the City of New York, and constituting the plant with which said business is now carried on; and in and to all of the new lithographic machinery, presses, tools, implements and appliances, of every kind, that I shall hereafter put into said establishment and plant for the purpose of improving the same or keeping it as good as it is at present."

Between the delivery of the mortgage and the sale of the property to the bankrupt the mortgagor placed other property in the building, and, after purchasing, the bankrupt brought in machinery, tools, implements, etc. The greater part of the property thus added was for the purpose of fashioning into boxes the material that had been subjected to the lithographic process. The mortgagee claims not only the right to the property described in terms in the mortgage, so far as it is in existence, but also all property placed in the factory, whether appropriated to lithographic purposes or to making boxes. The trustee admits that the mortgage, as to property falling within its scope, after-acquired by Green, is valid as between Green, the original mortgagor, and the mortgagee, but that it is invalid as to the trustee, succeeding to the rights of the attaching creditors; and he further insists that the mortgage does not, by its terms, cover the after-acquired property of the Sentenne & Green Company, nor property for making boxes, by whomsoever acquired. Undoubtedly, the provision that after-acquired property, so far as covered by the mortgage, would fall under its lien as it should come into existence and possession of the mortgagor, is valid as between the mortgagor and the mortgagee. *Hale v. Bank*, 49 N. Y. 626; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Coats v. Donnell*, 94 N. Y. 169, 177; *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811; *Deeley v. Dwight*, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298; *Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635. The trustee relies upon the case last cited to limit the rule that would bring after-acquired property under a mortgage to those cases where the rights of third persons have not intervened, and to maintain that such a mortgage as to after-acquired property is void as against subsequent purchasers or attaching creditors, and also cites in this connection *Otis v. Sill*, 8 Barb. 102; *Edgell*

v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Gardner v. McEwen, 19 N. Y. 123; Farmers' Loan & Trust Co. v. Long Beach Imp. Co., 27 Hun, 89; Brunswick-Balke-Collender Co. v. Stevenson (Sup.) 4 N. Y. Supp. 123; Beebe v. Power Co., 13 Misc. Rep. 737, 35 N. Y. Supp. 1; Hilliman v. Neher, 20 Barb. 37; Jones, Chat. Mortg. § 138.

But it is conceded that in *Re New York Economical Printing Co.*, 49 C. C. A. 133, 110 Fed. 514, the Circuit Court of Appeals of this circuit determined that a trustee was not permitted to attack the mortgage unless he represented a creditor armed with process; but the trustee urges that he is thus enabled by the fact that he has been subrogated by the order of this court to the rights of the creditors who levied attachments upon the after-acquired property, even before there was any attempt to foreclose the mortgage. If the order of subrogation be allowed to stand, the trustee's position seems to be correct. However, passing this inquiry for the moment, the question is considered, what after-acquired property is included in the terms of the mortgage? In the lithographic business, as carried on by Green at the time the mortgage was made, words, devices, colors, etc., were lithographed upon tin. He afterwards took on the business of fashioning the lithographed material into boxes, and for that purpose new machinery was obtained and devoted to this new industry, not only by Green himself, but also by the corporation that succeeded to his interest. Unless there be ambiguity in the language of the mortgage, it is not permissible to look beyond its face to discover the intention of the parties. As already stated, in the body of the mortgage the mortgagor stipulates for the sale of (1) "one Koch lithographic press," (2) "all other goods and chattels mentioned in the schedule hereto annexed and now in the lithographic establishment owned and conducted by me." Following the mortgage is the schedule, which concludes with a clause which brings in all the tools, implements, furniture, equipments, and appliances "now in my said lithographic establishment," and constituting the plant with which said business is now carried on, and in and to all of the new lithographic machinery, presses, tools, implements, and appliances of every kind that I shall hereafter put into said establishment and plant for the purpose of improving the same or keeping it as good as it is at present." This sentence reiterates the statement that the establishment is lithographic in its nature; that the intention is to mortgage everything that constitutes the plant of the business as then carried on at that place; and all the lithographic machinery, presses, etc., that he should put into said establishment and plant, not generally, but for the limited purpose "of improving the same or keeping it as good as it is at present." The mortgagor had a lithographic establishment, not a box-making establishment. He called it a lithographic establishment, and nothing else; and he stipulated that all after-acquired property brought into such an establishment for the limited purpose of improving it or keeping it in its present condition should fall under the lien of the mortgage. At that time the manufacture of boxes may have been within the mind or ambition of Green, but it was not then an actuality. The contemplation of the business was not even suggested in the mortgage, and the mortgage did cover, and was intended to cover, only the property devoted

to his lithographic business. Therefore all after-acquired property brought in and devoted to a purpose not lithographic in its nature does not fall within the mortgage, and the property so excluded is that property that was brought in for and devoted to the purpose of manufacturing boxes. If there be any question of fact as to what machinery is included in the mortgage or excluded therefrom by virtue of this finding, further application may be made to the court upon such evidence as the parties may be advised to take. It may be that the order subrogating the trustee to the rights of the attaching creditors would enable the trustee to take from under the mortgage lithographic machinery added to the plant "for the purpose of improving the same or keeping it as good as it is at present." Equitably the mortgagee is entitled to such property, and, so far as the attachments and the subrogation of the trustee interrupt such equity, the order will be modified by the court.

The trustee urges that after-acquired property supplied by the corporation does not fall within the lien of the mortgage, within the holding of *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811. In that case the assignee of the mortgaged property was not aware of the existence of the mortgage. In this case the assignee assumed all the obligations of the mortgagor, but, without determining whether the cases may be differentiated, it is here decided that, to the extent that property has been added for the purpose of maintaining or improving the efficiency of the lithographic plant, the clause in the mortgage as to after-acquired property should be deemed operative. That at least is an equitable disposition of the question.

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AMERICAN SPIRITS MFG. CO. v. EASTON et al.

(Circuit Court, N. D. Illinois, N. D. January 31, 1903.)

**1. CORPORATIONS—ACTS OF DIRECTORS—INDIVIDUAL PROFITS—ACTIONS—PARTIES—PLEADING.**

Where, in an action by a corporation to recover profits alleged to have been illegally made by a director, since deceased, it was alleged that such director, with consent of his partner, had acted as complainant's agent in the purchase of cereals, and received therefor a salary, but, in violation of his trust, such director had charged profits on the cereals over the price paid, but there was no allegation that the director's estate was inadequate to meet complainant's demand, the partner was not a proper party, and the bill stated no cause of action as against him.

**2. SAME—PRINCIPAL AND AGENT.**

A bill in equity to recover profits alleged to have been made by a director of a corporation, charging that such director had been employed on a salary to purchase cereals for the corporation, and that he had sold such cereals to the corporation at a profit, could not be sustained on the theory that it was a bill to enforce a trust.

**3. SAME—ACCOUNTING.**

A bill in equity to recover profits illegally made by decedent as complainant's agent for the purchase of cereals could not be sustained on complainant's allegation that it had no other mode of ascertaining the facts as to the items and parties from whom purchases were made than by a bill in equity, and on its offer to do equity, where there was no mutual, intricate, or complicated account, and the relief to which complainant



would be entitled was of the same measure and kind as it might obtain at law.

4. SAME—MULTIPLICITY OF ITEMS.

In a suit against the personal representatives of an agent of a corporation to recover profits illegally received by the agent, where there was no charge in the bill that the agent's books were fraudulently kept, and there was no allegation that any different evidence or information could be obtained in equity from that obtainable at law, the allegation that the accounts consisted of many thousand items was insufficient to sustain the jurisdiction of a court of equity.

On Demurrer to Amended Bill. Sustained.

Moran, Mayer & Meyer, for complainant.  
Stevens, Horton & Abbott, for defendants.

KOHLSAAT, District Judge. The original bill herein was brought against Easton & Hall. Easton died pending the cause, and an amended bill was filed against his executors and Hall. The amended bill charges that Easton, while a director of the complainant company, was paid a salary, in return for which, with the full knowledge and consent of Hall, his partner, he was to act as complainant's agent, and from August 22, 1895, to December 3, 1897, did act as agent for complainant, in the purchase for complainant of all corn, grain, and cereals necessary to be and which were purchased and used by complainant in the operation of its distilleries at Peoria, Ill.; that with like consent and knowledge of Hall, and by reason of being a director of complainant, and of said salary, Easton undertook and agreed to fulfill the said duties without other compensation or profit to him or his said firm; that by reason of the circumstances Easton became and was a trustee for complainant and its stockholders; that he had sole and exclusive control of such purchases, and was relied on by complainant, and always stated and agreed that he always had and would purchase for complainant such products at the lowest and best price, and without profit to himself or his said firm, in which representation said surviving partner, Hall, acquiesced; that, notwithstanding said undertaking, Easton and his said copartner purchased for complainant large quantities of corn and grain and sold and delivered same to complainant at a greatly advanced price over the purchase price, and made large profit without complainant's knowledge, which complainant paid, in ignorance of such profit, to Easton and his firm; that complainant had no means of ascertaining the same; that Easton and his firm, in many cases, included their commissions and profits in their statements unbeknown to complainant; that the amount of such profit and commissions is unknown to complainant, and it has no means of ascertaining the same except by this bill. The bill further states, on information and belief, that Easton made \$25,000 profits, and Easton & Co. a like sum, for which they refuse to account; that the accounts consist of many thousands of items, are complicated, and that complainant has not nor ever has had any means of ascertaining from whom said purchases were made or the prices paid, or where same were purchased. The bill prays for an accounting, and that defendants be decreed to pay what is owing, and also offers to do equity. To this the defendant executors

on the one part and the defendant Hall on his own part file separate demurrers.

It is evident on the face of the bill that, unless the Easton estate is inadequate to meet complainant's demands, the defendant Hall is not a proper party. No allegation of such inadequacy is made. Whatever consent or agreement was entered into by Hall is and was a matter between Hall and Easton. The most Hall agreed to was that Easton should do the work without cost to complainant. There was no trust relation or agency between complainant and Hall. The joining of Hall would seem to be only for the purpose of using him as a witness. He is not a proper party, and his demurrer is sustained. The bill is dismissed as to him.

It is urged against the defendant executors that the relation between complainant and Easton was that of trustee and cestui que trust. Heretofore, on demurrer to the original bill, I have held that the relation was that of principal and agent, and I am still of that opinion upon this demurrer to the amended bill, and that a court of equity could not, under the facts of this case, take jurisdiction upon that ground alone.

The allegation in the bill that complainant has no other method of ascertaining the facts as to items and parties from whom purchases were made than by a bill in equity, as also its offer to do equity, are without weight, in view of the facts set up in the bill. It is manifest from the bill that there are no mutual, intricate, or complicated accounts. When the only relief to which the complainant would be entitled in equity is the same in measure and kind as that which it might obtain in a suit at law, it can have no standing in equity, unless the remedy at law is doubtful, circuitous, or complicated by a multiplicity of parties having different interests. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 6 Pick. 376-396; Pom. Eq. § 1421, and cases cited.

The only remaining ground for equitable jurisdiction is the statement that the accounts consist of many thousands of items. Is this fact sufficient to cause equity to take jurisdiction? There is no charge that the accounts or books were fraudulently kept. Nor is any reason shown why any different evidence or information could be obtained in equity from what could be obtained at law. So far as appears from the bill, the only ground for equitable jurisdiction growing out of the multiplicity of items is the difficulty in presenting so many items to a jury. Of course, the presentation of several thousand items to a jury is practically impossible, yet the remedy would be as adequate and prompt in one case as in the other. That on the one hand it would take the time of a court and jury, whereas on the other it would only take the time of a master, would not be ground for equitable jurisdiction.

Easton is dead, and there is no presumption that his executors acquired his knowledge or any knowledge of the accounts in question, or that any of that fund ever came to their possession. The law charges them with the duty of defending the estate, and there is no authority requiring them to look up information for, and supply the same to, complainant for the purpose of charging the estate. The

items of the account are all on one side, i. e., moneys said to be due from defendant's testator to complainant. From all that appears in the bill, complainant knows more of the facts than defendants do. While the bill makes a case for federal court jurisdiction, it would seem to present a case peculiarly appropriate for the state probate court.

The demurrer is sustained, and the bill dismissed for want of jurisdiction.

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In re GALT.

(District Court, N. D. Illinois, N. D. January 31, 1903.)

No. 7,236.

**1. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—CONTRACT RESERVING TITLE IN SELLER.**

Petitioner sold goods to a bankrupt prior to the bankruptcy, under a contract by which the purchaser agreed to settle all bills by notes when the goods were received, or on monthly balances, at his option. It was contemplated that the goods were to be sold by the purchaser, who was given the exclusive right to sell the same, at the place where he was in business, and there was no provision that he should account for sales made by him; all settlements being made on the notes or monthly balances, all of which were to become due at once on the death or insolvency of the purchaser. *Held*, that a further clause providing that the ownership of all the goods and their proceeds should remain in petitioner until the goods were paid for was inconsistent with the other provisions of the contract, and, if it had any effect, created a secret lien, fraudulent against creditors; that the title to the goods passed to the purchaser, and vested in his trustee in bankruptcy.

In Bankruptcy. On question certified by referee.

Sweeney & Walker, for claimant.

A. A. Wolfersperger, for trustee.

KOHLSAAT, District Judge. The Moline Plow Company files its intervening petition, asking that the trustee be directed to deliver to it certain agricultural implements; claiming title thereto under a written agreement made a part of said petition. The referee, on hearing had, denied the prayer of the petition, and found the title thereof to be in the trustee, and certified his actions in the premises up to the court.

The contract under which it is admitted the bankrupt held the goods at the date of the filing of his petition in bankruptcy provided, in substance, as follows: The plow company sells, and Galt buys, the following list of goods, to be shipped f. o. b. car, Sterling, at following prices and terms. Extras, except certain named articles, to be subject to an invariable discount of 25 per cent. from list prices. All payments to be made with express charges, or in exchange on Chicago or New York. Accounts to draw interest at 7 per cent. after due. A further discount of 1 per cent. per month to be allowed on prepayments. All bills to be settled for by note on receipt of goods, or upon monthly balances, at Galt's option. Galt to have exclusive sale of said goods for Sterling for season ending November 15, 1900. He

agrees to neither buy nor sell any other make of said goods during that time, and also agrees not to countermand "this order," or any part of it, except on payment of 20 per cent. of net purchase, as liquidated damages. Title and ownership of all implements so shipped to remain in plow company, and proceeds thereof, in case of sale, to be the property of plow company, and subject to its order, until full payment is made to satisfaction of plow company, "but nothing in this clause to release second party from making payment as above." "If the purchaser under the contract sells out, fails or becomes insolvent, or dies, all accounts or notes for goods bought under this contract, including renewal notes, in whose hands soever, shall then become due and payable whether given in payment for goods or accounts or collateral security thereto."

Under the bankruptcy act, the trustee takes title to 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. It thus becomes necessary to determine what title the bankrupt acquired to the implements sold and accepted under terms of the contract. It will be seen from an inspection of the contract above set out that the plow company sold and Galt bought the articles in question. It will further be seen that Galt was at liberty to sell at any price, at any time, and to anybody he might choose, and pocket the money. He was to settle all bills by notes on receipt of goods, or on monthly balances, at his option, and pay interest at 7 per cent. on all accounts after maturity. He had the exclusive right to sell these goods in Sterling, and bound himself not to buy any other make of said goods while exercising said right. Galt was not required to pay for each article as sold, but to meet his notes and monthly balances when matured. So far, it was a plain transaction of selling and buying. Then the contract goes on to provide a qualification of the general character of the dealings between the parties. The title and ownership of all the articles so bought, and the proceeds thereof, were to remain in, and be the property of, the plow company, until paid for to the satisfaction of the plow company; and all accounts and notes for goods bought under said contract, including renewals, in whose hands soever, should become due and payable in case of death, insolvency, etc., of Galt. Whatever accounts and notes were outstanding at the time of the filing of the petition herein, due from Galt to the plow company, therefore, became then due and payable.

The main question here presented is, what was and is the effect of said last-named clause upon the previous terms of the contract, as against the title of the trustee? Ordinarily, as against all persons except judgment creditors and innocent purchasers, under the Illinois decisions, a contract of sale, reserving title in seller until notes given for purchase money are paid, is valid between the parties, and is binding upon the assignee of an insolvent debtor. *Hooven, Owens & Rent-schler Co. v. Burdette*, 153 Ill. 672, 39 N. E. 1107, and cases cited. Whether a trustee in bankruptcy takes any better title than an assignee would take, is not definitely settled. The various Circuit Courts of Appeals and District Courts have disagreed as to the exact extent of a trustee's title. What the petition claims is that there was

a conditional sale. There is an undoubted conflict between the different clauses of the agreement. While the title to the articles sold and their proceeds are said to remain in the seller, the seller is to look entirely to the notes and monthly balances for his pay. There is nothing shown whereby it can be ascertained what articles have been paid for. The payments are made upon the notes and balances, and not for any particular article. Nor is there any limitation upon the right and power of Galt to sell without the knowledge or consent of the plow company. Can the mere dictum as to title be held to obtain, as against a trustee in bankruptcy, when the contract, taken as a whole, discloses a sale? Does the clause, at best, show anything more than an unrecorded lien? These goods were sold to Galt for the purpose of resale, presumably at a profit. So far as the public was concerned, Galt was the absolute owner of the goods, and the clause was a fraud upon creditors, and is merely colorable. In *re Garcewich* (C. C. A.) 115 Fed. 87. There is no provision in the contract for any method of recovering them or the proceeds. The seller reserved no right to an accounting or report of sales. The reserving clause has all the earmarks and effects of an extraneous provision, foreign to the general effect of the contract. If it has any effect, it can only be as a secret lien. This is not valid as against the trustee.

The referee was right in his finding, and the same is confirmed.

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PRICE v. MORSE IRONWORKS & DRY DOCK CO.

(District Court, E. D. New York. December 6, 1902.)

1. SHIPPING—DEMURRAGE.

That no provision was made in relation to demurrage in a contract of affreightment does not show that no demurrage was to be charged, but the rights of the parties are to be determined by the general rule as to reasonable dispatch.

In Admiralty. Action to recover freight and demurrage.

Hyland & Zabriskie, for libellant.

Blandy, Mooney & Shipman, for respondent.

THOMAS, District Judge. This action is to recover freight earned in the delivery of coal to the respondent by the canal boats *Comfort* and *Elder*, amounting to \$69.31, and demurrage for detention of such vessels, to wit, the *Comfort* from September 26, 1901, until November 30, 1901 (in all, 66 days), and the *Elder* from October 3, 1901, to December 12, 1901 (in all, 71 days); in each instance 6 days having been allowed for discharge. The answer is that the parties agreed that the coal should be delivered at the respondent's place of business, and that there should be no charge for demurrage. This contention

¶ 1. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

is supported by the evidence of Mr. Moulton, the respondent's agent who had to do with the purchase of the coal, and by the evidence of Mr. Morse, the respondent's president. On the other hand, the libelant states that by the terms of the contract the coal was to be delivered on board at Weehawken, and that there was no agreement waiving demurrage. It further appears that the coal delivered on the *Comfort* was sold at the rate of \$4.50 per ton, and on the *Elder* at \$4.90 a ton, and that in each case the coal was bought by the libelant for the purpose of the delivery at 10 cents less per ton than the contract price, and that his profit thereon was \$26.90. It is hardly conceivable that the libelant, for the purpose of selling coal at a profit of \$26.90, undertook to pay freight which at current rates amounted to \$69.31, and to allow unlimited detention of the canal boats, the usual demurrage price of which would be \$3 per day each, and which he had under charter at the rate of \$2.50 per day each. It is concluded that the libelant is entitled to recover the freight, \$69.31, and certain demurrage. However, it is considered that the libelant must have assured respondent's agent that strict demurrage would not be charged. The failure to fill the blanks relating to the demurrage ordinarily leaves the rights of the parties with respect to demurrage to be determined by the general rule as to reasonable dispatch. *Donnell v. Manufacturing Co. (C. C. A.) 118 Fed. 10.* Such condition of the bills of lading does not show that no demurrage was to be charged. Although the matter of demurrage must have been the subject of conversation, yet it is considered that the detention of the boats, severally, for 66 days and 71 days, was not within the contemplation of the parties. There is evidence that one of the boats was detained after November 15th, and that there was conversation respecting the same, and it is concluded that the libelant acquiesced in such detention. Therefore demurrage is allowed upon the *Comfort* for 66 days, and on the *Elder* for 45 days.

A decree will be entered accordingly.

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UNITED STATES, to Use of BRADY et al., v. O'BRIEN et al.

(Circuit Court, D. Massachusetts. January 29, 1903.)

No. 1,264.

**1. SUMMONS—TIME OF ENTRY—POWER TO EXTEND BEYOND TERM.**

The general law and practice in Massachusetts prior to the enactment of Rev. Laws Mass. c. 173, § 11, did not so definitely limit the authority of the court and parties as to forbid an extension of the time for entry of a writ beyond the term at which it was returnable, where the extension was made by agreement of the parties, and with the consent of the court.

**2. JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT.**

A suit on the bond of a contractor for public work, brought in the name of the United States for the use and benefit of others, as provided by Act Aug. 13, 1894 (28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]), even conceding it to be a suit by the United States for the purpose of conferring jurisdiction on a federal court under the judiciary act of 1887—

88 [U. S. Comp. St. 1901, p. 507], regardless of the citizenship of the parties, cannot be maintained in such court on that ground in any district other than the one of which the defendant is an inhabitant.

At Law. On motion to dismiss for want of jurisdiction.

Butler, Cox & Murchie, for plaintiffs.

Carver & Blodgett, for defendants.

LOWELL, District Judge. This was a suit brought against O'Brien and another, government contractors, and against the surety on their bond, the City Trust Company, a Pennsylvania corporation, by a voluntary association composed of citizens of Massachusetts, Pennsylvania, and other states. The suit was brought under chapter 280 of the Acts of 1894 (28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]). The writ was returnable October 15, 1900. As negotiations were pending between the plaintiffs and the individual defendants, counsel for the trust company at some time before the return day indorsed upon the writ, "The within writ may be entered late." These negotiations continued throughout the following term. Some payments were made on account, and about May 1, 1901, there was conversation between counsel for the plaintiff and counsel for the trust company, in which the former stated that he was trying to effect a settlement, and that, if he did not succeed, he must enter the writ. To this statement the counsel for the trust company made no objection. Counsel on both sides acted in entire good faith. On the one hand, counsel for the trust company supposed that his agreement for a late entry was limited to the term which ended May 14, 1901. On the other hand, counsel for the plaintiff supposed that the authority to enter the writ did not expire with the term. Standing by itself, the indorsement takes more naturally the former construction; but, after hearing evidence, I find that, through an honest misunderstanding, counsel for the plaintiffs was led to believe by counsel for the defendant that the latter construction was the true one, and delayed entry in consequence. If a binding agreement that an entry may be made after the expiration of the term is a possibility, such an agreement was here entered into. Defendant's counsel contends that no effective agreement of this kind can be made, and that neither by agreement, nor by order of court, nor by both together, can the time for entering a writ be extended beyond the term in which it is returnable. Rev. St. § 915 [U. S. Comp. St. 1901, p. 684], provides that the federal courts, in respect of practice, pleadings, and forms and modes of proceedings in civil causes, shall conform to the practice, etc., existing at the time in like cases in the state courts. At the time the indorsement was made upon this writ, Rev. Laws Mass. c. 173, § 11, was not in force. This section apparently embodies the interpretation put upon the general law and previous statutes by *Dudley v. Keith*, 153 Mass. 104, 26 N. E. 442. That case decided that it was beyond the power of the court, against defendant's objection, to extend the time of entry further than the last day of the term. Whether this could or could not be

done by agreement of parties was not decided, and the only provision then existing which can be supposed to affect an entry by agreement is Pub. St. c. 167, § 64. Upon the whole, I am inclined to think that the general law and course of proceeding in Massachusetts, which were discussed by Chief Justice Field in *Dudley v. Keith*, do not so definitely limit the authority of the parties and the court combined to extend the time of entry as to forbid the entry of the writ in this case after the term had expired.

The defendant has further filed a motion to dismiss for want of jurisdiction. Plaintiffs concede that there is no jurisdiction here upon the ground of diversity of citizenship, and rest their contention wholly upon the jurisdiction of this court over suits at law brought by the United States. In *U. S. v. Henderlong*, 102 Fed. 2, the circuit court in Indiana decided that a suit under the act of 1894 was not a suit brought by the United States. In *American Surety Co. v. Lawrenceville Cement Co.*, 96 Fed. 25, the question was stated, but not answered, by the circuit court in Maine. The practice in this district and in Maine appears to be opposed to the decision in *U. S. v. Henderlong*. Even if it be true, however, that this is a suit brought by the United States, within the meaning of the judiciary act of 1887 [U. S. Comp. St. 1901, p. 507], yet it cannot be maintained in this district, because the defendant is not an inhabitant thereof. In *Donnelly v. Cordage Co.*, 66 Fed. 613, and in *Manufacturing Co. v. Watson*, 74 Fed. 418, it was decided by the circuit court for this district that, under the act of 1887, not even a patent suit could be brought, except in a district of which the defendant is an inhabitant. And in those courts which hold that, under the act of 1887, a suit for infringement of a patent can be maintained in any district where the defendant is found, it has been admitted that the proviso of the first section of the act of 1887 applies to suits brought by the United States. *Southern Pac. Co. v. Earl*, 27 C. C. A. 185, 82 Fed. 690, 694. See *U. S. v. Sayward*, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508.

Action to be dismissed for want of jurisdiction.



## THE EAGLE POINT.

(Circuit Court of Appeals, Third Circuit. February 3, 1903.)

No. 22.

## 1. COLLISION—STEAMERS CROSSING—EXCESSIVE SPEED IN FOG.

In a suit for collision in the night between the Atlantic steamships Biela and Eagle Point, 150 miles east of Sandy Hook, while on crossing courses, a finding that there was a fog at the time and place of collision so dense that the two vessels could not see each other until within 250 yards, and that the Biela was therefore in fault for maintaining full speed and failing to give fog signals, *held* supported by the evidence, but a finding that the Eagle Point was not in fault for excessive speed *held* erroneous.

## 2. SAME—VIOLATION OF RULE AS TO SPEED.

Under article 16 of the international navigation rules [U. S. Comp. St. 1901, p. 2868], which provides that "every vessel shall in a fog, mist, falling snow or rain storms go at a moderate speed, having careful regard to the existing circumstances and conditions," a speed of eight miles an hour by a steamship proceeding in the night and in a dense fog, 150 miles east of Sandy Hook, in the customary track of transatlantic steamers, is not a moderate speed; nor can such speed be justified on the expressed opinion of her officers that she could not be properly controlled at a lower rate of speed. The requirement of the rule is absolute, and liability for a collision caused or contributed to by its violation cannot be avoided because a vessel is so constructed or is running so light that she cannot be navigated at such a slow speed as will comply with such requirement.

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

For opinion below, see 114 Fed. 971.

Charles C. Burlingham, for appellant.

H. G. Ward, for interveners.

Wilhemus Mynderse, for appellee.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was a suit in admiralty brought by the Liverpool, Brazil & River Plate Steam Navigation Company, Limited, as owner of the British steamship Biela, and as carrier of her cargo and trustee for her passengers, master, officers, and crew, against the British steamship Eagle Point, to recover damages sustained by reason of a collision between these vessels, which occurred about 1 o'clock on the morning of October 1, 1900, on the Atlantic Ocean, about 150 miles east of Sandy Hook, resulting in the total loss of the Biela and her cargo. The Eagle Point having been attached, the Norfolk & North American Steam Shipping Company, Limited, as owner and claimant, intervened and defended the suit. The district court rendered a decree dismissing the libel, from which decree the libellant appealed. Since the appeal was taken, several of the cargo owners intervened as colibellants and appellants. The Biela was bound on a voyage from New York to Liverpool, laden with a general cargo.

¶ 2. Collision rules as to speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.

She was of 2,182 tons gross, 1,344 tons net, 316 feet in length, nearly 35 feet in breadth, and about 29 feet deep. The Eagle Point was bound on a voyage from London to Philadelphia, carrying only 300 tons of cargo. She is of 5,221 tons gross, 3,307 tons net, in length 410 feet, in breadth 51 feet, and in depth 31 feet. Before the collision the vessels were on crossing courses, the course of the Biela being E. by  $\frac{1}{2}$  S. magnetic, or E.  $\frac{3}{4}$  S. true, and the course of the Eagle Point being S.  $75^{\circ}$  W. magnetic, or S.  $65^{\circ}$  true. These courses were maintained by the steamers until immediately before the collision. The Biela was making about 9 knots an hour,—her full speed. The Eagle Point (whose full speed is nearly 12 knots an hour) was proceeding on this occasion at a speed of not less than 8 knots an hour. The bow of the Eagle Point struck the port side of the Biela at or near her main hatch, cutting into her so far that the Biela was in a sinking condition when the Eagle Point backed out. The Biela sank in less than half an hour. Her officers, crew, and passengers escaped in her boats, and were taken on board the Eagle Point. The bow of the Eagle Point was badly damaged, but she was able to proceed on her voyage, reaching Philadelphia in due course.

The primary question in the case is whether at the time and place of collision the weather was such that lights could be seen at a considerable distance, as alleged by the libellant, or was densely foggy, as alleged by the respondent. The district judge stated the question arising upon the conflicting allegations of the parties thus: "Whether there was a fog at the time and place of collision so dense that the vessels could not see each other farther away than, say, 250 yards, or whether the night, although dark and overcast, was nevertheless clear enough to permit the lights of each vessel to be seen from the other at a distance of several miles." The district court found that at the time and place of collision there was a dense fog through which the vessels were running, and that the Biela "was steaming at full speed through the fog without giving the signals required by the international rules," and hence was in fault. In respect to the Eagle Point, the finding of the court was as follows:

"In the present case the undisputed evidence proves that the Eagle Point was very light, carrying only about 300 tons of cargo, and that such a ship carrying so small a load could not be properly controlled at a lower rate of speed than the rate at which she was proceeding. Positive testimony to this effect was given on behalf of the Eagle Point, and no witness was offered in denial. This is in effect an admission that the testimony on this point is true, and I find, therefore, that the speed at which the Eagle Point was steaming was a moderate speed, not greater than was proper under the surrounding circumstances. I see no ground upon which it can be held that she was guilty of negligence that contributed to the collision."

The conclusion reached by the district court, that a dense fog prevailed before and at the time when the vessels came together, was fully warranted, we think, by the proofs. Upon the question of the condition of the weather, the clear weight of evidence, both direct and circumstantial, it seems to us, is with the Eagle Point. We concur in the finding that the two steamers were running in a dense fog. Now, undoubtedly, the Biela was proceeding at the rate of nine knots an hour—her full speed—without giving the required fog signals. She

was then in fault, and that fault must be held to have contributed to the collision. Thus far we agree with the findings and judgment of the district court.

But was the court right in exculpating the Eagle Point? She, indeed, was giving proper fog signals, and it may be conceded that, after the lights of the Biela were perceived by those charged with the navigation of the Eagle Point, they did everything possible in the emergency to avoid the collision. The question, however, whether the Eagle Point was going at a moderate speed, with due regard to the existing circumstances and conditions, remains to be considered. The answer of the owner and claimant of the Eagle Point contains the following statements:

"At about 1:10 o'clock deck time, and 12:45 o'clock corrected time, in the morning of October 1, 1900, while the Eagle Point was thus proceeding upon her course, the white masthead light of a vessel which subsequently proved to be the Biela was dimly discerned through the fog, bearing about a point on the starboard bow of the Eagle Point. It was seen by the lookout, and by the officer in charge of the bridge of the Eagle Point, as soon as it could be seen from their respective stations, considering the character of the light and the density of the fog, and it was duly reported."

"At the time of discovering the masthead light of the Biela, the officer in charge of the bridge of the Eagle Point was in the act of blowing a regular fog signal. This signal he sounded, and immediately thereupon the red side light of the Biela came into his view, which was as soon as the light could be seen by him, considering the character of the light and the density of the fog. The distance between the two vessels cannot be accurately stated; but it is believed that the distance at this time did not exceed two hundred and fifty yards. The fog existing at the time was of such density as to prevent the white light of the Biela from being seen at a greater distance than about three hundred yards."

The foregoing statements and the following quotations from the testimony of the lookout (Moore) and the second officer (Linklater), who was in charge of the bridge of the Eagle Point,—witnesses in her behalf,—serve to illustrate the then existing circumstances and conditions as alleged by the respondent. The outlook, who was on duty from midnight until 2 o'clock, testified thus:

"Q. What kind of weather was it when you went on duty at midnight? A. Very thick fog. Q. What was the first you knew about any approaching vessel? A. The first I knew was a white light I saw first. Q. Whereaway was that light? A. I should think about 150 yards from us."

The second officer testified thus:

"Q. When you saw the loom of these two lights—the white light and the red light—could you form any estimate as to whether they were far away or near you? A. I thought it was pretty close; about a length and a half away. Q. That was the judgment you formed at the time? A. Yes. Until I saw the red light I didn't know how far she was away, or what the light was, or anything at all about it. \* \* \* Q. I suppose you have had some experience in fog before this voyage? A. Yes, I have had a good deal. Q. You call it a dense fog, do you? A. I call it a dense fog; yes. Q. How far could you see a bright masthead light that night, do you think? A. Now, I should think I ought to see a light two of our ship's lengths. Q. No more than that? A. I shouldn't think so. Q. 800 feet? A. 800 feet; I mean judging now. Q. How are you judging now? A. I mean now; I mean that is all I could see, 800 feet. \* \* \* Q. Are you able to estimate the distance the two vessels were apart when you first saw the masthead light of the Biela? A. I think now that it was about two lengths away. Q. Eight hundred feet?"

A. Eight hundred feet; two of our ship's lengths. At the time I couldn't estimate the distance at all, but that is what I think now."

According to this testimony, the fog was so dense that a bright masthead light was not discernible at a greater distance than 800 feet, and by the admission of the answer the distance between the vessels when the second officer of the Eagle Point perceived the red light of the Biela did not exceed 750 feet. But the distance between the Eagle Point and the place of collision was still less, for both vessels were moving on the crossing courses above stated. Now, the speed of the Eagle Point was not less than 800 feet a minute. It is, therefore, not surprising that the collision was not averted, notwithstanding the wheel of the Eagle Point was promptly put hard aport and her engines reversed full speed. The truth is, the Eagle Point's rate of speed was so great that after the Biela was seen it was impossible to prevent the disaster. The Eagle Point was only 150 miles east of Sandy Hook, and was in the frequented track of commerce. It is worthy of note that the steamship Elise Marie was following the Biela, a short distance to rearward, and that, during the brief time the Eagle Point was delayed (her master stated it was "about three-quarters of an hour"), fog signals were heard off her port bow and off her starboard quarter from passing steamers. The courts on both sides of the Atlantic have recognized this locality as one where the presence of other vessels may reasonably be expected, and as calling for the greatest care in case of fog to avoid collisions. The Pennsylvania, 9 Blatch. 451, Fed. Cas. No. 10,950; Id. 19 Wall. 125, 133, 22 L. Ed. 148; Id. 23 Law T. (N. S.) 55, 57.

The case of *The Pennsylvania*, supra, is instructive. There a collision occurred in a thick fog between a sailing bark and a large steamer, about 200 miles east of Sandy Hook. The bark was moving slowly, ringing a bell, but not using a fog horn, as required by the navigation rules. The steamer was going at the rate of seven knots an hour. The privy council gave judgment against the steamer as alone responsible for the collision. 23 Law T. (N. S.) 55, 57. Lord Romilly, master of the rolls, in delivering the opinion of the privy council, after stating that the rate of speed "must always have reference to the peculiar circumstances of the case," said:

"But their lordships are of opinion that in a thick fog in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook, where frequently there must be a great number of vessels congregated, seven knots an hour is too great a speed for a steamer to proceed at. It was argued that if their lordships held that seven knots an hour was too great a speed in which to proceed in a thick fog in that position, it would paralyze all the efforts of mercantile transactions, and that neither passengers nor goods could be properly conveyed across the Atlantic with a due regard to business and trade. Their lordships do not concur in that argument, and are of opinion that the lives of passengers and the safety of goods must be protected in the first place. Their lordships are of opinion that, even if these fogs should last longer than they are said to do, still the steamers must abate their speed, and if they do not they must take all the consequences of a collision."

The supreme court of the United States, in considering the same collision (19 Wall. 125, 133, 134, 22 L. Ed. 148), while holding the bark culpable in not giving the required fog signals, and therefore

liable for one-half the damages, condemned the steamer for running in the fog at the rate of seven knots an hour. And Mr. Justice Strong, speaking for the court, and referring to the steamer, said:

"And she ought to have apprehended danger of meeting or overtaking vessels in her path. She was only two hundred miles from Sandy Hook, in the track of outward and inward bound vessels, and where their presence might reasonably have been expected. It was, therefore, her duty to exercise the utmost caution. Our rules of navigation, as well as the British rules, require every steamship, when in a fog, to 'go at a moderate speed.' What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased."

And answering the argument that the steamer could not be controlled or navigated safely at a lower rate of speed than seven knots an hour, the court said:

"And we do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true, her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower,—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to."

The international regulations for preventing collisions at sea, which went into operation on July 1, 1897, and apply to this case, provide as follows:

"Art. 16. Every vessel shall, in a fog, mist, falling snow or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel, hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." U. S. Comp. St. 1901, p. 2868.

This article does not relax the previous regulation a whit. The words "having careful regard to the existing circumstances and conditions," following the words "at a moderate speed," merely express what before was implied, as our above quotations from the opinions of the courts plainly show.

This article 16 was considered by the English court of appeal in the case of *The Campania* [1901] Prob. 289, on appeal from the judgment of Gorell Barnes, J., pronouncing the *Campania* alone to blame for a collision with the barque *Embleton*. The *Campania*, a large twin-screw mail and passenger steam vessel, was proceeding up the St. George's Channel in a dense fog at 9 or 10 knots an hour,—her full speed being 21 knots,—when she sighted the barque *Embleton* about 150 feet ahead, and, in spite of efforts to avoid her, struck her amidships, cutting her in two. It was contended on behalf of the *Campania*, and evidence was given to show, that her speed on this

occasion was moderate in the existing circumstances and conditions, as that speed was the lowest at which she could readily be maneuvered so as to avoid other vessels, and that, unless she was kept steaming continuously at about that speed, she could not be navigated with safety to herself, as there would be danger from uncertainty both in respect of her course and position. The decision of Barnes, J., against the *Campania* was put wholly upon the ground that the steamship was guilty of a breach of article 16, in that a speed of nine knots an hour in such a fog as prevailed was greatly excessive; and the contention that, because the steamship could not be safely navigated at a less speed than nine knots an hour, she was justified in keeping at that speed in a dense fog, was rejected. Barnes, J., cited with approval the remarks of Lord Hannen in the case of *The Irrawaddy*, and the remarks of Sir Charles Butts in the case of *The Resolution*. Lord Hannen, in the course of his judgment in the case of *The Irrawaddy*, said:

"I should add that, so far as I am able to form an opinion on this matter, it seems to me quite untenable to argue that a vessel is justified in going at the lowest rate she is constructed to go at, if that is not a moderate speed."

And Sir Charles Butts, in giving judgment in the case of *The Resolution*, said:

"I know it is said, and nearly always said in these cases, that large steamers cannot go below a certain rate, because, apart from the question of steerage-way, the revolutions would be so slow that the engines would stop on the center. But if a vessel cannot reduce her speed sufficiently with the continuous action of her engines, and therefore cannot go at what would be a reasonable speed in a fog without occasionally stopping her engines, it is her duty occasionally to stop them."

The court of appeals affirmed the judgment of Barnes, J., expressing concurrence in the reasons stated by him for the decision. The rule of general application which the case of *The Campana* lays down (as correctly stated in the syllabus), is this: that, if a steam vessel in a fog cannot be continuously navigated at such a slow speed as will comply with the requirement of article 16, she must, in the absence of exceptional dangers of navigation, such as may arise from narrow waters or current, be stopped from time to time to take off her way.

In the still more recent case of the steamship *Kincora* against the steamship *Oceanic*, decided by the English court of appeal on June 18, 1902, which arose out of a collision in the Irish Channel in a dense fog, resulting in the sinking of the *Kincora*, it was held that the *Oceanic's* speed of  $6\frac{1}{2}$  knots an hour was not a moderate speed within the meaning of article 16.

Both the *Biela* and the *Eagle Point* were British vessels, and were subject to article 16 of the international regulations, which apply everywhere at sea to British vessels and to the vessels of all the principal maritime nations. The *Campania*, *supra*.

The testimony upon which the district court found that the *Eagle Point* could not be "properly controlled" at a less rate of speed than that at which she was going came from her master, chief officer, and third officer, who naturally sought to find excuse for her great speed in a dense fog. The statements of these witnesses upon this subject were mere unsupported opinions. They were not controlling, al-

though not directly contradicted. Little weight is to be given to such opinions. Besides, the master, in testifying, was speaking of the speed necessary "to keep the Eagle Point under the best control," and the chief officer of a speed necessary "to have her properly under control, to get out of the way of anything in a hurry." Evidently the witnesses had in their minds quick steerageway and the fullest control. But in whatever way they are to be understood, their testimony furnishes no justification for the Eagle Point's steaming continuously through the fog at the rate of eight knots an hour. *The Pennsylvania*, 19 Wall. 134, 22 L. Ed. 148; *The Campania*, supra. To lend a ready ear to such an excuse for high speed in a fog as the Eagle Point sets up would be to overlook the imperative language of article 16 of the international regulations, and tend to defeat its beneficial purpose.

It is our judgment that the Eagle Point, in the then existing circumstances and conditions, was going at more than a moderate speed, and was guilty of a breach of article 16 of the international regulations, and that this was a contributory cause of the collision. In holding the Eagle Point guilty of negligence, we follow the decision of the supreme court of the United States as well as the decisions of the English courts.

The answer, as a distinct defense, avers that, as both steamers were British vessels, the extent of the liability of the Eagle Point and her owner, if any liability exists, is to be ascertained in accordance with the British statutes and the maritime law, as construed and administered by the courts of Great Britain, and the damages assessed accordingly. The question thus raised was not considered at all by the district court. The argument in this court, in the main, related to the other questions in the case. We think, therefore, that we should not pass upon this question at this time, but that it should be referred to the district court for determination in the first instance.

The decree of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

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### THE ACILIA.

#### THE CRATHORNE.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 470.

#### 1. COLLISION—INLAND RULES—NAVIGATION OF NARROW CHANNELS.

Article 25 of the inland navigation rules established by Act June 7, 1897 [U. S. Comp. St. 1901, p. 2883], requiring steam vessels in narrow channels, when it is safe and practicable, to keep to that side of the fairway or channel which is on their starboard side, is applicable to the navigation of a dredged channel in the Chesapeake Bay, 600 feet wide, and is mandatory, superseding all prior rules and local customs.

#### 2. SAME—STEAMSHIPS MEETING—VIOLATION OF RULES.

The ocean steamships Crathorne and Acilia came into collision in the Patapsco river, on the afternoon of a clear day, at the point where Ft.

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¶ 2. Signals of meeting vessels, see note to *Union S. S. Co. v. Erie & W. Transp. Co.*, 30 C. O. A. 630.

McHenry and Brewerton channels meet; the channel being at that point about 600 feet wide. The Crathorne was passing down from Baltimore at a speed of 6 miles, and the Acilia, a large ship, was coming up at a speed of 10 knots or more. Each was in charge of a licensed pilot. When half a mile apart the pilot of the Acilia ordered the wheel starboarded and two blasts of the whistle given; his purpose being to pass to the port side of the channel, in accordance with a claimed local custom, but in violation of the inland navigation rules. Owing to a disarrangement of the whistle, the valve would not close, and but one blast was sounded, which continued until after the collision. The pilot of the Crathorne, taking it at first as a signal to pass port and port, in accordance with the rule, answered with the same signal and ported his helm. On seeing that the Acilia was taking a course across his bows he reversed. The Acilia also reversed shortly prior to the collision, but made no change of course, and was making greater speed than the Crathorne at the time of the collision. She did not hear the Crathorne's signal, owing to the sound of her own whistle. *Held*, that the Acilia was in fault for going at full speed under the circumstances and in such place, but chiefly because of the violation of the rules by her pilot, but for which the collision would not have occurred, and that the Crathorne was not chargeable with contributory fault for not sounding danger signals, which would have conveyed no information not already in possession of the Acilia, nor because she did not sooner reverse, her pilot being justified in supposing, up to the time she did reverse, under the circumstances, and in the absence of a contrary signal, that the Acilia would obey the rules, and the continued whistling of the Acilia, when she was manifestly not in distress, also, being confusing.

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

J. Wilson Leakin and Harrington Putnam, for appellants.

Wilhelmus Mynderse (Daniel H. Hayne on the brief), for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PER CURIAM. The opinion of the learned judge below states fully and clearly the facts and law in this case, and, finding no error therein, it is adopted as the opinion of this court. It is as follows: .

The case stated in the pleadings on behalf of the Crathorne is: That she is a steamship of 1,695 net tonnage, and on the afternoon of January 16, 1901, she left Baltimore in charge of a licensed pilot, Howard Ensor, bound for Copenhagen, laden with cargo, drawing between 21 and 22 feet, and proceeded down the Ft. McHenry channel. That the weather was clear and vessels could be seen the usual distances. When in the vicinity of Ft. Carroll the lookout reported a steam vessel on the port bow, which proved to be the Acilia, coming up the Brewerton channel to Baltimore. That, as the vessels approached, the Acilia gave a single blast of her whistle, to which the Crathorne responded with a single blast and ported. When the vessels had approached within a short distance of each other, it was observed that the Acilia, contrary to the signal, was attempting to cross the Crathorne's bow. When this was discovered, and it was seen that there was risk of collision, the Crathorne's engines were at once stopped and reversed, full speed astern; the Crathorne's previous speed having been moderate. The Acilia, however, crossed in front of the Crathorne, and they collided, with the result, owing to the great size and speed of the Acilia, that the Crathorne's bow was greatly damaged, and she had to return to Baltimore; the damage to ship and cargo amounting, as the libellant now claims, to \$50,000.



The case stated in the pleadings on behalf of the *Acilia* is that she is a new steamship, built in November, 1900, 452 feet long, 52 feet beam, 5,697 gross tonnage, drawing at the time of collision 19 feet aft and 13 feet 6 inches forward; that on January 16, 1901, between 2 and 3 o'clock in the afternoon, she entered the Brewerton channel and was proceeding to Baltimore in charge of a licensed pilot, Warren Garrison; that she was equipped with an electric automatic steam whistle of approved kind, which had always worked satisfactorily and had been used several times that day; that while proceeding up the Brewerton channel, when about three-quarters of a mile from the turn into the Ft. McHenry channel, the *Crathorne* was seen coming down the Ft. McHenry channel on its easternmost side, more than a mile off; that shortly thereafter the pilot of the *Acilia*, "knowing the custom of pilots, going to and coming from the port of Baltimore, of giving the laden vessel coming down the easternmost side of the channel, where the water is deeper, and of the lighter laden vessel taking the westernmost side, where the water is shallower, proceeded to change the course of his ship by putting his helm hard astarboard, and to signal so as to head for the westernmost side of the channel"; that he directed the second officer to blow two short blasts as a signal, but the whistle of the *Acilia* continued to blow one long drawn out blast, without stop or interruption, which continued five or six minutes, and until after the collision; that, finding that the whistle could not be shut off, the pilot of the *Acilia* put her engines full speed astern, and they were kept so for some time before the collision, so that the headway of the *Acilia* had been entirely overcome at the time of the collision; that the *Crathorne*, not observing the unusual character of the continued whistle, apparently regarded it as an ordinary passing signal for port helm, and changed her course, and kept on at full speed, and struck the *Acilia* on her starboard bow, about 27 feet aft the stem, and turned her around nearly at right angles with the channel, putting her bow outside the channel, and striking the *Acilia* a second time about amidship; that owing to the great speed of the *Crathorne*, and to the fact that her plating was old and weak, her stem was repulsed and turned to port; that the whistle of the *Acilia* could not be stopped until the steam had been shut off at the boiler after the collision; that subsequently, on being taken apart, it was discovered that two small pieces of metal had apparently been carried up by the steam and lodged on the valve seat of the whistle, so as to prevent its closing; that it is not known where the small pieces of metal came from, and no practicable care or diligence could have avoided such an accident; that the *Acilia* was navigated with great caution and skill, and complied with every rule, and the collision was wholly caused by fault on the part of those in charge of the *Crathorne*, (1) in that they assumed that the prolonged whistle of the *Acilia* was a passing signal, and so shaped her course; (2) that the sight of the escaping steam from the whistle, and the change of the heading of the *Acilia*, was not taken as a warning that it was not a passing signal; (3) in persisting in their mistake when it involved risk of collision; (4) in not regarding the prolonged whistle as a signal of distress, calling for special caution on their part; (5) for running at too great speed in the channel; (6) for failing to stop and reverse promptly; (7) in failing to starboard so as to avoid the *Acilia*; (8) in failing to sound danger signals. They claim that the damages to the *Acilia*, including demurrage, amount to \$60,000.

The navigation of these two steamships was governed by the act of Congress approved June 7, 1897 [U. S. Comp. St. 1901, p. 2875], entitled "An act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States." This act superseded all previous legislation, and all regulations adopted in pursuance of such legislation, and contains the whole law at present in force as to the Chesapeake Bay and its tributaries, except certain amendments to rule 2 and rule 4, adopted by the board of supervising inspectors and approved by the Secretary of the Treasury, January 30, and February 1, 1900, which are not material to this case. The testimony discloses that the licensed pilot in charge of the navigation of the *Acilia* was grossly in fault. He was bringing the *Acilia*, a steamship of 452 feet length, up the Brewerton chan-

nel, approaching the bend which unites the Brewerton with the Ft. McHenry channel, and was about to pass a descending steamer in the bend; a situation plainly demanding caution. Yet he continued the *Acilia* at her full ocean-going speed of not less than 10 knots, and probably more. It is true that the master of the *Acilia* states that he had, about 10 minutes before the collision, told the chief engineer to reduce steam in the boilers as they were approaching quarantine; but there is no evidence that his suggestion had been acted upon or had produced any effect. The pilot gave no order at all to the engine room to lessen speed until, when the collision was imminent, he ordered the engines reversed. Full speed in these dredged channels, when about to pass other vessels, is undeniably a fault which increases every risk of navigation. *Appleby v. The Kate Irving* (D. C.) 2 Fed. 924.

Article 25 of the inland rules, established by the above-mentioned act of June 7, 1897, is as follows: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair way or mid channel which lies on the starboard side of such vessel." This was a dredged channel of about 600 feet width. It was therefore, in the sense of the statute, a narrow channel, and it was perfectly safe and practicable to obey the rule. For some reason of his own, but with no legal excuse, the pilot of the *Acilia* determined to disobey the rule and endanger the ship, which, because of his supposed familiarity with the local rules, had been intrusted to him. He states that he supposed the *Crathorne*, being a laden vessel, would desire the northerly or easterly side of the channel, which is the side marked by buoys; but he had no right to proceed upon such a supposition without an interchange of signals. The testimony shows that there is no reason for such a violation of the rule. The channel is of the same depth on both sides, there is ample room to make the turn, and the pilot of the *Crathorne* expected nothing but that the rule would be obeyed; and, even after the whistle went wrong, there would seem to have been time enough to have brought the *Acilia* under a port helm to the northerly or easterly side of the channel, if her pilot had been willing to do so. It is not to be endured that certain of the pilots shall arbitrarily pursue a course in opposition to the law, and what makes it even more dangerous is that there is no agreement even among the pilots of the same association. *The Mary Shaw* (D. C.) 6 Fed. 918; *Occidental S. S. Co. v. Smith*, 20 C. C. A. 419, 74 Fed. 261-267. If the *Acilia* had been steered for her proper side of the channel, as directed by the law, there would have been no collision, notwithstanding her speed and the accident to her whistle. It is not true, as is stated in the libel of the owners of the *Acilia*, that she was navigated with great caution and skill, and complied with every rule; but the reverse is the fact. It is true that the officers and seamen of the *Acilia* obeyed and executed with promptness and skill the orders they received from the pilot; but they did not receive proper orders. *Belden v. Chase*, 150 U. S. 674-699, 14 Sup. Ct. 264, 37 L. Ed. 1218.

It being manifest that the *Acilia* must be held in fault, it remains to consider whether the pilot in charge of the *Crathorne* is to be held in fault for the omission to do something that he might have done to avoid the collision. The *Crathorne* was going at a moderate speed, probably not over six miles an hour. She was, when the *Acilia* signaled, a little to the southward of the center of the channel; that is to say, nearest to the side which was to her starboard. What was done on the *Crathorne* is quite fairly stated by the witness Newton, her first officer, who was the officer put in charge of the bridge to execute the pilot's directions. His testimony, reduced to narrative form, is in substance as follows: "We saw the *Acilia* two or three miles off. When she was a little below the bend, she blew her whistle. She was then two points on our port bow, showing us her starboard side. When she got to the bend we would expect that she would go around into the Ft. McHenry channel, which we were coming down, and pass us port to port. I would say she was five or six ships' lengths off when she first blew her whistle. Our pilot answered with one short blast, and said, 'Port the helm,' and the man put the wheel over, and while he was porting the pilot said, 'Hard aport.' We then observed that, con-

trary to her signal and contrary to the rule, instead of porting, the *Acilia* was going off to our starboard side of the channel, and our pilot gave the order, 'Stop, and full speed astern,' and I transmitted it by the telegraph to the engine room. We were then two ships' length from the *Acilia*." He thinks it was about a minute from first hearing the *Acilia*'s whistle to the time when they noticed the *Acilia*'s change of course as if she was under a starboard helm, and it was not until then that he thought there was something wrong with the *Acilia*. The master of the *Crathorne* states that he had left the bridge to go to the water-closet, and while there heard his ship give one short blast; that presently he felt the engines going astern, and then he came out, passed through the saloon and up the port side of the deck, and when he had arrived at the foot of the ladder leading to the bridge the collision occurred. The testimony of the pilot of the *Crathorne* is to the same effect. He says the *Crathorne* had just passed buoy 34 when he heard the first of the *Acilia*'s whistle. He says he was expecting a port whistle, because he was intending to keep the starboard side, and never had any other intention, and that he kept ahead under a port helm until he made out that the *Acilia* was starboarding and heading across his bow, and then he gave the order to stop and reverse. The pilot of the *Acilia* testifies that he was abeam of buoy No. 30, and about mid-channel, when he ordered the wheel to starboard, and told the second officer to blow two short blasts; that the wheel was put to starboard and the whistle started, and it continued to blow and could not be stopped; that when he found the whistle was out of order he gave the order full speed astern, and that the engines were going astern for three minutes before the collision; that when he gave the order to blow the signals the *Crathorne* was about three-quarters of a mile off, near buoy 34.

The vessels came together just inside the southerly and westerly edge of the channel, quite close to the black buoy which marks the apex of the bend. The bow of the *Crathorne* struck the bluff of the starboard bow of the *Acilia*, and rebounded, and struck the *Acilia* again about midships. The bow of the *Crathorne* was driven in and crushed over to port, and the plating of the *Acilia* was punctured in several places by the *Crathorne*'s anchor, as it scraped along the *Acilia*'s starboard side. The headway of the *Crathorne* was stopped by the blow, and the *Acilia* kept on, rubbing by the *Crathorne*'s bow. The Brewerton channel runs W. N. W., and the Ft. McHenry channel N. W.  $\frac{1}{2}$  N., so that they make an angle of  $2\frac{1}{2}$  points, or about 28 degrees. This is not the case of two steamships approaching by straight courses. The case is peculiar in this: that those navigating the *Crathorne*, looking across the bend of the channel, would see the starboard side of the *Acilia*, but they would know that, in order to keep in the channel when she reached the bend, she must port her helm, and her bow must come to starboard and expose to them her port side, and the fact that they continued to see her starboard side, even until she was nearly up to the black buoy at the apex of the bend, was no sure indication that she did not intend to port. It would only indicate some slowness in making the turn, or that the ship had perhaps taken a sheer which presently her port helm would overcome. As they watched her, they would every moment be expecting to see indications of the change to a port helm. The last thing they would have a right to assume would be that those in charge of the *Acilia* were persistently determined to take the wrong side of the channel. The continuing of the whistle blowing was only confusing and without certain meaning. It did not mean that the *Acilia* was going to disobey the rule, and she was not in distress, needing assistance (article 31). Under these circumstances it does not seem reasonable that the highest degree of promptness and certainty of action should be expected of those navigating the *Crathorne*. They were confronted by a perplexing situation brought about by no fault of their own. The *George L. Garlick* (D. C.) 91 Fed. 920-924; The *George S. Shultz*, 28 C. C. A. 476, 84 Fed. 508.

The fault charged against the *Crathorne* amounts, I think, to this: that when the *Acilia*'s whistle continued to blow for more than 3 or 4 seconds the pilot of the *Crathorne* should have treated it as a distress signal, or a signal which he could not understand, and should have blown danger sig-

nals, and at once have slowed his vessel, or stopped and reversed. Rule 3 provides as follows: "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and, if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient to steerageway until proper signals are given, answered, and understood, or until the vessels shall have passed each other." Now the difference, as I understood it, between what it is contended the pilot of the Crathorne should have done and what, in fact, he did do, is this: It is contended that, as soon as the Acilia's whistle continued to blow beyond the proper duration of a passing signal, the Crathorne should instantly have stopped and reversed, while what he did do was to delay giving that order until he saw that the Acilia was not directing her course up the channel, but was going off to his starboard and crossing his bow; he having, in the meantime, hard aported his helm and gone close to his starboard side of the channel.

There was no manifest danger of collision, so far as the pilot of the Crathorne could judge, until he could see that the Acilia's course was directed toward the southerly side of the channel; and this he could not determine with certainty until the Acilia had passed the point where, in order to keep in the channel, she had to port. Until in some way warned to the contrary, the pilot of the Crathorne was entitled to presume that the other pilot would act lawfully, and keep to his proper side of the channel, and that, even if by reason of some sheer of his ship he did not enter on that course as soon as he might, he would do so as soon as he could bring his vessel's head around. It cannot be said that the pilot of the Crathorne failed to understand the course or intention of the Acilia before he could make out that she was under a starboard helm, because he had a right to presume, until he received a signal of two blasts, that she was going to obey the statute and keep to her proper side of the channel. Therefore it was not a fault that he did not blow danger signals. He blew one blast, and that was not heard on the bridge of the Acilia because of the sound of her own whistle; but, even if danger whistles could have been heard, it does not seem possible that they would have afforded any information to those on the Acilia. The pilot of the Acilia says he already knew there was danger when he had starboarded his helm and found that he could not shut off the Acilia's whistle, and so could not give notice of the altered course he had entered upon.

But the omission to give danger signals, if, indeed, they ought, under the rule, to have been given, is not sufficient to charge the Crathorne with fault, as it clearly appears that the omission in no way contributed to the disaster, as the pilot of the Acilia already knew all that danger signals could have conveyed to him. *The City of Washington*, 92 U. S. 31-37, 23 L. Ed. 600. To put upon the Crathorne the responsibility for the failure of her pilot to do all that any navigator might possibly have done, if he had understood then what is understood now, after the unlooked for intention of the Acilia's pilot has been explained, and the cause of the prolonged whistle has been discovered, is, as was said by Lord Esher, Master of the Rolls, in *The Stephanotis* and *The Horton*, cited in *The Victory*, on page 428 of 168 U. S., page 157, 18 Sup. Ct., and page 519, 42 L. Ed., "requiring men to do what no man ought to be expected to do under such circumstances." All the language of Lord Esher quoted in the decision above cited seems to me quite applicable to the present case. What the pilot of the Crathorne did was to port as soon as he heard the Acilia's whistle, and to give a signal of one blast, and when the Acilia's whistle continued he hard aported, which took his vessel more and more toward his own side of the channel, and gave more room for the use of the Acilia; and when he could be sure that the Acilia was not going to follow the channel, but under a hard starboard helm was heading him off, he stopped and reversed. Suppose, when he first discovered that there was something, he could not tell what, wrong with the Acilia's whistle, he had then either stopped and reversed, or starboarded his helm, and the Acilia had then obeyed the law and ported, and a

collision ensued; would not the Acilia's proctor be justified in urging, "You should never have presumed that we were going to act unlawfully. We never gave you two blasts, and why should you infer that we did not mean to keep to our side of the channel? If you had obeyed the rule, and ported, and kept on, instead of stopping, merely because our whistle was out of order, there would have been no collision."

In *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764-768, this reasoning was applied, and a vessel held not in fault for not changing her course as soon as she saw a mistaken manœuver of the approaching vessel, as the first vessel could not know but that the approaching vessel would change and conform to the rule. In *The Delaware*, 161 U. S. 459-469, 16 Sup. Ct. 516, 521, 40 L. Ed. 771, the Supreme Court, speaking of a situation somewhat similar to that in the present case, said: "Until the last moment the tug had a right to assume that she (the Delaware) would comply with the rule." And the court held that there was too much doubt about the fault of the tug to justify an apportionment of the damages. *The Victory* and *The Plymothian*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, was a case of collision between two steamships in a narrow channel, in which the *Victory* was held in fault for being on the wrong side of the channel; and her fault being obvious and inexcusable, it was held (page 423, 168 U. S., page 155, 18 Sup. Ct., and page 519, 42 L. Ed.) that "evidence to establish fault on the part of the *Plymothian* should be clear and convincing in order to make a case for apportionment," and that any doubts regarding her management were to be resolved in her favor. The Supreme Court held (page 424, 168 U. S., page 156, 18 Sup. Ct., and page 519, 42 L. Ed.) that the *Plymothian* was not bound to stop and reverse earlier, as she had a right to presume that the *Victory* would act lawfully, and would keep to her own side, and, if temporarily crowded out of her course, would return to it as soon as possible. In the recent case of *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, the Supreme Court again declared that exceptions to general rules of navigation are to be admitted with reluctance, and only when adherence to the rule must almost necessarily result in collision. They held that the *Albert Dumois* was primarily in fault for trying to pass the *Argo* starboard to starboard in disregard of the rule. The *Argo* was going down the Mississippi river below New Orleans at the unusual speed of 20 miles an hour with the added movement of the current. The proof established that she disregarded two signals of two blasts each from the *Albert Dumois*, which was proceeding up the river slowly against the current, and which were given in reply to her own signal of one blast; and the court held that she was in fault in failing to stop and reverse, when it was plain, from the *Dumois* shutting in her red light and exhibiting her green, and from her signals, that she was starboarding. The court found that the *Dumois* must have starboarded and shown her green light some time before the *Argo* ported, and that the *Dumois* must have run a quarter of a mile across the river, showing her green light, to reach the point of collision. Even with these strong circumstances showing fault on the part of the *Argo* in not regarding the rule with regard to cross signals, and not acting promptly in the face of a manifestly wrong manœuver by the *Dumois*, two of the justices dissented, such is the reluctance to condemn the pilot who has used his best judgment in the face of a danger brought about by the violation of a plain rule of navigation by the other vessel.

There is some conflict in the testimony in the present case as to the distance apart of the two vessels when the signals were given and when the engines of each were reversed. The witnesses from the *Crathorne* estimate the distance at the beginning of the whistle at 5 or 6 ship's lengths apart. The witnesses from the *Acilia* place the vessels, the one at near buoy 30, and the other at near buoy 34, when the *Acilia* began to blow her whistle, and this would be a distance of about three-quarters of a mile. I think probably both are somewhat mistaken. The *Acilia* was probably, as her witnesses state, near buoy 30 when she signaled; but the *Crathorne* was probably somewhat further down the channel, and nearer to buoy 32, as her own witnesses testify. But I am satisfied they were not less than half a

mile from each other when the *Acilia* began to blow. Their combined speed was over 15 miles an hour, so that, as long as that speed continued, they would require less than two minutes to come together, starting from the distance of a half a mile apart. The evidence establishes that the speed of the *Acilia* was greater than that of the *Crathorne*, both before and at the time of the collision. The character of the damage tends to confirm this. The bow of the *Crathorne*, although she was heavily laden with cargo and drew over 21 feet, was smashed in bodily, and her headway was stopped by the blow, while the *Acilia* was not cut into, except by the *Crathorne's* anchor as it slipped along the *Acilia's* starboard side. If the *Crathorne's* speed had been greater, it would have resulted, I am inclined to think, in her bow penetrating into the *Acilia's* hull. The signal of one whistle given by the *Crathorne* was not heard on the bridge of the *Acilia* because of the continuous sounding of their own whistle; but men on other vessels in the neighborhood heard it, and possibly it may have been heard on the bow of the *Acilia* by the lookout, but he was not examined.

I hold that the *Acilia* is solely responsible for the collision. I cannot pronounce this decree without adding some observations with regard to some of the licensed pilots of the Chesapeake Bay. If I am right in my decision of this case, the owners of the German steamship *Acilia* have suffered a loss, which it is said may amount to \$100,000, by the inexcusable violation of a rule of navigation by one of our own pilots, employed because he is supposed to know the local rules, and whose services they were compelled to accept. Notwithstanding the accident to the steamship's whistle, this loss could not have happened, in broad daylight and with all natural conditions favorable for safety, if the pilot of the *Acilia* had not willfully disobeyed the rule prescribed by act of Congress for navigating narrow channels. I have been for a long time disturbed by observing how little attention is paid by many of these members of the Pilot Association to the regulations prescribed by Congress, and by the United States supervising inspectors under authority of Congress, for preventing collisions. They seem often to be arbitrary and opinionated in their notions of navigation, and indifferent to the fact that it is the owners of these large and valuable steamships, and not themselves, who have to pay for their neglects. They receive a compensation in excess of that paid to highly intelligent men of ability who are masters of steamers, and it is but fair to expect of them an equal degree of intelligence and character, and yet the truth is that admiralty lawyers often feel great concern at being obliged to put some of these pilots on the witness stand. They frequently give such an unintelligent, obviously incorrect, and biased explanation of the cause of their collisions, and the way the ships came together, and of their own maneuvers, that they put in jeopardy even a good case. I am not infrequently obliged, in order to get at the real facts, to refuse to accept what they testify to. It has more than once happened that, when testifying, the witness has been noticeably affected by drink, thus exhibiting a lamentable lack of any sense of responsibility for their conduct as pilots. I do not wish to be considered as speaking of all, for it is probable that it is only those who have got ships into collision that I have seen in court, and I do not doubt that there are many who are justly entitled to high reputation; but, speaking of some of those I have heard testify, I feel it my duty, in a matter of such great interest to the commerce of the port, to say that these men do not exhibit the knowledge of the rules of navigation, the education, the intelligence, and the character that is fairly to be expected of men who occupy the position which special legislation has given to these pilots. In my judgment there should be a more rigid supervision of the members of this body, with a view to requiring of its members character, intelligence, temperance, and obedience to the rules of navigation, and of punishing derelictions by suspension and dismissal.

The decree of the District Court is affirmed.

CAMERON MILL & ELEVATOR CO. v. CHAS. F. ORTHWEIN'S SONS.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1903.)

No. 1,162.

1. CONTRACTS—ISSUE AS TO CONSTRUCTION—ADMISSION OF PAROL EVIDENCE.

In an action on a contract embodied in writings, where there is a controversy as to whether certain words used are ambiguous and unintelligible, such construction is a matter to be determined by the court as one of law, and, if it determines that the words are not ambiguous, parol evidence is not admissible to show the understanding of either party as to their meaning, nor to vary or contradict them, although the court may, on the issue as to ambiguity, hear parol evidence to throw light upon the collateral facts and circumstances; but when the court admits testimony of a contradictory character as to the meaning of the words, in view of the circumstances under which they were used, the question becomes one for the jury, and the burden rests upon the plaintiff to establish his contention as to their meaning by a preponderance of evidence.

2. SAME—DELIVERY UNDER CONTRACT OF SALE—QUESTION FOR JURY.

Plaintiffs contracted with defendant verbally, at Ft. Worth, Tex., for the purchase of a quantity of wheat. Each party wrote a letter to the other, confirmatory of the oral contract, and each stating the price and quantity, and that the wheat was to be "delivered Galveston." Plaintiff's letter stated, in addition, that the purchase was by Galveston weight and grades, and contained direction for shipment from Ft. Worth, where the wheat was then stored. Defendant shipped the wheat, and plaintiffs paid for the same on presentation of the bill of lading. The wheat arrived at Galveston, and, while still in the cars, was damaged by the great storm. Plaintiffs sued for damages, alleging that the contract required the wheat to be delivered into the elevator at Galveston, and that title had not passed at the time of the damage. *Held*, that the words in the letters, "delivered Galveston," without other language explanatory, could not be construed, as matter of law, to require delivery into the elevators at Galveston, and that, the testimony as to the terms of the oral contract being contradictory, the construction of the contract in that respect was a question for the jury.

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

S. B. Cantey and R. W. Flournoy, for plaintiff in error.

W. P. McLean and F. Charles Hume, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

BOARMAN, District Judge. Orthwein's Sons, citizens of Missouri, dealers in and exporters of grain—their immediate place of business being at Ft. Worth, Tex.—were the plaintiffs below; and the Cameron Mill Company, receivers, shippers and dealers in grain in the same place, called in the briefs the "Mill Company," were the defendants below. It will be sufficient for our present purposes to state the cause of action to be as follows: Orthwein's Sons allege that the mill company on August 19, 1900, sold, under two different contracts of sale (5,000 under each contract), 10,000 bushels of wheat of a certain quality, under conditions and mutual understandings which show an executory contract—a contract which did not become executed or vest title in the thing sold in Orthwein's Sons unless

and until it (the wheat) was delivered to them after inspection, grading, and weighing thereof, according to Galveston inspection grades and weights, into the elevator at Galveston; that the mill company, because of its default and failure to perform its part of the contract, became ultimately indebted to them in the sum of \$3,715.61. The mill company rest their defense on the ground that the said contract of sale vested title to the wheat in Orthwein's Sons; that the delivery and shipment from Ft. Worth of the wheat were made by the mill company as bailees of the purchaser thereof, according to mutual understandings and obligations of the sellers and buyers, and if said wheat, after its delivery at Ft. Worth, was in fact damaged by the Galveston storm, or otherwise, the title thereto having passed out of the sellers to the buyers, the mill company is not liable for such damages. Orthwein's Sons, contending that the delivery of said wheat was to be made into the elevators at Galveston, sought to show and recover on an executory contract which, in its essential elements, had been defaulted on by the mill company. In these contentions inhere the issuable matters of fact and law material in this case, the trial of which resulted, on an affirmative charge of the Circuit Court, in a judgment for the defendant in error for \$3,771.04.

The record shows 10 assignments of error on behalf of the plaintiffs in error. The first assignment of error charged against the trial court is because of its refusal to admit a part of McLellan's evidence relating to his understandings of the meaning of certain words and phrases relating to place of delivery appearing in the letters now in evidence, which letters plaintiffs in error contend are ambiguous and incomplete in their meaning, and do not show a mutual understanding that sellers were to deliver wheat into the elevator at Galveston. The several other assignments, relating, as they do, to the refusal of special instructions, challenge, substantially, the Circuit Court's affirmation of the contention of the defendants in error to the effect that, under the terms of the contract of sale, the title remained in the mill company, and the said company bound itself in the contract of sale to deliver the wheat to Orthwein's Sons "in the elevator at Galveston," and may be taken up later, and disposed of in considering the charge of the Circuit Court. The Circuit Court's charge is as follows:

"\* \* \* It appearing to the court that the law is for plaintiff, the court so announced, and instructed the jury to find for plaintiffs the amount of the difference between the sums paid by plaintiffs to defendant for the wheat in controversy, and the value of said wheat at the time same was delivered to plaintiffs in the elevators at Galveston, together with the expenditures made by plaintiffs for handling and preserving the wheat before it went into said elevators. \* \* \*"

Considering the first assignment of error, it appears that plaintiffs in error, refusing to be held to an acquiescence in the interpretation which the defendants in error sought to put upon the contract of sale, offered to show by McLellan how he himself (he having negotiated the sale over the phone with Orthwein's Sons' agent, Mountcastle) understood, on his reading of buyers' letters, the sellers' obligation as to the matter of delivery. He was asked to read Orthwein's Sons' letter, and say what he understood—that is, what is the meaning of



the statement, "We confirm purchase from you to-day" of so many bushels of wheat "at 70½ delivered Galveston, Tex." We recite here two of the confirmatory letters; the other two, relating to the other 5,000-bushels deal, being, except as to price, substantially similar:

"Fort Worth, Texas, Aug. 29, 1900.

"Mess. Cameron Mill & Elev. Co., Fort Worth, Texas—Dear Sir: We confirm purchase from you to-day of \_\_\_\_\_ cars, 5,000 bushels, No. 2 red wheat, new crop, at 70½ delivered Galveston, Tex., \_\_\_\_\_ f. o. b. shipment within 10 days. Delivery at \_\_\_\_\_ by Galveston, Tex., weight and grades. Ship to Galveston, care Texas Star Mills Elevator, and don't fail to note on B. L. 'For Export.' Make draft on us B. L. attached, at Fort Worth, Texas, leaving fair margin. Exchange to be paid by shipper. All cars must be loaded to capacity.

"In reference to this purchase please use Contract No. 897.

"Yours truly, Chas. F. Orthwein's Sons per Butts.

"No. 3 wheat, 59 lbs. 1c off, and 1c additional for each pound below 57."

"Cameron Mill & Elevator Co. High Grade Flour and Meal.

"Fort Worth, Texas, Aug. 29th, 1900.

"C. F. Orthwein's Sons, City—Dear Sirs: We beg to confirm our sale to you over phone to-day of 5,000 bushels of No. 2 red wheat at 69½ cents per bushel and 5,000 bushels at 70½ cents per bushel, delivered Galveston.

"Yours truly,

Cameron Mill & Elevator Co.,

"Per McLellan."

This record shows a case which resolves itself, on writ of error, into the question as to whether any issuable matters of fact are disclosed therein which should have been submitted to the jury. Several issues of law are presented by counsel on either side, illustrating their contentions as to the first assignment of plaintiff in error. Under our view of the case, it seems necessary to consider two issues of law: First. The legal question as to whether or not the language and phrases of the letters relied upon by the buyers to show an aggregatio mentium of the parties on the place for the delivery of the wheat, when read between their four corners, are ambiguous and incomplete. Second. Should the letters, in considering McLellan's rejected testimony, be treated as written instruments intended by their authors, respectively, not to reduce to writing all their understanding as to the essential elements of the verbal contract of sale made over the phone, but to add confirmation thereof, with supplementary instructions, in which both parties had already primarily concurred as to matters which may necessarily enter into in whom the title vested when the damaged wheat was found after the storm at Galveston.

It was competent for the parties to make a verbal contract of sale of either an executory or an executed character. The agents of the parties, as witnesses on either side, agree in saying a contract of sale was made and completed on parol negotiations and understandings had over the phone. Conceding that the sale was made verbally, an agreement as to the thing sold, the price, and consent, presumably, was understood by the parties, and this sale could have been enforced at the instance of either in the absence of these letters. In that case the matter of delivery would have been supplied by a presumption of law. Presumably, the two letters were written by the authors thereof, respectively, in their offices at Ft. Worth. Nothing in the evi-

dence appears to warrant us in saying which of the two letters was first written, or first reached the addressee. Neither of the letters propounds a proposition to buy or sell wheat, nor were the authors thereof discussing a new or another contract of sale. It seems that both parties, being content to stand on the parol sale, adopted such commercial methods of confirming the sale as may be customary with such dealers. Plaguing difficulties like those presented in these skeleton letters are often imposed on trial courts, when traders, trusting their ventures to the vagaries of such hastily formed commercial instruments, find it desirable, after the unforeseen happens, and losses to either side follow, to invoke the courts to determine for them, from enigmatical contracts, made up of such letters, where or in whom was the title and risk when the loss was incurred. We are not impressed by the vague language of these letters, nor by the want of words which seem necessary to clothe the skeleton, or fill the blanks with sentient thought, with the presumption of fact that their authors respectively intended, or were endeavoring to reduce, concretely, to writing, or even to state intelligibly, all the understandings which they had with each other in making the verbal contract of sale. If these letters, taken together, and read between the four corners, show, manifestly, the consent and purpose of both parties that the sale should be completed only when the wheat is delivered "into the elevator at Galveston," then the instruments, being free from ambiguity, were rightly construed by the trial judge. The record shows that, before objection appears therein to McLellan's testimony, he and several other witnesses on either side had given evidence, more or less contradictory of each other, responsive to the line of inquiry which was later on forbidden as to him. McLellan had already repeated the verbal negotiation which he and Mountcastle had, in making the contract over the phone, as to his understanding of the essential elements of the sale. Among other things, McLellan contradicted some of the material statements of the witness Mountcastle in relation to a conversation over the phone between himself and Mountcastle as to the delivery of the wheat in question. McLellan says:

"I called Mountcastle over phone. After some talk, I accepted a price of 69½c., 70½c. at Galveston on basis No. 2 red. I was to pay the freight. I heard Mr. Mountcastle's deposition read as to our conversation about delivery, and he is mistaken."

Further testifying, McLellan said, after the full purchase price was paid, and the bills of lading were turned over to the buyers, the wheat which was in the elevator at Ft. Worth was then shipped to Galveston "as per instructions given to me." It does not appear how these instructions were given to him. Presumably, he meant, in using the words quoted, that the sellers' letters were or should be construed as giving him instructions as to delivery and shipment of the wheat, or it may be that he had received in some other way verbal instructions as to such material matters. Much of the evidence appearing in the record seems to be historical, as to things which occurred after the cars, with the wheat, left Ft. Worth, yet some of the evidence went, in its effect, whatever may have been apparently the

purpose of it, to illustrate contradictorily the material issues of fact tendered in the pleadings on either side. Other evidence showing how the buyers acted in relation to the damaged wheat, and tending to show upon whom they thought the loss would fall, would have been valuable to the jury, to show them where the buyers themselves thought the title rested when the storm damaged the wheat in the railway yards at Galveston—notably, the evidence of C. A. Orthwein and others, who told of matters occurring in Galveston, would have been persuasive as to where it was thought by him, and others acting for him, the title then rested. Something illustrative of that issue, or as to how the buyers regarded the title and risk, may be gathered, too, from the readiness with which he (Orthwein) followed and found the damaged cargoes of wheat at Galveston, and from the zealous and solicitous care which he gave to it at a time when, as the results of the storm, widespread desolation and commercial ruin on every hand were still appalling the panic-stricken survivors of the great storm at Galveston, who were yet in the presence of thousands of their unburied dead. Besides this, something as to where the buyers thought the title rested may be suggested by the fact that the buyers received the bills of lading and paid in full for the wheat at Ft. Worth, notwithstanding it appears from their letters that they instructed the sellers, in drawing on them, to leave a fair margin in the amount of the draft to be drawn on them, apparently, to protect the buyers on any reclamation claims they might have for failure of the sellers to comply with conditions of the contract of sale. In addition to this, it may be a suggestive fact as to the matter of title to know that, presumably, the buyers themselves did not feel assured as to in whom the title rested until they were advised by counsel some days after the wheat had, by their zealous care, been placed in the elevators, that the risk was in the sellers when the wheat was damaged. Mountcastle himself says, "It was stipulated in the verbal contract of sale that the wheat was to be delivered at Galveston." He further says: That the grade of wheat was ascertained by a grain inspector of the inspection department at Galveston under the supervision of the cotton exchange, and the weight was ascertained by a sworn weigher. That in purchasing wheat for plaintiffs a price would be fixed for a grade of No. 2, with fixed discounts for wheat not termed "off grade." It was customary for plaintiffs to accept wheat grading below No. 4 when it was merchantable, and would be unloaded in the elevator by the elevator people at Galveston. That final settlements were made between buyer and seller on such inspections and weight. Further, on cross-examination, he said that McLellan told him when the trades were made that he would sell No. 2 wheat, but did not know what the grade would be at Galveston, but would accept and make final settlement on Galveston weights and grades; stating at the time that he would very much prefer that Ft. Worth inspectors inspect the wheat at Ft. Worth. This last proposition of McLellan's he declined. Orthwein, witness, knew nothing of the particulars of the transaction over the phone. He says it is not customary for the carrier to deliver grain anywhere in Galveston but in the elevators. This was export grain. "We

never received car locally at Galveston." Neither of these witnesses make it clear in their testimony that there was anything in these contracts of sale to show that the sellers in this case knew of such a custom of the carriers, or agreed to deliver the wheat into the elevators at Galveston according to such a custom. On the matter of delivering wheat for export into the elevators at Galveston, it seems clear enough that the custom of the carrier was, after a car load of wheat for export came to the railway yards, to remove it to the elevator, for which moving a special trackage charge was made; but it may not follow, as a matter of course, that the dealers in wheat at Ft. Worth buy and sell wheat with a view to such custom of the carriers, though it may appear from the evidence that traders in wheat in Galveston understand the custom is for export wheat to be delivered into the elevators.

We make cursory reference to such contradictory evidence, not with a view of stating rules of law with which to test the passing of title from the seller to the buyer on a given state of facts—such issues of law are not now considered by us—but only to suggest that so much of it as we have referred to was largely surplusage, unless it was the purpose of the trial court to submit to the jury the issue of fact as to in whom title to the wheat rested when it was damaged. It seems that the trial judge was of opinion that these letters were intended by the parties to be, concretely, the repository of all their understandings as to the essential elements of the contract. On such a view of the state of case, much of the parol evidence as to delivery was not admissible. It seems, too, to have been thought by him that there was no conflict apparent in the evidence, which seemingly was admitted to illustrate the subject-matter and material incidents of the contract of sale, and the intention of the parties on the matter of delivery; that the letters, being free from ambiguities and incompleteness, clearly enough, on reading the same between the four corners thereof, showed that the parties intended that title should remain with the sellers until they had delivered the wheat "into the elevators at Galveston." Whether this view of the trial judge is well taken or not, we think, on the state of facts already disclosed at the time the case was withdrawn from the jury, that it should have been submitted to the jury for a verdict on such contradictory evidence as appears in the record.

Whether the language used in a contract is ambiguous or incomplete is a question of law, for the court. We think these letters were ambiguous and incomplete, if not absolutely obscure in surplusage of words, as well as in the absence of words which seem necessary to intelligibly fill the blanks and places where no words appear. In either of the confirmatory letters is found the words "delivered Galveston." Taking these words as they are related to and appear in the context in either letter, it does not follow manifestly that both authors gave, or intended to give, the same meaning to the phrase. The buyers contend that these words, together with the context of their letters, mean that the sellers promise to deliver the wheat at Galveston into the elevators. The sellers contend that the words "delivered Galveston" relate to a net price of 70½ cents per bushel

at Galveston, and the language "delivered Galveston" does not show a promise on their part to deliver wheat into Galveston elevators. The sellers write: "We beg to confirm our sale to you over phone to-day of 5000 bushels \* \* \* at 70½ cents per bushel delivered Galveston." This letter is limited to a confirmation of the sale made over the phone. It purports an acquiescence only in all the terms of the sale made over the phone. Reading it between its four corners, it does not manifestly purport an acquiescence in all the terms and conditions shown in the buyers' letter. Taking this letter by itself, as if no letter had been received from the buyer, it might be difficult enough to understand just what was meant by its author in the use of the words "delivered Galveston." Taking the letters of the buyers and sellers together, the difficulty appears to be much intensified. The words "delivered Galveston" are not technical words. They do not manifestly or presumably show that one party understood them as the other did. The words "delivered Galveston, Texas," appearing in the sellers' letters, when taken with the other words and blanks which make up the context of the several letters, are ambiguously obscure in their meaning. The buyers insist that the sellers shall acquiesce in the meaning which they give to these words. The letters of both parties, taken together, are ambiguous on the pivotal issue as to where the sellers promise to deliver the wheat. Taking the two letters together, and limiting the reading thereof to the four corners, we are unable to follow the line of reasoning which led the learned trial judge to the conclusion that the sellers promised to deliver wheat "into the elevators at Galveston." On this view, it seems that extrinsic parol evidence which might clear up the meaning and intention of the parties as to the delivery of the wheat should have been admitted, and the issues thereon submitted to the jury. The state of case when it was withdrawn from the jury showed manifestly that such evidence, if offered by either side, could have been legally admitted to show whether or not the sellers promised, in the letters or otherwise, to deliver the wheat into the elevator at Galveston.

Regarding the first assignment, it appears, under the rule of parol evidence, that neither party to written instruments intended to embody all the understandings of the parties as to the essential elements of a contract may be heard as a witness to show, as against the other party, what he himself intended to be, or should be, the meaning of certain ambiguous words therein. Greenleaf, vol. 1, page 406, notes. It may be that to admit McLellan's evidence over the objection urged in the trial court would be trenching too closely on the rule of evidence which we have just suggested. If the letters relied on by the sellers to show the place of delivery are, because of these ambiguities, not intelligible on that issue, the common-law rule would authorize the presumption that the parties intended to have delivery made at Ft. Worth. If there was a suspensive condition as to title resting in the matter of delivery, then either party may avoid the effect of the legal presumption just stated by administering parol evidence to show how and when such a suspensive condition was to be performed by the seller. The rule of evidence applicable to such a state of case, stated substantially, is, if the contention is that

certain words or phrases relied upon by either party to a contract to show an aggregatio mentium on an essential element of a sale are ambiguous and unintelligible on that issue, such contention as to ambiguity is a matter of law, for the court. If the words, in the opinion of the court, are free from ambiguity, no parol evidence is admissible to show how either party understood them. They are bound by them as the court interprets them. Nor is such evidence admissible to vary or contradict them. When there is a contention as to whether certain words in an instrument are ambiguous, as in this case, the judge may hear parol evidence to throw light on collateral facts and circumstances. *Greenleaf*, vol. 1, page 427. But if the court admits testimony of a contradictory character as to the meaning of the words in question, then it seems clear enough that the party seeking to hold the other to acquiescence in his interpretation of such words must, by a preponderance of proof, make clear to the jury what the words really mean as between the parties. To aid the jury in such an issue, either party should be permitted to show by parol evidence anything which may tend to show usage respecting the subject to which the contract relates; to show how and under what understandings as to trade customs at Ft. Worth others engaged in similar transactions traded in wheat at Ft. Worth; to show by any other evidence as may assist the court and jury in placing themselves, in regard to surrounding circumstances, as nearly as practicable in the situation of the parties whose written instruments are to be construed—the question being, what did the parties thus circumstanced mean as to the matter of delivering the wheat sold over the phone? We think there was error in not submitting the case to the jury on issuable matters of fact upon which the record shows there was conflicting evidence.

For the foregoing reasons, the judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to award a new trial.

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**HALE v. COFFIN.**

(Circuit Court of Appeals, First Circuit. January 13, 1903.)

No. 441.

**1. WILLS—LIMITATION OF ACTION TO CHARGE LEGATEE—MAINE STATUTE.**

The statute of Maine (Rev. St. Me. c. 87), which provides that, where a claim against the estate of a decedent is not filed in the probate office as therein authorized, "the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due," is a statute of limitations applicable to all claims founded upon a legal demand, in whatever court they may be asserted, state or federal, and whether in an action at law, which is recognized by the practice of the state as a proper remedy, or whether cognizable in a federal court of equity, independent of statute.

**2. SAME.**

In the absence of fraud, the fact that a claimant is a nonresident of the state does not prevent his claim from being barred by such statute.

**3. EQUITY—APPLYING STATUTE OF LIMITATIONS—SUIT ON LEGAL DEMAND.**

A proceeding to enforce the statutory liability of a stockholder, whether at law or in equity, is based on a legal, and not an equitable, right; and,

where the right to enforce it at law is barred, a court of equity will apply the same limitation by analogy.

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

For opinion below, see 114 Fed. 567.

William E. Hale, M. H. Boutelle, and E. W. Freeman, for appellant.

Joseph A. Locke and Ira S. Locke, for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. This is a suit in equity to follow the properties of a deceased stockholder, and to charge a legatee, or the property by her received as heir and legatee, to satisfy stockholder liability. The cause was submitted in the court below upon the pleadings and an agreed statement of facts.

The answer of the defendant sets out, and the facts in this respect are not controverted, that the estate, of which she was an heir and a legatee under the will, of Mary A. Ripley, a stockholder in the Northwestern Guaranty Loan Company, was finally settled by the executor more than two years before the proceedings were instituted, and that the personal representative of the deceased, Mary A. Ripley, was discharged prior to the filing of the plaintiff's bill.

It was admitted by the plaintiff that no notice of the claim in question was ever given or demand made upon the executor within two years and six months from the time of giving notice of his appointment, and that the claim was not filed in the probate court within such period of two years and six months. It was also admitted by the plaintiff that the property received by the legatee and devisee under the will came into her hands before August, 1897; that he did not bring any action or make any claim, either within a year after the final decree in which the plaintiff was appointed receiver in the proceeding in Minnesota, or within a year after the distribution of the Mary A. Ripley estate; and the bill herein was filed June 27, 1900. The point was taken in the answer that the claim was barred by the statute of limitations, and we need only consider this question.

The position of the plaintiff is that his right is one enforceable under the principles of original chancery jurisdiction and procedure in the federal courts, and that it is not susceptible of limitation or modification by state law; that the limitation contained in the Maine statute is a statutory limitation of a statutory right, and does not, therefore, operate as a bar to this proceeding in equity.

We cannot accept this view, and we will first consider the cases on which the plaintiff relies. The cases cited by the plaintiff in support of the position that the Maine statute does not operate as a limitation upon this proceeding may be fairly enough grouped under two heads: First, those which relate to insolvency proceedings in the state courts, based upon state statutes, where it is held that local laws and proceedings in the insolvency courts do not operate to bar the rights of parties outside the state, or proceedings in the federal

courts, to enforce such rights. The leading case cited in this group is that of *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357. This case and others in that class proceed upon the idea that the rights of parties and the jurisdiction of federal courts cannot be impaired by the insolvency laws of a state. The other group of cases, in which is *Payne v. Hook*, 74 U. S. 425, 19 L. Ed. 260, speaking generally, sustain the idea that state laws conferring jurisdiction upon certain courts within the state, like probate courts, to the exclusion of courts of law and equity within the state, cannot limit or restrain the law or equity jurisdiction or the remedies conferred upon the federal courts by the constitution and the statutes of the United States.

While some of the general expressions used in the cases referred to, when not considered in connection with the point there, under consideration, would seem to sustain the position of the plaintiff, we do not look upon such authorities as applicable to the situation involved in this case. The defense relied upon here is not based upon any limitation growing out of insolvency laws or insolvency proceedings, nor is it based upon the idea that equity jurisdiction of the federal courts is limited to the jurisdiction exercised by the probate courts or the courts of equity in the state of Maine, but upon a statute of limitations, which it is claimed is applicable to all cases within its provisions and to all courts alike. In this view, it is not deemed necessary to inquire with particularity whether a right like the one now asserted by the plaintiff was cognizable in equity, independent of statute, or whether the effect of the statute was to give an additional and cumulative remedy at law.

For the purposes of this case, we may assume, without consideration and without decision, both of these positions as claimed by the plaintiff; for in our view the statute in question should be accepted as a statute of limitations, applicable to all claims of this nature, in whatever court they may be asserted, whether in an action at law, based upon the statutory right of action, or in a proceeding in equity, prosecuted under the rules of chancery. The statutory limitation does not restrict itself to remedy at law. The language of the statute is:

"When such claim has not been filed in the probate office within said two years, the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due." Rev. St. Me. c. 87, § 16.

And thus, under reasonable construction, the language is broad enough to include remedy in equity as well as at law.

The usual remedy, and perhaps the uniform remedy in Massachusetts and Maine, for the enforcement, against heirs and devisees, of a claim founded upon a legal right, has been at law; and the statute in question has been accepted as a limitation of the time in which the claim could be asserted. It would be a very strange condition, and one which would offend public policy in respect to estates and properties of a deceased person, if the same legal right, which could only be enforced at law within a year, could be enforced in equity without regard to such limitation.

The liability of heirs and devisees, or of the property distributed to them, to be impressed with a trust in behalf of the creditors, speak-



ing generally, is old; but liability upon a contract like the one upon which the plaintiff's right in this case rests is new. The right sought to be enforced is, strictly speaking, a legal one of recent statutory origin. And in this sense the plaintiff employs an equitable remedy to enforce a new and strictly legal right; that is to say, remedy in equity to enforce the right of stockholder liability, which is a strictly legal right resulting from modern statutory and contractual relations.

As has already been said in effect, a situation whereby a strictly legal right, which could only be enforced at law if asserted within a year, can be enforced by resort to equity, without regard to the statutory limitation of a year, would present an anomalous condition, and one repugnant to the spirit of a well-understood public policy, which requires that claims against estates and properties of deceased persons should be restricted to narrow limits in respect to time, and it could only be justified by weighty equitable considerations, springing from the peculiar and special circumstances of a particular case, clearly and unmistakably calling for equitable interposition. It was manifestly intended, on grounds of public policy, to limit rights of action against heirs and devisees to the period of one year, and it is probable that the limitation was intended to operate upon all remedy for the enforcement of such rights, and that it was never intended to limit the legal remedy, and leave the right to be enforced in equity, without regard to the statutory limitation of one year. Under the circumstances of this case, why should equity broaden or extend the legal right beyond its status as a strictly legal right? Why should not the bar at law operate by analogy in equity? *Willard v. Wood*, 164 U. S. 502, 520, 17 Sup. Ct. 176, 41 L. Ed. 531.

No point is taken by the defendant that the limitation is a condition precedent to the right, and therefore that compliance therewith should be alleged, so there is no occasion for us to consider that view of the statute. The defense of the statute of limitations was taken in the answer, and it is admitted that no claim was made upon the legatee, and that this proceeding was not instituted within the year, the period after which it is clear that remedy at law was barred.

It is not necessary to determine the precise question whether the statute under consideration is, strictly and technically speaking, a general statute of limitations. It is quite sufficient to say that the statute has been accepted as one founded upon wise public policy, and that the period of a year in which to assert the right against heirs and devisees has been treated in Maine, and in Massachusetts, from which the statute was borrowed, as a limitation upon the remedy, and as a bar against the right, unless asserted within the statutory period. *Sampson v. Sampson*, 63 Me. 328; *Baker v. Bean*, 74 Me. 17, 21; *Fowler v. True*, 76 Me. 43, 45-49; *Webber v. Webber*, 6 Greenl. 127, 137, 138; *Royce v. Burrell*, 12 Mass. 398; *Howes v. Bigelow*, 13 Mass. 384, 389; *Hall v. Bumstead*, 20 Pick. 2. Statutory limitations in respect to estates of deceased persons are more stringently enforced, both at law and in equity, than those of the general statutes of limitations. *Bank v. Fairbank*, 49 N. H. 139; *Atwood v. Bank*, 2 R. I. 191.

There being no suggestion of fraud, the statute in question operates upon the plaintiff's right, although he is not a resident of the state of Maine. *In re Marston*, 79 Me. 25, 41, 8 Atl. 87; *Wells v. Child*, 12 Allen, 333, 336; *Sykes v. Meacham*, 103 Mass. 285; *In re Broderick's Will*, 21 Wall. 503, 519, 22 L. Ed. 599; *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043.

While, as has been seen, jurisdiction in the federal courts, and proceedings in equity therein, cannot be limited or affected by state legislation, the right of a state to fix a limit upon the time in which relief may be sought has been recognized in the federal courts, and the limit enforced in accordance with the interpretation placed upon it by the highest courts of the states. *Bank v. Heilman*, 30 C. C. A. 232, 86 Fed. 514; *Moore v. Bank*, 104 U. S. 625, 26 L. Ed. 870; *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043; *Bank v. Eldred*, 130 U. S. 693, 696, 9 Sup. Ct. 690, 32 L. Ed. 1080; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; *Telegraph Co. v. Purdy*, 162 U. S. 329, 339, 16 Sup. Ct. 810, 40 L. Ed. 986; *Security Trust Co. v. Black River Nat. Bank* (decided by the supreme court December 1, 1902) 23 Sup. Ct. 52, 47 L. Ed. —.

Statutory limitations upon personal actions have been generally accepted as governing proceedings in equity, when such procedure has been employed to enforce a legal right. *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 448, 13 Sup. Ct. 944, 37 L. Ed. 799; *Willard v. Wood*, 164 U. S. 502, 520, 17 Sup. Ct. 176, 41 L. Ed. 531; *Baker v. Cummings*, 169 U. S. 189, 206, 18 Sup. Ct. 367, 42 L. Ed. 711; *In re Broderick's Will*, 21 Wall. 503, 518, 22 L. Ed. 599; See, also, *Boyd v. Blankman*, 29 Cal. 19, 44, 87 Am. Dec. 146; *Chewett v. Moran* (C. C.) 17 Fed. 820, 823; *Insurance Co. v. Brown*, 11 Mich. 265.

In the last-mentioned case, it is said by Mr. Justice Campbell that:

"The statute of limitations is confined to actions or suits to enforce payment of the contract as a personal demand. Equity follows the analogies of the law in all cases where an analagous relief is sought upon a similar claim."

It is only where the right is in the nature of an equitable right, and the remedy an equitable one, that equity follows its own rules, in disregard of and to the exclusion of the analogies of the law. *Tiernan v. Rescaniere's Adm'rs*, 10 Gill & J. 217, was a case in equity, and it was there said, at page 223:

"So far as regards the recovery of the money received by the respondents, the complainant might have had redress by an action in a court of common law, in which tribunal it would have been barred by the statute of limitations, more than three years having elapsed between the receipt of the money and the filing of the bill. \* \* \* Unless the bill is more comprehensive, from its peculiar allegations and the relief sought, than an action for money had and received, the complainant is equally barred in equity as at law; a court of equity adopting by analogy the statute of limitations."

To the same effect is *Lansing v. Starr* (a proceeding in equity) 2 Johns. Ch. 150, where it was said that "the statute of limitations

is a good plea in bar, in this court, as well as at law, to an action on the note." The rule was stated by Chancellor Kent as a general one, and it was there observed "that there must be something special in the case, or some new equity, to form an exception to this general rule."

We see no special reason in this case for the interposition of equity to extend the remedy beyond the limitation placed upon the right of remedy by the state statute as administered by the local courts. The only ground for seeking to enforce the right in equity is that the statute has run upon the remedy at law. This, we think, is not sufficient to justify the interposition of the equitable arm to extend a remedy for the enforcement of a legal right beyond its status at law.

The decree of the circuit court is affirmed, with costs for the appellee.

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HASSENCAMP v. MUTUAL BEN. LIFE INS. CO.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 464.

1. LIFE INSURANCE—ACTION ON POLICY—PROOFS OF DEATH AS EVIDENCE.

Proofs of death furnished by the beneficiary in a life insurance policy, as required by its terms, are admissible on behalf of the insurance company in an action on the policy, and are prima facie proof against the plaintiff of the facts therein stated, including the fact of suicide, and are conclusive, unless the plaintiff shows that the statements made were erroneous, or were given through mistake or misapprehension.

2. SAME—DEFENSE OF SUICIDE—EVIDENCE.

Where the proofs of death of an insured, furnished the company and introduced in evidence on its behalf in an action on the policy, contained, as required by the policy, a certified copy of the proceedings at a coroner's inquest, including the verdict finding that the insured committed suicide, which avoided the policy by its terms, and also a certificate of the attending physician to the same effect, such evidence was not overcome by testimony merely tending to show a want of motive, and that insured was a man of good character and habits, and the direction of a verdict for defendant was proper.

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

The facts in this case are substantially as follows: The defendant in error is a corporation under the laws of New Jersey, doing a life insurance business in the state of Maryland. On the 11th of October, 1899, Alexander Hassencamp applied for a policy, and in consideration of the payment of the required premium the company issued to him on that day a life policy for the sum of \$3,000, in which Juliet V. Hassencamp, his wife, the present plaintiff in error, was the beneficiary. Alexander Hassencamp died on the 6th day of June, 1901, at Dr. Walter's sanitarium, in Wernersville, Pa. One of the stipulations contained in the application made by Hassencamp for the policy was as follows: "I also agree that if, within two years from the date of this policy, I shall, without the consent of the company, reside or

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¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 1359, 1702.

¶ 2. Suicide as a defense to action on life insurance policy, see notes to *Ætna Life Ins. Co. v. Florida*, 16 C. C. A. 623; *Fidelity & Casualty Co. of New York v. Egbert*, 28 C. C. A. 284.

travel elsewhere than in or to the United States, Canada, or Europe. \* \* \* or within such period shall commit suicide, while sane or insane. the policy hereby applied for is to be null and void." Shortly after the death of the assured, the plaintiff in error made her claim to the company for the loss. She followed the instructions issued by the insurance company for making death claims, among which was one as follows: "When a coroner's inquest is held, a certified copy of the inquest must accompany the proofs." In accordance with this requirement, the plaintiff in error attached to her proof of loss a certified copy of the proceedings and verdict of the coroner's inquest, held over the body of her deceased husband in the county of Berks, where he died, in which the jury found "that, according to the evidence and inspection of the body, we, the jury, agree to the following verdict: that the above-named committed suicide by shooting himself in the right temple with a pistol, and in our opinion the act was premeditated." The plaintiff in error also accompanied her claim by the certificate of the attending physician, Robert Walter, who stated that he was the attending physician of Alexander Hassencamp; that he had known him three weeks; that his final illness was complicated with or preceded by another disease called "insomnia melancholia"; that he had died from suicide by shooting. On receipt of the claim, accompanied by these proofs, the insurance company declined to pay the insurance money, on the ground that the proofs of loss sent up showed that the death of the assured was by suicide, within two years from the issuing of the policy; and thereupon this suit was brought in the Circuit Court of the United States for the District of Maryland, and was tried before a jury at April term, 1902, of said court. The plaintiff in error declared for the amount of the policy, and defendant in error denied the right of recovery on the ground of suicide of assured within two years from date of policy.

The plaintiff in error, to support the issue on her part, proved the execution of the policy, the punctual payment of the two yearly premiums, the death of the assured, furnishing of proofs of death, and refusal of the company, as set out in a letter, to pay the amount of the policy on the ground that the insured had committed suicide, in violation of an agreement contained in his application for the policy. She also proved that the proofs of death were furnished on blanks received from the company for that purpose, and were made out by her two brothers-in-law, for her, by her order. Thereupon she rested her case in chief. The defendant in error then, over the objection of the plaintiff in error, introduced the proofs of death which had been forwarded to the company. These consisted of the statement of the plaintiff in error, giving number and amount of the policy, the place of her husband's death, and that she was the widow and beneficiary in the policy; the statement of a friend as to the death of the assured and the identity of the body; the statement of the attending physician; the undertaker's certificate; and a certified copy of the coroner's inquest. The admission of this evidence for the defendant in error constitutes the first bill of exceptions. The defendant in error rested, and the plaintiff in error, in rebuttal, introduced one Lyszman, who testified that he knew Alexander Hassencamp in his lifetime; that he saw his body on the morning of the 7th of June, 1901, the day after his death, in the undertaking establishment, about a mile from the sanitarium; that there was a wound in the head of the deceased in the temple, very small, but that there were no powder marks about it. The plaintiff in error, in her own behalf, testified that the deceased had been in the employment of Ullman, Boykin & Co., at Baltimore, for about 10 years; that he was suffering with nervous prostration, and had gone to the sanitarium on the 18th of May preceding his death; that he was getting a salary of \$2,100 a year, and that his place was kept open for him by his employers; that he had some money in bank, and was in easy circumstances; that the relations between him and his family were always affectionate; that he was temperate and regular in his habits, and that she never knew him to have a pistol; that the news of his death came to her as a surprise. W. A. Boykin was introduced by the plaintiff in error, and testified that Hassencamp had been employed by the firm to which he belonged as a bookkeeper and confidential secretary,

for about 9 years, at a salary of \$2,100 a year, or thereabouts; that Hassencamp was an industrious, high-toned man, of good habits and correct in his business transactions; that his health broke down on the 6th of December 1900, and that he was given a leave of absence without limit, for rest and recuperation; that Hassencamp went first to New York, and then to Bermuda, and while in the latter place he wrote letters to the house, which were very intelligent; that there was nothing in his actions while in the employment of the firm to lead to the fear that he might commit suicide. He was assured, when he left, that his place would be kept open for him whenever he wanted it. This concluded the testimony.

Thereupon the plaintiff in error offered the following prayers for instruction to the jury: "(1) The plaintiff prays the court to instruct the jury that the finding of a man dead, with a bullet hole in his head, in the absence of other explanatory facts and circumstances, establishes accidental death; and the burden is on the defendant to show by additional facts and circumstances that the said death was due to suicide. (2) The plaintiff prays the court to instruct the jury that, where death results from a pistol shot wound, self-destruction is not to be presumed, but the law presumes the wound was the result of accident; and the burden of proof is upon the defendant to show, by a preponderance of testimony, that the wound was intentionally self-inflicted, and that it was not the result of accident; and that, unless the jury find from the evidence that the insured intentionally shot himself, their verdict must be for the plaintiff. (3) The plaintiff prays the court to instruct the jury that, the defendant having by its plea alleged that the death of the insured was caused by suicide, the burden of proving this allegation by a preponderance of evidence rests on the defendant. The presumption is that the death was not voluntary; and the defendant, in order to sustain the issue of suicide, must overcome this presumption and satisfy the jury that the death was voluntary. (4) The plaintiff prays the court to instruct the jury that, if the jury find from the evidence that the death resulted from violence, the presumption of law is that it resulted from accident or assassination; and, before the jury can find that the death was due to suicide, they must be satisfied by a preponderance of evidence that the death was not due to either accident or assassination. (5) The plaintiff prays the court to instruct the jury that the burden of proving by a preponderance of evidence that the death was due to suicide is not shifted by the introduction of the proofs of death, and it is not the duty of the plaintiff to satisfy the jury by a preponderance of evidence that her husband died otherwise than by his own hand and deliberate act; and that the proofs of death are only admitted in this case as admissions by the plaintiff, but the weight to be given to such admissions is to be determined by the jury, having regard to the circumstances under which and the purposes for which they were so furnished by the plaintiff to the defendant. (6) The plaintiff prays the court to instruct the jury that the proofs of death furnished by plaintiff to defendant are not prima facie proof of the fact that the insured died by suicide. (7) The plaintiff prays the court to instruct the jury that where it appears that death was the result of accident or suicide, and there is no evidence to show which was the cause, or where from all the evidence the cause of death may be equally referred to either accident or design, the presumption of law is that the death was accidental. (8) The plaintiff prays the court to instruct the jury that, if they find a verdict for the plaintiff, the measure of damages is the face value of the policy, with interest, in the discretion of the jury."

The defendant in error offered the following prayer: "That the statements contained in the proofs of loss offered in evidence by defendant are binding upon plaintiff to the extent of being prima facie evidence against the plaintiff of the facts stated therein as to the manner or cause of the death of insured, except in so far as they may show by proof that they are mistaken or erroneous; and as the plaintiff has offered no legally sufficient evidence that the statements contained in the same, that Alexander Hassencamp died by suicide within less than two years from the issue of the policy, are erroneous, the plaintiff is not entitled under the terms of the policy to recover, and the verdict of the jury must be for the defendant."

The court rejected all the prayers of the plaintiff in error, and granted the prayer offered by the defendant in error, to which action of the court the plaintiff excepted. In response to the instructions of the court, the jury rendered a verdict for the defendant, and judgment was accordingly entered. The assignment of errors is based upon the exceptions taken as above indicated.

Robert M. McLane and Edgar Allan Poe, for plaintiff in error.  
John J. Donaldson and John D. Parker, for defendant in error.

Before GOFF, Circuit Judge, and PURNELL and BOYD, District Judges.

BOYD, District Judge. The plaintiff in error, in the brief and argument in this case, does not rely upon the exception based upon the objection interposed to the admissibility of the proofs of death as testimony, and the sole question presented here is that raised by the refusal of the court to give the instructions requested by the plaintiff in error, and giving instead the instructions requested by the defendant in error. The counsel for the plaintiff in error take the position that the main point in the case is the effect of the proofs of death furnished by the plaintiff in error, and it is insisted that, conceding the admissibility of these proofs, the weight to be attached to them is to be determined by the jury, having regard to the person by whom, to the circumstances under which, and the purposes for which they were furnished. In the case of *Insurance Co. v. Newton*, 89 U. S. 32, 22 L. Ed. 793, one of the points involved was as to the effect of proofs of death furnished in making claims for payment under a life policy of insurance. In that case, as in this, the proofs consisted of several affidavits, giving the time, place, and circumstances of the death, and the record of the finding of the jury upon a coroner's inquest; the finding being that the deceased came to his death by a pistol shot fired by a pistol in his own hand, through the heart. In that case, also, upon the trial, as in this, the plaintiff made proof of the death of the assured, the execution of the policy, the presentation of proofs of death, and the refusal of the company to pay on the ground of suicide. The insurance company offered reply to this testimony by the introduction of the proofs of death forwarded to the company. These were excluded by the court. In passing upon the exception to the exclusion of this testimony, Mr. Justice Field, in delivering the opinion of the court, says:

"But the court also erred in excluding from the jury the proofs presented of the death of the insured when offered by the company. \* \* \* The proofs presented were admissible as representations on the part of the party for whose benefit the policies were taken as to the death and manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proofs of death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made, until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained."

And, following this line, it is further held in the same case that:

"The preliminary proofs are admissible as prima facie evidence of the facts stated therein against the insured and on behalf of the company."

It is held, however, in the case of *Supreme Lodge v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 740, that the statements contained in the proofs of death in presenting a claim to an insurance company for loss are not an estoppel; that the party furnishing such proofs has the right to explain them, to show that they are erroneous, or were given by mistake or under a misapprehension. Until such explanation, however, those proofs are to be taken as true, and are, as before stated, prima facie evidence of the facts they contain. The question before us, therefore, is, did the plaintiff in error, after the introduction of the proofs of loss, which she furnished to the company, containing a certificate of the attending physician that the assured died from suicide, and also a certified copy of the coroner's inquest, in which the jury found as a fact that the deceased came to his death by suicide, make any explanation of these facts, or introduce testimony showing that in furnishing them she had been mistaken, or that they were erroneous.

As shown in the statement of facts, only three witnesses were introduced in rebuttal by the plaintiff in error. One of them was Liszman, who testified that he saw the dead body of Hassencamp; that there was a small wound in the temple of the deceased, but no powder marks whatever about him. The plaintiff in error herself was the next witness, and she said the deceased had gone to the Wernersville sanitarium on the 18th day of May, 1901, for his health, as he was suffering from nervous prostration; that his home relations were happy; that he was not worried about money matters; that he was a man of regular habits, and not given to drinking; that she had no reason to apprehend that he would commit suicide; that the news of his death, which she received on the afternoon of the day it occurred, came to her as a great surprise; that she never knew him to have a pistol; and that nothing was found among his papers indicating that he contemplated suicide. The other witness was Boykin, the employer of the deceased, whose testimony was directed to deceased's general good character and habits, his easy circumstances, and absence of motive to commit suicide. This witness had not seen the deceased for several months previous to his death.

There was nothing in the testimony of these witnesses to contradict the fact stated in the proofs that the assured came to his death by suicide. It was not suggested by the plaintiff in error that she furnished the proofs under any misapprehension whatever, and she gave no explanation of the cause of her husband's death inconsistent with the facts contained in the proofs. It is true that the testimony in rebuttal tended to prove absence of motive to suicide; but was this sufficient to overcome the fact distinctly stated in the proofs of death presented to the insurance company? This evidence did not directly contradict that fact. It did not show that the statement in the proofs was erroneous. We think, therefore, that the instructions to the jury, as given by the Circuit Court, were in entire harmony with the law as laid down in the decisions above quoted.

There is no error, and the judgment is affirmed.

**SAFFORD v. ENSIGN MFG. CO.**

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 454.

**1. EQUITY JURISDICTION—BILL FOR DISCOVERY AND RELIEF—FEDERAL COURTS.**

A federal court of equity is without jurisdiction of a suit in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand.

**2. SAME.**

A bill based on a contract by which defendant agreed to use a patented device of plaintiff on cars to be built by defendant, and to render statements to plaintiff showing the number of cars so equipped, and pay a royalty thereon, which alleges that defendant has failed and refused to render the statements or pay the royalty, and prays for a discovery and accounting, is not one for an accounting between persons occupying fiduciary relations, and for that reason within the jurisdiction of equity, but is in effect one to enforce a legal demand, in aid of which a discovery is sought, and as such is not within the jurisdiction of a federal court of equity, both because defendant is entitled to a jury trial on the merits, and because a bill of discovery is rendered unnecessary by Rev. St. § 724 [U. S. Comp. St. 1901, p. 53c], under which plaintiff may compel the production of the required evidence in an action at law.

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

Z. T. Vinson, for appellant.

F. B. Enslow, for appellee.

Before GOFF, Circuit Judge, and PURNELL and BOYD, District Judges.

GOFF, Circuit Judge. The appellant filed his bill of complaint in the court below against the appellee, alleging an agreement between them under the terms of which the Ensign Manufacturing Company (appellee here) was to use a certain patented drawbar device, owned by the complainant below, on the cars manufactured by such company, and was to render statements to him at regular periods of time, showing the number of cars so manufactured at its works upon which said drawbars had been placed, and was also to make quarterly payments to him for such use at the rate of two dollars per car on which the drawbar had been placed. It was set out in the bill that said company had used a large number of such devices upon the cars it had manufactured (over 5,500 in number), the exact number complainant being unable to state because the company had failed to render the statement to him as required by the terms of the said license to it, and had also failed and refused to make the quarterly payments due as the royalty stipulated in the contract. It was alleged in the bill that the accounts respecting such dealing were still open and unsettled, and that on the proper adjustment of the same a sum of money exceeding \$2,000 would be due from the defendant to the complainant. The prayer of the bill was for a full and true discovery of and concerning all the transactions had under and re-



lating to said agreement, for an accounting thereof under the order and direction of the court, and then for a decree in favor of the complainant for the amount found due him. To this bill the defendant demurred, and the court, sustaining the demurrer, granted permission to the complainant to amend his bill, which in due time he did, to which amended bill the defendant also demurred, and the court, after holding the demurrer to be well taken, entered an order dismissing the bill. From that order the appeal now under consideration was allowed.

The only question raised in this court by the assignments of error is concerning the jurisdiction of a court of equity over a bill of this character. The same point was presented to the court below by the demurrer there filed. That court held that there was a full and adequate remedy at law, and therefore the order dismissing the bill was entered. We have carefully considered the authorities relied on by counsel for the appellant, and we conclude that they do not authorize a reversal of the decree complained of. The court below filed an opinion in which the question of jurisdiction is fully and ably discussed, and, as we find that it properly decides the question herein involved, we adopt it as the judgment of this court. It is as follows, viz.:

"This case is submitted upon demurrer to the amended bill filed herein. It is contended on behalf of the plaintiff that equity is the proper forum for the trial of this cause, because there is no complete and adequate remedy at law, and the bill in this case is for discovery and relief, and that equity, having taken jurisdiction for the purpose of enabling the plaintiff to obtain a discovery, would retain it for the purpose of affording him relief, or, in other words, would completely dispose of the matters involved for the purpose of avoiding a multiplicity of suits. On behalf of the defendant it is contended that the remedy at law in this case, as is apparent from the nature of the claim as disclosed in the bill, is complete and adequate. It appears therefrom that the claim is for money claimed to be due the plaintiff under a contract made with defendant whereby the defendant agreed to pay to the plaintiff two dollars for each car manufactured by defendant upon which was placed a patent coupler designed and patented by the plaintiff, or, at least, the patent for which is the property of the plaintiff. It is contended on behalf of the defendant that the common-law action of assumpsit presents an appropriate remedy in this case, and that, by virtue of the provisions of section 723, Rev. St. [U. S. Comp. St. 1901, p. 583], the federal courts are without equitable jurisdiction in such a case, and that by the provisions of section 724, Rev. St., the plaintiff may, on motion and due notice thereof, require the defendant to produce its books or other writings containing the information desired, and to obtain which the plaintiff has resorted to equity. In reply to this it is contended by plaintiff that, even though these statutes exist, the remedy in this case by action in assumpsit is not plain, adequate, and complete, because by virtue of section 11, c. 125, Code W. Va., a plaintiff in assumpsit is required to file with his declaration 'an account stating distinctly the several items of his claim, unless it be plainly described in the declaration, and if he fail to do so he shall not be permitted to prove any item not stated in such account, on trial of the case,' and that plaintiff is not in possession of information upon which to base a proper statement of the amount of his claim. In order to determine whether the statutory provision quoted is such a requirement as, in a case like the present, actually renders the action at law incomplete and inadequate. It is important to know what is a sufficient account under the statute; and in the first place we may say that its object and purpose is to give the defendant notice of the character of the plaintiff's demand. Moore v. Mauro, 4 Rand. 488; Abell v. In-

insurance Co., 18 W. Va. 412. The demand, as described in the account filed, must comport with that asserted in the declaration. *Moore v. Mauro*, supra; *Fitch v. Leitch*, 11 Leigh, 471. And the account should be plain enough to guard against surprise. *Phillips*, Ev. 147. The account thus required to be filed is no part of the pleadings themselves, and its sufficiency cannot be tested on demurrer. *Choen v. Guthrie*, 15 W. Va. 113; *Abell v. Insurance Co.*, supra; *Smith v. Townsend*, 21 W. Va. 486. It would seem, therefore, that the only care that would need to be exercised by the plaintiff, in a case like the present, would be to see that he filed an account for royalty upon a sufficient number of the couplers to insure that he was not understating the facts. Indeed, it is doubtful whether any account would need to be stated, where the declaration contained a special count setting forth the substance of the agreement, as the claim could be alleged as well in the count as by a bill of particulars; the latter being necessary for particularity where the common counts are resorted to by the pleader. It is undoubtedly true that equity will take jurisdiction in cases where there is an agency of a fiduciary character, involving trust and confidence and making it necessary to keep accounts and preserve vouchers, even though the demands are not on both sides, and there is no charge of fraud or misrepresentation. *Zetelle v. Myers*, 19 Grat. 68; *Coffman v. Sangston*, 21 Grat. 263; *Segar v. Parrish*, 20 Grat. 680; *Thornton v. Thornton*, 31 Grat. 212. These cases and many English cases hold the doctrine that, whenever the relation between the person who seeks the account and the person against whom he seeks it partakes of a fiduciary character, a trust is reposed by the plaintiff in the defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman. *Zetelle v. Myers*, 19 Grat. 68, and cases cited. The question whether this case falls within this class is not free from doubt, inasmuch as it is alleged in the bill that defendant agreed to report to plaintiff the number of cars built by defendant upon which his device was used; and, if this bill can be sustained at all, it must be upon the ground that such fiduciary relation existed in this case. I think, however, that this case cannot be said to fall within this class, as in all the cases I have been able to find, sustaining the doctrine above referred to, a distinct personal agency of a fiduciary nature existed on the part of the defendant toward the plaintiff. Here there was a contract of sale, in the nature of a license, and no direct allegation is made in the bill that defendant was made the agent of plaintiff for any purpose.

"In reality, what is wanted here is rather a discovery than an account. Undoubtedly, a simple bill for a discovery might have been sustained in aid of a suit brought or to be brought at law, unless section 724, Rev. St. [U. S. Comp. St. 1901, p. 583], renders such bill unnecessary; and the point here is whether this can be sustained as a bill for discovery and relief. Such bills have been sustained in various jurisdictions, apparently through a misapplication of the maxim that equity, having assumed jurisdiction of a cause for one purpose, will retain jurisdiction to grant relief; but the whole practice seems to be clearly opposed to the principle, and to the established English practice, after which the federal equity practice is modeled. 1 Story, Eq. Jur. (13th Ed.) p. 78, note on Jurs. for Dis.; 2 Am. & Eng. Enc. Law, 199, note 6. But, however this may be in state jurisdictions, it has been held by the highest federal authority that 'the Constitution, in its seventh amendment, declares that in suits at common law, where the value in controversy shall exceed \$20, 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 proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact.' *Scott v. Neely*, 140 U. S. 109, 11 Sup. Ct. 713, 35 L. Ed. 358. It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States, because under section 724, Rev. St., it is no longer generally needed. See *Rindskopf v. Platto* (C. C.) 29 Fed. 130; *Preston v. Smith* (C. C.) 26 Fed. 885, 889; *U. S. v. McLaughlin* (C. C.) 24 Fed. 823, 825; *Ex parte Boyd*, 105 U. S.

647, 26 L. Ed. 1200; *Paton v. Majors* (C. C.) 46 Fed. 210. From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would violate the doctrine laid down by Justice Field in *Scott v. Neely*, supra, and would permit, by indirection, the entertaining of a bill for discovery, although the trend of authority is that a pure bill for discovery cannot be maintained in the federal courts, because it is no longer necessary.

"For these reasons, I am of opinion that the demurrer should be sustained and the bill dismissed. It is accordingly adjudged, ordered, and decreed that the bill of the plaintiff be dismissed, and that the defendant recover its costs in this behalf expended."

The decree of the court below is affirmed.

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TERRY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 451.

**1. INDICTMENT—JOINDER OF COUNTS—COMPELLING ELECTION.**

The general rule is that the prosecution will not be required to elect between the several counts of an indictment when they have been inserted in good faith for the purpose of meeting the evidence as it may transpire, and where the offenses charged, although technically different, are of the same general nature and substantially the same, arising out of the same transaction, and concerning which the same testimony must be relied on for a conviction.

**2. SAME—SUFFICIENCY—DESCRIPTION OF OFFENSE.**

An indictment under Rev. St. § 3279 [U. S. Comp. St. 1901, p. 2126], which charges that the accused "unlawfully and knowingly did carry and deliver, to wit, raw material to a distillery" on which no sign was placed and kept as required by law, but which does not state that such distillery was one for the production of spirits, nor set forth the kind of raw material which was furnished, is insufficient, as not describing the offense with the particularity required.

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

This case is here upon a writ of error to the District Court of the United States for the Eastern District of Virginia. The plaintiff in error was tried upon an indictment containing six counts. The first count is under section 3258 of the Revised Statutes [U. S. Comp. St. 1901, p. 2112], and charges the plaintiff in error with setting up and having in his possession and control a still and distilling apparatus without having registered the same. The second count is under section 3281 [page 2127], charging that the plaintiff in error had unlawfully carried on the business of a distiller without having given bond, etc. The third count is under the same section, and charges that the plaintiff in error unlawfully engaged in and carried on the business of a distiller, with intent to defraud the United States of the tax on spirits distilled by him. The fourth count is under section 3279 of the Revised Statutes [U. S. Comp. St. 1901, p. 2126], charging plaintiff in error with working in a distillery upon which no sign was placed as the law requires, and the fifth count charges that the plaintiff in error unlawfully carried away a quantity of distilled spirits from a distillery on which the required sign was not placed. The sixth count charges that the plaintiff in error unlawfully delivered raw material to a distillery on which the sign required by law was

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¶ 1. See *Indictment and Information*, vol. 27, Cent. Dig. §§ 439, 443, 444, 447.

not placed. Throughout the indictment the term "distillery" is used without further description, and without stating whether it was a distillery for the production of distilled spirits from grain or from fruit or other material. The jury returned the following verdict: "We, the jury, find the prisoner, J. O. Terry, guilty as charged in the sixth count of the indictment." Upon this verdict the court sentenced the plaintiff in error to imprisonment for the period of 60 days. Before the trial began and the introduction of testimony was had, the plaintiff in error, who appeared in his own behalf, moved the court to require the district attorney to elect upon which count in the indictment he would go to trial. This motion was overruled by the court, and to this ruling the plaintiff in error excepted. Upon the return of the verdict the plaintiff in error moved the court to set aside the said verdict and grant him a new trial, because the same was contrary to the law and the evidence. The motion was overruled by the court, to which the plaintiff in error excepted. The assignments of error are: First. The court erred in overruling the motion of the plaintiff in error to require the United States to elect upon which count in the indictment he should be tried. Second. The court erred in overruling the motion of the plaintiff in error to set aside the verdict and grant him a new trial, upon the ground that the verdict was contrary to the law and the evidence, and in entering up final judgment upon the said verdict against him. The facts as disclosed by the witnesses for the government are substantially as follows: That an illicit distillery of spirits from grain had been operated, some time in the summer of 1900, on a farm called the "Derring Farm," near Clayville, in Powhatan county, Va.; that the farm was the property of the plaintiff in error, and that one Paul, who was in his employment, did the work; that the plaintiff in error was present on one occasion when the distillery was in operation; that he and Paul left together, carrying with them a keg of distilled spirits which had been produced in the distillery. There was found at the place by a deputy collector, who went there after the operations had ceased, the furnace where the still had been located, a worm and cooling tub, about 450 pounds of meal, a barrel of molasses, and three sacks of malt. There was also some other evidence tending to prove that the distillery was being operated on plaintiff in error's farm with his knowledge and consent, and that the meal and molasses found there by the deputy collector belonged to him. The plaintiff in error was himself a witness, and denied any knowledge of the distillery, or that he had any interest in it, or that he furnished the materials, and there was some evidence to corroborate him.

J. O. Terry, in pro. per.  
Edgar Allan, U. S. Dist. Atty.

Before GOFF, Circuit Judge, and PURNELL and BOYD, District Judges.

BOYD, District Judge (after stating the facts). It is not necessary to discuss the question raised by the first exception—the refusal of the court to require the district attorney to elect—as we think that was a matter within the discretion of the district judge. The general rule is that an election will not be compelled when the several counts of the indictment have been inserted in good faith for the purpose of meeting the evidence as it may transpire, the offenses charged, though technically different, being of the same general nature, substantially for the same offense, arising out of the same transaction, and concerning which the same testimony must be relied upon for conviction. Such is the case we are now considering.

In the second exception and assignment we find an important question, one materially affecting the rights of the plaintiff in error, and that is whether or not the allegations in the count upon which he

was convicted are sufficient in law to charge a criminal offense. It is true that the plaintiff in error did not make a formal motion in arrest of judgment for this defect, but he requested the court to set aside the verdict because it was contrary to the law, and he also insisted that the court erred in entering up final judgment upon the said verdict. The plaintiff in error, who is a layman and not presumed to be familiar with the technical forms of pleading, was evidently intending to ask the court to give him the benefit of such legal rights as he might be entitled to under the circumstances, and it is but fair to him to so construe his action. We think, therefore, that the court should have taken notice of the form of the indictment, and, if found to be defective, should have declined to pronounce judgment. It is our conclusion, therefore, that we ought to treat the plaintiff in error's second exception and assignment as in substance a motion in arrest of judgment after verdict, and, if it is found that matter intrinsic appears on the face of the record which would render the judgment, if given, erroneous or reversible, or if it would have been fatal to the indictment on general demurrer, to give him the benefit of it.

The count upon which the plaintiff in error was convicted reads as follows :

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that at the time and place, and within the jurisdiction aforesaid, the said J. O. Terry unlawfully and knowingly did carry and deliver, to wit, raw material to a distillery on which no sign bearing the words 'Registered Distillery' was placed and kept as required by law, contrary to the statute in such cases made and provided, and against the peace and dignity of the United States."

The law making it indictable to furnish raw material to distilleries is, as stated before, to be found in section 3279 of the Revised Statutes [U. S. Comp. St. 1901, p. 2126]. In the beginning of that section we find the following :

"Every person engaged in distilling or rectifying spirits and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign exhibiting in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier or wholesale dealer, with the words 'Registered Distillery,' 'Rectifier of Spirits' or 'Wholesale Liquor Dealer,' as the case may be."

And in the latter part of the said section it is provided as follows :

"And every person \* \* \* who knowingly carries and delivers any grain, molasses or other raw material to any distillery on which such sign is not placed and kept, shall forfeit all horses, carts, drays, wagons or other vehicles used in conveying such property aforesaid, and shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than six months."

It will be observed that, in the outset, this section describes the business to be engaged in to be that of distiller, rectifier of spirits, or wholesale dealer in liquor, and it is upon this business that the sign required by law is to be placed and displayed. This indictment does not charge that this was a distillery for the production of spirits, and does not distinguish the establishment from any other distillery.

There are other distilleries operated in this country besides those for the production of spirituous liquor. Neither does this indictment charge any particular kind of raw material as having been furnished to the distillery, but simply states that J. O. Terry "willfully and knowingly did carry and deliver, to wit, raw material to a distillery." In distilleries for the production of spirituous liquor various kinds of raw material are used, such as the meal from corn, rye, and barley, and also molasses and malt. In fruit distilleries for the production of spirituous liquors the kinds of raw material used are probably more numerous, for they include apples, peaches, many kinds of smaller fruits, and in some instances brandy is made from oranges and apricots. Is this indictment, therefore, sufficient in law to charge a criminal offense? In the Cruikshank Case, 92 U. S. 552, 23 L. Ed. 588, the court says:

"In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amendment 6. In U. S. v. Mills, 7 Pet. 142, 8 L. Ed. 636, this was so construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty of apprising the accused of the crime with which he stands charged,' and in U. S. v. Cook, 17 Wall. 174, 21 L. Ed. 538, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an 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 species—it must descend to them particularly.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of conviction or acquittal for protection against a future prosecution for the same cause; and, second, to inform the court of the facts, so that it may decide whether they are sufficient in law to support conviction if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intentions, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

Without quoting other authorities in support of these principles as to the sufficiency of indictments, does the indictment here comply with the requisites as set forth in his case? We think not. The indictment in the case from which the above is quoted charges certain persons with having banded and conspired to injure, oppress, and intimidate citizens of the United States of African descent, therein named, and thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them by the Constitution and laws of the United States, etc. The Supreme Court held that this indictment was not sufficient; that it should have charged specifically the particular right or privilege which was intended to be interfered with. The term "raw material," such as is used in distilleries of spirituous liquors, as above shown, includes material of various kinds, and it was due to the plaintiff in error that the indictment should set forth particularly the kind of raw material which was furnished, in order that the court might see whether or not it was such material as could be utilized in a distillery for the production of distilled spirits. Aside from this, how could the plaintiff in error go into trial unembarrassed, and with a fair

opportunity to defend himself, when he was not put upon notice as to the particular kind of material he was charged with furnishing, or the character of the distillery to which he carried it? How, upon the face of this record, if he were again indicted for the same offense, could he plead and avail himself of a former conviction?

We think that the judgment should have been arrested after verdict, and therefore we now direct that it be reversed.

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JACOBY et al. v. JOHNSON.

(Circuit Court of Appeals, Third Circuit. February 20, 1903.)

No. 4.

**1. TRIAL—ACTION FOR TORT—MEASURE OF DAMAGES—ERRONEOUS INSTRUCTION—CURE BY REMITTITUR.**

Where, in an action of tort, there is error in the instructions, which may have caused the jury to render an excessive verdict against defendant, the only mode in which the error can be rectified is by granting a new trial; and ordering a new trial unless plaintiff remits a portion of the recovery—the amount being specified by the court, though there is nothing appearing of record by which the damages are apportionable—which is accordingly done, will not cure the error.

**2. FIXTURES—PROPERTY OF TRESPASSER—REMOVAL BY OWNER—LIABILITY.**

In an action by the owner of signs, placed on another's land without the landowner's consent, for damages for their removal, the plaintiff testified that the structures consisted of heavy posts, 16 feet long, sunk into the ground about 5 or 6 feet, with double braces against the wind, and sleepers laid on the ground to keep the structures from sinking deeper; the signs being from 100 to 200 feet in length. He further testified that the structures were moved by sawing down close to the posts, in sections, and then moving each section, and spiking another piece where the sawing was done, and nailing the sign up again. *Held*, that the signs were affixed to the realty, so as to become the property of the defendant landowner, relieving him from liability for damages occasioned the structures by their removal.

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

C. L. Cole, for plaintiffs in error.

Martin V. Bergen, Jr., for defendant in error.

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

ACHESON, Circuit Judge. This was an action of tort. The plaintiff's declaration charged the defendants with having cut down and destroyed "certain temporary structures used as signs," the property of the plaintiff, erected and being on meadow lands back of Atlantic City. There was a verdict in favor of the plaintiff for \$3,500. The defendants moved for a new trial, and after argument the court made an order setting aside the verdict and granting a new trial. The ground for this order, as stated in the court's opinion, was the failure of the court sufficiently to instruct the jury as to the measure

of damages applicable to the case, in the different views of the facts allowable under the evidence. The opinion concluded thus:

"It does not appear, of course, upon what ground the jury arrived at their verdict; but it is quite possible that they may have been misled by the deficiency of the charge in the respect stated, and have found a verdict for a much larger sum than a true measure of damage would have justified."

At a later date, upon a rehearing, the court modified its previous order granting a new trial, and ordered that if the plaintiff should accept a verdict of \$1,800, instead of the verdict of \$3,500, judgment for the lesser amount should be entered; otherwise the rule for a new trial should be made absolute. Thereupon the plaintiff filed a stipulation accepting a verdict for \$1,800, and judgment for that amount was rendered.

Upon an examination of the record, we agree with the conclusion of the court below that its charge upon the question of the measure of damages was inadequate, and hence misleading. Could the court rectify this error in the way here pursued? Undoubtedly, where the jury, after being properly instructed by the court, return an excessive verdict, the court, in the exercise of its judicial discretion, may make a conditional order granting a new trial unless the plaintiff remits the excess. In such case, however, it is the error of the jury that is corrected; and, as the plaintiff voluntarily remits the excess, the defendant is not injured by a judgment for the reduced amount, and has no just cause to complain. But where, in an action of tort, there is error in the instructions of the court, which may have caused the jury to render a verdict against the defendant for damages in an amount greater than is justifiable, the only mode in which the court can rectify its error is by granting a new trial. In such instance the court cannot substitute its own estimate of the damages the plaintiff ought to have recovered for the sum found by the jury. The defendant is entitled to have the damages assessed by a jury under proper instructions by the court. Of this right the defendant cannot be deprived without his own consent. This, it will be noted, was not a case in which the damages were apportionable by anything appearing of record. The verdict was a general one, the jury finding a lump sum for the wrongs complained of in the several counts of the declaration. We are of opinion that the assignment of error covering this branch of the case is well founded and must be sustained.

As this case goes back for retrial, it is proper, and, indeed, necessary, that we notice some other matters brought before us by the bills of exception and assignments.

The counsel for the defendant in error (the plaintiff below), in their brief, referring to the signs here in question, say, "That the defendants were owners of land in the township, or even of the land whereon the goods were, is no answer to this suit, which is for damage to personal property." And authorities are cited in the brief to show that while the owner of land may remove the goods of a trespasser, or drive off the beasts of another trespassing on his land, he cannot destroy the goods, nor kill or wound the beasts, and, if he undertakes to remove the goods, he must do so with due care.



From the charge of the court we learn that the plaintiff tried his case upon the theory that his suit was for damage to personal property "which he owned, irrespective of any particular title to the land." The declaration designates the property as "temporary structures used as signs, the property of said plaintiff, erected and being on the said meadow lands." This, certainly, is not the most apt language in which to describe movable personal chattels. The plaintiff's own testimony, however, discloses the character of these structures. Testifying in his own behalf, he described them thus:

"Well, they are heavy posts sunk down in the ground. If I had that sign, I could explain it. (Model handed witness.) These are heavy posts sunk down in the ground. The ground is very soft, and we sharpen the ends of the posts, and push them down according to the height of the signs. That is, if the sign is low, we push our posts that much further in the ground; if it is high, we lift it out. Then these are double bracers to keep the wind from blowing it over. These are stakes that we drive in the ground. These you see here are what we call 'sleepers.' They are very heavy posts laid on the ground to keep the sign from sinking any deeper in the ground with the wind. This, I think, is a fair fac simile of the signs."

He further stated that the signs were from 100 feet to 200 feet in length, and that generally the posts were 16 feet long, and, on an average, were sunk in the ground about 5 or 6 feet. Being asked, "How do you move them?" he answered, "By sawing them down here close to the posts in sections, and then put lever under here, and raise each section out, and move it over, and then spike another piece on to this where we saw it down, and nail our sign up again without injuring it."

Upon the evidence, it is plain that these structures were annexed to the land. Now, it is a familiar principle that if a stranger, without the consent of the landowner, makes an erection on or affixes chattels to the land, such erection or article annexed to the soil becomes the property of the landowner. *Grest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353; 13 Amer. & Eng. Ency. of Law (2d Ed.) 619, 620, and cases cited in footnote. Under the proof, the structures here in question, we think, came within the operation of this principle, if the plaintiff had no title to the land, and made the erections without any authority from the landowners. The defendants, by plea, set up their ownership of the land upon which the signs were erected, and they put in evidence deeds to show that the title to the land vested in them prior to the acts complained of by the plaintiff; and they examined a surveyor, who testified that he had run the lines on the ground, and that the defendants' title deeds include the land upon which the signs were erected and stood. There was no evidence that in erecting the signs the plaintiff acted by the license or with the consent of the defendants, or any person in privity with them. The defendants requested the court to charge as follows:

"(2) If the defendants have shown that they have title to the land on which the signs were erected, the verdict must be in their favor." "(6) If the defendants had title, they had a right to remove the signs, and there can be no verdict for damages against them."

The evidence fully warranted these requests, and we think that the instructions therein asked for should have been given without quali-

fication. These requests were not specifically answered, and it seems to us that they were not substantially affirmed by the general charge of the court. On the contrary, the charge made notice to the plaintiff to remove the signs a prerequisite to a lawful removal thereof by the defendants. The jury were instructed that if the defendants had failed to show title to the land, or had "failed to establish that the plaintiff was properly notified or requested to remove the signs," the acts complained of were a trespass for which the plaintiff was entitled to redress. This instruction, we think, was erroneous, for, if the title to the land was in the defendants, they had a legal right to cut down and remove the signs without any notice to the plaintiff. As already observed, there was no evidence that the defendants, or any one in privity with them, had consented to the erection of the signs. Furthermore, if the defendants were owners of the land, they were not bound to exercise any care in the removal of the signs. If they owned the land, they owned these structures, and might do therewith as they saw fit. We may add, however, that it does not appear to us, from the evidence, that in removing the signs the defendants did anything more than was necessary.

The judgment of the Circuit Court is reversed, and the cause remanded, with direction to grant a new trial.

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GLOUCESTER ELECTRIC CO. v. KANKAS.

(Circuit Court of Appeals, First Circuit. January 22, 1903.)

No. 459.

1. NEGLIGENCE—ACTION FOR INJURY BY ELECTRIC WIRE—EVIDENCE OF CONDITION AFTER INJURY.

In an action to recover for a personal injury to plaintiff caused by her hand coming in contact with an electric wire maintained by defendant, the insulation of which was defective, it was shown that the wire was not broken from its supports by the strain put upon it at the time of the accident, and there was evidence which justified the inference that it was not materially stretched or changed in position. *Held*, that the testimony of a witness as to the height of the wire above the place on which plaintiff was walking, five or ten minutes after the injury, was competent as tending to show its position at the time of the injury, and as bearing upon the question whether it was so placed as to unreasonably and negligently expose people to danger.

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

John Lowell and James A. Lowell, for plaintiff in error.  
William A. Pew, Jr., for defendant in error.

ALDRICH, District Judge. In this case the plaintiff was injured by coming in contact with an electric wire, which was used to conduct a current of sufficient voltage to be dangerous. The wire entered a building over a roof or platform to which there was a door opening, and through which people sometimes passed. The wire was four or five feet above the platform, but its exact height was in controversy.

It is admitted that the insulation about the wire was badly defective, and that the wire had been suspended over this platform for something like twelve years. The question of the necessity of inspection, and the question whether the defendant was lacking in due care in not discovering the defective condition, were questions of fact for the jury, and we think there was sufficient evidence to entitle the plaintiff to go to the jury. So much as to the plaintiff's first assignment of error.

The remaining assignment relates to the admission of the statement of Preston O. Wass as to the situation of the wire five or ten minutes after the accident, who said it was within easy reach. The evidence of Wass did not relate to the condition of the wire,—in other words, to the question of improper insulatory covering which created the conditions that caused the injury,—but to the question of the situation or height of the wire; and that was material upon the question whether or not it was so situated as to unreasonably and carelessly expose the plaintiff to danger. Whether it was so situated that a woman's hand would fall upon it when dropped from her head, as the plaintiff testified, or within easy reach, as testified by Mr. Wass, is perhaps not very decisive on the question whether it was so situated as to unreasonably expose people to danger. However that may be, we think the evidence was competent.

The wire in question, as shown by the exhibit, was a one-eighth inch copper wire of firm consistency. It is a matter of common understanding that the strength of a wire of such size and consistency is sufficient to withstand the strain to which this wire was subjected without stretching. There is no evidence that the wire broke from its fastenings at the ends of the 90-foot stretch. Indeed, it is admitted that it did not. We think the trial court might have reasonably inferred, therefore, that the strain to which the wire was subjected would not have materially or substantially changed the situation, and that the evidence, therefore, might not only have been admitted, but considered by the jury. We make no question as to the general rule, which is well established, that, in order to make statements of the condition of the thing in question before or after the injury admissible as evidence, it must be shown to be in the same condition as it was at the time of the injury; and this rule plainly enough results from the fact that the situation or condition at the particular moment is the decisive question. The rule, however, is subject to many qualifications. Though the thing is slightly changed, evidence of its condition before and after, under certain restrictions, may be given as tending to show the condition at the exact time of the injury. It must not be remote, however, in respect to time, and the conditions must be substantially the same. In other words, if evidence is offered of the condition at a time before or after the accident, the circumstances must be such as to show that its then condition would have some bearing upon the question as to what the condition was at the time of the accident. Of course, if there was a substantial or radical change, it would not be competent. If the change was immaterial, or slight in respect to displacement or the situation, it would still have some tendency to show its condition when it caused the injury. The presiding judge must necessarily pass upon the question of remoteness, and the question of fact whether

the condition is the same, or substantially the same, as at the moment of the accident, or so near the condition as to have some tendency to show how it was then. The strain to which the wire was subjected may have made some slight change in the situation of the wire, but, under the circumstances described, not so substantial a change, in our opinion, as to render the evidence incompetent.

The only dispute in argument upon the exception in question was whether the wire was something like four or something like five feet high; and we think under the circumstances that the situation of the wire after the strain would be evidence for the jury, under proper explanations, upon the question of its condition at the time of the accident. Of course, to make evidence of a subsequent or prior condition admissible, the situation must be such as to justify the inference that the then condition was substantially the same as at the time of the accident. It is not an unusual thing in trials for the judge, acting upon an inference, at one stage of the trial to admit evidence, and at a subsequent stage of the trial, upon a situation which shows the inference to be not well founded, to withdraw the evidence from the jury, with instructions not to consider it. Another way of dealing with such evidence, not unfamiliar, where the question whether the conditions are substantially the same, involves a serious conflict upon the evidence, is to leave the evidence with the jury provisionally, under instructions that it is not evidence, and should not be considered unless the jury find the condition to be substantially the same as at the time of the injury.

In many cases it is impossible to show the exact condition at the exact time of the injury, as, for instance, where the person is killed. Under such circumstances, the question whether the condition at a subsequent time is the same is necessarily a matter of inference, and whether it is so nearly or so substantially the same as to have a tendency to show its condition at the time of the injury is also necessarily a matter of inference. A slight change or a slight displacement would not necessarily render the evidence incompetent, but the change would call for proper explanation by way of instructions to the jury.

The cases are numerous to the effect that if there has been no change, or if the change is slight or not of a substantial or material character, the evidence is admissible. In this view, it becomes largely a matter of discretion for the court to determine what evidence shall be admitted; and, as said in a note to 1 Greenl. Ev. § 14t, "it largely depends upon the thing, and the facts of each case must control, and precedents are of little value." In the case at bar the wire remained on its attachments. The thing was there in all substantial respects the same as before the pressure was put upon it; and the question, as has been said, would not be whether there had been any slight change, but whether the fair inference would be that the change had been so substantial as to render the evidence not of consequence upon the question of the condition at the precise moment of the injury.

In this case the presiding judge, acting upon the idea that there might have been some displacement, withdrew the evidence, and twice cautioned the jury distinctly and emphatically not to consider the evidence of the witness in question. With these views, we think the at-

titude of the circuit court sufficiently favorable to the plaintiff, and the exceptions are therefore overruled.

The judgment of the circuit court is affirmed, with costs for the defendant in error.

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WULBERN et al. v. DRAKE.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 452.

**1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PERSONS ENGAGED CHIEFLY IN FARMING.**

An alleged bankrupt managed and controlled plantations containing over 1,100 acres, the greater part of which he owned, the title to the remainder being in his children. Nearly all of the land was cultivated, a part by hired labor and the remainder by tenants. He resided on the land, and devoted the principal part of his time to the carrying on of its cultivation, upon which he relied as his principal source of income. He also maintained on the plantation where he resided a store or commissary, for which he purchased goods, supplies, and fertilizers to the amount of about \$20,000 a year, and sold the same, almost exclusively, to his employes and tenants. *Held*, that he was "engaged chiefly in farming or the tillage of the soil." within the meaning of Bankr. Act, § 4b [U. S. Comp. St. 1901, p. 3425], and could not be adjudged an involuntary bankrupt.

Appeal from the District Court of the United States for the District of South Carolina, in Bankruptcy.

For opinion below, see 114 Fed. 229.

On the 31st of December, 1901, C. Wulbern & Co., Simons-Evans Manufacturing Company, and Drake-Innes-Green Shoe Company filed a petition against J. N. Drake, of the county of Marlborough, in the District of South Carolina, alleging that petitioners were creditors in excess of \$500 of the said Drake, and that he owed debts in excess of \$1,000. The petitioners further alleged that the said Drake, within four months next preceding the date of the petition, had committed an act of bankruptcy by a general assignment for the benefit of creditors. The said Drake filed his answer to the petition as follows: "And now the said J. N. Drake appears, and denies that he comes within the terms of the act of the Congress of the United States relating to bankruptcy, and, on the contrary, alleges that he was, before and at the time of contracting the debts in said petition mentioned, and is now, engaged chiefly in farming and the tillage of the soil, and avers that he should not be declared bankrupt for any cause in said petition alleged, and this he prays may be inquired of by the court." Upon the issue thus raised the testimony was taken by the court, and it was ascertained that Drake owed Wulbern & Co. one note of \$1,400, due November 1, 1901, and also an account for goods and merchandise sold and delivered to him of \$1,165.32; that he owed the Simons-Evans Company an account for goods sold and delivered to him the sum of \$205.87; and the Drake-Innes-Green Shoe Company an account for goods and merchandise sold and delivered to him of \$177.95.

The facts, based on the testimony in the record, are, in substance, that all of these debts were contracted by Drake for dry goods, groceries, and supplies for a store or commissary, as some called it, kept in the usual form

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

of a country store, which he conducted on his premises near his home; that he sold goods from his said store to his tenants and employes, and in a few instances to outside persons; that the store was kept open generally in the daytime, and was in charge of Drake's nephew; that such patrons as applied were served; that the letterheads upon which orders were made for the goods bought for the store contained the words, "J. N. Drake, Merchant and Planter." It was further shown that Drake lived in the country about 10 miles from Bennettsville, in the county of Marlborough; that in the year 1901, at the time the debts set forth in the petition were contracted, and up to and including the petition in bankruptcy, he had under cultivation one plantation containing 350 acres, another place containing 225 acres, and still another of 85 acres, the title to all of which was in his name; that, besides this, he had in control a tract of 450 acres, the title to which was in his children's name; that the principal product of these plantations was cotton and corn, and that the larger part of the land described was in cultivation; that some of the lands were let to tenants by Drake for part of the crops produced, some of it to tenants for a stipulated rental, and the other was cultivated by Drake himself through employed laborers at fixed wages. Drake bought all of the fertilizers for the lands, and provided supplies for the laborers and tenants, these fertilizers and supplies being procured by the laborers and tenants from the store or commissary heretofore described. Drake superintended all of the farming operations, as well those of the croppers and tenants as those conducted by himself, and attended personally to gathering the crops, to ginning the cotton and selling the crops. That on the several farms about 42 plows, with the necessary stock, were employed, one-third of which he operated with hired labor, and the remainder were used by tenants and croppers. Drake furnished the stock generally, but in some instances he sold it to tenants, to be paid for when the crops were matured and sold. That Drake paid his hands out of the store, and also let tenants and croppers have goods and supplies in their mutual dealings. That Drake did not solicit trade outside of those upon his farms, although he sold goods to such persons as applied. That he bought for the store \$15,000 or \$20,000 worth of goods and supplies a year. That at the time of the assignment there were accounts due on the books of the store to about the amount of \$5,000, all of which was due by tenants and croppers except about \$300. It was also shown that on many of the plantations in that section it was the custom for the landowner to keep a store or commissary for the purpose of supplying those who worked upon his lands with fertilizers, groceries, and such articles of food and clothing as might be necessary, and that this business was a mere adjunct to the farming operations. The testimony shows further that Drake, for six or eight years previous to the filing of the petition, had borrowed on an average of \$5,000 a year from the bank of Marlborough, the money being used in aid of his farming operations, and giving as security therefor liens on his crops, his horses and mules, and sometimes mortgages on his lands; that his principal income was derived from his farming operations, and that he relied on this as the source from which to obtain the means to maintain and support himself and family. It was also in evidence that Drake, at the time of the filing of the petition, owed debts to a considerable amount besides those mentioned in it. It was admitted that Drake had executed, just before the filing of the petition, a general assignment of all his property, in which he had secured all of his debts, without preference. The District Court held upon the evidence that Drake was a person engaged chiefly in farming and the tillage of the soil, and therefore could not be adjudged a bankrupt in an involuntary proceeding, and rendered a decree accordingly. From this decree the petitioners appealed to this court.

F. L. Willcox, for appellants.

Knox Livingston, for appellee.

Before GOFF, Circuit Judge, and PURNELI, and BOYD, District Judges.

BOYD, District Judge (after stating the facts as above). The law under which the question presented in this case arises will be found in Bankr. Act, § 4b [U. S. Comp. St. 1901, p. 3425]:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

We think the District Judge amply justified, upon the testimony, in finding as a fact that Drake was chiefly engaged in farming. The counsel for the petitioners made the point and contended that much of the lands described were not cultivated by Drake personally; that his relation to this was only that of landlord, and his tenants were the farmers; and that as to the other lands, the principal part of the manual labor being performed by hirelings and not by Drake himself, he could not be regarded as a farmer. We cannot agree with this view as to the meaning of the term, "farmer, or one engaged in the tillage of the soil," as the same should be construed in compliance with the spirit and language of the statute; but, on the other hand, we coincide with the conclusion of the District Judge when he declares, "within the purview of this statute it is understood to mean the business of cultivating land or employing it for purposes of husbandry."

The statute does not apply to such persons only as are engaged solely in farming or tillage of the soil, but exempts from the provisions relating to involuntary bankruptcy all persons who are chiefly so engaged. It does not matter, therefore, if the person may have other business or other interests, if his principal occupation is that of an agriculturalist, if that is the business to which he devotes more largely his time and attention, which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth, although, as before suggested, he may have other interests or other investments, yet the conclusion must be that his chief business is that of farming or tillage of the soil. The presence of an establishment like the one maintained by Drake on his premises as a store or commissary was of great convenience, to both the landowner and his tenants, croppers, and employes, for it afforded a place from which they could readily obtain necessary supplies. It saved them from the loss of time necessary to go to distant places to make their purchases, and it also provided them an opportunity to procure necessities without using ready cash. It was therefore a benefit to both Drake and those employed in cultivating his lands to have his store or commissary where it was. When, upon the testimony, it was found as a fact that Drake was engaged chiefly in farming, which view is fully sustained by the testimony, it was the duty of the court, under the law, to dismiss the petition.

The decision of the District Judge is affirmed.

## PENDER v. BROWN et al.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 453.

**1. JURISDICTION OF CIRCUIT COURT OF APPEALS—WRIT OF ERROR—FAILURE TO PROSECUTE.**

A Circuit Court of Appeals does not acquire jurisdiction of a cause by writ of error unless such writ, together with the record, is returned to the next ensuing term of the court to which it is made returnable, or sufficient cause is then shown why it is not so returned.

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

On motion to dismiss writ of error.

Alan G. Burrow and Harry K. Walcott, for plaintiff in error.  
William H. White and T. S. Garnett, for defendants in error.

Before GOFF, Circuit Judge, and PURNELL and BOYD, District Judges.

GOFF, Circuit Judge. This writ of error is to a judgment rendered by the Circuit Court of the United States for the Eastern District of Virginia in an action of assumpsit brought by the plaintiff in error against the defendants in error. The case was tried to a jury, which, under the direction of the court, returned a verdict in favor of the defendants below. On such verdict judgment was duly entered, and to the same this writ of error was sued out. The judgment was rendered on the 21st day of March, 1901, and the writ of error was allowed on the 17th day of September of that year. On the 1st day of May, 1902, the transcript of the record was filed in this court. On the 9th day of October, 1902, the defendants in error filed a motion to dismiss this writ of error, and it is the matters relating to that motion which have been argued and submitted for our consideration.

The first term of this court next ensuing after the writ of error was allowed commenced on the first Tuesday in November, 1901. That was the term of this court to which said writ of error was returnable. Since that term, and previous to the filing of the record in this court, another regular term, commencing on the first Tuesday of February, 1902, was duly convened, held, and adjourned. We have no jurisdiction of this writ of error unless it has been brought before us by virtue of the provisions of some act of Congress, or of the rules made in accordance therewith. This writ of error, together with a copy of the record of the case to which it related, should have been returned to the next term of this court held after it was issued, or some sufficient cause should then have been given for not having so proceeded; otherwise it became void, and the party suing it out, if he then still desired to invoke the appellate jurisdic-

¶ 1. Jurisdiction of Circuit Court of Appeals, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.



tion of this court, could only have done so by resorting to a new writ of error. The plaintiff in error failed to duly prosecute his writ, and for that reason it became of no avail. *Castro v. United States*, 3 Wall. 46, 18 L. Ed. 163; *Grigsby v. Purcell*, 99 U. S. 505, 25 L. Ed. 354; *Credit Company v. Arkansas Central Ry. Co.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; *Caillot v. Deetken*, 113 U. S. 215, 5 Sup. Ct. 432, 28 L. Ed. 983; *Evans v. State Bank*, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917. It appears that a citation was issued under date of February 21, 1902, but that was subsequent to the adjournment of the second regular term of this court held after the granting of the writ of error, and consequently such citation was inoperative. A citation is one of the necessary elements of a writ of error taken, as this was, subsequent to the term during which the judgment was rendered; but if it be not issued and served before the end of the next ensuing term of the appellate court, it, as well as the writ of error, becomes ineffective. *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581. We conclude that this court has not acquired jurisdiction of the writ of error referred to, and therefore the motion to strike the same from our docket is granted.

Dismissed.

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WILLIAMS BROS. v. SAVAGE.

(Circuit Court of Appeals, Fourth Circuit. February 10, 1903.)

No. 442.

**1. BANKRUPTCY — DISCHARGE — APPEAL — TIME OF TAKING — SUFFICIENCY OF RECORD.**

Bankr. Act 1898, § 25 [U. S. Comp. St. 1901, p. 3432], requires an appeal from a decree granting a discharge to be taken within 10 days. Circuit Court of Appeals Rule 14, subd. 3 (31 C. C. A. liv, 90 Fed. liv), provides that no case will be heard until a complete record, containing in itself all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in that court, has been filed. The record on an appeal from a bankrupt's discharge was certified to by the clerk as a true transcript of a part of the record, proceedings, and judgment, as ordered by appellant's counsel. The record showed the order of discharge dated July 15, 1901, and petition for an appeal, accompanied by an assignment of error, without anything to show when it was presented, or when the order granting its prayer was made or filed, or whether it was filed at all. There was a citation, dated January 25, 1902, returnable February 20, 1902, and extended by order to March 15, 1902. No appeal bond appeared to have been filed. It appeared in the discussion at bar that the discharge was granted upon oral testimony. *Held*, that the appeal must be dismissed, it not appearing that it had been filed in time in the District Court, nor that the transcript had been filed at the term next succeeding the taking of the appeal, nor that the court was in possession of the testimony, so as to enable it to review the case on its merits.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

James E. Heath, Jr., for appellant.

John A. Lamb, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. At the call of the case the appellee moved to dismiss the appeal on the following grounds, viz.:

"(1) Because the appeal was not taken within ten days after the decree was entered granting the discharge, as required by section 25 of the bankrupt act [U. S. Comp. St. 1901, p. 3432]. From this record it appears that the discharge was granted on the 15th day of July, 1901. The citation is dated 25th January, 1902, and was renewed 20th of February, 1902, and was finally made returnable on the 15th day of March, 1902. (2) Whilst the discharge was granted on the 15th day of July, 1901, the record was not filed with the clerk of this court until the 15th day of March, 1902. Thus two terms of this court were allowed to pass without prosecuting the appeal. (3) The record does not show that the appeal bond required by the district judge has been given. (4) Because it does not appear from the record that appellant has any claim against the estate of the bankrupt; it being his duty, if he have a provable claim, to prove it in manner and form prescribed by the bankrupt act. (5) Because the record is so incomplete, indefinite, and uncertain that this court cannot pass upon it."

The record, on its face, shows that it is not complete, the clerk certifying that it is a true transcript of the part of the record and proceedings and judgment of the said court in this cause as ordered by counsel for the appellant. Rule 14, subd. 3, of the original rules of the Circuit Court of Appeals (31 C. C. A. liv, 90 Fed. liv), of force in this circuit, provides: "No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, have been filed." In *Union Pacific Company v. Stewart*, 95 U. S. 284, 24 L. Ed. 431, it is made the duty of appellant to see that the record is properly presented to the appellate court. Examining the record in this case, made up, as the clerk certifies, under the instructions of appellant's counsel, we cannot find any answer to the objections made by the appellee. It is impossible to tell from this record whether any of the steps to perfect the appeal were taken in proper time; nor, indeed, when they were taken. There is no evidence whatever, from the record, when any of these papers were filed. The record shows that the order of discharge of the bankrupt which the appellant seeks to reverse was dated the 15th day of July, 1901. Then in the record appears a petition for an appeal accompanied by an assignment of errors. There is nothing to show when it was presented, nor when the order granting its prayer was granted or filed, nor whether they were filed at all. Then we find a citation dated 25th of January, 1902, returnable to the 20th day of February, 1902, extended by order to the 15th day of March, 1902. All of these last dates were more than six months from the date of the final discharge. When the transcript is not filed at the term next succeeding the taking of the appeal, the appeal will be dismissed. *Mesa v. U. S.*, 2 Black, 721, 17 L. Ed. 350. There is nothing in the record which can inform the court when this appeal was taken. There were explanations made by appellant's counsel at the

bar relating to this matter. But these verbal statements are not part of the record, and cannot be treated as of the record. It is true that the citation was issued by the district judge on the 25th of January, 1902, and that we may presume that he did his duty, and so that a bond was filed. But on the 25th day of January, 1902, the time for taking an appeal had passed. This fact alone would not cut off the right of an appeal, if the petition for leave to appeal and its allowance were duly filed. *Evans v. The State Bank*, 134 U. S. 333, 10 Sup. Ct. 493, 33 L. Ed. 917. Of this we know nothing from the record. "An appeal," say the court in *Credit Company v. Arkansas Central Railway Co.*, 128 U. S. 261, 9 Sup. Ct. 103, 32 L. Ed. 448, "cannot be said to be taken, any more than a writ of error can be said to be brought, until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers with the petition and allowance of the appeal, if there be such a petition and allowance, and the appeal bond and citation." In *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989, in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of the Supreme Court, was held sufficient evidence of the allowance of the appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office. We cannot tell from this record whether such bond was filed, or when it was filed, and, if filed, whether it was in the time in which an appeal must be perfected. In *Credit Co. v. Arkansas Central Railway Co.*, supra, it is held that no writ of error is brought, in the legal meaning of the term, until it is filed in the court which entered judgment, and the same rule is declared applicable to appeals. The bankrupt law requires an appeal from an order like this to be taken within 10 days. So this appeal cannot be said to have been brought in the legal meaning of the term, unless it was filed in the court which rendered the judgment, and we have no evidence whatever that the appeal was filed in the clerk's office within that time. See *Wood v. Bailey*, 21 Wall. 640, 22 L. Ed. 689.

It appeared in the discussion at the bar that the district judge granted the discharge of the bankrupt upon testimony taken before him ore tenus. No mention whatever of this testimony appears in the record. His conclusion on this point is a matter which the appellant seeks to review. We could not come to any satisfactory decision unless we were acquainted with all the facts upon which his conclusion was based. So, even if we pass by this motion to dismiss, and if we hear the case on its merits, we could not decide it.

We desire to emphasize to the bar the necessity for sending to this court complete and proper records. The whole case on appeal must come up, and the entire record must be printed, unless the parties on both sides consent to omit matter deemed unnecessary. Clerks of courts must see to it that they place in the record not only the contents of papers, but the dates showing when such papers were filed. When the counsel for appellant, whose duty it is to see that the record is complete, permits the clerk to send up a transcript in the im-

perfect and unsatisfactory condition in which the record in question is presented, they may rest assured that this court will direct the dismissal of their appeal. In this connection we call attention to the case of *Pender v. Alexander Brown et al.* (decided at this term) 120 Fed. 496.

It is ordered that this appeal be dismissed.

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CONYNGHAM v. BALDWIN.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 44.

1. RELEASE OF PLEDGE—CONTRACT OF THIRD PERSON—LIABILITY—CONDITIONAL CHARACTER—HAPPENING OF CONDITION.

In consideration of the surrender of his brother's note for \$6,420 and corporate stock pledged to secure it, defendant promised to pay plaintiff \$3,000 in cash, and, in the event that either the note or the stock should prove of "sufficient value to pay the balance of the note, or any part of it, he would pay accordingly." *Held*, that an offer by plaintiff to take back the stock in satisfaction of defendant's promise, which defendant refused, was not equivalent to a determination of the market value of the stock, so as to render defendant absolutely liable for the balance of the note; it being at most a controvertible admission that he considered the stock of more value, and worth more to him, than a release of his liability.

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

Geo. W. Pinney, Jr., for plaintiff in error.

Edmund L. Mooney, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below, and brings this writ of error to review a judgment for the plaintiff upon a verdict directed by the court.

The action was brought to recover upon a promise of the defendant made upon the delivery to him of his brother's note for \$6,420 and a certificate for 246 shares of the stock of the Jefferson Iron Company, which plaintiff held as collateral security for the payment of the note. In consideration of the surrender of the note and scrip by the plaintiff, the defendant promised to pay her \$3,000 cash, and that, in the event that either the note or the stock should prove of "sufficient value to pay the balance of the note, or any part of it, he would pay accordingly." Defendant paid the \$3,000. The controversy on the trial was whether he had become liable to pay plaintiff the balance, or any part of it.

The only evidence introduced on the trial tending to show that the stock or note ever became of any value was that the plaintiff had, subsequently to the delivery of them to the defendant, received an offer from one Elliott to pay her \$3,000 for the stock if she could

¶ 1. Rights and liabilities of pledgees of corporate stock, see note to *Frater v. Old Nat. Bank*, 42 C. C. A. 135.

get the defendant to turn it over to her; that she communicated this offer to the defendant, and defendant promised that, if she could make the sale, he would try to carry out any instructions given by her; that subsequently Elliott renewed his offer, and plaintiff communicated it to the defendant, and the latter then insisted upon being paid the \$3,000 before transferring the stock; and that subsequently she made him a proposition, which was, in substance, that if he would send her the certificate, "so that she could have the stock transferred on the books of the company," she would accept it in satisfaction of his promise, which proposition was declined by the defendant.

In behalf of the defendant, Elliott testified that he had never made any offer to purchase the stock of the plaintiff. The defendant also introduced testimony to show that it had never been of any appreciable value.

The trial judge took the case from the jury, and directed a verdict for \$3,420 and interest, and to this ruling the defendant duly excepted. The assignments of error challenge the correctness of the ruling.

The trial judge, in directing a verdict, proceeded upon the theory that the plaintiff's proposition to the defendant to take the stock and discharge him from further liability upon his promise was equivalent to an offer by her to pay the defendant \$3,420, the balance of the note, and the defendant, by refusing that offer, precluded himself from asserting that the stock was not of that value.

We think this ruling was erroneous. The offer and refusal was evidence against the defendant in the nature of an admission that he considered the stock to be of some value, and worth more to him than a release of his liability upon his promise. Except as such an admission the evidence was incompetent. Even if he had admitted in terms that the stock was of the value of \$3,420, that admission would not have concluded him from subsequently disproving its truth. By the ruling of the court he was held liable as if his promise had been an undertaking to pay the plaintiff such a sum, not exceeding the balance due on the note, as she might choose to offer him for the stock. That was not the undertaking, either in terms or spirit. Such a promise would have put it in her power to exact of him immediately, if she desired, the whole balance due upon the note, or any part of it which she might choose. It would have given her the right to fix the value of the stock arbitrarily. Neither of the parties contemplated such an obligation. The promise was that he should pay her the value of the stock, if it should prove to be of any value; not a value fixed by her own estimate, or by his, but its fair and reasonable value. The measure of his liability upon this promise was the intrinsic or market value of the stock. By the ruling not only was his liability measured by a different standard, but he was held liable as though the plaintiff had made him a cash offer of \$3,420 for the stock, which he refused. If the offer and refusal tended to prove that the parties considered the stock as equivalent in value to the release of the defendant's liability, it did not have the slightest tendency to prove that they considered his liability to be \$3,420.

Without intending to decide whether, upon the case made, there

was sufficient evidence to authorize the jury to find that the defendant was liable in any sum whatever, the judgment must be reversed for the reasons indicated. Ordered accordingly.

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BLOOMFIELD v. ROY.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1903.)

No. 1,172.

1. CONTRACT OF RECEIVER—CONSTRUCTION.

Intervener made a contract with the receiver in a suit by which, in consideration of certain advances, the receiver agreed that under no circumstances would he enforce any claim for his commissions as receiver "to the detriment of" the claim of the intervener. *Held*, that such contract did not entitle the intervener to the allowance of his claim against commissions allowed the receiver from funds which would otherwise have been applied in payment of claims having precedence over that of the intervener.

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

Hewes T. Gurley, for appellant.

Frank L. Richardson, for appellee.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. This is an appeal from the decree of the Circuit Court dismissing a bill of intervention filed by the appellant in the equity suit of Ackroyd against Taylor, in which equity proceeding the appellee was receiver. The bill of intervention claimed the sum of \$800 as against the appellee. In the progress of the equity proceeding the appellant had certain dealings with the appellee as receiver, by which he contracted to make certain advances not necessary to be recited or considered here, further than as shown by the clause which is the basis of this claim, viz.:

"That Roy does hereby agree and bind himself that under no circumstances will he enforce any claim for his commissions as receiver to the detriment of the claim of the said Bloomfield for the reimbursement of his said advances, which shall prime that of the receiver for his commissions as such up to the amount of one thousand dollars."

The matter embraced in the bill of intervention was referred to a master, and from his report thereon it appears that in the settlement of the equity proceeding the receiver, Roy, was allowed \$1,800 for his commissions. It also appears that the sum to be distributed was not sufficient to pay the claims, other than the receiver's commissions, which, beyond dispute, and by the admission of the appellant, held a higher rank than his claim; that the amount allowed to the receiver, and decreed to be paid to him, came wholly out of funds which would otherwise have been distributed to the claims of higher rank than that of the appellant; that therefore, in accepting the commissions allowed him, the appellee had not enforced, and

would not enforce, any claim for his commissions as receiver to the detriment of the claim of Bloomfield. The master reports, in substance, that if the paragraph relied on is to be considered a contract whereby the receiver, for consideration, agreed to pay or give an uncertain sum of money which the court might award to him for services as receiver, he (the master) would hesitate to recognize such contract as valid in law, and, after stating certain other grounds of doubt as to the propriety of such a contract, asks, "Is it not contra bonos mores?" And without further consideration as to the right of the receiver to make a valid contract, as stated in the bill of intervener, the master passes to the merits of the case, and, after a full review of the facts of the case and the contentions of the parties, proceeds:

"It will be seen, therefore, that whatever was allowed by the court for the receiver was so much taken away from these two claims, to wit, the holder of receiver's certificates and Ackroyd; and, had the receiver been allowed no sum whatever, Bloomfield would not have fared better than he did. \* \* \* Roy did not enforce any claim for his commissions as receiver to the detriment of the claim of the said Bloomfield for the reimbursement of the said advances. What Roy did receive was so much deducted from the holders of receiver's certificates and the Ackroyd pledge."

It is not contested that the receiver's certificates and the Ackroyd pledge referred to in the master's report had rank of the appellant's claim. The master proceeds:

"It is evident, therefore, a court of equity, from any standpoint, could not be justified in permitting Mr. Bloomfield to benefit to the extent of \$800 at the expense of the holders of receiver's certificates and the Ackroyd pledge, in the face of the decree of the Circuit Court, which found that the claim of Bloomfield for \$1,500 was subordinate to said certificates and Ackroyd's pledge, which must be paid by priority and preference over all other claims. In deducting the funds from the receiver's certificates and Ackroyd's pledge to pay the costs of court, Roy cannot be considered as in any way to have violated his covenant, for it cannot be said that Roy endeavored to enforce his claim for his commissions as receiver to the detriment of the claim of Bloomfield. Wherefore I find that the bill filed on behalf of W. B. Bloomfield, intervener in this cause, should be dismissed, at his costs, and his claim rejected."

The appellant's exceptions to the report of the master were overruled. The report was approved, and the bill of intervener was dismissed.

We do not deem it necessary to indulge in any speculative consideration of the various questions raised in the elaborate and learned briefs of the respective counsel in this case. A careful examination of the same and of the record has not discovered to us any adequate ground for reversing the action of the Circuit Court, and its decree is therefore affirmed.

## MELTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit, February 17, 1903.)

No. 945.

**1 CRIMINAL LAW—MAILS—FRAUDULENT USE—INSTRUCTIONS—BURDEN OF PROOF.**

In a prosecution for fraudulent use of the mails, an instruction that if the letter addressed to C. & Co. was found by C. on his desk, on or about the day of its date, in the place in which it was the custom of the clerks of the company to place letters that had come by mail for C.'s consideration, and the letter was written by defendant on the day of its date, and related to a scheme to defraud, charged in the indictment, which had been formed by one of the defendants, the jury would be authorized to assume that the letter was placed or caused to be placed in the post office by defendants, or one of them, "unless there be other circumstances or evidence which removes such presumption," was erroneous, as placing on the defendant the burden of rebutting the inferences arising from the evidence of guilt.

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

A. E. Goodhue, for plaintiffs in error.

Wm. Vaughan and Thomas R. Roulhac, U. S. Atty.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

SHELBY, Circuit Judge. The defendants below were indicted and convicted for fraudulently using the United States mail, in violation of Rev. St. § 5480, as amended by the act of March 2, 1889 (25 Stat. 873 [U. S. Comp. St. 1901, p. 3696]). There are 19 assignments of error. Several of them relate to the demurrers to the indictment, which we think were properly overruled. Other assignments relate to rulings on the rejection or admission of evidence, and the same questions may not arise on the second trial.

We shall proceed to consider an assignment of error based on the trial court's instructions to the jury. A material charge in the indictment was that the defendants, for the purposes alleged in the indictment, placed or caused to be placed certain described letters in the post office at Gadsden, Ala., addressed to Louis V. Clark & Co., at Birmingham, Ala. Louis V. Clark testified that he received the letters in question at Birmingham. "I found it," he said (referring to one of the letters), "on my desk, where it was the custom of the clerks in my office to place letters that had come by mail." The court, as a part of the general charge, instructed the jury:

"As to whether or not the letters, or any of them, set out in the indictment, were mailed at Gadsden by the defendants, or some one of them, I charge the jury as follows: If the jury find from the evidence that the letter addressed to Louis V. Clark & Co. was found by Louis V. Clark on his desk, on or about the day of its date, in the place where it was the custom of the clerks in said Clark's office to place letters that had come by mail, for his consideration, and said letter was written at Gadsden, Ala., by one of the defendants, on the day of the date thereof, and related to the scheme to defraud set forth in the in-

†1. Nonmailable matter—Frauds and counterfeiting, see note to Timmons v. United States, 30 C. C. A. 86.



dictment which had been formed by defendants, then the jury, on such finding, may be authorized to presume that the said letter was placed or caused to be placed in the post office of the United States at Gadsden, Ala., by defendants, or one of them, unless there be other circumstances or evidence which removes such presumption."

The principle that there is a presumption of innocence of the accused—a presumption that enters into the trial of every criminal case—is elementary, and lies at the foundation of the administration of the criminal law. The charge, it seems to us, tends to some extent to deprive the defendants of that presumption. The jury are told that, if they find certain facts proved, they may presume that the defendants did a certain act necessary to their conviction. If it be conceded that so far there was no error—a question we need not decide—we must deal with the last two lines of the charge: "unless there be other circumstances or evidence which removes this presumption." The important inquiry was whether or no the defendants posted the letters at Gadsden. From proof of certain facts the court said the jury were authorized to find that they did so post them, unless there was other evidence favorable to the defendants which "removes such presumption." This is, in effect, to instruct the jury that the proof of certain facts showed defendants guilty of the act in question, and shifted the burden of proof to the defendants to remove the presumption.

In *McKnight v. United States* (C. C. A.) 115 Fed. 972, the trial court, having correctly instructed the jury as to inferences that could be drawn from the evidence against the defendant, was held to have erred in adding that the burden was thrown on the defendant to rebut such inferences. The jury should not be so instructed, because the presumption of the defendant's innocence may be sufficient to prevent the jury's drawing an inference, although they are authorized or permitted to draw it. The burden of proof is not shifted. It is on the government to prove the guilt of the defendant beyond a reasonable doubt.

In *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, the trial court instructed the jury:

"That when the prohibited acts are knowingly and intentionally done, and their natural and legitimate consequences are to produce injury to the bank or to benefit the wrongdoer, the intent to injure, deceive, or defraud is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful and their acts legitimate."

The Supreme Court held this charge was error, saying:

"The error contained in the charge, which said, substantially, that the burden of proof had shifted, under the circumstances of the case, and that therefore it was incumbent on the accused to show the lawfulness of their acts, was not merely verbal, but was fundamental, especially when considered in connection with the failure to state the presumption of innocence."

The judgment of the court must be reversed, and the case remanded for a new trial.

## FAY v. MASON et al.

(Circuit Court, W. D. New York. January 31, 1903.)

No. 139.

## 1. PATENTS—REISSUES.

Where a reissue is for the same invention, a broader claim than that in the original patent will not invalidate it.

## 2. SAME—DATE OF INVENTION—EVIDENCE.

The date of invention is presumptively that of the issue of the patent, and evidence of a prior conception of the completed invention must be clear, positive, and unequivocal. The mere assertion of the patentee that he conceived the invention on a prior date, unaccompanied by corroborative evidence showing that his conception was sufficiently specific and definite to enable him to construct a machine (if the patent be for a machine) which is capable of successful operation, is insufficient.

## 3. SAME—SUIT FOR INFRINGEMENT—PLEADING.

The rule that the burden rests upon the complainant in a suit for infringement to prove that his invention was prior to defendant's applies only where the issue is raised by defendant by giving the 30 days' notice required by Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394]; otherwise complainant's patent is sufficient evidence *prima facie* that he was the original inventor.

## 4. SAME—INFRINGEMENT—IRONING MACHINE.

The Fay reissue patent, No. 11,664 (original, No. 560,819), for a machine for smoothing the edges of collars and cuffs, claims 1, 2, 3, and 4, and No. 678,949, to the same inventor, for an improvement thereon, both *held* not anticipated, valid, and infringed.

In Equity. Suit for infringement of reissued letters patent No. 11,664 (original, No. 560,819), issued May 17, 1898, and No. 678,949, issued July 23, 1901, both to Fred E. Fay for improvements in ironing machines. On final hearing.

Macomber & Ellis, for complainant.

Frederick F. Church (A. Parker-Smith, of counsel), for defendants and intervener.

HAZEL, District Judge. The complainant is the inventor and patentee of a machine for smoothing edges of cuffs and collars. His original patent, No. 560,819, granted April 13, 1897, was reissued May 17, 1898, on application filed within four months after the issuance of the original patent. Its number is 11,664. On July 23, 1901, an improvement patent, No. 678,949, was granted to complainant. The bill is in the usual form, and alleges conjoint infringement of both patents, and prays for an injunction and accounting. The defendants named in the title are mere users of the machine manufactured by the inventor, W. H. Rickey, under patent No. 660,277, issued to him by the Patent Office October 23, 1900, nine months prior to the date of complainant's improvement patent, but subsequent to the filing of the application therefor. Infringement of claims 1, 2, 3, and 4 of the reissued patent, and of claims 2, 3, 4, 18, 21, 23, 24, 25, 26, 27, 31, and 33 of the improvement patent, is charged. The essential elements of

¶ 1. See Patents, vol. 38, Cent. Dig. § 208.

the invention are concisely stated in claim 2 of the reissue, which reads as follows:

"(2) An ironing machine having a rotatable head, a circular groove in the head, and guide on the same plane as a side of the groove, forming a projecting wall to the latter, substantially as set forth."

The specification of the reissued patent says:

"An object of my invention is to greatly increase the convenience and facility of adjusting the edge of the collar in the groove, thus to increase the rapidity with which the work can be done. In this relation my invention comprises an ironing machine in which the rotating head has a peripheral groove, the lower wall of which is wider than the upper wall, and projects to form a step, rest, and guide for catching the cuff or collar, and guiding the edge thereof into the groove."

Claim 2 of the improvement patent substantially embodies all the elements of the enumerated claims of the reissued patent, and an arrangement by which the ironing heads, varying in size and placed in two parallel lines, yield when the collar or cuff comes in contact, and move back into place when the article is withdrawn. The claim reads as follows:

"(2) An ironing machine comprising two or more grooved circular heads, adapted to iron the edge of a starched collar or cuff, and yielding supports for the heads, whereby the latter are permitted to follow the outline of said edge as the article bears thereon."

The defenses interposed are many. They relate chiefly to the inoperativeness of the reissued patent, anticipation, expansion of claims, and noninfringement. No expert witnesses were sworn on the hearing by defendants to explain any of the many patents, foreign and domestic, set out in the answer in anticipation of the reissued patent. Two only were offered in evidence by the defendants, a third finding its way into the record by stipulation. These patents are Burges' United States patent, No. 557,766, of April 7, 1896 (application filed October 26, 1895); Senkbeil German patent, No. 57,148, dated June 15, 1891; Gantenberg German patent, No. 77,219, dated October 10, 1894. It is submitted by the defendants that the analysis made by complainant's expert witnesses of these prior patents, and the inferences deducible from their testimony, convincingly disclose the inoperativeness of complainant's machine; that if the prior ironing machines in evidence are inoperative the complainant's machine, by comparison, is also practically incapable of successful operation; and, conversely, if the court decides that the complainant's machines are practically inoperative, then the patents are completely anticipated by the Senkbeil, Gantenberg, and Burges patents.

The defense of anticipation will first be considered. According to the views of the defendants, complainant's prima facie case discloses the invalidity of the reissued patent on two seemingly inconsistent theories. Its validity is challenged on the one hand because the testimony tends to establish the inoperativeness of the Gantenberg and Senkbeil patents cited in anticipation, and because the asserted differentiating features between those patents and the reissued patent do not prove operativeness in complainant's machine. This assertion requires an examination of the testimony offered by complainant to

substantiate the practical utility of the machine for which the patent was granted. Before so doing, I will endeavor to make clear what the patentee claims for his invention. According to his view, a groove in an iron circular rotatable head designed to smooth the rough edges of cuffs and collars requires in its construction walls or sides slanting from the groove to the periphery, and conforming to the rounded shape of the collar or cuff edge. The specification of the reissued patent sets out that the rotatable ironing head by preference is cone-shaped, and is provided with steps having peripheral grooves, the lower walls of which are on a line with the next lower step. He does not, however, confine himself to that method of construction, and it appears by the proofs that several ironing rotatable heads having suitable grooves may be used alternately by the operator to facilitate the ironing. Any one of the curved grooves suitable for the work may be used, depending somewhat upon the roughness of the collar or cuff edge. The ironing head or series of heads described under patent No. 678,949, and improvement of the reissued patent, are supported from below a table or standard upon which they are mechanically attached. The slant of the grooves, as already pointed out, enables the operator to dexterously guide the collar or cuff to the rounded part and to thereby smooth its edge. In order to facilitate the ironing and successfully operate complainant's machine, it is essential that the grooves should be circular and accurately conform to the specification. Unless the groove guide or ledge described in the claims is present, the machine is not capable of practical operation. The testimony of the expert witnesses is altogether directed to the inoperativeness of the prior art and the practical utility of the machine described in the reissued patent. The proofs show that a V-shaped groove not only retards the ironing, but, on account of its conformation, tends to throw the article ironed out of the smoothing part of the groove, while a parallel or rectangular groove tends to roughen the side or edge of the cuff or collar ironed. Such a result obviously defeats the object of the patent, and renders the success of such grooves impracticable. It is unnecessary to decide whether the Burges patent is prior to that of complainant's invention, as I am satisfied by the evidence that it did not suggest the invention in suit. The machine is for folding a collar, and the groove there described has an edged disk which pressed the collar into the groove. It has no guide or ledge, and therefore would be unable to perform the functions of complainant's groove. Defendants' best reference, the Gantenberg patent, is for ironing edges of collars and cuffs. It has a rotatable head and circular groove. Clearly, this invention is first, and if practically operative must limit the scope of the claims in suit. The Senkbeil machine is a hand device, and has longitudinal fixed grooves, without a guide or ledge, and is only practicable for ironing articles of uniform thickness. Is either invention capable of successful practical operation? The expert witnesses, two of whom are practical laundrymen, uniformly negative their operativeness. Through the absence of the guide or ledge to facilitate ironing, the Senkbeil and Gantenberg inventions are, according to the experts, incapable of successful practical operation. I am of the same opinion. The guide or

ledge of the patent in suit serves a distinctive object, and undoubtedly is a valuable adjunct to the circular grooving of complainant's invention. That the grooving is circular, and that the patentee intended to describe a circular groove, does not admit of serious doubt. The defendant vigorously insists that a scrutiny of the cross-examination of the expert witness Leary discloses that the walls of the grooves shown in the reissued patent are parallel, and not slanting or flaring, and therefore the reissued patent comes directly within the scope of the Gantenberg patent. The witness, however, explains that the details of the drawings of Figs. 2 and 3 of the Fay reissued patent are on such a small scale that it was difficult for him to discern whether there was a slant of the outer wall to the groove or not. The proofs sufficiently show that the walls of the groove in complainant's invention were not parallel and that the grooves were circular in form. A separate and distinctive element, although a very small one, has made the Fay machine practical and useful. The defendants had it in their power to show by evidence that the groove without slanting walls was capable of practical usefulness. This they have failed to do. They prefer to rely on the inferences which they claim may be drawn from the testimony of complainant's witnesses, that if the Senkbeil and Gantenberg devices were inoperative the reissued patent must suffer the same fate. The uncontroverted evidence, however, does not warrant such inferences. The testimony is not susceptible of that interpretation. The specifications and drawings of the alleged anticipating foreign patents are not sufficiently clear to enable me to determine that the Senkbeil and Gantenberg patents include the essential elements of the Fay invention. *Seymour v. Osborne*, 78 U. S. 516, 20 L. Ed. 33; *Hanifen v. E. H. Godshalk Co.*, 28 C. C. A. 507, 84 Fed. 649; *Cohn v. Corset Co.*, 93 U. S. 366, 23 L. Ed. 907; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064; *Downton v. Milling Co.*, 108 U. S. 466, 3 Sup. Ct. 10, 27 L. Ed. 789. The Gantenberg patent does not claim or describe a slanting wall or ledge to guide the collar or cuff to the ironing groove. I am persuaded by complainant's expert witnesses that it was not a complete and operative invention. Their evidence is supported by the descriptions and drawings. The practical success of complainant's invention is shown by its general use.

The complainant testifies that the "commercial machine" which embodies the claims of the infringed patents has been adopted by many large laundries. Expert witness Cooper, himself a laundryman, testifies that he uses two at his laundry. In view of the Gantenberg and Senkbeil patents, the Fay invention appears to be a very small one, but I think it comes within that class of patents where the inventor who has taken the final step which has turned a failure into success should not be deprived of the fruition of his labors or hopes. *In re Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161; *Palmer v. Johnston (C. C.)* 34 Fed. 336; *Wilcox v. Book-walter (C. C.)* 31 Fed. 224. Complainant testifies that several experimental machines were constructed before a satisfactory result was achieved. First, a rotatable head and circular groove was employed, without, however, the slanting walls or guide. No satisfactory re-

sults were produced. Friction caused by contact of the edge of the collar or cuff with the groove of the rotating wheel excluded the collar or cuff from the ironing surface of the groove. Another machine was constructed having a guide which was formed by cutting away one wall or side of the groove, the other wall projected forming a ledge or guide to feed the ironed article to the groove or the ironing portion of the head. This was new, and was something beyond the ability of the mechanic skilled in the art. This would appear to corroborate the impracticability of the Gantenberg and Senkbeil inventions, and entitles the patent to more than a limitation to precise claims and to greater merit than defendants are willing to accord. Giving effect to that construction, the machine of the defendants comes within the scope of the reissue. The defendants' machine is the equivalent of complainant's rotatable head and peripheral groove and guide or ledge upon which to support or aid the article into the groove, which leads to the same result in substantially the same way. Therefore claims 1, 2, 3, and 4 of complainant's reissued patent include defendants' machine, although of different construction. The doctrine which applies is the one well stated in *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, where the court in its opinion uses the following language:

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

The reissued patent: The grant of the reissued patent presupposes the inoperativeness or imperfection of the original patent on account of defective or insufficient specification. Act 1870, c. 230, § 53, 16 Stat. 205 [U. S. Comp. St. 1901, p. 3393]. The Revised Statutes provide that a reissue shall only be granted when the alleged defect or insufficiency has arisen through inadvertence, accident, or mistake. These are conditions precedent. Now, it is asserted by defendants that the patentee has gone beyond these conditions by including in the reissued patent an enlargement of the terms of his actual invention. Assuming the assertion to be well founded, would that invalidate the reissue? To extend or enlarge the claims beyond the scope of the original invention by inclusion of claims for another invention undoubtedly invalidates the patent, but where the reissue is for the same invention a broader claim than the original will not invalidate it. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783. In the *Topliff Case* the Supreme Court, in passing upon the validity of the reissued patent in that case, said:

"It is a mistake to suppose that that case (*Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783) was intended to settle the principle that under no circumstances would a reissue containing a broader claim than the original be supported."

A patentee has the undoubted right to amend either his description or the claims, not only as a protection to himself, but to ac-

quaint the public with his invention in such clear phraseology as will permit any person skilled in the art to construct the machine or improvement. In the absence of laches in obtaining a reissue, it is presumed that the conditions precedent upon which a reissued patent is authorized actually existed. It is broadly contended by the defendant that claims 1, 2, 3, and 4 of the reissue are for a different invention from that claimed in the original patent. I do not so regard them. I am of the opinion that the reissue is supported by the authorities. As already stated, by the later patent the machine described in the reissue was practically improved by arranging a series of yielding iron heads in parallel lines, five of which were constructed on each side of the machine, supported by a table or standard. This machine, on account of its expensive construction, was not manufactured. Another machine—one of less cost and modified construction, but embodying the elements of the reissue and improvement patents—was placed upon the market. Its practical utility has been generally recognized by the trade. The defendant contends that as the improvement patent was issued subsequent to the Rickey patent, assuming the machines to be practically the same, the defendants do not infringe any of the claims of that invention. The defendant's patent was granted to him October 23, 1900, while complainant's improvement patent is dated July 23, 1901. It was issued upon an application dated December 14, 1897, as appears by the date upon the specification. As the file wrapper containing the application is not produced in evidence, the date of invention is presumptively the date of issue of the patent, unless prior invention is established by convincing proof. *Walk. Pat. § 129*. It is uniformly held that, as the evidence of prior conception of the completed invention is within the knowledge and control of the party submitting it, the proof must be clear, positive, and unequivocal. *Thayer v. Hart (C. C.) 20 Fed. 693*; *Wheaton v. Kendall (C. C.) 85 Fed. 666*; *Michigan Cent. R. Co. v. Consolidated Car-Heating Co., 14 C. C. A. 232, 67 Fed. 121*. The mere assertion of the inventor that at the time specified he conceived the invention, unaccompanied by additional evidence, is insufficient. He must satisfy the conscience of the court that his invention was sufficiently specific and definite to enable him to construct a machine, if the invention be for a machine, which is capable of successful operation. *Reeves v. Bridge Co., 5 Fish. Pat. Cas. 456, Fed. Cas. No. 11,660*. Authorities abound which hold that the complete conception of the idea of the invention may be shown by sketches and drawings, followed by reasonable diligence in perfecting it. *Rob. Pat. § 380*. It must appear, however, that the patentee was the first to perfect and adopt the invention to actual use. *Wheaton v. Kendall, supra*. The complainant here relies upon the oral testimony of the inventor to establish *prima facie* complete conception at a time nearly two years anterior to the Rickey patent. The complainant on that point merely testifies that he commenced the construction of the machine described in letters patent No. 678,949 in the month of July or August, 1897, that it was not completed until early in the year 1898, and that the machine immediately went into general use. The testimony offered to establish prior invention is meager, and

uncorroborated by any drawings or other definite description. The defendant invokes the rule laid down in *Mergenthaler v. Scudder*, 11 App. D. C. 264, and argues that evidence of an earlier conception than that obtained by the letters patent must be corroborated. The question of priority of invention calls for an independent examination of the evidence bearing upon that contention. It is undoubtedly the rule that the burden is upon the complainant to show that he invented his improvement earlier than the defendant. That rule has application only where the defendant undertakes to establish by evidence that he has first invented his machine. Prima facie, Fay was the original inventor of the patents in suit. This must be overcome by competent evidence. The facts disclosed by the record are peculiar and unusual. The Rickey patent was not offered in evidence by the defendant to establish a priority of invention. The priority of the Fay improvement patent is not questioned by the pleadings. The Rickey patent is not set up in the answer as anticipatory of complainant's improvement patent, nor did the defendants, as required by section 4920 of the Revised Statutes [U. S. Comp. St. 1901, p. 3394], give notice in writing 30 days before the hearing that they intended to prove such priority. This provision of the law makes the patent prima facie evidence of (1) the patentability of the invention; (2) that the invention was first conceived by the patentee; and (3) that he has made the public fully and clearly acquainted with what is claimed to be a new discovery. A different rule prevailed under the common law. The burden of proof rested primarily upon the patentee, and, under the general plea of denial, a defendant was permitted to controvert the patentability of the invention and priority of conception without previous notice to the complainant. It is settled by abundant authority that the legal effect of the statutory requirement presupposes a notice to a complainant of the character and nature of the proposed attack upon the validity of the grant. *Rob. Pat.* §§ 987-990; *Roemer v. Simon*, 95 U. S. 215, 24 L. Ed. 384. Complainant rested upon a prima facie showing of infringement. Defendants offered no evidence except the Senkbeil, Gantenberg, and Burges patents, which are claimed to anticipate the reissued patent. The defendants have not complied with this provision of section 4920 of the Revised Statutes [U. S. Comp. St. 1901, p. 3394]. No evidence was given showing the Rickey patent to be prior in date. Not having challenged the validity of the Fay improvement patent as against the Rickey patent by competent procedure, defendants must be deemed to have waived such defense upon this hearing. The introduction of the Rickey patent in the record by the complainant cannot be considered in defendants' favor upon the question of priority. It was brought into the record for a different purpose. To hold that it may now be considered in anticipation of the Fay improvement patent would in effect deprive complainant of his right to establish an earlier conception than that which arises from the grant of the patent. It was in defendants' power, under proper procedure, to prove that the Rickey patent was a prior invention, or, not having adopted that procedure, to bring it into the case, for the purpose of limiting the claims of the Fay improvement patent. Neither having



been done, they have elected not to avail themselves of these defenses. The authorities on this point cited by counsel for defendants in his supplementary brief do not apply. They chiefly refer to a complainant's waiver of the notice required by the statute because of failure on his part to seasonably object to evidence showing prior invention which otherwise would have been excluded. Whatever value there may be to the Rickey patent, as an improvement on the Fay generic invention, is only available by conjoint employment in the combination described by the claims of the Fay reissue. Such employment has already in this opinion been held infringement. Without such unwarranted employment the Rickey patent lacks utility.

Infringement: The defendants employ in the machine used by them the equivalent of the improvement described in the reissued patent, as heretofore stated. The pivotally swinging irons are functionally similar to the rotatable grooved ironing heads of the improved Fay machine. They are arranged to yield in groups or series. The new feature described in the Rickey patent is a pivotally swinging dampener. In other respects the combination employed infringes claims 1, 2, 3, and 4 of the reissued patent, and also the claims of the improvement patent, which describe a series of two or more grooved circular heads and the "yielding supports for the heads." The point is raised that the phraseology of the specification wherein the patentee states that "my invention relates to improvements upon those machines for ironing," etc., is an admission negating complainant's claim to a broad invention. Robinson, in his work on Patents, § 211, discussing this subject, says:

"An improvement is thus neither the creation of a means entirely new nor a mere formal variation of the old. It occupies an intermediate position, yet often practically it approaches so nearly to the one or to the other that the line of demarcation becomes quite obscure."

Robinson also calls attention to the prevailing practice by which an entirely new means is often described in the specification as an improvement. Therefore the effect of the use of the word "improvement," whenever found in a patent, must be governed by the prior art, reference to which will disclose the true status of the patent, whether the improvement is an independent invention, or merely an alteration or addition to that which already existed. A discussion of any other question raised is deemed unnecessary.

Complainant is entitled to a decree for an injunction and accounting. Decree may be entered accordingly.

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CALHOUN v. SOUTHERN COTTON OIL CO.  
(Circuit Court, N. D. Georgia. October 27, 1902.)

**1. PATENTS—INVENTION—FEED BALER.**

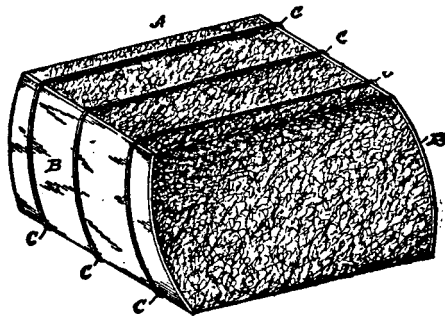
The Davenport patent, No. 340,769, for a method of baling short-cut hay or straw, is void on its face, for lack of patentable invention.

In Equity. Suit for infringement of letters patent No. 340,769, for baling short-cut hay or straw, granted April 27, 1886, to Emery M. Davenport. On demurrer to bill.

Abbott & Goree, for complainant.  
King & Spalding, for defendant.

NEWMAN, District Judge. The complainant brings this bill to enjoin the defendant company from the use of a certain patent right, and to have a decree for the gains and profits realized by the defendant from the use of such patent. The letters patent in question were granted to Emery M. Davenport on April 27, 1886. The bill alleges that Emery M. Davenport died intestate soon after the issuance of the letters patent, and on the 2d day of May, 1887, Ellen M. Davenport was duly and legally appointed administratrix on the estate of said Emery M. Davenport by the surrogate of the county of Chautauqua, N. Y., and further that on March 11, 1902, Ellen M. Davenport, as administratrix, by assignment in writing, sold, assigned, and transferred to complainant all her exclusive right, title, and interest in the letters patent for a number of states and territories,—among them, the state of Georgia.

The patent in question here is a method or device for baling short-cut hay or straw. The specification and claim, with the accompanying drawing, are as follows:



“The object of this improvement is the baling of short-cut feed, such as hay or straw, in a manner that is adapted to prevent the disintegration of the bale and wasting of the feed during the transportation of the same from one place to another. These results are attained in the bale illustrated in the drawing herewith filed as part hereof, which is a perspective representation of a bale of cut feed made according to the manner of my improvement. In the drawing, A is the hay or straw. B, B', represent single binder-pieces, of thin plank, bound to the opposite ends of the bale by cords or wires, C, C, C, hooked or tied together in the ordinary manner at any part of the bale that may be most convenient. These binder-pieces, B, B', are made to agree in size with the transverse area of the receiving-chamber of a suitable press,—preferably, Deaderick's perpetual press,—and are therefore about the same width as the bale, and as long as its sides. These binder-pieces are put into the press simultaneously with the hay or straw, in positions to come at the ends of the bale; and the hay or straw is then compactly pressed together, as shown, and the binder-pieces, B, B', suitably secured to the body of the bale by cords or wires shown, and the formation of the bale completed before it is removed from the press, and while the binder-pieces and hay or straw are under pressure in the same. Forming the bale with wood binders at its ends, and completing the same while under pressure therein, would not be practicable, except with single binder-pieces, as series of pieces could not be made to preserve suitable relative positions to each other and to the hay or

straw. I am aware that short-cut feed has been baled by binding the sides of the same between series of longitudinal strips at each side of the bale, and also between series of transversely arranged pieces of plank, and longitudinal strips to bind the ends of the transverse pieces to the body of the bale. I do not claim such features or arrangement, but what I claim as new, and desire to secure by letters patent, is a bale provided at its ends with single binder-pieces about the same size as the ends of the bale, and suitably bound thereto by cords or wires, substantially as shown and specified."

To this bill a demurrer is interposed on several grounds. The only one which I care to notice, before reaching the real merits of this case, is that on the ground of laches. The patent was granted April 27, 1886. The patentee died very soon thereafter. An administratrix was appointed in May, 1887, and no steps whatever appear to have been taken—certainly nothing towards utilizing this patent—until it was transferred to the complainant, in March, 1902. The bill was filed in this court on April 29, 1902. The patent was granted for 17 years, and therefore at the time this suit was commenced it had 2 days less than one year to run. The patent then lay dormant for 16 years, without any attempt whatever, apparently, to put it into practical use. It is immaterial to consider, however, whether this would defeat any rights which might otherwise exist as to this patent, because I think the case is controlled by that ground of demurrer which sets up that the device for which the patent was issued does not contain novelty or patentable invention. The patentee says in his specification:

"I am aware that short-cut feed has been baled by binding the sides of the same between series of longitudinal strips at each side of the bale, and also between series of transversely arranged pieces of plank, and longitudinal strips to bind the ends of the transverse pieces to the body of the bale. I do not claim such features or arrangement, but what I claim as new, and desire to secure by letters patent, is a bale provided at its ends with single binder-pieces about the same size as the ends of the bale, and suitably bound thereto by cords or wires, substantially as shown and specified."

It will be seen, therefore, that the patentee concedes that short-cut feed had been baled by binding the sides with series of strips, and he proposes to do it with one strip, the same size as the ends of the bale. The demurrer raises the question as to whether there is anything patentable in this new method of baling. It seems to me that the simplest mechanical skill could have ascertained, if such be the fact, that one thin board across the end of a bale of short-cut feed would work better than three or four narrow strips, if it be true, as claimed, that such strips "could not be made to preserve suitable relative positions to each other and to the hay or straw." I am not unmindful of the recognized rule that, after a patent has been issued by the patent office, the presumption is in favor of patentability, or of another rule, that, where the lack of patentability is set up by demurrer, it should be clear that the alleged invention is nonpatentable. In this case, however, I am perfectly clear that the element of invention is lacking. I think that not only the most ordinary mechanical skill would have produced the device here claimed to be an invention, but that any person of ordinary intelligence, engaged in baling short-cut feed or other material, would naturally have resorted to this method of baling.

Believing as I do that this is not a patentable invention, upon that ground, without passing upon the other grounds urged in the demurrer and in argument, the demurrer is sustained and the bill dismissed.

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In re WOLLOCK.

(District Court, N. D. Illinois, N. D. January 31, 1903.)

No. 7,325.

**1. BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—FRAUD.**

By the provision of Bankr. Act 1898, § 17 [U. S. Comp. St. 1901, p. 3428], that "a discharge \* \* \* shall release a bankrupt from all of his provable debts except such as \* \* \* (2) are judgments in actions for frauds," it was not intended to limit the claims exempted from release on account of fraud to those which had been reduced to judgment, but fraud in the creation of a claim is sufficient to bring the claim within the exception.

**2. SAME—POWERS OF COURT—ENJOINING PROCEEDING IN STATE COURT.**

A court of bankruptcy is without jurisdiction to enjoin proceedings in a state court in an action on the case for fraud against the bankrupt, since such action can in no manner affect the proceedings in bankruptcy, nor could the bankrupt's discharge constitute a defense thereto.

Rudolph D. Huszagh and Samuel A. Ettelson, for bankrupt.  
Kraus, Alschuler & Holden, for respondents.

KOHLSAAT, District Judge. This matter comes on to be heard on motion of the bankrupt to restrain prosecution of a suit in tort brought by Crump Bros. against the bankrupt pending his discharge. The suit was instituted subsequently to the filing of the petition herein. The declaration counts upon fraud of defendant therein (bankrupt herein) in securing credit upon goods purchased. The state court has advanced the cause to a speedy hearing, on the representation of plaintiff therein that the claim will be released by a discharge in bankruptcy unless reduced to a judgment prior to discharge. The bankruptcy matter stands now on objections to discharge. If it is true, as contended, that the Crumps will be barred from pressing their suit for fraud unless the same is reduced to judgment before discharge, manifestly they should be permitted to proceed to judgment at once. On the other hand, if the claim would not be released by a discharge of the bankrupt in bankruptcy, then there are many reasons why the action in the state court should be restrained pending such discharge, among which may be named: First, that the bankrupt should be placed in a position to plead such discharge; second, it is peculiarly the province of the court having jurisdiction of the suit for recovery on the ground of fraud to pass upon the question as to whether the claim is one that is barred by a discharge under the statute, or not; third, if it shall become general practice to cast upon the District Court, in bankruptcy proceedings, the duty of determining the character of claims presented, the work of administering the bankrupt estates will become unconscionably prolix and burdensome.

The question raised involves a construction of section 17 of the bankruptcy act [U. S. Comp. St. 1901, p. 3428]. Clause 2 of this section, by its terms, seems to limit the exception to judgments in actions for fraud, or by obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another. A common-sense reading of this clause is to the effect that nothing short of a judgment obtained in the cases specified will serve to take a case out of the general rule, and release it from the effect of a discharge; but this clause must be read in connection with clause 4 of section 17, which is as follows, viz.:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

The result of the state court proceeding can have no effect upon the bankrupt's right to a discharge. He is entitled to a discharge, in a proper case, notwithstanding some claims against him are found to be based upon fraud, and the question for the court having jurisdiction of a given case is simply whether that claim is released by the discharge. Nor can the character of a claim be affected by any steps taken subsequent to the filing of the petition. The rights of the parties must be adjusted as of the time of filing the petition in bankruptcy. It is inconceivable that the congress intended to enact by section 17 that no claim, however tainted by fraud, even to the extent of theft or robbery, should be excepted from the effect of a discharge in bankruptcy, unless reduced to the form of a judgment. From the reading of the act, it is evident that no such idea was contemplated. In my judgment, a fair interpretation of section 17, in the light of the previous act and the spirit of the law, leaves no doubt but that fraud in a claim, as well as a judgment based upon a fraudulent claim, is sufficient to bring the claim within the exceptions of the statute. This view is supported by many authorities. *In re Blumberg* (D. C.) 94 Fed. 476; *In re Thomas* (D. C.) 92 Fed. 912; *In re Lewensohn* (D. C.) 99 Fed. 73; *In re Steed* (D. C.) 107 Fed. 682; *Loveland, Bankr.* §§ 293, 295; *Lowell, Bankr.* 488; *Collier, Bankr.* (3d Ed.) 200, 202; *Bracken v. Milner* (C. C.) 104 Fed. 522 (neighbor's transaction); *Frey v. Torrey* (Sup.) 73 N. Y. Supp. 201; *Id.*, 75 N. Y. Supp. 40; *Stevens v. Meyers* (Sup.) 76 N. Y. Supp. 332.

There is nothing in the point made by counsel that the court is without power to stay a proceeding begun after the filing of the petition in bankruptcy. The argument reduces itself to an absurdity. Section 11 of the act of 1898 [U. S. Comp. St. 1901, p. 3426] provides that the court shall stay a suit which is founded upon a claim from which a discharge would be a release, etc.; the plain object of the section being to bring all matters affecting provable claims into the District Court. Section 11 provides that nothing in that section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not therein enumerated. Clause 15, § 2 [U. S. Comp. St. 1901, p. 3420], provides that the court has such jurisdiction at law and in equity as will enable it to "make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be neces-

sary for the enforcement of this act." It will be seen that the court is required to stay only provable claims, by the statute. This would not limit its power to provable claims in a case, the prosecution of which would interfere with the proper enforcement of the act. It is admitted by the petition presented herein for a restraining order that the action sought to be stayed is an action on the case for fraud. If tried, the verdict must be "Guilty" or "Not guilty." Fraud is the gist of the action. Unless fraud is proven, there can be no recovery. The judgment of the court will be conclusive as to the existence or absence of fraud. Manifestly, under the holding above set out, the court is entirely without jurisdiction to stay the proceeding, under the language of the statute; and where, as in this case, there is nothing but the question of fraud involved, to which a discharge cannot be pleaded, there can be no embarrassment to the administration of the bankruptcy cause by this court,—consequently no case made for the general powers of this court.

The petition to stay suit is denied.

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OCCIDENTAL CONSOLIDATED MIN. CO. v. COMSTOCK TUNNEL CO.

(Circuit Court, D. Nevada. February 2, 1903.)

No. 708.

1. JURISDICTION OF FEDERAL COURT—DISTRICT OF SUIT—WAIVER OF OBJECTION.

A circuit court has jurisdiction of a suit where the plaintiff and defendant are citizens of different states, and the requisite amount is involved, although neither is an inhabitant of the district, when the defendant has appeared and answered to the merits without objection.

On Motion to Dismiss for Want of Jurisdiction.

W. E. F. Deal, for plaintiff.

F. M. Huffaker and W. T. Baggett, for defendant.

HAWLEY, District Judge (orally). This is an action at law to recover damages for the alleged breach of certain contracts. The plaintiff is a corporation organized and existing under the laws of the state of California, and is a citizen and resident of that state. The defendant is a corporation organized and existing under the laws of New York, and a citizen and resident of New York. The defendant, after service of process, regularly appeared and filed an answer upon the merits of the case, without raising any objection to the jurisdiction of this court. The cause, being at issue, was set for trial on December 8, 1902, and on said day the trial of the case was continued. On January 2, 1903, the defendant gave notice that it would move the court "for an order dismissing the above-entitled action on the ground that the above-named court has no jurisdiction of the parties to said action, as appears from the complaint therein; the plaintiff corporation being a citizen of the state of California, and the defendant of the

¶1. Waiver of right as to district in which suit may be brought, see note to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192.

state of New York, and neither a citizen of the state of Nevada, in which case this court is without jurisdiction."

Does the fact that neither the plaintiff nor the defendant resides in the district of Nevada, in which this action is brought, deprive this court of jurisdiction in a case like the present, where the defendant voluntarily appeared and filed an answer upon the merits of the case? This is the only question presented by the motion, and it has been answered in the negative by the Supreme Court of the United States in *Trust Co. v. McGeorge*, 151 U. S. 129, 132, 14 Sup. Ct. 286, 38 L. Ed. 98. In that case the court said:

"The court below, in holding that it did not have jurisdiction of the cause, and in dismissing the bill of complaint for that reason, acted in view of that clause of the act of March 3, 1887, as amended in August, 1888 [U. S. Comp. St. 1901, p. 508], which provides that 'no civil suit shall be brought in the circuit courts of the United States against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant'; and, undoubtedly, if the defendant company, which was sued in another district than that in which it had its domicile, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicile is a personal privilege, which may be waived, and which is waived by pleading to the merits."

And after reviewing the previous decisions on this subject, including the case of *Shaw v. Mining Co.*, 145 U. S. 444, 453, 12 Sup. Ct. 935, 36 L. Ed. 768, and others, relied upon by defendant in support of its motion, said:

"Nor do we see any reason for a different conclusion as to the subject of waiver when the question arises where neither of the parties are residents of the district, from that reached where the defendant only is not such resident."

In *Construction Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401, the same question was presented. The court, after reviewing the acts of Congress relating thereto, said:

"The circuit courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance without taking the objection."

These decisions are so clear, plain, direct, and positive as to be absolutely conclusive upon the question herein involved.

The motion is denied.

## THE WARNER MILLER CO.

(District Court, E. D. New York. February 4, 1903.)

**1. MARITIME LIENS—NEW YORK STATUTE—JOINT LIEN CLAIMED ON TWO VESSELS.**

Under 1 Laws N. Y. 1897, c. 418, art. 2, which provides that a debt for certain materials and articles furnished to a vessel shall be a lien thereon, but shall cease to be a lien unless the lienor shall file a notice of lien, "containing the name of the vessel, the name of the owner, if known, the particulars of the debt, and a statement of the amount claimed to be due from such vessel," a lien cannot be enforced against a canal boat for supplies furnished, as stated in the notice filed, to such vessel and another, "coupled together as a double-header, and run, managed, and navigated by one captain and crew, together, as one boat," without distinguishing the goods supplied to each.

In Admiralty. Suit to enforce lien for supplies furnished.

Martin A. Ryan, for libellant.

Carpenter & Park and J. K. Symmers, for claimant.

THOMAS, District Judge. One Castle owned the canal boat Hiram W. Eads, and another person, unknown, owned the canal boat Harris. The libellant sold and delivered to Castle goods as follows: October 3 and 11, 1899, \$69.79; lien filed October 26, 1899. May 5, 1900, \$42.97; lien filed June 4, 1900. August 29, 1900, \$30.73; lien filed September 18, 1900. The evidence tends to show that at these dates the boats were on the Erie Canal, "coupled together as a double-header, and run, managed, and navigated by one captain and crew, as one boat"; the captain and his family living on one boat, the Eads, and the six horses and mules stabled at times on both boats, but during actual navigation on the Harris. The goods consisted largely of feed for the animals, and, to some extent, of supplies for the crew. The goods were delivered on the boats, but in what proportion, kind, or amount to each, does not appear, and were consumed in the course of the undertaking to which the boats were jointly appropriated. It is fairly inferable that Castle promised the vendor that he should have a lien for the price of the goods, although the matter was not specifically mentioned at the time of the last purchase. The liens were duly filed against both vessels, "coupled together as a double-header, and run, managed, and navigated by one captain and crew, together, as one boat." The Eads was purchased by claimant at a foreclosure sale of a mortgage on September 21, 1900. The libel was filed May 27, 1901. The statute (1 Laws N. Y. 1897, c. 418, art. 2) provides that the debt contracted for certain materials or articles furnished to a vessel shall be a lien thereon, but "shall cease to be a lien upon such vessel unless the lienor shall, within thirty days after it is contracted, file a notice of lien, containing the name of the vessel, the name of the owner, if known, the particulars of the debt, and a statement of the amount claimed to be due from such vessel." In the present case the two vessels are regarded as one, and the lien is sought to be imposed

¶ 1. Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.



indivisibly upon one entity, embodying the two vessels. The libellant relies upon *The Alabama* (C. C.) 22 Fed. 449; *The Murphy Tugs* (D. C.) 28 Fed. 429; *The Merrimac* (D. C.) 29 Fed. 157; *McRae v. Dredging Co.* (C. C.) 86 Fed. 345. In *The Alabama* the plant consisted of a dredge and scows, and some doubt was entertained whether the dredgeboat, by itself, was a vessel. The learned judge inclined to the opinion that it was, but did not doubt that the lien could attach to the plant composed of the dredge and scows, because they were built and operated together for a work that could not be done if one of them were absent. The decision is noticed in *The Columbus* (D. C.) 65 Fed. 430. In *The Murphy Tugs*, Judge Brown decided that a diver, contracting for services upon any of several tugs belonging to the same company to which he should be ordered, for a per diem compensation, was entitled to a maritime lien upon each of such tugs for the time he was actually engaged thereon. The tugs were completely segregated for the purposes of the decision, and there is no community of obligation or lien suggested. The only feature common to all the tugs was the general contract of hiring. *McRae v. Dredging Co.* involved a maritime lien for materials and work furnished and done on dredging vessels engaged in a common enterprise. The opinion states:

"It is true that some of the men worked upon and in connection with both vessels, and the law does not admit of a lien upon one vessel for wages earned in service upon a different vessel; but the evidence shows with approximate accuracy the time which each man devoted to the service of each vessel, and the amounts can be fairly apportioned."

In *The Merrimac* it was held that a seineboat accompanying a fishing schooner was appurtenant to the latter so long as the ownership was common, but not after the severance of ownership, although the seineboat was used by the schooner under a contract of hiring. In *The Knickerbocker* (D. C.) 83 Fed. 843, Judge Benedict denied a lien under the statute of New York for supplies alleged to have been bought for a fleet consisting of a dredge, tugs, scows, water boats, etc., composing one plant, and used on some of the vessels, but not on others. The opinion states:

"The statute of the state of New York creates a lien upon a vessel for provisions supplied to such vessel, and not otherwise. It is impossible to say from the evidence here what part of the supplies in question, or whether any of them, was used to provision any particular vessel. The evidence will not permit holding that the vessels proceeded against were so employed as to constitute, in law, a single vessel; but, if such a case be possible, the statute of the state makes no provision for a lien upon several vessels so employed. The testimony fails to designate the vessel which was supplied with provisions furnished by the libellant. Doubtless the provisions were used to supply the needs of men employed on some of the vessels proceeded against, but which of the vessels was supplied by the libellant does not appear."

In *The Columbus* (D. C.) 65 Fed. 430, it was held that the libellant had no joint maritime lien on several scows and dredges for services of tugs in towing the scows for the purposes of discharging the material raised by the dredge, and for moving the dredges from place to place as the work progressed, although the plant was an entirety. In *The Newport*, 52 C. C. A. 415, 114 Fed. 713, the Circuit Court of Appeals for the Second Circuit decided that, although the services

were rendered on the credit of the vessels, a joint lien against a dredge, and scows used in connection therewith, for services rendered to all the vessels under a common contract, could not be enforced. The libelant in the case at bar could not have enforced a maritime lien under the evidence adduced, as he furnished the supplies on the credit of two vessels, without distinguishing the goods supplied and credit afforded to each. He cannot enforce a lien under the statute, because the statute has not been followed. It makes a vessel a debtor, provided the amount claimed against the vessel be stated in the notice of lien filed. Here a general debt against two vessels conjoined is stated, without any effort to charge either with its just share. Even if the libelant could now point out the amount due from each, he has not done so in his notice of lien, and, as a result, he has no lien to support his action. The time for him to distribute the indebtedness to the several vessels was when he sought to charge such indebtedness to the several vessels. He cannot state a gross sum against both vessels, and await the trial for the purpose of determining what each vessel should bear.

The libel filed alone against the boat the Warner Miller Company, formerly the Hiram W. Eads, to enforce the lien sought to be perfected against two vessels, must be dismissed.

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### THE DE VEAUX POWELL.

#### THE LACKAWANNA.

(District Court, E. D. New York. January 31, 1903.)

#### 1. COLLISION—STEAM VESSELS CROSSING—CONCURRING FAULT.

A ferryboat, leaving her New York slip to cross North river in the daytime as a tug was coming up with a tow several hundred feet below, claimed her privilege of crossing ahead by signal, which was not answered. A second signal was unanswered, and she proceeded on her course, a collision resulting. The master of the tug, who was acting as wheelsman, pilot, and lookout, neither initiated nor answered a signal, and paid no attention to the ferryboat, although his was the burdened vessel. *Held*, that both vessels were in fault; the tug, for inattention and failing to maintain a proper lookout, and the ferryboat, for proceeding after her signals were unanswered, and the inattention of the tug had become apparent.

In Admiralty. Suit and cross-libel for collision.

James J. Macklin, for Hoboken Ferry Company.

Butler, Notman, Joline & Mynderse and Mr. Brown, for Harris and for the De Veaux Powell.

THOMAS, District Judge. At about 5:45 a. m. in July the tug De Veaux Powell, towing an empty barge on a hawser, was going up the North river, with the tide ebb, the wind N. N. W., and was several hundred feet below, and a thousand feet off-shore from, the Fourteenth

† 1. Signals of meeting vessels, see note to *Union S. S. Co. v. Erie & W. Transp. Co.*, 30 C. C. A. 630.

Street Ferryhouse, when the ferryboat Lackawanna issued therefrom. After clearing the slip, the ferryboat claimed her privilege by sounding one whistle, and, in default of reply, repeated the same, after going twice her length, but received no answer. She continued under a port wheel, which turned her obliquely across the tide and the course of the Powell toward her ferryhouse at Fourteenth street, Hoboken. The tug and ferryboat collided, and for the injuries received by the vessels the above libels have been filed.

The captain of the Powell was leaning indolently on the wheel, undertaking ineffectually the duties of pilot, wheelsman, and lookout. He testified that he saw the Lackawanna at Fourteenth street, and did not see her again until she ran across the bow of the tug at Twenty-First street. His contention is that the ferryboat was behind the tug, and, after straightening up the river, paralleled the tug's course, until at Twenty-First street she circled around the latter's bow, whereupon the collision occurred. This statement is incredible, and illustrates the culpable inattention of the Powell's pilot. The ferryboat, swinging under a port wheel to get her heading, might seem for a time to run alongside the Powell, especially as the latter starboarded when the Lackawanna was abreast; but the latter did not have occasion to go, nor did she go, to Twenty-First street, and the collision probably occurred below Eighteenth street. Although the tug was the burdened vessel, she did nothing to avoid the collision until it was inevitable. She neither initiated nor answered signals, she had no proper lookout, and the pilot was negligent in the discharge of each of the dual duties assumed by him. Whether the Powell was privileged or burdened, she knew that the Lackawanna was claiming and assuming the privilege, and yet she made no protest. But this situation must have appeared plain to the pilot of the Lackawanna. He twice claimed the right of way, and understood that it was not accorded. He knew of the continued inattention or misapprehension of the pilot of the tug, as the vessels converged over a considerable distance on crossing courses, and yet kept on his way to the menaced collision. This cannot be excused, in view of any explanation given, and it follows that the costs and damages must be divided.

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**PEDEN v. AMERICAN BRIDGE CO.**

(Circuit Court, N. D. Illinois, N. D. January 31, 1903.)

No. 26,295.

**1. DEATH—DECLARATION—ALLEGATION OF DAMAGES.**

Where, in an action for death by decedent's administrator, the declaration alleged that decedent left, him surviving, his widow and four children, and contained the usual allegation of damages to plaintiff as administrator, it was not objectionable for failure to allege damages sustained by the next of kin; damages to the wife and children being presumed.

**2. SAME—DEFECTS AVAILABLE AFTER VERDICT.**

Under Rev. St. Ill. c. 7, § 6, par. 9, providing that judgment shall not be arrested after verdict by reason of want of any allegation or aver-

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¶ 1. See Death, vol. 15, Cent. Dig. § 69.

ment on account of which omission a special demurrer could have been sustained, where no demurrer was interposed to a declaration for wrongful death, and the jury found that decedent's next of kin had sustained substantial damages by reason of defendant's negligence, a judgment on the verdict could not be arrested on the ground that the declaration did not allege damage to the next of kin.

Kruse & Peden, for plaintiff.  
Alexander Clark, for defendant.

KOHLSAAT, District Judge. Plaintiff recovered a verdict in the above case. A motion for new trial was overruled, and now defendant moves in arrest of judgment on the ground that the declaration does not allege damage to have been sustained by the next of kin. It appears from the declaration and the evidence that plaintiff's decedent left, him surviving, his widow and four children. The declaration contained the usual allegation of damages to plaintiff as administrator, but does not specifically set out that damages were sustained by the next of kin. Defendant relies upon a dictum of the supreme court of Illinois in the case of *Railroad Co. v. Morris*, 26 Ill. 400. In that case the existence of next of kin was not alleged, and the dictum relied on was not essential to a disposition of the case. It is well settled that, where the relation of husband and wife or parent and child exists, the law presumes pecuniary loss from the fact of death. *McKechney v. Redmond*, 94 Ill. App. 470; *Railroad Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942; *Railroad Co. v. Scanlan*, 68 Ill. App. 630; *Haug v. Railway Co.* (N. D.) 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727; *Korrady v. Railway Co.*, 131 Ind. 261, 29 N. E. 1069.

Paragraph 9 of section 6 of chapter 7 of the Revised Statutes of Illinois provides that:

"Judgment shall not be arrested or staid after verdict, nor shall any judgment upon verdict be reversed or in any way affected by reason of the following imperfections, omissions or defects in the process, pleadings or records, i. e., [paragraph 9] for the want of any allegation or averment on account of which omission a special demurrer could have been maintained."

No demurrer was here interposed. There can be no doubt but that the defect, if it be such, could have been reached by a special demurrer. The jury found that the decedent's next of kin had sustained substantial damages by reason of defendant's negligence. The allegations of the declaration are sufficient to sustain the verdict.

The motion is denied.

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In re BELDEN et al.

(District Court, N. D. New York. January 31, 1903.)

**1. BANKRUPTCY—SALE OF ASSETS—SETTING ASIDE.**

A sale of an asset of a bankrupt, fairly and regularly made, will not be set aside at the instance of one who has no other interest than the desire to become the purchaser at a resale, and who offers to make a higher bid, against the objections of all the creditors who could alone be benefited.

In Bankruptcy. This is an appeal, or motion, in the nature of an appeal, to review the action of the referee refusing to set aside the sale of an asset belonging to Alvin J. Belden individually.

Robert E. Drake, for petitioner, Westinghouse Electric & Manufacturing Company.

Wm. M. Brown, for individual creditors of Alvin J. Belden.

RAY, District Judge. Alvin J. Belden and John A. Seely were copartners doing a general contracting business. Having been adjudged bankrupts, it is found that the debts of the firm amount to \$166,000, or thereabouts, with assets amounting to \$3,000, or thereabouts. The individual debts of Alvin J. Belden amount to at least \$49,150.54. His individual property, so far discovered,—and it is conceded he has no other,—amounts to the sum of \$10,000, as determined by the sale sought to be set aside. This individual asset consisted of an interest of Alvin J. Belden in the estate of his father, A. Cadwell Belden, who died in 1896, given him by the will of said deceased. It is not necessary to recite the terms of the will of said A. Cadwell Belden. It is clear that it is impossible at this time, and will be impossible for many years to come, if Alvin J. Belden lives, to determine the value of his interest in the estate, held by trustees, applicable to the payment of his debts. It may be very small, and it may prove to be large. An action was brought by the trustee in bankruptcy to recover what might be recovered at this time. Answers were interposed, and a long, protracted litigation was in prospect. An order was made authorizing a settlement of that action, and a sale of such asset, so that the creditors may receive something, the litigation ended, and the bankruptcy proceedings finally ended. Notice of such sale was given to all the creditors of the firm and to all the individual creditors of Belden. The petitioning creditor, Westinghouse Electric & Manufacturing Company, has a large claim against the firm, but no claim against Belden individually. This creditor claims that it did not receive its notice of the sale before it occurred, but does not deny that it was duly sent as required by law. On the sale duly made, and in all respects fairly conducted, this asset sold for the sum of \$10,000. This, subject to deductions for commissions, etc., is to be divided among the individual creditors with claims aggregating \$49,000, as stated. On the motion to open the sale made before the referee, the petitioning creditor offered to pay \$11,000 for this asset, and, on this appeal here, offers to bid \$15,000. All the individual creditors of Alvin J. Belden oppose this motion, and protest in writing against a resale. They allege that the delays and expenses will more than counterbalance any possible benefit accruing to them from a resale. It is plain that the general creditors of such firm, of which the petitioner is one, have no interest in a resale of this asset unless it shall sell for more than \$49,000. It is not indicated in any manner that there is hope such will be the case. The fact that, after full investigation of the matter, the petitioning creditor only offers \$15,000, is strong evidence that a resale will only benefit the individual creditors of Belden, if it does them, and that the Westinghouse Electric & Manu-

facturing Company has no interest to open this sale, except a possible desire to become a bidder and purchaser at the resale, with the hope, or possibly with the expectation, that it will become the purchaser, and find the asset of greater value than the sum paid. This court does not doubt its power to open this sale on the ground of inadequacy of consideration, but to do that, in face of the opposition of all the creditors interested in that consideration, would be unjustifiable.

This motion must therefore be denied, and the order of the referee denying the motion to set aside the sale made, and order a resale, approved and confirmed. It is so ordered.

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**BROWN v. DAUGHERTY et al**

(Circuit Court, D. Missouri, S. W. D. February 10, 1903.)

No. 3.

**1. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—RECEIPT OF PROCEEDS BY HUSBAND.**

Under Gen. St. Kan. 1889, § 3752, which provides that any property which a woman may own at the time of her marriage shall remain her sole and separate property, and shall not be subject to the disposal of her husband, a husband who receives the proceeds of his wife's property in that state, sold after the marriage, holds the same in trust for her use and benefit; and it remains her property after it has been taken by him into another state, and becomes subject to the laws of such other state.

**2. SAME.**

Rev. St. Mo. 1889, § 6869, provides that all property of a married woman, together with all income, increase, and profits thereof, shall be and remain her separate property, and that her personal property shall not be deemed to have been reduced to possession by her husband by his use, occupancy, care, or protection thereof, unless with her assent in writing, giving him full authority to sell or dispose of the same. A husband, in Missouri, invested money received from a sale of his wife's property in other property and in business in her name, and subsequently, on a sale of such property and business, reinvested the proceeds in a farm, the title of which was taken in her name. *Held*, that the proceeds of such farm, when sold, although received by the husband, was the property of the wife; she never having given him any written authority to dispose of any of her property.

**3. SAME—DEPOSIT OF WIFE'S MONEY BY HUSBAND—LIABILITY OF BANK.**

A husband deposited money which he received from a sale of land owned by his wife, and which, under the law, was her separate property, in a bank in her name; stating to the cashier that he would sign the checks. The bank entered her name as the depositor, and issued a passbook in her name, which the husband showed to his wife. He subsequently drew checks against the deposit, to which he signed her name, and which the bank paid, until the money was all withdrawn and converted to his own use. The wife had not authorized the deposit; nor did she authorize the drawing of the checks, or know of the same until after the money was all withdrawn. *Held*, that the legal effect of the transaction of the deposit was to establish, prima facie, the relation of creditor and debtor between the wife and the bank, and that having accepted her as a depositor, and the money being in fact her property, the bank could not discharge its indebtedness by paying out the money without her authority, but was liable to her, under the facts shown, for the amount of the deposit.

## 4. SAME—ESTOPPEL OF WIFE—AGENCY OF HUSBAND.

The fact that the husband had been doing business in his wife's name, and handling her money, without objection on her part, did not create an estoppel against her in favor of the bank, where it was not shown that the bank had knowledge of it, or acted upon the faith of the husband's general agency.

## 5. SAME—PROOF OF AGENCY.

When it is sought to bind a married woman by acts of her husband on the ground of his agency, the evidence must be clear, cogent, and unequivocal.

This is an action by the plaintiff to recover from the defendants, as trustees of the Bank of Carterville, the sum of \$4,000, alleged to have been deposited to the plaintiff's credit in said bank in June, 1895.

The petition alleges that in April, 1897, said bank, a Missouri corporation, by resolution of its stockholders, went into voluntary liquidation, and was thereby dissolved; that at the time of said dissolution the defendant Daugherty was president, and the other defendants were directors, of said corporation, and were the exclusive managers thereof; and that at the time of the dissolution there were sufficient assets and property of the bank to have paid off all of its indebtedness, including the \$4,000 to plaintiff. It is then alleged that, under the provisions of the statute of the state (section 976, c. 12, art. 1, Rev. St. 1899) in force at the time in question, said officers of the bank became liable for said deposit, and it was their duty to have paid the same to plaintiff, which they have failed and refused to do after demand therefor. The answer, after tendering the general issue, alleges that one Joseph Brown, the then husband of the plaintiff, came to the defendant's bank to deposit the sum of \$4,000, which he then had on his person; that he stated to the officers of the bank, in making the deposit in the name of his wife, that all checks signed by him should be honored by said bank on said fund, and the bank should pay all checks signed by him in the plaintiff's name and that nearly all of said money so deposited was accordingly paid out by said Bank of Carterville on checks so signed by said Joseph Brown; that when said bank dissolved there was about \$700 on hand of said fund; and that, on the organization of the First National Bank of Carterville, the balance of said fund was turned over to the last-named bank, and was checked out, prior to the institution of this suit, in the manner above stated. The second paragraph of said answer states that, if said money was that of the plaintiff, her said husband at the time of the deposit was her authorized agent to handle the money for her, and to sign her name to checks, and that long prior thereto, and while the same was being checked out, said Joseph Brown did business in his wife's name, and was her general agent, authorized to handle the deposit and check out all of her funds. A jury being waived by stipulation of the parties, the cause was submitted to the court for hearing. The evidence showed that at the time of said deposit the name of the plaintiff, Louisa Brown, was entered by the cashier of the bank upon the register book as the depositor; and a passbook was handed by the cashier to said Joseph Brown, with the indorsement on the back thereof: "Bank of Carterville, Carterville, Mo. In Account with Louisa Brown." On the first inside page of this passbook the caption is as follows: "Dr. Bank of Carterville, in Account with Louisa Brown, Cr." And underneath which are the words and figures: "1895, June 1 By Dept. 4,000.00." The credit side of this passbook shows that, in sums ranging from \$50 to \$500 (most generally in sums of \$100), from month to month, this fund was checked out between the time of the deposit and April 10, 1897, with the exception of \$700. This passbook Joseph Brown took home with him and showed to his wife just after the deposit, showing the deposit of \$4,000 in her name. She never saw this passbook, nor the credits therein, nor was she aware that he had checked said fund out, until after their separation, some time in 1900. Said Carterville bank was dissolved, as alleged in the pleadings, leaving sufficient assets to pay said debts. Said balance of \$700 was transferred by the

¶ 5. See Husband and Wife, vol. 26, Cent. Dig. § 527.

Bank of Carterville to the First National Bank of Carterville in April, 1897, which fund the latter bank entered to the credit of the plaintiff; the latter bank being managed by the same officers who conducted the Bank of Carterville. After said Joseph Brown had so drawn this fund from said banks and squandered it, he and his wife separated, and he sued her for a divorce, but on her cross-bill the divorce was granted to her. The said passbook issued by the Bank of Carterville having been found by the plaintiff's daughter in a private drawer at the home of the daughter of said Joseph Brown, where he lived after the separation, which passbook disclosed the fact of the abstraction of said fund by Joseph Brown, the plaintiff took legal advice, and suit was instituted in the state court for the recovery of this fund, which, for some reason not disclosed by the evidence, was discontinued, and this action was brought in this court. Other essential facts will sufficiently appear in the following opinion.

C. W. Hamlin, John D. Porter, and W. D. Tatlow, for plaintiff.  
Spencer & Spencer and Howard Gray, for defendants.

PHILIPS, District Judge. That the \$4,000 deposited by Joseph Brown in the Bank of Carterville was the money of the plaintiff, the court is well satisfied. The plaintiff was a widow at the time of her marriage with Joseph Brown. She inherited from her first husband a small farm and some personal property situate in the state of Kansas, where she then resided. Joseph Brown at the time of his marriage to the plaintiff was practically impecunious. His only estate, according to his testimony, consisted in a claim to some land which he had entered in Kansas, which he sold shortly after his marriage, in about 1878, for about \$1,400. About that time he and the plaintiff moved into the state of Missouri, where he squandered and consumed the proceeds of said sale of his Kansas claim, which satisfactorily appears from the evidence to have been prior to the sale of the plaintiff's land in Kansas, which occurred in about 1883, at which time they were living in the state of Missouri. The amount realized on the sale of the plaintiff's said land was about \$1,400. The evidence does not show whether or not this money was turned over to Jos. Brown in the state of Kansas. It was, however, brought into the state of Missouri.

By the statute of Kansas (section 3752, Gen. St. 1889) in force at the time in question, of which statute the federal court takes judicial cognizance—

"The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profit or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts."

Even if the proceeds of the sale of the plaintiff's said property in Kansas was received by the husband, he received it in trust for her use and benefit. When it was brought into the state of Missouri, the domicile of the husband and wife, it became subject to the laws of the latter state.

By section 6869, Rev. St. Mo. 1889, in force at the periods in question in this suit, it was provided that:

"All real estate and personal property, including rights in action, belonging to any woman at her marriage, or which may come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or



means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife: provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit."

There is no pretense that any assent in writing was ever given by the plaintiff to evidence his right of possession to this money. The statute positively interdicts any claim of right by or through him to this property, growing out of his possession, control, or management thereof, exclusive of the wife's absolute title, unless expressed in writing. His taking and using this money of the plaintiff is readily understood from the relative character and disposition of this man and wife, as the court observed them on the witness stand, and from the surrounding facts and circumstances. She is an illiterate woman, of little mentality and self-assertion, and easily imposed upon by such a man as Joseph Brown. He is a coarse man, of low instincts and little moral sense, who evidently regarded his wife as little more than a servant, with no rights he was bound to respect; holding her mind and property in complete subordination to his will and desires. Nolens volens, he took her money and invested it in mining property and in other adventures, and even in the saloon business. He employed her name in these transactions without her consent or request. She testified (and the court credits her statement) that if, at any time, she made inquiry or sought information respecting the state of the business affairs, he would curse and repulse her, and therefore she shrunk from seeking such information. He testified that he made money out of these operations, and with the proceeds a farm was bought in Newton county, Mo., in 1885, which he claimed cost about \$5,000, the deed for which was made to the plaintiff in fee simple. Where the wife's separate money is invested in other property or in business, and the same is managed by the husband in her name, the proceeds thereof remain the property of the wife. He does not thereby acquire either an exclusive or community interest therein under the married woman's act of this state. This is necessarily so under the statute which expressly secures to the wife "all income, increase and profits" from her separate estate. This is the rule in Kansas. *Parker v. Bates*, 29 Kan. 597. Aside, however, from this aspect of the case, when the husband caused the title to this land to be placed absolutely in the wife by deed of conveyance the land became the separate estate of the wife, and repudiates the idea of a resulting trust in the husband's favor. *Gilliland v. Gilliland*, 96 Mo. 522, 10 S. W. 139; *Schmalhorst v. Peebles*, 71 Mo. App. 219, 223. When this land was sold, in 1895, the proceeds thereof, by express provision of the statute, became and remained the separate property of the wife. This land sold for something over \$6,000. It was then subject to a mortgage of about \$1,200, which left the net proceeds of the sale about \$5,000. Four thousand

dollars of this sum is the fund deposited in the Bank of Carterville, leaving about \$1,000 in the hands of Joseph Brown, which he appropriated to himself. Without more, had he deposited this \$4,000 in the bank in his own name, the wife, as a feme sole, under the statute, could have maintained an action therefor against the bank, as for money had and received to her use and benefit, prior to its disbursement by the bank on the husband's order. Logically and legally it must follow that, if the bank had notice that it was the wife's money when deposited, it would be legally bound to repay the same to her, unless withdrawn by her, or by some one duly authorized by her. In *Rodgers v. The Bank of Pike County*, 69 Mo. 560 (a case much in point), it was held that, where the wife sells her real estate for money, the transaction amounts to a purchase of the money with her separate means, within the meaning of the married woman's act, and, if such money comes into the possession of the husband, he cannot dispose of it without her consent in writing. In that case the plaintiff's husband collected the money arising from a sale of her land, and at first deposited the amount in the bank as his own. On the same day he returned to the bank, and asked the cashier if his creditors could reach the money; and, upon being informed that they could, he directed the cashier to transfer the deposit to his wife's credit, which was done, and a certificate was made out in her name. At the same time he directed the cashier to pay out the money on checks drawn either by himself or his wife. Characteristically, however, the husband drew out the money on checks drawn in the wife's name, signed by him just as in the case at bar; and, precisely as in the case at bar, the plaintiff did not tell the husband to deposit the money in bank, but he informed her a few days afterwards that he had done so in her name. She learned afterwards, when at the bank, that her husband had already drawn out \$100 of the \$400 deposited, and she made no answer thereto. The wife recovered judgment for the balance of the account; and, while the case was reversed because of the nonjoinder of the husband with the plaintiff, as the law then required, it is quite clear from the opinion of Judge Napton that the wife was entitled to recover, in the absence of the requisite evidence of agency to the husband to draw the money out for her. The only doubt expressed by him was whether or not the plaintiff's silence and nonaction after she had been advised by the bank that her husband was drawing the money out on checks signed in her name was a ratification or estoppel. The same ruling was followed by the Court of Appeals in *Stone v. Bank*, 81 Mo. App. 9.

Conceding to the defendant the most favorable construction of what transpired when Joseph Brown deposited this money, the legal effect of it is that the cashier of the bank was advised that the \$4,000 was the money of the plaintiff. The effective substance of the evidence touching this issue is that the defendant Daugherty, president of the defendant bank, introduced Joseph Brown to the cashier, W. B. Kane, as his (Daugherty's) friend, stating that he wanted to make a deposit. Thereupon Brown produced \$4,000 in currency, and handed it to the cashier, saying he wanted to deposit it in his wife's name, and that he would draw it out in her name. The cashier's version of the transac-

tion is that Brown said: "I wish to make this deposit in my wife's name—Mrs. Brown. I will sign the checks." Thereupon the name of the plaintiff, Louisa Brown, was entered in the register book of depositors, and the cashier handed to Joseph Brown the passbook described in the foregoing statement of the case. The cashier never saw the plaintiff, and she was never in the bank, nor even in the town of Carterville. In his testimony the cashier, Mr. Kane, spoke of hearing a conversation of Joseph Brown at a window of the bank counter, with some clerk, perhaps, of the bank, to the effect that his reason for having made the deposit in his wife's name was that he owed some old debt in Kansas when he left there, and he was afraid his creditors might be after the money. But it is clear from his cross-examination, and a previous deposition given by him respecting this controversy, that the conversation at said window was after the money had been checked out by Joseph Brown. At the time of the deposit, Brown did not even state that the money was his, or that he deposited it as agent for his wife, or that he had any agency from her to withdraw it. The legal effect of the transaction of the deposit is that *prima facie* it established the relation of creditor and debtor between the plaintiff and the bank. The corollary of this proposition is that the bank could only discharge that relation by payment to the plaintiff in person or on her order, or to her authorized agent. Authorities *supra*. The very fact that the husband made the deposit in the name of his wife was notice to the bank that the money, *prima facie*, was the property of the wife. It was in the nature of a caveat to the bank that no one could thereafter withdraw this deposit without authority from her. The books of the bank and the passbook given in the name of the plaintiff constitute an admission and recognition by the bank that she was the depositor in fact and in law. The moment Joseph Brown stated that he was to withdraw this money on checks signed by him, the most ordinary business prudence would have dictated to the cashier the inquiry, "Where is your authority to do so?" A more unbusinesslike course, on the part of a bank, to accept checks on a fund known not to have been signed by the depositor, and not even by Joseph Brown as her agent, is hard to conceive.

The case of *Bates v. First National Bank*, 89 N. Y. 286, presents a parallel case in its principles, and the reasoning of the court is so complete and satisfactory as to justify extended quotations therefrom. In that case the wife received from her father's estate checks payable to her for \$1,000, in separate sums of \$500. She indorsed one of the checks in blank, and delivered it to her husband, with directions to deposit it in the defendant bank in her name, and bring her the passbook. The passbook was accordingly made out by the bank, just as in the case at bar, showing the wife to be creditor, and the bank her debtor, in the sum of \$500. The husband took the passbook and delivered it to his wife. In the case at bar, Brown took the passbook home and showed it to his wife. The second check was deposited in the same way, and likewise entered in the passbook. On the trial, Jefendant offered to prove by its teller that, when the plaintiff's husband came to the bank and made the deposit, it was in pursuance of an agreement between him and the teller for the bank that the money

should be deposited to the credit of the wife, with the condition that it should be withdrawn upon checks made by him in her name, and the money was afterwards so withdrawn. The trial court ruled that this evidence was competent, provided it was followed up by evidence of the agency of the husband to so sign checks in his wife's name, or of the wife's permission to her husband to withdraw the money in his own name or in her name, or if counsel expected to follow it up with evidence of ratification by the plaintiff. Counsel stating that he offered the evidence irrespective of the fact of such agency or ratification, but upon the sole ground of the alleged understanding and agreement between the husband and the teller, the court ruled this evidence out. The Court of Appeals held that the evidence offered was only admissible upon the assumption that the husband was either the real owner of the fund, or was entitled to be dealt with as such by the bank; that in such case it was perfectly competent for him to dictate the terms of the deposit, and the manner of its withdrawal. "But if the husband came as agent, and not as owner, or the attending circumstances were such as to charge the bank with knowledge of his real relation to the fund, an arrangement hostile to the safety of the principal, and beyond the apparent scope of the agency, drew after it the peril attaching to a want of actual authority." The court held that the indorsement of the checks in blank, and the delivery thereof to the husband, were sufficient to make him the apparent owner, but when he made the deposit in the name of his wife, and took the passbook in her name, it disclosed the fact of his agency only to the extent of making the deposit for her. The situation then was that the bank was bound to recognize the wife as the owner, and pay only upon her order, and that when the defendant sought to show that the transaction imposed upon the bank the condition that the husband should be at liberty to withdraw it upon checks signed by him in his wife's name—"It was inconsistent, because the bank was asked at the same moment to treat the wife as owner and depositor, and as neither, and so give to her an apparent credit which was in truth a delusion. It was suggestive of fraud, because, while assuring her of the safe disposal of her money, and the honest fulfillment of the agency she had created, it enabled her credit to be stolen away without her knowledge, and disclosed plain traces of duplicity and equivocal purpose. It was out of the usual and ordinary course of business. If the money had been the husband's, and he had merely wished to enable his wife to draw on it at will, he would naturally have deposited it to his own credit, and given her his checks, or authorized the bank to accept hers. If, on the other hand, as the bank was fairly warned, the money was hers, and she desired her husband to draw upon it freely, she would have given him her checks, or sent an order to accept his. When the bank was tendered a deposit upon conditions such as we have described, and with such knowledge as the circumstances tended to impart, its duty was to refuse the deposit, or require the assent of the wife. Omitting to do so, it took the risk of the actual truth, and paid the unauthorized checks at its peril. Any other rule would permit a bank to be blind when it ought to see, and furnish dangerous facilities for fraud. In the present case just that happened which might easily have been foreseen. The husband drew his wife's money upon fraudulent vouchers, with such aid from the bank as made it liable for the consequences. The husband's possession of the money did not authorize it to infer authority to sign the wife's name to future checks. It relied upon the husband's honesty without inquiry as to the fact, and must take the risks of its reliance. Its passbook was something more than a mere receipt. It imported, besides, a promise to pay on demand, and so had in it elements of

contract. The bank made the wife its depositor, whom it was bound to protect against vouchers not known to be actually hers. It established a relation which it was required to respect so long as it existed, and from the duties of which it could not escape without her real authority. It trusted the husband beyond the scope of his apparent authority, and must bear the consequent loss."

To the same effect are the cases of *Kerr v. Bank*, 158 Pa. 305, 27 Atl. 963; *Honig v. Bank*, 73 Cal. 464, 15 Pac. 58. The latest utterance by the appellate courts of this state touching this question is in *Armstrong v. Johnson*, 93 Mo. App. 492. It is on this principle that it was held in *Ball v. Liney*, 44 Barb. 505, that a depository who has received goods, to be stored from one acting agent for another, must deliver to the principal, notwithstanding the agent's directions to the contrary.

The only defense interposed to save the bank for paying out this money as it did is set up in the second paragraph of the answer, which simply alleges that Joseph Brown was the authorized agent of the plaintiff to handle the money for her, to sign her name to checks, and that a long time prior thereto, and while the money was being checked out, Joseph Brown did business in his wife's name, and was her general agent to handle all her funds, to deposit the same in banks, and check the same out. It does not plead any acts of estoppel or ratification in terms. It is the settled rule of practice under the Code in this state that no evidence is admissible to show a ratification or estoppel in pais unless the same be specifically pleaded. *Wade v. Hardy*, 75 Mo. 399; *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Hammerslough v. Cheatham*, 84 Mo. 21. While the answer alleges that Joseph Brown had been doing business in his wife's name, and was her general agent, fully authorized to handle all of her funds, it does not allege that this fact was known to the defendant at the time the deposit was made, or when the funds were being checked out, or that it acted upon the faith of any such general agency, so that the bank "neither acted on nor altered its conduct on account of any act of the plaintiff." *Spurlock v. Sproule*, 72 Mo. 503; *Noble v. Blount*, 77 Mo. 235. And even if a ratification or estoppel had been properly pleaded, there is no sufficient evidence to support it. The court finds the evidence to be that the plaintiff neither expressly nor impliedly authorized Joseph Brown to withdraw this money from the bank, nor was she made aware of the fact that he was checking the money out in her name prior to the dissolution of the bank.

Responsive to the spirit of the statute for the protection of the rights of married women, the court holds that, when it is sought to bind her by acts of the husband on the ground of his agency, the evidence must be clear, cogent, and unequivocal. The observation of Judge Cole in *McLaren v. Hall*, 26 Iowa, 305, has been approved by the Supreme Court of this state in *Rodgers v. The Bank of Pike County*, *supra*—that in view of the Legislature requiring the written assent of the wife to the reduction of the wife's property to his possession, while the statute has not prohibited her from making him her agent, nor altered the common law in that respect, the spirit of the legislative enactment requiring such unequivocal proofs "is for the

reason that in general experience of the past, if not in the philosophy of the present, the wife is under the control of and subordinate to the husband; and neither good law nor sound reason will require the wife to destroy the peace of her family and endanger the marriage relation by open repudiation, or hostile conduct towards her husband, in order to save her property from liability for his unauthorized contracts." This ruling has been reaffirmed by the Supreme Court of this state in *Long v. Martin*, 152 Mo. 680, 681, 54 S. W. 473. The defendant's testimony tended to show that about 1882 or 1883 Brown engaged in the mining business, in partnership with another party, in the name of his wife, and that he ran a saloon in her name; but the plaintiff's testimony is that he did not even inform her of the fact that he was taking out a saloon license in her name, or that he was using her name in the mining business, and consequently she never authorized him to transact such business. And the evidence utterly fails to show that prior to the transaction in question he ever deposited a dollar in bank in her name, and checked it out, either by signing the checks in her name, or in her name by him as agent. And there is no evidence that the bank, when it accepted the deposit in question, and when it honored the checks in the plaintiff's name drawn by Joseph Brown, had any knowledge that he had ever acted as agent for her in a single transaction. While Joseph Brown testified that his wife knew that he was using the money deposited in bank, her testimony is that she never authorized him to check the money out, and that she did not know that he had checked a dollar of it out until the disclosure of the fact on the finding of the pass-book by her daughter after the separation between plaintiff and Brown. Her mere silence, or failure to go to the bank to see if the money was there, creates no estoppel. *McClain v. Abshire*, 72 Mo. App. 396, 397; *De Berry v. Wheeler*, 128 Mo. 90, 91, 30 S. W. 338, 49 Am. St. Rep. 538.

Neither can I find the quality of a ratification or an estoppel in the incident disclosed by the evidence respecting the wager made by Joseph Brown in October, 1896, on Bryan's election. It appears that he put up with a stakeholder a check drawn by him in his wife's name on the Bank of Carterville for \$500. When he learned the result of the election, he repudiated the wager. He telegraphed to the bank, in the name of the plaintiff, not to pay the check; but it seems that the stakeholder had turned over the check to the winner, who had drawn the money thereon from the bank. Thereupon he instituted suit in the state court to recover from the stakeholder or the winner the amount so collected. This suit he instituted in the name of his wife, of all which the wife had no knowledge or information until he came home from Neosho, and told her that he was in some trouble about having bet \$500 of her money on the election, and wanted her to go into town the next day to help him out. She went in with him; his purpose being, presumably, to prove by her that it was her money. The case was not tried, the defendants paying the money over to Joseph Brown without further contest. Four hundred dollars of this money he redeposited in the bank, and kept \$100 thereof, as the court infers from the circumstances disclosed.

He did not inform his wife that it was the money in the bank he had bet, or that he put up a check therefor, and there is nothing to justify the finding that she knew or had reason to believe that he had drawn a check therefor on the fund in bank. He had retained \$1,000 of the purchase money on her farm, and the plaintiff had no reasonable grounds to conclude that he had drawn upon the fund deposited in the bank. The only fact in evidence, advanced by defendants to support a claim of knowledge on her part that her husband was using the money in the bank, is the fact that he sent \$500 to the plaintiff's daughter, at Springfield, Mo., to buy her a piano, and perhaps to defray expenses at school. His testimony was that he drew this money out of the bank on a check signed by him in the plaintiff's name. The passbook shows cash drawn November 6, 1895, \$500; and it may be conceded that it represents the sum so advanced to the daughter. Plaintiff's statement is that she was aware of the fact that he had so advanced that amount of money, but she did not know that he had drawn it by check on the fund in bank, and that she supposed he was paying the money out of the proceeds of the horses and cattle on the farm, of which there was a large number, which he was selling at will. He never informed her of the fact that this money was drawn from the bank. It would be a strained inference from these facts for the court to find that the plaintiff had knowledge of and recognized his action in checking out the money in her name. Such evidence is not clear, cogent, and persuasive, within the rule. Nor is such fact pleaded in the answer as a ratification or an estoppel. Nor is there any evidence that the officers of the bank had any knowledge of the purpose for which said money was to be appropriated by Brown.

When on the witness stand, Joseph Brown was sharply interrogated by the court as to what disposition he had made of so large a sum as \$4,000 within a period of about two years. He was unable to give any intelligent or reasonable explanation thereof. He claimed, in a general way, that he had used much of it in supporting his family. On the contrary, the plaintiff's testimony showed that during this time they were living on a farm, which was supplied with cattle and horses, and the products of the farm, out of which the family was supported and maintained; that she and her children worked hard; that she milked the cows, did the household work, sold products from the farm, and was very economical. The evidence showed that he was a man who did little work; that he raced horses and was dissipated to some extent. And I am persuaded that he wasted such a large amount of money in profligacy, on his own appetite and sporting indulgences, while his wife was living on the little farm, "to pinch and spare" to eke out a stinted livelihood. When they separated she went out into the world homeless and almost penniless, and this condition was aggravated by her ill health. Until she was freed by a divorce from her husband's domination, she should not be held guilty of laches in not looking after her claim against the bank. At the time of the separation, Joseph Brown had withdrawn the whole of the deposit.

The true explanation of the bank's conduct in this transaction is found in placing confidence personally in Joseph Brown on the introduction of him by the president of the bank to the cashier. The cashier and the disbursing clerk assumed that Brown had the authority to sign his wife's name to checks, upon an assumption of authority based alone on his statement. In law and equity, the bank should look for restitution to Joseph Brown, who deceived it.

Another fact may be adverted to by the court: On the dissolution of the Bank of Carterville and the organization of the First National Bank of Carterville, the remaining fund in the former bank, of \$700, was by the defendants, of their own motion, transferred to the latter bank, and thereupon the national bank advised the plaintiff of the credit in her name of \$700. She was under no legal or moral obligation to demand that fund from the First National Bank. There was no contractual relation between her and the new bank. Her contract was with the Bank of Carterville, and the relation of creditor and debtor existed alone between them. She had a right to rely upon her depository to account for the fund when called for. A demand by her on the First National Bank the defendants would have at once claimed was a recognition of the right of the Bank of Carterville to make such transfer. While it appears from the evidence that some time prior to the institution of this action in this court the plaintiff had brought such suit against the defendants in the state court, yet, as the date thereof is not definitely fixed by the evidence, the court will award interest to the plaintiff only from the date of the filing of the present suit.

Judgment for plaintiff.

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**KELLEY et al. v. CUNARD S. S. CO., Limited.**  
(Circuit Court, D. Massachusetts. January 6, 1903.)

No. 1,258.

**1. SHIPPING—ACTION FOR FAILURE TO DELIVER CARGO—EVIDENCE OF RECEIPT OF GOODS.**

Upon the issue whether goods claimed to have been shipped in a foreign port, but which were not delivered by the carrier, were in fact received on board, the acts of the ship's officers, whose customary duty it is to check off merchandise received aboard, is received as evidence of great importance.

**2. SAME.**

Evidence examined, in an action at law by a shipper against a steamship company to recover for failure to deliver cargo, and *held* such as to justify the submission to the jury of the question whether the merchandise in controversy was actually received on board defendant's ship. *Smith v. Navigation Co.* [1896] App. Cas. 70, applied.

At Law. On motion for new trial.

Whipple, Sears & Ogden, for plaintiffs.

Putnam & Putnam, for defendant.

PUTNAM, Circuit Judge. In this case there was a verdict for the plaintiffs for goatskins and kidskins alleged to have been shipped



from Naples to Boston by the defendant's steamer *Tarifa*. The voyage of this ship ended at Liverpool, where bulk was broken, and the merchandise brought from Liverpool to Boston by another vessel. The voyage from Naples to Liverpool was a part of a continuous shipment on defendant's alleged through bill of lading to Boston. The only question we have to consider is whether the merchandise in question went over the rail of the steamer *Tarifa* at Naples with the plaintiffs' marks thereon. The defendant maintains that it did not, and that sheepskins were substituted before the goods were delivered to the ship, so that, through the fraud of parties at Naples, to whom the plaintiffs are alleged to have intrusted them for shipment, effectuated before they were laden, sheepskins were substituted for the goatskins and kidskins owned by the plaintiffs, falsely marked with the tags which the plaintiffs had caused to be put on the latter while on the quay awaiting shipment.

It was conceded that at least a portion of the goatskins and kidskins belonging to the plaintiffs were laden aboard the *Tarifa*, though, as claimed by the defendant, when laden, they bore, through the fraud of the parties intrusted by the plaintiffs with their shipment, the marks of another consignee, to whom the defendant, being misled by the fraud, delivered the same. The court instructed the jury that, under the circumstances, unless the defendant received aboard the ship the merchandise which belonged to the plaintiffs, and with their proper marks on them, the plaintiffs could not recover. Consequently, the only question which we have now to consider is whether the jury properly found that the plaintiffs' goods went aboard the ship so marked.

This motion for a new trial sets out several reasons on which it is based; but the only one we need notice is that most favorable to the defendant, namely, that the verdict is against the weight of the evidence. Everything else in the motion is either an amplification of what is thus assigned, or claims that the evidence was conclusive in behalf of the defendant. In the latter event the defendant will, if its propositions are true, have relief under one of its requests for instructions to the jury, which was refused, as follows:

"There is no evidence from which the jury would be justified in finding that the goods described in the plaintiffs' bills of lading were delivered to the defendant on the steamship *Tarifa* as and for the goods of plaintiffs."

As an exception was taken to the refusal of this request, and as a proposition that the evidence is conclusive one way or the other raises an issue on which clearly an appellate tribunal may pass, the rights of the parties will be better secured, and the litigation sooner ended, by our refusal to consider such an issue on a motion for a new trial. Therefore, and because, also, as we have said, it is the most favorable view of the motion which can be taken for the defendant, we limit our observations and conclusions to the claim that the verdict was against the weight of the evidence.

One Rondino, who assumed to act as the agent of the defendant at Naples, gave what was apparently a bill of lading for this merchandise while it lay on the quay, and before the *Tarifa* arrived. It was agreed by the parties that one Ferolla was the agent of the

defendant at Naples, with authority to sign bills of lading "for the master," "for the transportation of merchandise delivered on board the steamships" at Naples, and that Rondino was Ferolla's clerk, with power to exercise his authority. So far as it appears, there was no other agent or representative of the defendant at Naples. The alleged bill of lading was in due form on a printed blank of the defendant. It provided, as other "line" bills of lading do, that merchandise might be forwarded by the steamer named in it, or by some other of the defendant's steamers. Therefore it was the view of the court at a previous trial that the terms of the bill of lading overruled the literal language of the agreement referred to, so that Ferolla, and Rondino as his representative, were authorized to give bills of lading for the company itself, and not merely for the master of any particular vessel, having in this respect the same authority as the agent of an express company, or railroad company, or of other ordinary land carriers. This fact was impressed especially on the court, because, in this particular case, the alleged bill of lading was given in advance of the arrival of any steamer, and named a ship other than that on which the merchandise was afterwards directed by the defendant to be laden.

Also, inasmuch as it was conceded that the defendant undertook to deliver at Boston the merchandise apparently called for by the alleged bill of lading, and collected the freight stipulated therein, it seemed to the court that it was not incumbent on the plaintiffs to prove the authority of the assumed agent who signed the alleged bill. One party to an apparent contract cannot accept the benefits thereof, and recognize it for certain purposes, and compel the other party, when seeking to enforce it in his own behalf, to prove the authority of the person who assumed to execute it as agent. Also, the court recognized the facts as stated by the court of appeals for this circuit in *Pollard v. Reardon*, 13 C. C. A. 171, 65 Fed. 848, that, while bills of lading are not negotiable instruments in the sense that promissory notes are such, yet they are negotiable, that "they are well recognized commercial instruments, that when indorsed in blank they carry title by mere delivery from hand to hand, and that the community gives credit and reliance on what appears on the face of them." Indeed, it was recognized by the court that, in the language of Lord Halsbury in *Smith v. Navigation Co.* [1896] App. Cas. 70, 75, bills of lading are a class of mercantile documents "which has a force and effect of its own, and involves the rights of persons other than those who execute them." The court understood that the practical rules with reference to bills of lading, although now extended to inland bills, had its origin with reference to foreign bills, precisely as the law with regard to promissory notes had its origin with reference to the goldsmiths' foreign bills of exchange. Bills of lading given in distant countries are given under circumstances as to which the holders may have, and sometimes can have, but little knowledge, while the transactions are usually, and, indeed, we may say always, under the eye of the owners of the ships, their masters, or other agents. Therefore, while the court recognized the fact that, so far as a bill of lading operates as a receipt, it may be explained, yet, in accord-

ance with the practical rules which have been applied in reference thereto, it understood that such a bill does not constitute a mere prima facie case, in the refined sense in which the term "prima facie" is used in the courts in New England, but that it casts the burden on the party issuing it, and claiming that goods were not received as stated in it, to prove his contention in a satisfactory manner and clearly. In other words, the court understood that the rule has always been practiced with reference to foreign bills of lading as is said in *The Freeman*, 18 How. 182, 192, 15 L. Ed. 341, namely, that the giver of a bill of lading is not estopped from "alleging and proving" the fact that the merchandise named in it was not in fact received aboard his vessel, and as it is also said in *Carv. Carr. by Sea* (3d Ed.) 80:

"The onus of falsifying the statements in the bill of lading is upon the shipowner."

The circuit court of appeals, however, in its opinion setting aside the verdict for the plaintiff which was taken at the previous trial, observed as follows:

"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."

Consequently, at the present trial, each alleged bill of lading came in only as *res gestæ*, and, when the case went to the jury, it was left in such form by the apparent consent of both parties that the court was unable to instruct the jury that any had been given. Under these circumstances, the burden of proof clearly rested on the plaintiffs to show that their merchandise was received aboard the ship, properly marked, as we have stated. It is on this account, and only on this account, that any difficulty arises in the mind of the court growing out of the motion now under consideration.

It is necessary to refer to only a few facts in the case. It is entirely clear that the methods of covering and baling at Naples goat-skins or kidskins on the one hand, and sheepskins on the other, are such that any person at all familiar with them would see at a single glance the difference between them, and would not confuse one for the other. It must be assumed that the officers of the Cunard ships, resorting regularly to the port of Naples, knew this; and it is difficult to understand how, if those officers were attentive to their duties, they could have been deceived with reference to the character of the merchandise received aboard the *Tarifa*. On the other hand, it is agreed by the plaintiffs that no substitution of the merchandise was made after the ship arrived at Liverpool. She was in Naples but a few hours, the hatches were seasonably secured after sailing, and for various reasons, to which the court need not refer, the court is unable to perceive how a substitution, which necessarily involves, not only a change of marks, but a removal of a portion of the merchandise, could have been effectuated in the harbor of Naples after the goods passed the rail of the ship. On the other hand, Rondino

testified in reference to the plaintiffs' merchandise. It is necessary to preface that one Garsin purchased the goods for the plaintiffs at Naples, and that, when the alleged bill of lading was given, and before shipment, the goods were at a quay in Naples known as the "Punto Franco." His testimony was this:

"Garsin was in a great hurry to get the bill of lading, which I would not issue immediately, without first having ascertained that the goods were at the Punto Franco. I went, in fact, to the Punto Franco, where the storekeeper pointed out the lot of skins. \* \* \* I delivered the second bill of lading after I ascertained that the merchandise was deposited in the Punto Franco. \* \* \* In conformity with the conditions embodied in the bill of lading, the merchandise was all loaded on the steamship Tarifa. \* \* \* All this is perfectly true, and I can verify that, on the day when the 101 bales were shipped, 53 belonging to Mr. Garsin, 48 to Signor Salvini, I was present at the shipment, and made sure that these were really the goods deposited in the Punto Franco."

His testimony was in Italian, where he used, in lieu of the words "I was present," the word "assistetti"; but a witness, familiar with the English and Italian languages, translated this to mean "watching over." What is the correct translation was for the jury; but the testimony of the witness referred to was not contradicted, and the jury was not only at liberty, but probably was required, to find that Rondino was not only present at the shipment, but was vigilant with reference thereto, and thus personally made sure that the plaintiffs' goods went aboard the Tarifa. Of course, under the circumstances, his testimony that he made sure that the goods which went aboard the ship were really the goods deposited in the Punto Franco, included the fact that they went aboard the ship properly marked, and that they were goatskins or kidskins, because, otherwise, presumably as his duty required, he would have observed the difference in the packing and covering, and the falsification of the marks, and would, at once, have informed the master of the ship in reference thereto.

Furthermore, the subordinate officers of the ship, whose customary duty it is to check off merchandise received aboard a vessel and report the same to the mate, so that he may give proper receipts therefor, produced their books, and testified in such a way as to demonstrate that the plaintiffs' goods were received aboard the ship, properly bearing their marks, unless they were extremely inattentive and careless. Tallying off goods coming aboard ship, in the usual way, is, however, received as evidence of great importance with reference to defenses like that at bar, as was shown in *Smith v. Navigation Co.* [1896] App. Cas. 70, already referred to. That was a Scotch case, and came before the house of lords for the determination of the facts. It turned on a question of shortage of 12 bales of jute at Calcutta. It is true that there was in that case a bill of lading, but the lack of that at bar is more than compensated for by the testimony of Rondino. It also appeared that the bales as they came aboard were tallied in almost precisely the same way in which they were tallied in the case at bar,—in the one case from what were called "boat notes," and in the other from what are called "shipping notes." It also appeared that at all times, both day and night, there were watchmen

over the cargo, and that, on account of the warm weather, the crew slept on deck. It was said that, if an attempt had been made to remove a bale, the crew would have been disturbed. As soon as the cargo was put aboard, the hatches were put on, and no portion of it was removed until the ship reached her destination. There was also evidence that every available space was filled with cargo. In that case it was quite as difficult to understand that the cargo was tampered with after it came aboard the ship as in the case at bar; and yet the house of lords, as a matter of fact, decided against the ship-owner. It is true that in an earlier case which came before the house of lords (*McLean v. Fleming*, L. R. 2 H. L. Sc. 128) the ship prevailed; but there the loading of the cargo was under such circumstances that it was impossible to systematically check it as is ordinarily done, and the discrepancy was so large that it was almost certain there was some mistake.

The improbabilities which the plaintiffs have to contend against in the case at bar are no greater than in *Smith v. Navigation Co.* This was later than *McLean v. Fleming*, and the circumstances were more close to those at bar than in the earlier case. Of course, it is not necessary, on the motion at bar, for us to determine that the decision in *Smith v. Navigation Co.* was correct; but there is enough in it, and enough in the common rules applicable to motions for new trials, to bring us to the conclusion that the question which arises as between the almost absolute improbability of the plaintiffs' case from the defendant's point of view, and the somewhat like improbability of the defendant's case from the plaintiffs' point of view, is one to be solved by a jury, and not by a judge presiding at a common-law trial, either before or after verdict.

One point, not made by counsel, strongly impresses the mind of the court as of some value in determining whether the subordinate officers of the vessel made an error in tallying off the goods which were shipped as and for those of the plaintiffs. It was their duty, with reference both to the interests of the ship and the interests of the shippers, to have avoided mistakes of this character in a distant foreign port, when it was within their power to do so. That it was within it with regard to the merchandise in question is beyond doubt, because it must be assumed that they were sufficiently familiar with the difference between sheepskins, as packed and wrapped for ocean shipment, and goatskins and kidskins, that the slightest observation would have made plain to them whether a deception had been attempted. Such observation ought to have led to an immediate report to Rondino, if there had been a fraud, and, through Rondino, to the shippers or their agent, followed by a speedy detection of the fraud and relief against the same. Must we concede that these officers were guilty of negligence in this respect? Perhaps the court as now constituted attached too much importance to the usual transactions with reference to the receipt of goods shipped in foreign ports; but, however that may be, the case seems to be one which we cannot solve on a motion for new trial.

If the defendant's position on this motion is correct, it must be so because the inferences which arise from its case are so strong that

no evidence of a presumptive character can meet them, so that nothing except direct proof that some fraud was committed after the merchandise was laden aboard the ship could avail the plaintiffs. If such is the fact, it was the duty of this court to have granted the request of the defendant for the instruction to the jury which we have quoted. Therefore, as exception was duly taken in reference thereto, if we are in error in failing to see the force of the defendant's case in this respect, the appellate court can, on well-settled rules, give relief. *Schuchardt v. Allens*, 1 Wall. 359, 369, 17 L. Ed. 642; *Railroad Co. v. Moore*, 121 U. S. 558, 569, 7 Sup. Ct. 1334, 30 L. Ed. 1022; *Sparf v. U. S.*, 156 U. S. 51, 99, 100, 15 Sup. Ct. 273, 39 L. Ed. 343; *Coughran v. Bigelow*, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442; *Rainger v. Association*, 167 Mass. 109, 110, 44 N. E. 1088.

The defendant's motion for a new trial is denied.

Note by the Court: *Harrowing v. Katz*, 10 Times Law R. 115, 400, is worth examining in this connection, although, as it is not of so high authority and is less in point than *Smith v. Navigation Co.* [1896] App. Cas. 70, it was not thought advisable to discuss it in the opinion.

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In re WILLIAMS.

(District Court, W. D. Georgia, S. D. February 11, 1903.)

1. REFEREE—OBJECTIONS TO FINDINGS.

Where creditors seeking to overturn finding of the referee contend that certain moneys are not the proceeds of property pledged to a lienholder, the referee having found that they are, the burden of proof is on the objectors to show the fact to be as they insist.

2. NOTES—ASSIGNMENT—PRESUMPTIONS.

Where farmers' notes were transferred by a country merchant to a cotton factor to secure advances, and it is contended that the transfer was not legal because not in writing, and the notes are not produced in evidence or accounted for, in the absence of proof to the contrary it will be presumed that such notes were made in accordance with the custom of the trade, were either payable to bearer or to order, and were duly indorsed.

3. CHATTEL MORTGAGE—FRAUD—WITHHOLDING FROM RECORD.

There is no evidence in this case that the mortgage to the factor was fraudulently withheld from the record. In re *Josephson* (D. C.) 116 Fed. 404, followed.

4. SAME—LIEN.

Where a country merchant shipped cotton to a factor holding a mortgage or other security, and contemporaneously made drafts against the proceeds of such cotton with request to the factor to pay the proceeds on other accounts, thus leaving a balance of indebtedness in favor of the factor, all done in good faith and in usual course of business, held that the mortgage or other security given as a lien must be treated as a lien protecting such balance.

5. REFEREE—REPORT—CONCLUSIVENESS.

Report of referee on questions of fact is presumed to be correct until the contrary is shown.  
(Syllabus by the Court.)

In Bankruptcy. Objections of W. A. Doody Company et al. to proof of secured claim of B. T. Adams & Co. Petition to review finding of referee.

George S. Jones, for creditors.  
DuPont Guerry, for B. T. Adams & Co.

SPEER, District Judge. From the record in this case it appears that B. T. Adams & Co. are cotton factors and commission merchants in the city of Macon, Ga. J. F. Williams, the bankrupt, is a country merchant who dealt directly with the farmers. He relied upon B. T. Adams & Co. to make him advances, based principally upon the cotton crop of the current year.

It appears from the finding of the referee, and from the evidence, that on the 1st of January, 1901, the account between these parties was practically balanced. Their relations had continued for years, and Williams desired further advances for the year 1901. To obtain these he executed on February 21st to Adams & Co. two notes, each for the sum of \$750, and between that date and the 14th of June, Adams & Co. made further advances to Williams, aggregating \$6,750, all evidenced by notes given as the advances were made, all made payable in the fall of 1901. To secure these notes Williams made to Adams & Co. a mortgage upon his stocks of goods contained in the storehouses occupied by him in the town of Irwinton and in the town of McIntyre. All of this was more than four months anterior to the institution of bankruptcy proceedings against Williams. A verbal contract is also shown by the evidence, to the effect that, in consideration of the advances made to Williams during the summer and fall of 1901, as fast as he should receive notes and mortgages from his customers he undertook to deliver the same to Adams as collateral for further security of the large advances made him. In consideration of the mortgage and in consideration of the additional collateral afforded by the farmers' notes payable to Williams and transferred to B. T. Adams & Co., the factors made advances not only of \$6,750 secured by the mortgage, but of the additional sum of \$9,335.63. Williams complied with his contract to deliver the collateral in the fall of 1901, and as a result of this arrangement between the factor and their customer, after crediting the latter with the sales of cotton and moneys collected on notes and accounts, the balance showed that he was still indebted to Adams & Co. in the sum of \$4,354.08. The date of the mortgage of Adams & Co. is the 14th day of June, 1901. Proceedings in bankruptcy were instituted on the 16th day of December of the same year. After the administration of the bankrupt's estate, the sum of \$2,622.19 remains in the hands of the trustee, and a contest arises before the referee as to its appropriation. This sum resulted from the sale of the stocks of goods which had been mortgaged to Adams & Co. as part security for the advances made. The referee held that this sum should be appropriated so far as it would go to pay off the debt thus secured, and certain general creditors have filed numerous exceptions to that finding. The record is voluminous and confusing, but in so far as questions of fact are in dispute the referee has negatived by his finding the contentions of counsel for the objectors, and his action is now before the court for review.

With regard to the contention that the money in the hands of the trustee is not the proceeds of the property covered by the mortgage of B. T. Adams & Co., nor the proceeds of the collateral notes transferred or delivered to B. T. Adams & Co., the objectors do not appear to sustain the burden upon them to show its correctness by affirmative proof. Indeed, the mortgage expressly pledges "all dry goods, groceries, hardware, etc., which is now contained or that may be contained hereafter in the storehouses" of the mortgagor. By the law of the state such mortgages are of recognized validity. Nor does it appear that Williams was insolvent, or, if he was, that Adams & Co. were chargeable with notice of any facts which put them on inquiry as to his insolvency at the time the advances were made or the mortgage executed. On the contrary, Williams had by a long course of correct dealing established a character for solvency and reliability in which Adams & Co. might well have trusted, and it seems that his bankruptcy was more ascribable to illness on his part at a critical period of his business than to any other cause.

The contention that the transfer of the farmers' notes to Adams & Co. by Williams was not legal, because the transfer was not in writing, in view of the record is equally untenable. None of these notes are produced, and the court will not presume that they were nonnegotiable. Nor will the court presume that they would not pass on delivery before they were due, especially in view of the fact that they were transferred before the advances to secure which they were given were made. In the absence of the notes, it will be presumed that, in accordance with custom, they were either payable to bearer or to order and duly indorsed. "*Omnia præsumentur rite esse acta.*" The burden on this point also is on the objectors.

Nor is there any evidence to show that the mortgage taken by Adams & Co. was fraudulently withheld from the record. Repeated decisions of the Supreme Court of this state have declared that the failure to record such a mortgage does not impair its validity, and so far from being in proof that there was an agreement to withhold it from the record there is positive proof to the contrary. Indeed, there is nothing suspicious about it. The view the court has taken as to the validity of these mortgages is stated in *Re Josephson* (D. C.) 116 Fed. 404, and seems sustained by the decision of the Supreme Court of the United States in *Etheridge v. Sperry*, 139 U. S. 276, 11 Sup. Ct. 565, 35 L. Ed. 171, and the citations under this case in *Rose's Notes on U. S. Reports*, vol. 2, pp. 1157-8. The case of *Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758, cited by counsel for the objectors to show the invalidity of the mortgage, is apparently distinguishable from the case at bar; for in the mortgage in that case there was an express provision permitting the mortgagor to remain in possession of the property and deal with it as his own, and in that case also the creditors preferred got the goods only 12 days before the petition in bankruptcy was filed. The mortgage was there held void as to other creditors, and was as a consequence held void as to the assignee of the bankrupt mortgagor. Besides, the Indiana statute under consideration declared that no assignment of goods by way of mortgage shall be valid against any other person



than the parties thereto, when such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be duly recorded. Neither of these provisions are requisite in this state to the validity of such a mortgage. In the absence of any proof of fraud, the mortgage made more than four months anterior to the proceedings in bankruptcy, while a preference to Adams & Co., was a preference which is expressly upheld by the law of the state. In the case of *Huntley v. Kingman*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540, the Supreme Court upheld such a preference upon the ground that it was good at common law. The court also cites with approval the case of *Etheridge v. Sperry*, supra, and also distinguishes *Robinson v. Elliott*, supra. The conclusions of the court in *Huntley v. Kingman*, as announced by Mr. Justice Brown, are deemed conclusive as to the validity of this mortgage, considered in the light of general commercial jurisprudence. A fortiori, it is valid by the law of Georgia.

Nor does it appear, as contended, that the debt secured by the mortgage had been paid in full, as claimed by counsel for the objectors. This argument is based upon an account current furnished by the factors from their books, but the fact that a note is charged in that account which is secured by mortgage, taken with the fact that thousands of dollars were thereafter advanced on the faith of that security, cannot be held to show the payment of the note or the satisfaction of the mortgage. The notes were never surrendered by B. T. Adams & Co. to Williams, nor does it seem to have occurred to him that it was at any time proper to demand them. These notes, and the mortgage to secure the same, together with the collateral, were the security for all the advances made, and against these advances Williams continually drew drafts to pay his creditors and keep his business running.

It is also insisted that the notes and collateral are infected by usury, but under the law of Georgia this could only defeat the collection of the usurious interest, and, since the entire amount in the hands of the court is not more than sufficient to pay about 60 per cent. of the principal, it is not perceived how the alleged charge of usury, even if it were sustained, can be available to the objecting creditors. It is not contended that it affects the validity of the mortgage. If the notes to Adams & Co. were indeed usurious, or the collateral notes given to secure them were usurious, there is nothing to prevent the collection of principal and legal interest on both.

In conclusion, it seems clearly to appear from this record that the transactions presented by the evidence afford an instance of the ordinary relations between factor and customer, both dealing in entire good faith. Adams & Co. honored the drafts of Williams and his creditors in the year 1901 to an amount over \$9,000, and continued to pay these drafts without exception until December 9th of that year. The proceeding in bankruptcy was filed on December 16th.

In the absence of proof to the contrary, the court will not infer, as it is asked to do, that, after the carefulness the factors had manifested in exacting this security, they had abandoned the same and made large advances without any security at all. An apparently con-

trolling case upon this subject is *Hilton v. Sims & Co.*, 45 Ga. 565. In that case, in the spring, a planter gave his factor a note secured by mortgage on realty. This was to secure all advances made up to November 1, 1869. At that date the planter owed the factor about \$1,300, and thereafter the planter consigned cotton which sold for more than that amount, but drew on the factor in favor of different persons as he forwarded the cotton. The drafts were honored in an amount large enough to absorb the proceeds of the cotton shipped, and the Supreme Court held that the note and mortgage, under the circumstances, must be treated as collateral security for the balance due the factor. It is true, then, that the drafts drawn by Williams, or for him, against the advances placed to his credit by B. T. Adams & Co., must be regarded as requests to appropriate the proceeds of all cotton shipped or other funds paid in. This would leave the original mortgage in full force and effect, and a valid special lien on the merchandise in the storehouses of the debtor.

For these reasons, and for the reason generally that the objectors have failed to show a preponderance of evidence in their favor on the several contentions of disputed fact in issue, the report of the referee, always presumed to be correct on questions of fact until the contrary is shown, is affirmed, and the exceptions are overruled.

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**UNITED STATES v. NORTHERN PAC. R. CO. et al.**

(Circuit Court, D. Minnesota, Third Division. February 21, 1903.)

No. 589.

**1. TELEGRAPHS—SUBSIDIZED RAILROADS—CONTRACT WITH TELEGRAPH COMPANY—VALIDITY—STATUTES—INFRINGEMENT.**

Act Aug. 7, 1888 [U. S. Comp. St. 1901, p. 3583], requires all subsidized railroad companies to construct and maintain telegraph lines for governmental, commercial, and other purposes, and exercise by itself all telegraph franchises conferred on them; and section 2 [U. S. Comp. St. 1901, p. 3583] requires all such railroad companies to so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatsoever, and to receive and exchange business with connecting lines without discrimination. *Held*, that a contract between the Northern Pacific Railroad Company and the Western Union Telegraph Company by which the telegraph company agreed to construct telegraph lines along the railroad's right of way, and grant to the railroad company the exclusive use of one of two wires erected, and the right to stretch additional wires, for which the railroad company agreed to pay one-third the cost of constructing the line, and to transport the property and employes of the telegraph company in constructing and maintaining the line free of charge, was not in violation of such sections.

**2. SAME—CONNECTING TELEGRAPH LINES—DESIGNATION—ADDITIONAL CHARGES—IMPOSTS.**

The fact that the railroad company, in receiving telegraph messages for points beyond its lines, required the sender to designate the connecting telegraph company over whose line the message should be sent, and made a small additional charge for the words necessary to designate such line, which charge was in accordance with the uniform practice in like cases among telegraph companies, was not an arbitrary impost or discrimination prohibited by section 2 [U. S. Comp. St. 1901, p. 3583].

**In Equity.**

Philander C. Knox, U. S. Atty. Gen., and Charles C. Houpt, U. S. Dist. Atty.

C. W. Bunn, for defendant railway companies.

Rush Taggart, for defendant telegraph company.

AMIDON, District Judge. In a general way, this suit presents the same question as arose in *United States v. Union Pacific Ry. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319. It is prosecuted to compel the Northern Pacific Railway Company to maintain and carry on, by its own officers and agents, for commercial and public purposes, a line of telegraph coextensive with its line of road. The government contends that the present suit is controlled by the decision of the Supreme Court in the case referred to. But an examination of the contract between the Northern Pacific Railroad Company and the Western Union Telegraph Company now complained of, and the contract between the Union Pacific Railway Company and the same telegraph company involved in the earlier case, presents many points of marked and controlling difference.

The distinctive features of the contract in the Union Pacific Case were (1) that the railway company should not give permission to any other telegraph company to construct or operate any telegraph line upon the lines or roadway of the railway company without the consent in writing of the telegraph company; (2) that the railway company should not, without the consent of the telegraph company, transmit commercial or paid business from any station where the latter had an office, and that the railway company should account for and pay over to the telegraph company, at the tariff rates established by the latter, all sums received by the railway company for messages sent from points where the telegraph company had no separate office. It was held by the Supreme Court that these provisions of the contract had two results forbidden by law: (1) They amounted to a transfer by the Union Pacific Railway Company to the Western Union Company of the former's franchise to carry on a telegraph business, and disqualified it wholly from doing such business for public or commercial purposes; (2) they forbade the Union Pacific Railway Company to permit any other telegraph company to construct or maintain a telegraph line upon its right of way. It was held that the former result violated the act of Congress of August 7, 1888 [U. S. Comp. St. 1901, p. 3583]; and the latter, the act of Congress of July 24, 1866.

It should be borne in mind, in considering the present case, that it is brought to compel the Northern Pacific Railroad Company to comply with the provision of the act of August 7, 1888 [U. S. Comp. St. 1901, pp. 3579-3581]. It is difficult to see what bearing the other statute has. That act, in effect, in connection with earlier statutes, made the right of way of every railroad a post road, and provided that any telegraph company, on complying with the provisions of the act, should be entitled to construct and operate a line of telegraph upon all post roads. The right thus created is for the benefit of the telegraph company. It is doubtful whether the government has such a pecuniary

interest in the subject that it could maintain a suit on its own behalf to compel the railroad company to admit a telegraph company to the exercise of the privileges created by this statute, and to cancel a contract which impeded the exercise of that right. It would be even more doubtful whether the government could maintain a suit to cancel such a contract, when, as in this case, there was no averment that any telegraph company had, upon application, been denied the use of the right of way of the railroad company for the purposes mentioned in the statute. It would seem that such a suit could be maintained only by the telegraph company whose rights were obstructed. Whether these suggestions are correct or not, the primary object of the present suit is not to admit another telegraph company to construct and maintain a line upon the right of way of the defendant company, but to compel that company itself to construct and maintain such a line of telegraph upon its own right of way.

The Supreme Court stated the question presented by the Union Pacific Case to be whether the contract there under consideration, if performed, would prevent the railroad company from complying with the act of August 7, 1888; and, the provisions of the contract being in direct contravention of the duties created by the statute, the contract was condemned. The same question that was presented in that suit is now presented with reference to the contract between the Northern Pacific Railway Company and the Western Union Telegraph Company: Would its provisions, if enforced, prevent the Northern Pacific Railway Company from complying with the statute?

An examination of the contract discloses that neither of the provisions which were condemned in the Union Pacific Case is embraced in the present contract. It does not forbid the railway company to admit another telegraph company to its right of way, nor does it forbid the railway company to do a public and commercial telegraph business over its own lines. The contract does contain a provision whereby the railroad company is required to transport the property and employes of the Western Union Company engaged in the construction and maintenance of the telegraph line, free of charge, and a further provision which forbids the granting of like privileges to other telegraph companies. Are these provisions illegal? To answer that question, we must look at the whole contract. It provides, in substance, that the Western Union Telegraph Company should construct a line of telegraph, consisting of at least 30 poles to the mile, and two galvanized wires, along the right of way of the railway company. When completed, the railroad company is granted the right to the exclusive use of one of the two wires, and the further right to stretch upon the poles such additional wires as, in its judgment, are necessary for its business. For this the railroad company is bound by the contract to pay to the telegraph company only one-third of the actual cost of constructing the line. It is manifest, therefore, that its agreement to transport the property and employes of the Western Union Telegraph Company while engaged in constructing the line constituted a part of the consideration granted by the railroad company for the services and property which it secured as a result of the performance of the contract by the telegraph company. I find nothing in any act of

Congress which forbids the railroad company, in constructing its telegraph line, to employ any agency which it might find advantageous for that purpose; nor can I see anything illegal in its paying, by transportation of freight and persons, for the benefits which it secured by the contract. Its contract for free transportation is not a mere gratuity, but is given for value received. If it were to grant to another telegraph company such transportation free, that would be a mere gratuity; and, when it undertakes not to do this, it certainly violates no law. I am therefore unable to find anything in the contract between the railroad company and the Western Union Company which in any way obstructs the former in the performance of the duties imposed upon it by the act of August 7, 1888 [U. S. Comp. St. 1901, p. 3583]. It is also worthy of mention that the contract here sought to be annulled is no longer in force, having been terminated on the 31st day of January, 1899.

The effect of this contract, however, is not a mere matter of inference. It has been interpreted by the conduct of the parties. When the act of 1888 was passed, the railroad company at once attempted to conform to its requirements, having at the time under its exclusive control three wires extending over its entire line. It issued a circular to all its telegraph operators, requiring them to accept and transmit all public and commercial messages offered to them for transmission over its lines as far as the same extended, and over the lines of connecting companies to points beyond its own lines. This order recites that it is issued for the express purpose of complying with the act of August 7, 1888 [U. S. Comp. St. 1901, p. 3583], and the evidence in this case leaves no doubt that in issuing it the railroad company was prompted by entire good faith. It was then, and has at all times since been, willing and able to transmit over the lines under its exclusive control all public and commercial telegraph messages. Where such messages were destined for points beyond its own lines, the sender was required to designate the connecting telegraph company over whose lines the message should be sent, and a small additional charge was made for the words necessary to designate such connecting line. Such a charge, however, the evidence shows, is in accordance with the uniform practice in like cases among telegraph companies. The situation would seem to render it necessary. It was not an arbitrary impost levied upon those who sought to use the telegraph lines of the railroad company, but was simply an additional charge for an additional service. The evidence shows that few public and commercial messages have been tendered to the company since the promulgation of this order. That, however, is not the fault of the railroad company. All it could do was to comply with the statute. If the public refused to use the facilities which it furnished, for the reason that the accommodations were not equal to those of a national system of telegraph like the Western Union, and for the further reason that the public had by long experience become accustomed to the use of the Western Union service, this would constitute no violation of the law by the railroad company, but would rather show the folly of the law itself.

I find, therefore, from the evidence in this case:

1. That at all times since the passage of the act of August 7, 1888 [U. S. Comp. St. 1901, p. 3583], the defendant railroad company has, by and through its own respective corporate officers and employes, maintained and operated, for railroad, governmental, commercial, and all other purposes, a line of telegraph coextensive with its railroad system.

2. I find that, if the contracts between the Northern Pacific Railroad Company and the Western Union Telegraph Company, referred to in the bill, were fully performed, the same contain no provision which will obstruct the railroad company in the performance of its duties under the act of August 7, 1888 [U. S. Comp. St. 1901, p. 3583].

For these reasons, a decree will be entered dismissing the bill upon the merits.

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**BARNES v. WESTERN UNION TEL. CO.**

(Circuit Court, N. E. D. Georgia, S. D. February 16, 1903.)

**1. FOREIGN CORPORATION—ACTION AGAINST—JURISDICTION.**

A corporation which is a citizen of New York, and carries on its business through an agent in the Southern District of Georgia, may be sued there by a citizen of Georgia who resides in that district, and service may be effected on the local agent.

**2. TELEGRAM—FAILURE TO DELIVER—NEGLIGENCE.**

Where a telegraph company accepts a message relating to the sale of a valuable horse for which an offer has been made, and fails to deliver a written copy of the message to the person for whom it was intended, although his residence is in the delivery circle of the defendant, but on the contrary sends the message by telephone to the wife of a rival horse dealer, who leaves it exposed in the public office of an inn where horse dealers congregate, and it is alleged that from the publicity thus given the sale is defeated, with loss to the sender, the questions of negligence and consequent injury are for the jury.

**3. PROCESS—IRREGULARITY OF SERVICE—WAIVER.**

Where a United States marshal is the plaintiff in an action, and service of process is effected by his deputy, and no actual injury results and no intentional wrong is charged, if the defendant appears by attorney and files a special appearance to deny jurisdiction, and also files a motion to dismiss for irregular service, and also a demurrer on one day, and four days later, without having a decision on these defenses, files a general demurrer and a full answer to the merits, *held* that he has waived the irregularity of process.

**4. PLEADING—WITHDRAWAL—DELAY.**

Where the application of an attorney for the defendant for leave to withdraw his demurrer and answer, in order to insist on the technical irregularity of service, can only serve to delay the trial of the case on the merits, the application will be denied.

(Syllabus by the Court.)

F. B. Pearce, John T. West, and E. H. Callaway, for plaintiff.  
Boykin Wright, for defendant.

SPEER, District Judge. The petition in this case recites that on the — day of July, 1900, the plaintiff was the owner of a trotting

† 1. See Corporations, vol. 12, Cent. Dig. §§ 2610, 2611, 2616.

horse. This horse was valuable and blooded. He was a large, heavy gelding 10 years old, and on account of his great strength, style, and general qualities was well worth \$4,000. He had been trained at great pains, at an expense of \$800, was in fine condition, and by the plaintiff had been placed for sale in the hands of O. Mowers, a skilled trainer and horse broker at Yonkers, one of the suburbs of New York City. The name of the horse was Mousqueton, in commemoration of the virtues of the faithful servant in Dumas' great novel, and not "Musquetoon," as supposed by the uninformed. The commission to be paid Mowers for selling Mousqueton was to be adjusted according to the price received. It is further alleged that on the — day of July, 1900, the plaintiff received at Thomson, Ga., in said district, a telegram reading: "Can get twenty five hundred dollars for Mousqueton." This meant that the sale could be made for \$3,500, of which \$1,000 was to pay Mowers his commission. It turned out that Mowers had received an offer from a solvent purchaser willing to give that amount, and that the sale would have been made but for the alleged injury to the plaintiff, presently to be described. On the receipt of this telegram plaintiff immediately prepared a message substantially as follows: "O. Mowers, Yonkers, New York, I will take twenty five hundred dollars for Mousqueton if you so advise. (Signed) John M. Barnes." This message was delivered to the agent of the defendant at Thomson, Ga., and by said defendant transmitted to its agent at Yonkers, N. Y. The address of Mowers was Empire City Inn, a place of entertainment and rendezvous for horse lovers and dealers, of which he was host. The Empire City Inn was within the delivery circle of Yonkers station of the defendant, and was well known as the residence and place of business of Mowers. It is alleged that the agent at Yonkers failed to write out and deliver the said message, and that Mowers did not learn that it had been received until ——— hours. Then on returning to his inn he found what purported to be the message, written upon a slip of paper, and left open and exposed to view in the public room of the inn. This message had been written out by a Mrs. Sherrier, to whom a telephone message had been sent by the agent at Yonkers. This lady, it is alleged, was the consort of a dealer and broker in horses, who was a rival of Mowers. The sending of this telephone message to Mrs. Sherrier, and the consequent exposure of the private communications of the plaintiff to his broker, was alleged to be negligent and careless. The plaintiff is not able to allege the exact language of the telephone message, but declares, in effect, that, immediately after its receipt by Mrs. Sherrier, it was generally and currently reported among the horsemen and dealers in race horses at Yonkers that he had telegraphed Mowers that he would sell Mousqueton for \$2,500 rather than lose a trade. This information was at once circulated by Mrs. Sherrier and by her husband, or by her and other persons to plaintiff unknown, with the effect that the market value of Mousqueton was destroyed, and the person who had agreed to buy him for \$3,500 was led to believe that the horse was worth far less than the price he had agreed to pay. This purchaser at once notified Mowers that he withdrew his offer and would not

purchase, and Mowers wrote to the plaintiff that the sale was off. Plaintiff alleges that, in consequence of this careless and negligent conduct on the part of the defendant, he lost the sale of his horse during the season of 1900, that he was put to great expense, to the amount of \$500 or other like sum, in keeping and maintaining him, his market value was greatly depreciated, and since that time the plaintiff has not been able to get an offer of more than \$600 for said Mousqueton. For these reasons the plaintiff claims that he has been damaged in the sum of \$4,000, and brings this action on the case.

Replying to this declaration, the defendant has filed several defenses. One of these, filed on the 1st of April, 1901, was a motion to dismiss the plaintiff's petition because the court had no jurisdiction of the alleged cause of action; there was no legal process for the reason that it was directed to the marshal, who was also the plaintiff, and no legal service because this was effected by the marshal or his deputy, of the name of Hoss; the alleged agent was not a proper party on whom to make service; the defendant was not an inhabitant nor found and served in the district, and, if liable at all, is suable in the federal courts only, at the place of its domicile and residence, which is alleged to be in New York City; there is no cause of action; and because the acts set out in the petition were not the proximate cause of the alleged injury. A demurrer was filed on the same day setting out substantially the same grounds, or some of them, and no other grounds than those recited in the motion to dismiss. On the 5th of April, the defendant filed an answer, in which each paragraph of the plaintiff's declaration is answered in apt averments of defense, and many of them denied. And on the same day the defendant filed what is termed an amended demurrer. This question has been argued pro and con with abundant citation of authority, which manifests the acumen and research of the opposing counsel. The only question of difficulty arises upon the allegation of improper service.

It is urged that the court has no jurisdiction, but this contention seems untenable. The defendant corporation is a citizen of New York, and carries on its business in the Southern District of Georgia, and, it has been long settled, may be sued here by a citizen of Georgia who resides in that district. In the case of *Southern Pacific Company v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, it was held that a citizen of Texas who resided in the Eastern District thereof could not maintain a suit in the Western District against a Kentucky corporation, although the latter was carrying on its business in the Western District, the court declaring that the corporation "could not be compelled to answer to an action at law in the Circuit Court of the United States, except either in the state of Kentucky, in which it was incorporated, or in the Eastern District of Texas, in which the plaintiff, a citizen of Texas, resided." This decision was made necessary by the act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 507]), which annulled the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found." The plaintiff here resides, and the defendant carries on its business, in the Southern District of Georgia, in the Northeastern Division thereof, and in the county



in which the message was offered and accepted. Where a cause of action exists, service under the statute of Georgia and by the established practice of the United States courts may be effected upon its local agent. The statute (Code, § 2348) provides:

"In all suits brought under the provisions of this section, service shall be effected upon such telegraph company by leaving a copy of the writ with the agent of the company if any, if no such agent should be in the county, then at the agency or place of doing business," etc.

A similar provision (Code, § 1899) provides for service in the same manner upon any corporation doing business in this state. Here, also, the amount in controversy exceeds \$2,000, exclusive of interest and costs.

Whether or not the plaintiff has a good cause of action against the defendant seems peculiarly a question for a jury. If, as alleged, plaintiff was made, by the publicity negligently given to his telegram, to appear as willing to accept from a purchaser \$1,000 less than the sum for which the horse had been offered, the purchaser not understanding the arrangement as to commissions between the plaintiff and the horse broker, it may be that the jury will find such negligence as would support a right of action, if damage is shown. It has been held that, where the testimony of a physician tends to show that a surgical operation might have been avoided had he reached the patient earlier, it is not error to submit to the jury the question as to whether or not the failure of the telegraph company to properly transmit a message whereby the physician was prevented from earlier attendance was the proximate cause of the injury resulting from such operation. *Western Union Telegraph Company v. Morris*, 28 C. C. A. 56, 83 Fed. 992. The nature of the telegram indicated its importance. If a telegram has enough upon its face to show that it relates to the value of property offered for sale, it would seem sufficient to put the company on its guard against errors in transmission. *Western Union Telegraph Co. v. Landis* (Pa.) 12 Atl. 467. Nor does the telegraph company apparently perform its duty when the message is transmitted over a telephone line to a point within the accustomed circle of its delivery. The sender and the addressee of a message is entitled to the written copy of the message. *Brashears v. Western Union Telegraph Company*, 45 Mo. App. 433. See, also, *Western Union Telegraph Company v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877. There are many similar precedents, but these will suffice to indicate that the plaintiff's declaration presents a case for submission to a jury.

The remaining question, as stated, relates to the validity of service. Rev. St. § 922 [U. S. Comp. St. 1901, p. 686] which is the twenty-eighth section of the act of September 24, 1789, provides that in all cases—

"When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person, as the court, or any justice or judge thereof may appoint, and the person so appointed may execute and return the same."

The object of this enactment is manifest. It is to make sure that a marshal or deputy interested cannot by a false return deprive the

opposing party of his day in court. It is not contended that any actual injury resulted to the defendant company from the fact that Deputy Marshal Hoss served the process of the court in this case. That the defendant got it is undeniable, for it has appeared by its counsel and moved not only to dismiss the case on this ground but on other grounds, but has demurred, filed an amended demurrer, and a full and formal answer to the merits. The objection, therefore, is purely technical. There is no allegation of any intentional wrongdoing on the part of the marshal or his deputy. With this service the defendant can make its defense as perfectly as if the summons had been served by a wholly disinterested party. The court therefore will not impose upon the plaintiff the unnecessary delay and expense of a further service, or the possibility of a denial of a hearing on the merits, because of this inadvertence, if in the light of the authorities this can be avoided. Fortunately we find that the question was early before the Supreme Court of the United States. In the case of *Knox & Crawford v. Summers and Thomas*, 3 Cranch, 496, 2 L. Ed. 510, decided for the court by Mr. Justice Bushrod Washington in 1806, we find an instructive and apparently controlling authority. There the suit was against a deputy marshal, and the writ was not directed to a disinterested person conformably to the statute, but was directed to the marshal. There, too, the defendant appeared by attorney, and the court were unanimously of opinion that the appearance by attorney cured all irregularity of process. The defendant might have appeared in propria persona and directly pleaded in abatement, but, having once appeared by attorney, he is precluded from taking advantage of the irregularity. The appearance in that case, too, was merely to pray over of the writ. Here, however, the defendant answered over. It is true that, in the motion to dismiss, the defendant states it appears at the first term of the court, "not for the purpose of submitting to the jurisdiction thereof, but to protest that the court has no jurisdiction in said cause, and moves to dismiss plaintiff's petition on the ground that it appears on its face that the court has no jurisdiction of the alleged cause of action or of this defendant in said cause; second and third, that there was no legal process, it being directed to the marshal and served by the deputy," etc. The special appearance, therefore, seems to relate exclusively to its denial of jurisdiction, and not to the alleged irregularity of service. It is nowhere stated that the appearance is to object that the service was irregular or invalid. A denial of jurisdiction of the subject of the action or of the person of the defendant is a ground of defense wholly distinct from that of an irregular service. The special appearance by demurrer is therefore limited to the special appearance as set forth in the motion to dismiss, and, as we have seen, this is a special appearance solely for the purpose of protesting against the jurisdiction of the court. The amended demurrer, as it is termed, is upon the ground that the damages sought to be recovered were remote and speculative; and six principal grounds, and seven subdivisions thereof, substantially attack the plaintiff's case as it appears from the declaration. While termed an amended demurrer, it is apparently an independent demurrer. It states that it is filed "by leave of the court,"

but, if any such leave was granted, the order does not appear in the record before the court. The answer filed on the 5th of April contains many grounds of defense on the merits. It is stated that it is presented subject to the motion to dismiss for want of jurisdiction and for other reasons, and the demurrer already of file in said cause not waiving but insisting thereon, but in the opinion of the court this motion to dismiss the two demurrers, and the full answer on the merits, all filed by counsel, avoid the reason of the rule announced in section 922 of the Revised Statutes [U. S. Comp. St. 1901, p. 686], for the defendant appears, with the assistance of counsel, and makes all the defense he could have made had the original service been effected by a person wholly disinterested. There is therefore no reason to quash the service. *Ratione cessante, cessat ipsa lex.* See *Hill v. Mendenhall*, 21 Wall. 454, 22 L. Ed. 616, and *Edgell v. Felder*, 28 C. C. A. 382, 84 Fed. 69. The defendant might very well have conformed to the rule announced in *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237. There Mr. Justice Field remarks:

"The right of the defendant to insist upon the objection to the illegality of service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, \* \* \* nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived."

Construing this declaration together in its entirety, we conclude that by the words, "insisting upon the illegality," the court imports that the defendant must not only file his objection to the service, but urge it and have a decision before he answers over. This, as stated, was not done in this case. Of course, these authorities would not apply to a case where the objection was a want of jurisdiction of the person or of the subject-matter. So clearly is this distinction outlined that the Supreme Court, in *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, held that a party against whose property a foreign attachment has issued in the Circuit Court of the United States, although the Circuit Court had no right to issue such attachment, having appeared and pleaded to the issue, cannot afterwards deny the jurisdiction of the court. This is a leading case, and has been cited in many cases. *Irvine v. Lowry*, 14 Pet. 299, 10 L. Ed. 462; *St. Louis Railway Co. v. McBride*, 141 U. S. 131, 11 Sup. Ct. 982, 35 L. Ed. 659; *Interior Co. v. Gibney*, 160 U. S. 220, 16 Sup. Ct. 272, 40 L. Ed. 401. In the case last cited it was held that the defendant, having appeared and pleaded to the merits, thereby waived his right to challenge the court's jurisdiction on the ground that action had been brought in the wrong district. Many other cases might be cited. In the extensive discussion of this topic in that useful publication, the *Encyclopædia of Pleading and Practice*, vol. 2, pp. 632-648, inc., it is announced that procuring a consent to a continuance, filing a demurrer or any pleading to the merits, or attacking plaintiff's case in

any informal manner, or making a motion in the case limiting appearance to a specific purpose, will be held to be a general appearance for all purposes. It is further stated, as a general rule which admits of no exception, that, if the court has jurisdiction of the subject-matter, a general appearance gives jurisdiction over the person. Indeed, it has been held that where objection is made to the irregularity of service, in order to avoid a waiver thereof, the proper practice is to obtain an order of the court for leave to make a special appearance. *Romaine v. Insurance Company* (C. C.) 28 Fed. 625. This was a case in equity. In that case service of a subpoena outside of the judicial district evoked an extended and learned discussion of this topic by Judge Hammond, of the Western District of Tennessee.

The application of the eminent counsel for the defendant to withdraw his demurrer, and answer now of file, could only serve to delay the trial of the case on the merits. This it is the duty of the court to avoid. Indeed, it is ever the duty of the court intrusted with the administration of justice between contending parties to exercise its discretion and all of its ascertained powers to bring the parties to have the cause speedily determined on the merits. With this general purpose, and for the reasons here stated, the motion to dismiss and the demurrers are overruled and denied.

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In re MORAN.

**ATLANTIC, GULF & PACIFIC CO. v. LUCKENBACH et al.**

(District Court, E. D. New York. January 10, 1903.)

**1. TOWAGE—LIABILITY OF TUG FOR LOSS OF TOW—ABANDONMENT WITHOUT NECESSITY—LIMITATION OF LIABILITY.**

By the disablement of the tug intended therefor, Luckenbach was unable to perform his engagement to tow a dredge and laden scow from Wilmington to Washington, and acting for, but not disclosing the libellant, employed the Moran Company to take the dredge, without mentioning the scow. Upon arriving at Wilmington, the master of the tug discovered, and notified the tug owner, that the scow was part of the tow, and thereupon the owner addressed the libellant, as well as Luckenbach, with the result that he undertook to tow the scow without risk and for additional compensation. Urged to haste, the tug, with the tow, started on September 13th, with such equipment as she had, without opportunity to procure more. After leaving Delaware Breakwater the eight-inch hawser, new in the previous May, and since very much used, was employed for 16 hours, in favorable weather, save an adverse southeasterly swell, when it parted. After an hour's delay it was united to a good hawser, new in the previous July, and since sparingly used, and the line thus formed was continued in propitious weather until 4 p. m. of the next day, when, near St. Charles' Light, it parted in the older hawser. A delay for an hour was followed by a readjustment of the same line, which broke about 10 p. m. in the newer part thereof, under the influence of an impeding northwest gale of about 35 miles per hour, opposing southeasterly swell, and adverse strong ebb tide. Thereupon the dredge tendered, or furnished upon request, to the master of the Moran a six-inch line of 80 fathoms, which was run from the port bitt of the dredge,

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¶ 1. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

through her port chock, which soon gave way, to the tug's stern bitt, and thereby the dredge was towed cornerwise, until about 2:30 a. m.—the scow meanwhile having been cut adrift by the crew of the dredge—when the line parted, whereupon the crew of the dredge was taken off. The Moran stayed near the dredge for three-quarters of an hour, and then, leaving it in no immediate danger, went to Norfolk, 40 miles away, where she remained until 12 p. m., when she went out on a tardy and ineffectual search for the dredge. The dredge during the day of her abandonment floated along the coast in sight of land, in apparently good condition, and for several hours was seen by persons at two life-saving stations, respectively 40 and 45 miles below Cape Henry, and its wreckage came ashore 65 miles south of that point on Wednesday morning, September 19th. The scow was recovered some 50 miles down the coast by a wrecking steamer that left Norfolk at 8:40 p. m. on September 16th, and went some miles south of the place where the scow was recovered without seeing the dredge.

*Hold:* (1) The tug left the dredge and went to a point 40 miles away without necessity, where she remained, without purpose or useful errand, until all chance of rescue was past, and this fault was the proximate cause of the loss of the dredge.

(2) The breaking of the new hawser was not the result of the crew's negligence, or that of the master, but arose from the impediment to towing offered by the extraordinarily adverse conditions.

(3) If the use of the older hawser was negligent, it was the sole fault of the master of the tug, to whom a sufficient hawser had been provided, but its parting was not the proximate cause of the loss of the dredge.

(4) The scow was cut loose by the crew of the dredge, and no recovery can be had therefor.

(5) The owner of the Moran is entitled to limit his liability.

(6) The respondents Messrs. Luckenbach are not liable.

(Syllabus by the Court.)

In Admiralty. Suit for loss of tow, and proceeding by owner of tug for limitation of liability.

Wing, Putnam & Burlingham and Harrington Putnam, for petitioner.

Boardman, Platt & Soley and James Russell Seley, for Atlantic, Gulf & Pacific Co.

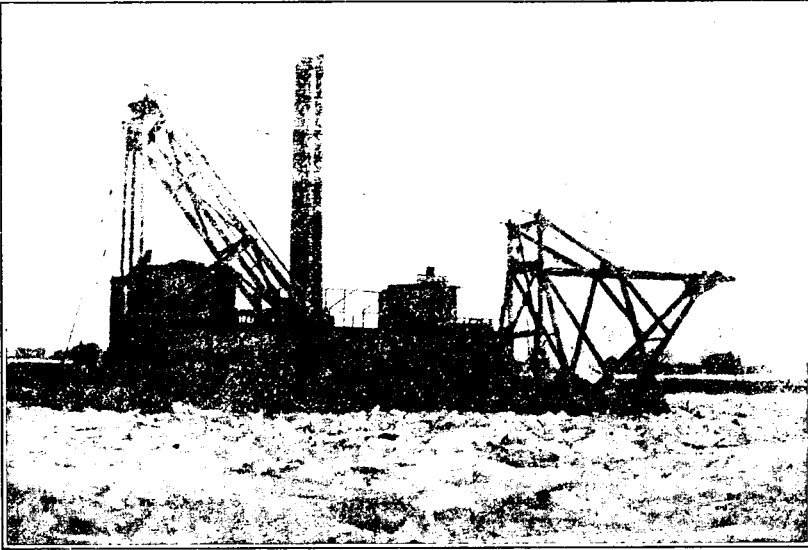
Peter S. Carter, for the Luckenbachs.

THOMAS, District Judge. September 3, 1900, the Atlantic, Gulf & Pacific Company, claimant in the above proceedings for limitation of liability, and libellant in the above action, by Catt, its president, engaged the Messrs. Luckenbach to tow a dredge and scow, by the ocean route, from Wilmington, Del., to the mouth of the Potomac, at the agreed price of \$450, with an additional \$150 if delivered at Washington. September 10th, Edgar F. Luckenbach advised Catt that the tug Luckenbach, intended for the service, was disabled. Thereupon Luckenbach, in his own name and without disclosing the libellant, engaged the tug Moran, of the Moran Towing Company, to tow the dredge to Washington for \$600, and he reported accordingly to Catt. Luckenbach claims that he made this contract at Catt's request, while the latter insists that it was done upon the responsibility of Luckenbach, and without notice to him that the tug Moran did not belong to the Luckenbach firm, although he admits notice of the disability of the tug Luckenbach, the request on his part that Luckenbach should find another tug, and that the latter

reported the substitution of the Moran. September 11th the tug Moran started for, and September 12th arrived at, Wilmington, where her master, Ellis, discovered that a large scow was to accompany the dredge, and reported the fact to his principal. Catt, Luckenbach, and Moran communicated, and Catt learned that Luckenbach had engaged the tug Moran to tow the dredge only. Moran insisted upon additional compensation for towing the scow without risk, and upon such terms he started the tow. At this time at least Catt knew that Moran had been employed by Luckenbach, but his negotiation for another tug at Baltimore, his conduct of the whole transaction, and the conversations, lead to the conclusion that Catt did not intend to look to Luckenbach as the principal. But the neglect of Luckenbach to advise Moran that the scow was part of the tow induced Moran to send his tug to Wilmington, expecting to tow the dredge alone, and resulted in the latter disclaiming responsibility for the scow.

Had the agreement been that the dredge and scow, one or both, were to be towed without risk on Moran's part, it would not exempt him or his tug from damages for injury caused through his own or his servant's negligence. The *Syracuse*, 79 U. S. 167, 171, 20 L. Ed. 382; *Deems v. Canal Line*, 14 Blatchf. 474, 7 Fed. Cas. 348 (No. 3,736); *Vanderslice v. The Superior*, 26 Fed. Cas. 970 (No. 16,843); *Williams v. The Vim*, 29 Fed. Cas. 1413 (No. 17,744a); *The Jonty Jenks* (D. C.) 54 Fed. 1021, Coxe, J., March 16, 1893. But this rule does not preclude consideration of the fact, as bearing upon the owner's privity or knowledge, that he was induced to agree to equip his tug for one burden, sent the tug to Wilmington for such service, was there without an opportunity to adjust his equipment to the superimposed duty of taking the scow, and was urged to start the tow in haste. Hence, on Thursday, September 13th, the undertaking began with towing lines that, under the conditions of weather at times ensuing, proved inadequate for the two vessels, however adequate they may have been for towing the dredge alone. The dredge was, in draft, shape, weight, and superstructure, difficult of navigation, especially in seriously disturbed waters. Her tendency was to flounder rather than to founder. The picture, which does not show the true height of her smokestack, will aid the description.

For the purposes of the voyage planking had been nailed outside of the house, so as to come within 18 inches of the top, and about one foot from the edge of the lower deck. The dredge was about 116 feet long, with 35 feet beam. Her sides were square, 9 feet deep, bottom flat, and ends nearly upright. At the working end, the part aft in towing, there was an open cut into the structure, called the ladder well, about 18 feet long and 12 feet athwart ships, the framework ladder at the outer, and carried a revolving cutter cage which could be raised or lowered by machinery. The ladder frame filled the well, and was at the outer end supported by wire tackle running over a high framework, by which it could be raised or dropped for dredging. On the tow, the ladder dragged in the water, being about two-thirds submerged. Thus ranged horizontally, the ladder projected about 22 feet from the after ends of the dredge.



The cutter cage itself was laden on the scow. In the after end of the hull, next the ladder well, was the pumproom, about 30 feet long, between two side bulkheads; then forward of a wooden cross-bulkhead was the engine room, in front of which (with no separating bulkhead) was the fireroom. Forward of the pumproom the fore and aft bulkheads were open, with the overhead deck resting on the stanchions only, supported by a keelson about 2 or 3 feet high. The boilers were 16 feet long and 14 feet high, rising 3 or 4 feet above the deck, and each had a furnace. The hull was box-shaped, and about 9 feet high. Then came a deckhouse, or machine house, 10 or 12 feet high, and some 70 feet long. This came within 4 feet of the sides of the hull. On this was a nearly square pilot house aft, and another upper house forward, with two rooms. The smokestack rose 60 feet above the top of the engine house, and was 64 inches in diameter, and was held in place by steel guys leading fore and aft, and by temporary rope supports at the sides. There were three anchors, one weighing 996 pounds, another 500 pounds, and another 550 pounds. She had a wire bridle for towing. The scow, which was used as a tender, was 65 feet long, 26 feet wide, and 5 or 6 feet deep, with a draft 2 feet forward and 3 feet aft. She was decked over, and carried about 30 tons of spare parts of machinery, and a crew of 2 men. She had a house seven feet high and six feet square. She was attached to the dredge by two lines, each 350 feet long, running from her forward corners. The Moran was a steel tug, built in April, 1900, 94 feet 10 inches long, with 19 feet beam and 11 feet depth of hold. She had a steel deckhouse, with a pilot house on the forward end thereof, and carried an eight or nine hundred pound anchor. Her consumption of coal was five tons in 24

hours, steaming steadily at sea. When she arrived at Norfolk, as hereinafter stated, she had 15 or 16 tons of coal in her bunkers.

With this ponderous dredge and clumsy scow, the tug made her way to Delaware Breakwater, where, on account of the weather conditions outside, she stayed until Sunday morning, September 16th, when she started down the coast. The weather and sea were favorable, save for a heavy southeasterly swell, which moderated so that the tow went well, until about 10 o'clock on Sunday evening, when, in a heavier undertow, the hawser, which ran from the stern of the tug to the steel bridle of the dredge, broke, causing an hour's delay. The hawser, which was 200 fathoms in length and about 8 inches in size, was new in the previous May, and had received such use that the tug's captain requested and received a new 7 or 7½ inch hawser in July, which had been used sparingly. After the parting of the hawser a line was made fast to the dredge, whereby she was held in position until the bridle of the dredge was drawn aboard by hand, whereupon the tug bent on both hawsers, thereby extending the scope of the line, for the purpose of easier towing, which readjustment gave some of the crew of the dredge the erroneous notion of a second parting of the line at that time. There was no further interruption until the next afternoon. At this time the wind was light, but there was a heavy southeasterly swell, with undertow, and when about a mile inside the Cape Charles Lightship, at 4 p. m., on Monday, September 17th, the hawser parted again in the older part thereof. After a delay of an hour the line composed of the two hawsers, except as wasted by former partings, was readjusted, and the tow proceeded. On account of the approaching night, the course into Chesapeake Bay nearer to Cape Charles was deemed inadvisable, and the channel nearer to Cape Henry, although some five miles longer, was attempted, the weather at the time being propitious. But the swell ahead grew more violent, the wind increased until it reached 26 miles from 6 to 9 o'clock, 35 miles between 10 and 11 o'clock, and continued at about that velocity while the tug remained with her tow. The tide was strong ebb, with low water at Cape Henry at 9:46 p. m., and at Cape Charles at 10:28 p. m. Between 10 and 11 o'clock the smokestack of the dredge fell, and was securely lashed, although the fall injured the pilot house roof and crushed one of the small boats. No vital damage was done. However, the repeated breaking of the hawser permitted the dredge to roll heavily in the sea, and enabled the scow to come against her in a manner calculated more to excite alarm of the crew than to produce essential damage to the scow or dredge. Sometime before 11 o'clock the hawser again parted, this time in the newer part thereof. Thereupon the two men on the scow signaled, and were taken upon the tug. The tug then went alongside of the dredge, and received from her an 80 fathom 6-inch line—upon the offer of the dredge, as the tug claims; upon the request of the tug's captain, as some of the crew of the dredge state. If the use of this line imputes fault to anybody, as it does not, the master of the tug was the final judge of its sufficiency. The *Margaret*, 94 U. S. 494, 496, 24 L. Ed. 146. In any case the captain of the tug preferred it to his own hawsers, and used



it for towing, one end passed through the port chock to the port bits of the dredge, inasmuch as the bridle of the dredge at the time of the last parting had dropped into the water and had not been drawn aboard, and the other end was made fast to the tug's stern. As a result, the dredge was towed by her port corner, or cornerwise. Soon thereafter the chock pulled out. Meanwhile the scow had been cut adrift, and the master of the tug hoped upon the changed tide to take the tow into the more tranquil waters of the bay. At 2:30 a. m. the hawser parted. The tow was then five or six miles to the southeast of Cape Henry Light, in the open ocean. The crew of the dredge gathered on the top of the house, and, as the tug came back alongside after hauling in the hawser, asked to be taken off, and jumped from the top of the house upon the stern of the tug, except the fireman, who left the dredge from her main deck. Nearly all the crew wore life-preservers. The wind was blowing as stated. There was a heavy swell. The night was dark but clear. The hawser had parted at 4 o'clock, and twice since that time. The smokestack had fallen. The scow had been cut adrift. The dredge was without a hawser, and had 10 inches of water. Her house had been strained somewhat, but was not essentially injured. Her pumps were of diminished use, because of the loss of the smokestack and consequent effect upon the draft of her fires, especially when she was not in motion, but the dredge was not seriously weakened, and, while the circumstances naturally prompted the crew to seek the safer position of the tug, the danger of the dredge sinking at the time was less to be dreaded than her escape from the tug. The captain of the tug seems to have raised no objection to the crew leaving the dredge, nor did he ask them to make fast a towing line before doing so, although he claims that he later asked one of the crew to go aboard the dredge and make a hawser fast, which request was declined. The tug circled about the dredge until about 3:30, when she started for Norfolk, where she arrived at about 7 a. m. There she took additional coal, and at midnight of September 18th left Norfolk, reaching the Capes about 3 a. m. of September 19th, cruised about 12 miles to the south and east of Cape Henry, and returned to New York. Meanwhile a wrecking steamer, Coley, belonging to the Merritt Wrecking Company, left Norfolk at 8:40 p. m., September 18th, reached Cape Henry about 11:40 in the night, encountered a somewhat rough sea, went down the coast until about 2:30 a. m. of September 19th, when she slowed for daylight. After daylight the scow was seen, and recovered in good condition, about W. by S.  $\frac{1}{2}$  S., and distant four miles from Caffey's Inlet station. Thereafter the Coley went to the southward for two or three miles, but returned without seeing any sign of the dredge.

There is sufficient evidence that the dredge drifted down the coast in apparently good condition, within sight of persons at Currituck life-saving station and Whale's Head live-saving station, respectively 40 and 45 miles south of Cape Henry, and that her wreckage came ashore at Kitty Hawk, about 65 miles south of such Cape, on Wednesday morning, September 19th. The keeper of Whale's Head life-saving station testified that he saw what is now considered to have

been the dredge, for several hours on Tuesday, the 18th of September; that he first saw it about noon, some ten miles to the northeast of the station; that he noticed it for five hours, and that it was in sight at 5 o'clock; that when opposite Whale's Head it was five or six miles off, and that it seemed to get nearer the shore as it drifted south. Tillett, one of the crew at Currituck life-saving station, also examined it through the glass, first seeing it about six or eight miles north, and eight or ten miles off shore, and continued to examine it from time to time during the day.

The Moran's abandonment of the dredge, and departure for, and delay at, Norfolk, are not excusable, and the fault is emphasized by her indolent and insufficient search. The excuses are (1) that the tug was in danger from the storm; (2) that it was useless to stand by the dredge, as she could not be retaken; (3) that the crew had abandoned the dredge. The first plea is obviously untrue. The weather on the night of the abandonment was doubtless boisterous, but several tugs anchored their tows in the general neighborhood of the entrance of the bay and kept near them all night, while the Moran, within an hour or two of daybreak, and in the face of no greater danger than brave seamen ordinarily encounter successfully, left the dredge to her fate, and not content, even on a flood tide, within the protecting shelter of the Cape, where the light could be awaited for pursuing and taking up the dredge, did not stop until she had reached the utmost security of Norfolk, 40 miles away, where she renounced practically all effort to reclaim her tow. The pilot boat Relief lay three or four miles inside the Capes, where she had gone that she might lie easier, but her pilot stated that he could have gone outside if occasion required. The tugboat Delmar, with a car float containing 28 cars in tow, during the night, bound for Norfolk, parted her hawser three times about midnight. After the tow anchored, her tug stood by until after daybreak. She was then inside and almost abreast of Cape Henry, and about a mile from the shore. The next morning the Delmar took her tow to Old Point Comfort. One of the Luckenbach tugs, the Ocean King, was towing to Norfolk the barge Brooklyn. She overtook and passed two miles away the Moran about 9 p. m. on Monday, when the latter was southwest of the lightship, between the lightship and the whistling buoy No. 2. The barge, a converted sailing ship, carried 2,600 tons. At 11 o'clock at night the Ocean King, with her tow, was abreast of Cape Henry; between 11 and 12 o'clock her hawser parted, and thereupon the tug anchored the barge by the whistling buoy. The engineer, a witness from the Ocean King, describes the anchorage as abreast of, and four miles off, Cape Henry. He stated: "We anchored the barge until daylight so we could pick her up. We couldn't pick her up that night. We just kept under steam, worked around the barge until daylight, and got her picked up at 6 o'clock in the morning." At 6 a. m. the weather moderated somewhat, and the Ocean King succeeded in pulling in her tow. Thus it appears that while the other tugs carried their tows into the bay, stood by them through the night, and delivered them when the day came, the Moran, with the morning not far away, left her valuable tow to float along down the coast to destruction. The Moran was a

powerful seagoing tug, large, new, and strong. She had withstood, without any marked danger or damage, the boisterous sea until the night was far gone. Having faced safely the weather for the greater part of the night, it is improbable that harm would have come to her during the approaching morning, and the further assurance of this is the fact that no tug or tow was injured seriously on that night, either while passing into the bay or lying near or within the Capes. Such experiences and the survival of the dredge for so many hours, and the retaking of the scow, recall certain language in the opinion in *The Quickstep*, 76 U. S. 671, 19 L. Ed. 767:

"But the claimants of the tug deny that their vessel was in fault, and insist that the disaster occurred by the violence of the storm and gale of wind which prevailed at the time. If this be so, how did it happen that two of the canalboats that got loose from the fleet survived the perils of that night? One of these boats anchored, and was saved without difficulty; the other, loaded with iron, drifted about, and was picked up the next morning without having sustained any damage. The fact that these boats did not experience any bad effects from the severity of this storm explodes the theory advanced by the claimants on the subject."

As to the second excuse, it is enough that the dredge was substantially in good condition for some three-quarters of an hour after her crew left her, and while the Moran was circling about her, and she was floating in apparently good preservation when seen all of the next day at various points down the coast. Why could not the Moran have retaken her? Even from the calmer waters of the bay the tug could have waited, and have come up with the slowly drifting dredge, and the moderating weather conditions favored her recovery. Lastly, it is urged that the fact that the crew left the dredge justified the Moran in abandoning her. That in itself is not a reason for a tug deserting her tow. There might be very good reason for the crew coming off, and yet for the tug to stand by. The crew left her because the tug did not hold the tow. If the dredge escaped, the crew feared the result; undoubtedly the happenings of the night had made the crew, one and all, fear to stay on the dredge. Surely an apprehension that would lead and justify men going from a ship in danger to a vessel in safety might not justify men in a place of safety deserting the endangered ship and allowing it to float away. There is no intention to suggest that the crew of the tug were cowardly, for they had faced the night almost to its ending; and it is considered that a sense of personal danger for himself, his men, or tug, did not influence considerably the departure of the Moran's captain. But surely his leaving his tow, almost on the edge of the morning, when it was floating successfully, and going 40 miles away, and staying away, showed neither good judgment, fidelity to his charge, nor that sturdy and obdurate endeavor to hold onto his tow that the law should demand under the conditions then existing. If the master of a tug may regard the tow as lost whenever there is a hard storm and his hawsers break, and the men on the tow come off, then Capt. Ellis was right. Such action is far from that cool judgment and dauntless endeavor to discharge his trust that should characterize the master of an American vessel. For the purposes of transportation, the tug has dominion over the tow (*Transportation Line v. Hope*, 95 U. S. 297, 300, 24 L. Ed. 477), and if in a

storm the hawser break, and prudence require the crew of the tow to board the tug, this does not justify the master of the tug in turning his back and abandoning the property intrusted to him. In the present case, the dredge was not a vessel in the ordinary sense. The engineer was nominally in charge of the dredge, but he was not a navigator, and had no occasion to be. The dredge could not be navigated; it was capable only of being hauled. The entire navigation was in the hands of the master of the tug. The arbitrary power of such a person upon his own vessel is well understood, and what he directed to be done under the circumstances existing at the time would be accepted by the crew of the dredge without dissent. Hence it is considered that, whoever may have been in charge of the dredge, he was not authorized, as against the captain of the tug, to exercise any such discretion as is suggested in *The J. P. Donaldson*, 167 U. S. 604, 17 Sup. Ct. 951, 42 L. Ed. 292. Certain of the crew of the dredge suggested that the tug should make some effort to save the dredge, either by standing by her, or by going to Norfolk and getting additional equipment and returning. But these suggestions were probably advanced with inconsiderable vigor, and perhaps diffidently, and the master was inattentive to them.

The plea is made that the master's judgment is best and should control. That is a rule to be honored in a proper case (*The Hercules* [D. C.] 75 Fed. 274; *The E. Luckenbach*, 51 C. C. A. 589, 113 Fed. 1017, affirming [D. C.] 109 Fed. 487; *The J. P. Donaldson* [D. C.] 19 Fed. 264, 266; *The Packer* [C. C.] 28 Fed. 156), but should not relieve all offending tugs. When a tug deserts her tow, there ought to be a good reason assigned for it. In the present instance, the master went away without a justifiable motive, without the influence of a warranted apprehension, with his tow afloat and not seriously damaged. He went because he lost hope, and he stayed away for the same reason; yet the evidence does not offer any substantial ground for his hopelessness. Neither danger, nor necessity, nor advantage, nor convenience, constrained the tug to go to Norfolk, or to remain there 17 hours; she obtained nothing but unneeded coal, and, if she needed a hawser, did not even inquire for one, although they were sold there. But whatever she needed she could have obtained in a brief time, and thereupon gone in pursuit. If the shelter of the bay was desirable, and the master was justified in seeking it, how does that excuse him? To excuse a tug for leaving and remaining away from her tow, there should be proof that the tow was sinking, or past saving, or that the tug was so injured or in such danger that it could not stay or return, or similar condition. Several cases are cited, which do not absolve the *Moran*, for, where they favor the tower, either the tug was injured or in danger, or the tow was beyond conservation, and departure was justified and return excused. In *The W. J. Keyser*, 6 C. C. A. 101, 56 Fed. 731, the tug abandoned a barge in the Gulf of Mexico, about 36 miles out from Pensacola, Fla. The latter's crew went off in a small boat, whereupon the tug cut the towing line and rescued the crew, who represented that the barge was in a sinking condition, was leaking badly, that they were unable to use the pumps, and were unwilling to return to her. Some of the crew stated that the

water was over the cabin floor. The opinion states that there were four feet of water in the hold; that she was taking water very fast, through openings in the deck and hawse pipe; that she "was in a sinking condition, and would probably go down in a few hours"; that the barge could not be towed without a person at the wheel; and that the quitting of the barge by the master and crew severed the contractual relations between her and the tug, so that any subsequent service would be salvage service. In *The R. C. Veit* (D. C.) 56 Fed. 122, it appeared that a tug attempted to pick up one of her scows that had gone adrift, but, being incumbered by another scow, and in danger of fouling her propeller in the trailing hawser of the drifting scow, she put into harbor, dropped the scow in tow, and went out and found the scow, which had been adrift at anchor in shoal water. Thereupon the tug returned and obtained aid, but meantime the scow had gone ashore. The tug was justified. In *The Miranda* (D. C.) 40 Fed. 533, affirmed in (C. C.) 43 Fed. 309, it appeared that the steamer *Miranda* undertook to tow a raft of logs by sea from Nova Scotia to New York. On the twelfth day out, the towing hawser parted in the midst of a heavy gale. The steamer lay by the raft for a time and then started for New York, arriving there four days later. The raft became a total loss. It was held that the insufficiency of the hawser was not proved, and that there was no fault in not sooner sending the *Miranda* out to look for the raft after the former's arrival in New York, as, by the time the steamer's necessary repairs had been finished, it had become evident that search was useless. In *The Czarina* (D. C.) 112 Fed. 541, it appeared that a steamship undertook to tow a large raft of timber from Puget Sound to San Francisco, and that when within two days' sail of the latter port the hawser parted, and the two went adrift. A strong wind was blowing, and the sea was so rough as to make it unsafe, in the judgment of the master, to attempt to recover it at the time, or to remain near it during the night; and he was also of the opinion that he could not keep it in sight if he remained, and would lose his bearings. Hence he proceeded to a port, where he communicated with his owners, and on the morning, and for two days following, he searched for the raft, but owing to the fog was unable to find it. It was recovered three weeks later by another vessel, 450 miles southwest of San Francisco, and brought in. It did not appear that the master erred in his judgment, or that he could have kept the raft in sight and recovered it if he had remained in the vicinity; and it was decided that his action in leaving it was not such negligence as rendered the steamer liable for damages. In *The Clematis*, 1 Brown, Adm. R. 499, Fed. Cas. No. 2,876, it was held that, when a tug abandons her tow of barges during a storm, the burden is upon the tug to show a sufficient excuse for such abandonment; but there must be a preponderance of proof that the action of the officers of the tug amounted to negligence; and that, where it was shown that the towlines parted in the night, during a storm of great severity, and the master of the tug was unable to pick up the line, to discover the lights of the tow, or to make any effort to regain it without great danger to the tug, he was justified in abandoning it. In *The O. L. Halenbeck* (D. C.) 110 Fed. 556, Judge Brown decided that the evi-

dence was sufficient to establish the claim that the action of an ocean tug in cutting adrift her tow, consisting of a dredge, four scows loaded with coal, and a water boat, during a moderate gale while off Cape Cod, and allowing them to drift on shore without any further effort to save them, was without necessity or justification, and rendered the tug liable for the loss.

Neither the tug nor her owner are liable on account of the hawser, or the use made thereof. It is urged that the owner guaranties the equipment of the tug; that is, that he engages absolutely that each line, rope, etc., when properly used, shall bear without breaking the strain made necessary by its office, caused by the ordinary violence of wind and weather, and that he will be liable for any damages happening under such conditions approximately from an unworthy sea line. It would be interesting to discover by what analogy or reasoning a tower not held to be a common carrier (*The Syracuse*, 79 U. S. 167, 20 L. Ed. 382; *The Margaret*, 94 U. S. 494, 497, 24 L. Ed. 146; *The J. P. Donaldson*, 167 U. S. 603, 17 Sup. Ct. 951, 42 L. Ed. 292) is regarded as an insurer of his tug's equipment. Mr. MacLachlin, in his *Law of Merchant Shipping*, states the law as follows:

"The employment of a steam vessel by the master or owners of another ship, for the purposes of towage, is a contract which implies the exercise of diligence, care, and reasonable skill in the fulfillment of their engagement by the parties to it on both sides, and their agents and servants, the master and crew of the tug, and the master and crew of the ship in tow.

"The parties to the contract contemplate risk in the performance of it, the risk of winds and waves, and of obstacles, floating or fixed, that lie about or in their path. They both engage to be ready, armed with diligence, vigilance, and competent skill, against these risks, and besides this, on the part of the tug, with such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class. *The Galatea*, Swab. 349; *The Minnehaha*, 30 Law J. Adm. 211, 212. With all this performed, if there be, notwithstanding, inevitable accident and consequent damage to one of the parties, there is no liability in the other. But neither may by his fault or negligence aggravate the risk of the other with injury to him, without liability for the damage accrued, unless the other have contributed to the loss by his own fault or negligence. *The Julia*, Lush. 224. In all this it is assumed on both sides, when the contract is made, that the risk will be no more than ordinary, under ordinary bad weather.

"But there is no implied warranty on the part of the tug to bring the tow to the point of destination under all circumstances and at all hazards. *The Minnehaha*, 30 Law J. Adm. 211. She engages to use her best endeavours for that purpose; but she is relieved from her obligation if she be prevented by vis major, or by accidents not contemplated, which render performance of her contract impossible. *The Minnehaha*, 30 Law J. Adm. 211.

"She is not relieved, however, from her obligation because unforeseen difficulties occur in the completion of her task—because the performance of her task is interrupted or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if, in the discharge of her task, by reason of the sudden violence of winds or waves, or other accidents beyond the control of and without default in the tug, the tow is placed in danger, and the tug incurs risks and performs duties which were not within the scope of her original engagement, she is entitled, on proof of this, if the ship be saved, to claim as a salvor instead of being restricted to the sum stipulated for mere towage. *The Minnehaha*, supra; *The Pericles*, Brown, & L. 60. *The Charles Adolphe*, Swab. 153; *The Albion*, Lush. 282; *The Robert Dixon*, 42 Law T. (N. S.) 344. Such a remuneration under the supposed circumstances becomes her right; but in such circumstances it is not optional with her whether she will render the services—she is bound to do

so. This is implied in her original contract, from which she is not relieved except by circumstances of difficulty that render the performance of it impossible. *The Saratoga*, Lush. 318; *The Minnebaha*, supra; *The White Star*, L. R. 1 Adm. & Ecc. 66."

In *The Syracuse*, 79 U. S. 167, 20 L. Ed. 382, and *The Margaret*, 94 U. S. 497, 499, 24 L. Ed. 146, it is said that the care and skill required of persons in the management of the towing boat must be reasonable. In *The J. P. Donaldson*, 167 U. S. 403, 17 Sup. Ct. 951, 42 L. Ed. 292, it is stated that "the contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services." Notwithstanding the holding in *The Francis King*, 7 Ben. 11, Fed. Cas. No. 5,042, that, in any case of disaster arising from a failure of the hawser, it is incumbent upon the tug to show plainly that its failure arose from no defect in quality or size, the rule is firmly established that "the burden is always upon him who alleges the breach of such a contract (of towage) to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault" (*The J. P. Donaldson*, 167 U. S. 603, 17 Sup. Ct. 951, 42 L. Ed. 292; *The Webb*, 14 Waii. 406, 20 L. Ed. 774; *The Burlington*, 137 U. S. 391, 11 Sup. Ct. 138, 34 L. Ed. 731; *The L. P. Dayton*, 120 U. S. 337, 351, 7 Sup. Ct. 568, 30 L. Ed. 669; *The Startle* (C. C.) 115 Fed. 555, 560, 561)—although it is said, in *The Webb*, supra, "There may be cases in which the result is a safe criterion by which to judge of the act which has caused it"; and the case of a ship towed on a known and easily avoided shoal is instanced as sufficient evidence of unskillfulness or carelessness in the navigation of a tug, in the absence of explanation.

But if it be agreed that the Moran engaged, absolutely and at all events, irrespective of negligence, to have such necessary towing hawser or hawsers "as are reasonably to be expected in a vessel of her class," there was a further implied stipulation that the hawser should not be subjected to more than ordinary risks. In fact, a hawser is seaworthy when it is sufficient to resist the violence of ordinary winds and weather. When the dredge was lost there was a combination of southeasterly swell, a condition expectable at times at that place, a northwest wind amounting to a gale of 35 miles per hour, a wind not uncommon or usually hurtful to navigators, and an adverse ebb tide, later changing to a favorable flood tide. Such a combination might be expected, as tempests are expected by seafaring men, but it was not ordinary. It was in fact an exceptionally stormy night for towing. Hawsers were broken on two other tows, and several tugs and tows were obliged to anchor or discontinue their voyage, and lie wholly or partly within the shelter of the Capes. The law does not contemplate that the owner should provide a hawser that would absolutely hold the dredge under the conditions then existing. Upon the trial, the excellence of the hawser in material and manufacture was shown, although it was condemned by an expert in its final state. Any fragility or impairment of fiber of the hawser was a condition expect-

ant upon the strain of this towing service, when for two days and one night the burden of the dredge and scow tended to weaken it, and on the second night the severe weather conditions to exhaust its vitality. A judgment from inspection succeeding such an experience is not very helpful. At the earlier time the newer hawser was excellent in material and manufacture; as it appeared on the trial its fiber showed to an expert eye infirmity traceable to the very kind of usage to which it had been subjected in this adventure. Accusation of primary inability to perform a given service, after suffering the shock of that very service, cannot be sustained by showing conditions that would result naturally therefrom. The hawser's vitality was sapped by service, and then the absence of life was tendered as evidence that it was not worthy of such use. By such method of proof, ruin in service is used to condemn participation therein.

It follows from these views that the duty resting immediately on the owner was discharged as regards the provision of the new hawser, which broke between 10 and 11 o'clock on Monday night. The older hawser parted on Sunday night, but the owner had provided a newer and adequate one, which the master could have used at that time. If there was any fault it was that of the master. The older hawser broke again Monday afternoon. But the towing at that time did not absolutely require the use of the old line, and, if there was any negligence in its use, it was still that of the master and not of the owner. The new line was 900 feet long, and, on a sea then disturbed only by a southeasterly swell, it furnished sufficient scope of line for the purposes of safety. The conjoined lines made easier towing and accelerated the voyage, but the owner did not guaranty that he would furnish lines sufficiently long to make the easiest towing or earliest arrival. The greater speed and ease with which the tow was taken along perhaps more than compensated for the detention. The only harm arose from the detention and injury to the dredge while awaiting readjustment of the hawser after parting, but such injury to the dredge as occurred on Sunday night, and on the afternoon of Monday, was inconsiderable, and was not the proximate cause of the loss of the barge. Hence, the injury from the use of the old line is confined to some two hours of delay. How much was gained by the greater scope of hawser afforded by the conjoined lines does not appear, but the tow traveled from Delaware Breakwater to Cape Charles Light, between 6 a. m., September 16th, and 4 p. m., September 17th, a distance of 125 miles, in 35 hours, including two hours' detention, or at the rate of more than  $3\frac{4}{10}$  miles per hour, with a clumsy dredge and an impeding scow. Such progress was sufficient. It is urged that the failure to arrive in time to pursue the Cape Charles entrance necessitated the tow traveling five miles farther, whereby she encountered more serious weather. At the time the captain of the Moran decided to pursue the Cape Henry entrance, there were no unusual storm conditions present or forecast, nor had there been since the tug left the Delaware Breakwater. It would be a stringent rule that would entail upon the tug all damages arising from a sudden storm which it might have avoided if it had not been detained for two hours by the breaking of the hawser, which had been used in good weather for the purpose of giving



greater scope of line for easier and faster towing, although, nicely tested, the hawser was not seaworthy for the heavy draft to which it was subjected. In *The Startle* (C. C.) 115 Fed. 555, it was decided that delay by a tug in proceeding with its tow, or other errors in navigation, although negligent, did 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 opinion states:

"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." (Citing cases.)

In *The E. V. McCaulley*, 33 C. C. A. 620, 90 Fed. 510, the disconnection between the negligent act and loss are noticed. In *The W. E. Cheney*, 6 Ben. 176, Fed. Cas. No. 17,344, there was an interruption of the towing service for two days, and after it was resumed the tow was lost in a storm. The court put the burden of accounting for the deviation upon the tug. The case was one of serious deviation and temporary abandonment, and is quite different from a two-hours detention from the parting of towing lines on a course of 125 miles, during which the use of a hawser too weak for the load facilitated the towing.

It follows from the foregoing views that the abandonment of the dredge, and continued absence therefrom, on the part of the tug, was negligent, and was the sole proximate cause of the loss of the dredge, and that the tug is liable for such loss; that the owner of the tug was without fault, and may limit his liability; that the respondents Messrs. Luckenbach are not liable; that the scow was cut loose by the crew of the dredge, and that no recovery can be had therefor.

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THE SOMERS N. SMITH.

THE CRESCENT.

(District Court, D. Maine. February 3, 1903.)

Nos. 32, 33.

1. TOWAGE—CARE REQUIRED OF TUG—DANGEROUS LOCALITY.

The reasonable care a tug is required to exercise in the performance of a towage service is relative, depending upon the dangers of the service. If the locality is more than ordinarily dangerous, she is held to a proportionately higher degree of care and skill.

2. SAME—STRANDING OF TOW.

Evidence considered, and held to show that the stranding of a schooner on a reef while being towed through a narrow and dangerous channel was due to a want of accurate knowledge of the channel on the part of the master of the tug, and to a want of care in failing to ascertain whether a buoy used to mark the position of the ledge on which the schooner stranded was in its proper place.

3. SAME—CONTRACT LIMITING LIABILITY.

The burden rests upon a tug to prove an alleged contract that a vessel was to be towed at the risk of her owners; nor will such contract, if

proved, relieve the tug from liability for the consequences of a failure of those in charge to exercise reasonable care and skill in the performance of the service.

In Admiralty. Suits to recover damages for alleged negligent towing.

Benj. Thompson, for Thos. B. Mehaffey.  
Arthur S. Littlefield, for Isaac C. Gay.

HALE, District Judge. These two cases were heard together, and are to be decided upon the same evidence. They make practically but one case.

In the first case, Thomas B. Mehaffey, in behalf of the schooner Crescent, brings this proceeding against the steamtug Somers N. Smith to recover damages alleged to have been sustained by that schooner by the negligence of the said steamtug in towing said schooner upon Gangway Ledge, in the entrance to the harbor of Long Cove, in the town of St. George, December 8, 1901. The schooner Crescent is a three-masted schooner of 463 tons gross tonnage. Her length is 150 feet, and her width 34 feet 8 inches. At the time of the injury she was drawing 12½ feet forward and 14 feet and 1 inch aft, and was loaded with paving blocks, under a charter obtained through J. W. Linnell, of Boston, to the Booth Bros. & Hurricane Island Granite Company. The memorandum of charter shows that she was to load paving at \$1 per ton, to be "loaded and discharged, and free wharfage, and towed out of Long Cove free." The steamtug Somers N. Smith is 66 feet long, 16 feet beam, and at the time carried a crew of four men. She had been employed in that vicinity and had towed vessels in Long Cove, for many years. On the morning of the day of the injury the tug was made fast to the Crescent about 8 o'clock by a hawser over each bow of the schooner attached to the stern bits of the tug, so that the tug was from 25 to 40 feet ahead of the schooner's jib boom; the passage out of the Cove is between Gangway Ledge on the northerly side and State Point Ledge on the southerly side, the passage being about 75 feet wide, and the water in the deepest part being 15 to 16½ feet deep at high water, which was about the time the towage service took place. The schooner, after being in tow about five minutes, and proceeding less than 500 yards, struck and was stranded upon Gangway Ledge, on the northerly side of the channel.

Without now considering the question whether or not the tug is relieved from her ordinary duties and liabilities by reason of a contract of exemption, it is necessary first to decide whether or not the tug was negligent in the management of its tow. This branch of the case may be first examined and decided, as though it were the only question at issue. The place where the towage service was performed demands in the outset careful attention. The channel is narrow and crooked. A short distance from where the tug was made fast to the tow the channel is reached at what is called the "Deep Hole," just below Ringbolt Ledge, and from this point the course is straight out through a passage between Gangway Ledge and State Point Ledge. This passage is found by certain range marks on the mainland, about which there is some conflicting testimony. The answer describes the

channel as narrow and crooked. Mr. Gay, the agent of the steamtug, says, "The place is a very critical, bad place; and is not a navigable place hardly." The pilot, who had been engaged in piloting service at this place for 15 years, and had taken out 40 or 50 vessels a year, says, "You cannot get but very little out of the channel, one way or the other, between Gangway Ledge and State Point, without going ashore with a deep-draught vessel;" that you have to keep very close to the channel, and that a matter of 10 feet one way or the other will take you ashore. Mr. Smith, the superintendent of the granite company, to which the schooner was chartered, was very familiar with the place, and says he had been in and out a thousand times, and that a schooner would have to be kept in the channel, and, if she deviated from a straight course, she would get into the mud on either side of the channel; she could deviate but a very few feet; that vessels going out take a sheer when they reach shoal water, and a tug almost invariably has to change her course to meet the sheer. He says that on the morning of the accident he was watching the schooner, as he always feels nervous until a vessel passes out, and more at that time than usual, as the Crescent was a very deep-draught vessel. All the witnesses who know anything about it, recognize the fact that the passage is dangerous, that the water in the deepest place is not more than 15 or 16 feet deep at high tide, and that vessels can pass out in safety only by the most vigilant precautions. There is testimony, further, that the spruce buoy upon Gangway Ledge was liable to be misplaced, and there is some testimony that it actually was out of place on the morning of the injury. Such misplacement or liability to misplacement adds to the hazards of towing in this place. The preponderance of evidence shows that the water in the deepest place between Gangway Ledge and State Point Ledge was in the center of the channel, not nearer to Gangway Ledge than about 25 feet, and that, unless a vessel was kept in this channel, she would take the bottom, even at high tide.

Now, it is well settled that a tug is held to reasonable care in the conduct of her towage service, but that such reasonable care is measured by the dangers which she is encountering. Judge Fox said in *The Adelia*, 1 Hask. 505, Fed. Cas. No. 79:

"The tug is only chargeable with reasonable, proper skill and care; but in the opinion of the court these are relative terms, and must be understood to be such as are reasonable and proper, and demanded by the peculiar circumstances and emergencies of the case."

He quotes the leading authorities of *The Webb*, 14 Wall. 414, 20 L. Ed. 774, and *The Syracuse*, 12 Wall. 171, 20 L. Ed. 382. In the case from which quotation has just been made, Judge Fox, in discussing the evidence, says:

"The master of the tug well knew the dangers which attended this locality, which were neither few nor small. He knew that the current there was more violent than at the anchorage; that the width of the river for his movements did not exceed three hundred feet; that the current set strongly to the easterly shore, as well as downward; that the shoal, with the rock thereon, projected nearly half the width of the river, and into the current; and that, if the tow should become unmanageable, and escape the control of the tug, she must be taken down broadside by the current, and thrown upon the shoal and rock."

He further says:

"Knowing, as the master must, all these dangers,—and if he did not know them then he was not qualified for his position,—and having, without consultation with the master of the schooner, chosen to make the attempt to wind her in that locality, in the opinion of the court a much higher degree of care, skill, and attention is demanded of him than if he had undertaken the same movement under circumstances free from danger. If the place selected had been deep, broad, open, still water, free from rocks and shoals, it is clear that the master would not have been expected to exercise the same carefulness and attention and good judgment as to the speed and management of his tug and in holding the tow always under instant control as he would when there was great and immediate danger with strong forces to contend with, which, if not properly met, involved the destruction of the property under his charge."

In the case of *The Julia S. Bailey*, a case involving towage service over Sullivan Falls, a dangerous locality, Judge Webb, in an unreported opinion, says:

"The slightest departure from the highest skill and care is almost certain to be attended with loss; and, although the mere fact of trouble raises no presumption of fault, it does call for the sharpest scrutiny of all attending circumstances."

In the case of *The Webb*, 14 Wall. 406, 20 L. Ed. 774, cited by Judge Fox in *The Adelia*, supra, Mr. Justice Strong said:

"The contract requires no more than that he who undertakes a tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. \* \* \* The place where the injury occurred would be considered in connection with the injury itself."

In the case of *The Deer*, 4 Ben. 352, Fed. Cas. No. 3,737, Mr. Justice Blatchford said:

"The fact that the sunken pier was there was known to her [the tug], and yet she ran the barge upon it. \* \* \* The fact that the existence of the sunken pier was known to those navigating the steamboat makes the running of the barge upon it conclusive evidence of negligence under the circumstances, in the absence of proof of any vis major."

In the case of *The Hercules* (D. C.) 81 Fed. 218, it was held:

"The master of a tug plying in a busy harbor is not justified in relying absolutely upon the presumption that a buoy placed by the government to indicate a dangerous obstruction to navigation in such harbor is in its proper position, but is bound, especially when towing a large ship past the obstruction, to observe the bearing of such buoy and watch for any change in its position."

The court further says:

"Certainly, there is no more important duty devolving upon the captain of a tug than to ascertain the location of an obstruction he has to move around with a large ship."

Did the tug meet the requirements imposed by law upon a steamer doing towage service in so dangerous a location? The account which the master of the schooner gives is that the vessel proceeded from the wharf a short distance before she came to the range, which he says is marked by a tree and hoister on the mainland to the westerly and by certain objects on Clark's Island at the easterly end of the channel, these monuments being in range line. He says that when the tug-

boat came alongside that morning Capt. Holmes was in command and in the pilot house; and that he (Capt. Mehaffey) had seven men,—himself, the mate, steward, and four sailors; that Warren Allen, the local pilot, but not in the employment of the schooner, was aboard the tug with two of his sons; that the tug came along, backed under the schooner's bow, and made fast to the tow with two hawsers; that the schooner had nothing to do with determining the length of the hawsers, but that this was determined by the mate of the tug; after the hawsers were made fast, the towboat started; soon after starting, when they got abreast of Ringbolt Ledge, and before getting to the rangeway, the tug turned to go down the channel at a point 50 or 60 feet to the northward of the center of the range line; that he saw the tug was swinging before he got into the range; that he spoke to the pilot, who said, "Holler at him, holler at him!" that he then shouted, and waved his hand, to sheer over into the channel, but there was not a soul on the towboat to be seen, and nobody on the stern, and that by the time he ran to the rail by the fore rigging the tug had passed the buoy on Gangway Ledge so close that he could have stood on the towboat's rail and put his hand upon it; that he saw Peter Richardson come out of the engine room or the fire room, and run forward, to notify them in the pilot house, but that before he (the captain) could get to the topgallant fore-castle of the schooner she struck the ledge. He said that when he found the tugboat was not in the channel, he put his vessel as far as he could to the southward of the towboat by putting his wheel hard aport, and that he remained in this position, in order to keep as near the channel as possible, until the vessel struck the ledge. He says that the towboat, as she approached the ledge, was never in position with the rangeway marks; that, as she went towards the ledge, she kept close to the buoy. Capt. Holmes, the master of the tug, gives an account of the starting of the vessels somewhat similar to that given by Capt. Mehaffey, the master of the schooner. He says he had heard from the pilots about the marks and the ranges in going out of the channel, but he gives a statement of the ranges somewhat different from Capt. Mehaffey's. He makes the spruce buoy on Gangway Ledge one of the marks that constitute the range. His account of the turning into the channel is different from Capt. Mehaffey's. He gives his custom to swing in the Deep Hole, and there get into the rangeway, and indicates in his testimony that he did this on the morning of the injury. He says he has always been told that the best water in the channel is close to the buoy, and adds: "It is all the way I know. I never saw it but once at low water." It further appears that only two of the crew of the tug observed the range marks, and that these two relied upon the buoy and the marks on Clark's Island. There is some contradictory testimony upon the question as to when the schooner began to sheer. Without discussing this testimony in detail, the court, from the preponderance of testimony, is of the opinion that there was no sheer on the part of the schooner which in any way led to the disaster; that the sheer which took place was after the schooner had taken bottom near the ledge and straightened up on the towline.

thus swinging to port. Certain marks found in the mud at low water after the stranding of the vessel tend to this conclusion. The position of those marks shows that the vessel was heading in a straight line for the buoy on the ledge. It is to be observed that the buoy was under the main rigging on the port side when the schooner finally brought up. If there had been so pronounced a sheer as has been claimed, the conclusion is almost irresistible that her bow only would have been on the ledge. These marks in the mud, and the preponderance of other evidence, tend to convince the court that the testimony of Capt. Mehaffey is correct,—that just before the vessel struck she sheered when the buoy was just outside of her cathead; she straightened up after the tug, the tug having been on her port bow. The testimony as to the examination of the mud marks is material, too, in deciding whether the towboat followed the channel or kept too near the northerly side. Mr. Smith, the agent of the granite company, gives his opinion that the deepest water was not on the Gangway Ledge side of the channel. He says he went to the vessel at low water the day of the injury, and saw the marks of the vessel's keel in the mud, and he should say the marks were not in the channel at all; but that the vessel would have gone all right in the channel. Capt. Mehaffey, too, saw the vessel's keel marks, and says that the vessel's heel took the bottom and straightened up somewhat after the tug, and that she had been dragging on the bottom the length of the courtroom; that the keel marks showed at low water after the vessel went ashore, and showed that the schooner was way out of the channel, away to the northern side of the channel. He says the keel marks dragged in the mud 50 feet; that in the place where marks of the keel were in the mud the water was 3 or 4 feet shoaler than it was to starboard; that he could see the direction the schooner took for the ledge by these marks, and the water was at least 3 or 4 feet deeper 35 or 40 feet away; that he could see these lines in the mud two-thirds the length of the vessel; that there was a straight line from the point where the keel mark began to the place where the schooner struck the ledge. This testimony as to the keel marks in the mud does not appear to have been contradicted, and is, in the opinion of the court, very valuable testimony on the question whether the vessel was kept in the channel, and also on the question as to when the sheer began.

The libellant contends that the lack of a competent lookout on the after-deck of the tug was a cause of the stranding. The court is not satisfied by a preponderance of testimony upon this point. While it is of the opinion that there was not an adequate lookout, it is not satisfied that the omission to have such lookout contributed to the stranding. It must be borne in mind that the whole towage incident took only about five minutes. It seems clear that, even if Richardson, the mate of the tug, had been where he could at once notify the captain at the wheel that the tug was not in the deepest water as she approached Gangway Ledge, that she was out of position with reference to the rangeway, and that the schooner was not in the channel, there would then have been too little time to have changed the course of the tug and avoided the stranding. The court is of the

opinion, from the preponderance of evidence, that the principal cause of the stranding of the schooner was that the master of the tug, although he had had many years' experience in towing vessels at this point, did not know the channel; that he took the testimony of certain pilots as to where the location of the deepest water was; that he turned into the channel too early, and several feet too far to the northward; that he did this either without knowledge of the range marks, or without paying suitable attention to them, thinking that the deepest water was next to Gangway Ledge, whereas the preponderance of evidence clearly shows that the deepest water was near the center of the channel; that the tugboat did not follow the usual marks which pilots of experience had been accustomed to follow in going in and out, but attempted to go down on the northerly side of the channel in shoal water, under the mistaken impression that the deep water was at that point, giving the buoy only a small margin; and the result of the stranding shows that the schooner was approaching in such a way that she brushed the buoy, the buoy being found under her bilge after the tide had ebbed. It was the duty of the master further to know, with reference to the location of the buoy on Gangway Ledge, whether or not it was out of position at the time of the towage service. It is unnecessary to find whether or not the buoy was actually misplaced on that morning, but clearly it was the duty of the captain to be informed upon this fact before assuming the hazards of towing a large vessel down through this dangerous passage. In these respects the court finds that there was a want of care on the part of the tug, her captain and crew, proportionate to the dangers to which the schooner was subjected. The court therefore finds negligence on the part of the tug, her captain and crew.

Another very important question now arises upon the pleadings and upon the testimony. It is contended by the claimant that the steamtug is relieved of its ordinary obligations to the schooner by a verbal contract between the towboat and the charterers under the terms of which the granite company or the vessel was to furnish a pilot for the tug, and the owners of the tug were to furnish simply the motive power to propel the tow, and to be in no way responsible for her navigation. The claimant therefore contends that the schooner, under this verbal contract, was towed entirely at the risk of the owners. The burden of proving a contract that the vessel was to be towed at the risk of its owners is upon the towboat asserting such contract. See *The James Jackson* (D. C.) 9 Fed. 614. Without discussing the conflicting testimony on this point of the case, it is, in the opinion of the court, at least doubtful whether the claimant has overcome this burden by a preponderance of evidence. The charter assumed that the towage out of Long Cove was to be free. The concurrent action of all parties seems to the court not to be consistent with the fact that there existed a contract of exemption by which the towboat was relieved from all responsibility. The contract was a verbal one, and there seems to have been some misunderstanding on the part of some witnesses as to exactly what was meant by the furnishing of motive power, and as to precisely what the terms and

effect of the alleged contract were. In the opinion of the court, even if the contract claimed by the owners of the tug had been established, it would not relieve the tug nor her owners from the negligence of the tug or her crew.

In the case of *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382, Mr. Justice Davis says:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal boat was being towed at her own risk, nevertheless the steamer is liable if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed upon the towboat the obligation resting upon a common carrier, it does require upon the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill; and, if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

In the case of *The M. J. Cummings* (D. C.) 18 Fed. 178, it was held:

"The duty of a towboat, in respect to the vessel in tow, not to cause injury to the same, does not arise out of the towage contract, but is imposed by law; and an agreement that a boat shall be towed at her own risk will not exempt the towboat from liability for damages caused by her own negligence."

In the case of *The Jonty Jenks* (D. C.) 54 Fed. 1021, the court holds that "a stipulation in a towage contract that the tow shall assume all the responsibility does not relieve the tug from liability for damages caused by want of reasonable care and skill in navigation." The court (Judge Coxe) said:

"It is unnecessary to determine whether or not the towage service was undertaken upon the express agreement that the owner of the canal boat should assume the entire responsibility, for such an agreement, if made, would not exempt the tug from proper and reasonable skill and care in her navigation."

In the case at bar the court is of the opinion that the master and crew of the towboat were not in the exercise of reasonable care, caution, and maritime skill in the conduct of the towage service, and it follows, as a matter of law, that, notwithstanding the alleged contract, the towboat must be held in fault. The libelant is therefore entitled to hold the tug accountable for the damages sustained.

Decree for libelant. Fritz H. Jordan appointed assessor.

In the second case, namely, *Gay et al. v. The Crescent*, the claim is for services in the nature of salvage in providing a lighter which assisted in unloading the *Crescent* and in pulling her off the ledge and towing her to a place of safety. As the court has held that the stranding of the schooner was caused by the fault of the tugboat, her captain and crew, the rescuing her from the dangerous position in which she was so wrongfully placed cannot be rewarded by any allowance in the nature of salvage, or by any allowance such as claimed in the case at bar. In this respect the case is like that of *The Julia S. Bailey*, cited in this opinion. In the case at bar, therefore, the decree must be: Libel dismissed, with costs.



## UNITED STATES v. LACKEY.

(District Court, W. D. Virginia. February 17, 1903.)

**1. INTOXICATING LIQUOR—LICENSE—SALES—PLACE—PRIVATE CARRIER—LIABILITY.**

A licensed liquor seller received orders from customers living in a place where he was not authorized to sell. He filled such orders by separating the liquor from the stock in his place of business, and delivering the packages, marked with the customers' names, to a private carrier, to be carried to the customers, and to be delivered at their place of residence, on payment of the price. *Held*, that the sales were completed in the seller's place of business, where he was licensed to sell, and hence the carrier was not liable for retailing liquor without a license.

Thos. L. Moore, U. S. Atty.  
J. W. Hartwell, for defendant.

McDOWELL, District Judge. The defendant was indicted for retailing liquor without license. The facts developed on the trial are as follows: One F. Dehart, who operated a registered distillery at Woolwine, Va., which is about 40 miles from Roanoke, and had licenses to sell at wholesale and retail at his place in Woolwine, received by mail sundry orders for liquor from persons living in Roanoke. The agreement between Dehart and his customers in Roanoke was that the liquor was to be delivered in Roanoke, and was to be there paid for when delivered. There were several orders, each for a 4½-gallon keg, and the only practicable method of transportation from Woolwine to Roanoke was by wagon. After Dehart received the orders, he filled the required number of kegs from his stock, tagged each keg with the name of its respective consignee, and delivered them to Lackey. Lackey's instructions were to take the kegs to a place agreed upon in Roanoke, there collect the purchase price, and then deliver the casks to the purchasers. Lackey was described as a "truckster"; that is, one who purchased garden and farm products and hauled them to market. Apparently his chief business for some time had been hauling whisky for Dehart to different points. He was paid by Dehart for the hauling. There was no evidence that the persons who ordered the whisky gave any directions as to the person by whom the liquor should be brought to them. When Lackey reached Roanoke, and after he had delivered some of the kegs and collected therefor, he was arrested. The defense was based on the theory that these sales were made by Dehart at Woolwine. The government's case was based on the theory that the sales were made in Roanoke, and that the agent, Lackey, is equally as guilty as the principal. The government requested an instruction to the effect that the jury shall find the defendant guilty if they believe him to have been the agent of Dehart. In *Black on Intoxicating Liquors*, sec. 434, the following are laid down as established rules:

"(1) When a liquor dealer has a license from the city or county in which his store is kept, he may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such

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¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 162.

store, and he is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents. (2) A licensed dealer, who receives, at his place of business, an order for liquor from a place in which he has no license, and fills it by selecting the liquor from his stock and delivering it to an express company or other carrier to be carried to the purchaser, does not violate the license law, although the carrier agrees to collect and return the price; for the sale is made at the place where the goods are separated from the general stock and delivered to the carrier, such delivery being delivery to the consignee. (3) Irrespective of the place where the bargain was made or the order received, if the seller, by his own hands or the hands of his servant or agent, carries the liquor to the purchaser, without any intermediate delivery to or through a common carrier, and delivers the liquor to the purchaser at the latter's place, and there receives the pay for it, the sale is made at the place of delivery, and, if the vender is not licensed to sell there, he is indictable."

To the same effect see 11 Am. & Eng. Ency. (1st Ed.) pp. 741-5.

Lackey cannot be classed as a common carrier. 2 Am. & Eng. Ency. (1st Ed.) 777; 1 Bouv. Law. Dict. 343. For the purpose of collecting the purchase price, he was certainly the agent of Dehart. 2 Am. & Eng. Ency. (1st Ed.) 899. But for the purposes of carriage and delivery he was the agent of Dehart, or of the purchasers, dependent on the question as to when the title to the liquor passed from Dehart to the purchasers. If the title passed at the time the kegs were delivered by Dehart to Lackey at Woolwine, Lackey was the agent of the purchasers; for they, by implication, authorized Dehart to select for them an agent to transport the liquor. If the title did not pass until payment, or until delivery in Roanoke, Lackey was the agent of Dehart. The true question in all such cases is, when did the title pass? If it passed at Woolwine, the transaction was legal, and neither Lackey nor Dehart are guilty. If it passed at Roanoke, both are guilty. There is no room for question that a sale on credit can be a completed sale, and the article become the absolute property of the vendee, prior to payment. 21 Am. & Eng. Ency. (1st Ed.) p. 499. In such case, is delivery to the vendee, or to the vendee's agent, an essential element of a completed sale? Assume that the contract of sale on credit has been made; that the desired article has been segregated from the vendor's stock, and marked distinctly as the property of the vendee, and is still in the vendor's possession awaiting an opportunity for shipment. Is this enough to transfer the title? In case where there is no express or implied agreement that the sale shall not be complete until delivery, I think the acts above mentioned transfer the title to the vendee. 21 Am. & Eng. Ency. (1st Ed.) 511-12, note. Now, is it possible to discriminate the case where the goods are shipped "collect on delivery," where there is nothing in the order for the goods, and no previous course of dealing between the parties, from which their intention can be learned? In other words, is the mere fact that the shipment is "collect on delivery" sufficient to make payment a condition precedent to transfer of title? On authority it is not. Black, Intox. Liquors, p. 510; 21 Am. & Eng. Ency. (1st Ed.) p. 511, note. And in reason it is not. An order for goods to be shipped "collect on delivery" makes payment a condition precedent to or concurrent with delivery to the purchaser, but it does not necessarily make payment a condition precedent to the transfer of title. In such

cases—there being nothing to show the intention other than the mere order to ship a certain article “collect on delivery”—it seems to me that when the seller has segregated the article, packed it, addressed the package to the consignee, and delivered it to the carrier, he has done all that the contract implied that he should do. The title then vested in the purchaser, subject to be defeated on breach of the condition subsequent that the vendee pay the purchase price on delivery to him. If this be sound, I do not see what difference it makes that the carrier selected by the seller is not a common carrier, but is his own servant. The common carrier is the agent of the consignor if the title does not pass until delivery to the consignee, and is the agent of the consignee if the title passed on delivery to the carrier. Just so even where the carrier is one in the regular salaried employ of the seller, whose sole business is to carry and deliver articles for the seller to his customers. In such cases, if the title passed at the time of delivery by the seller to the servant, the servant is *pro hac vice* the agent of the buyer. In arriving at a conclusion as to whether or not the title passed at the time of delivery by the seller to the servant, the question is, as in all cases of sales of chattels, one of intent. If it was expressly or impliedly agreed between the buyer and seller that the title should not pass until delivery by the servant to the buyer, then the sale was made at the place of delivery to the buyer. But in the case at bar we have no facts to warrant us in assuming an intent that title was not to pass on delivery of the kegs to Lackey.

In a criminal case the burden is on the government; and, if no evidence is adduced sufficient to warrant a conviction, a direction to the jury to acquit is proper. The facts adduced here do not show that the title to the liquor did not pass at Woolwine. If the delivery at Woolwine had been made by Dehart to Adams Express Company, collect on delivery (all the other circumstances being the same as in the case at bar), both on reason and on weight of authority, the express company would not have been guilty. The only argument for holding Lackey guilty is that, as he was in some sense the servant of Dehart, it may be inferred that the parties did not intend the title to pass until delivery at Roanoke. But, in the nature of things, if a dealer who has access to a common carrier can make legal sales, “collect on delivery,” to purchasers at places not covered by his license, why cannot a dealer who must depend for carriage on a wagoner (even his own servant) also make such sales? To the purchasers in the case at bar it was, presumably, a matter of entire indifference whether the liquor was sent by an express company or by some other carrier. It may be said that the difference lies in the fact that in the case at bar the seller had not done all that he was to do until a delivery was made in Roanoke. But he has done all that he was to do as much in the case at bar as in cases where the delivery was made by him to the express company. To my mind, in all such cases, where we have no certain guide showing a different intent, the acceptance of the order for the article, as shown by the act of the seller in segregating the specific article from his stock and marking it with the address of the purchaser, is sufficient to mark the contract as closed, and to effect a transfer of title. But, if not so, certainly when delivery by the seller to a carrier—even his

own servant—is added to the other acts done by him, there is no question but that the title has passed.

It may be said that, even after delivery by the seller to his servant, the article is still under the control of the seller. Ordinarily, it is true that the seller's servant, if so directed, would obey an order from his employer to return the article to the general stock, or to remove the address on it, and deliver it to some other customer. But the question is, had the master a right to give such orders? I think not. The title having been transferred to the buyer, the seller had no rights, other than he would have had if he had delivered the article to a common carrier; i. e., the right of stoppage in transitu.

In cases of this kind, when proper to be left to the jury, the instruction to be given is not as to whose agent the carrier was, but is as to the time when, or rather the place where, title to the liquor passed to the purchaser. In the case at bar there was no conflict of evidence as to the facts. The testimony presented a state of facts which, to my mind, showed a sale at Woolwine.

The instruction asked by the government was refused, and the jury was directed to acquit the defendant.

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### BLACK v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR.

(Circuit Court, E. D. Pennsylvania. February 10, 1903.)

#### No. 15.

#### 1. LIFE INSURANCE—BENEFIT ASSOCIATIONS—LIABILITY FOR BREACH OF CONTRACT.

Where a fraternal benefit association or order is incorporated, and empowered to make insurance contracts with its members, such contracts are made by it as a legal entity; and in an action for breach of such a contract the internal affairs of the corporation and the equities of its members inter sese are matters which are immaterial, and which cannot affect its liability.

#### 2. SAME—REPUDIATION OF CONTRACT—ACTION BY MEMBER TO RECOVER PAYMENTS.

Where an incorporated fraternal insurance association, having the power, but not the legal right, so amends its laws as to arbitrarily reduce the amount payable to the beneficiaries of its members on their death below that which it contracted to pay, a member who did not assent to such reduction has the right to treat the contract as rescinded, and to be restored to the situation he occupied before it was made by recovering the amount he has paid thereon; and it is immaterial in such an action what use the association has made of the money so paid, nor is it any defense against its legal liability for breach of the contract that its charter and laws make no provision for raising funds to discharge such liabilities, when it had power to make the contracts.

**At Law.** Action for breach of contract of life insurance.

Charles H. Sayre, for plaintiff.

Murdoch Kendrick, for defendant.

DALLAS, Circuit Judge. This case has been tried by the court without the intervention of a jury, in pursuance of a stipulation filed

under sections 649 and 700 of the Revised Statutes [U. S. Comp. St. 1901, pp. 525, 570]. The defendant has asked the court to make 15 special findings of facts, but the points presented include matters of inference and of law, which could not be adequately dealt with in a preliminary statement of the case without unduly expanding it and necessitating some repetition in the opinion which follows.

The finding of the court upon the facts is a general finding for the plaintiff.

The defendant is a corporation. It was incorporated for the purpose, inter alia, of establishing "a benefit fund, from which, on the satisfactory evidence of the death of a member of the order, who has complied with its lawful requirements, a sum not exceeding five thousand dollars shall be paid to the family, orphans or dependents, as the member may direct." The following is a copy of the contract to which this action relates:

**Benefit Certificate.**

Issued by

No. 117601.

Supreme Council

\$5000.

American Legion of Honor.

This is to certify that Hugh W. Black is a Companion of the American Legion of Honor said Companion having made application for 6 degree membership to Royal Oak Council No. 806 A. L. of H. instituted and located at Philadelphia in the State of Pa. and passed the requisite medical examination and been duly initiated into said Council, and this certificate is issued to said Companion as an evidence of the facts in it contained and as a statement of the contract existing between said Companion and the Supreme Council, American Legion of Honor. In consideration of the full compliance with all the by-laws of the Supreme Council, A. L. of H. now existing or hereinafter adopted and the conditions herein contained, the Supreme Council A. L. of H. hereby agrees to pay Margaret A. Black wife Five Thousand Dollars upon satisfactory proof of the death, while in good standing upon the books of the Supreme Council, of the Companion herein named, and a full receipt and surrender of this Certificate. Subject, however, to the conditions, restrictions and limitations following:

First: That all statements made by the companion in the application for membership and all answers to the questions contained in the medical examination are in all respects true and shall be deemed and taken to be express warranties.

Second: That said Companion shall have paid all assessments called to the Benefit Fund within the time and in the manner required by the by-laws of the Supreme Council in force at the time of the issuance of this certificate or as the same may be hereafter amended.

Third: That all monies which the Supreme Council, American Legion of Honor, may advance against this certificate by way of a relief benefit to the Companion named herein, for sick or disability benefits, under existing or hereafter enacted by-laws or regulations may be deducted at the death of the Companion, from the amount payable to the beneficiary named herein.

Fourth: That the amount designated by said Companion in his application for membership and stated herein, as a funeral benefit, may be deducted at the death of the Companion, from the amount payable to the beneficiary herein named.

Fifth: That this certificate is issued by the Supreme Council, and accepted by the Companion herein named, for himself and his beneficiary, upon the express condition and agreement that in case of any false or fraudulent statement or misrepresentation or violation of any of the covenants herein contained the same shall be void.

In witness whereof the Supreme Council, American Legion of Honor has hereunto affixed its Corporate Seal and caused this certificate to be signed by

its Supreme Commander and attested by its Supreme Secretary at Boston, Massachusetts, this 31 day of Mar. A. D. 1888.

Attest.

Adam Warnock,  
[Seal.] Supreme Secretary.  
Not assignable or subject to pledge.

Enoch S. Brown,  
Supreme Commander.

The defendant corporation had lawful authority to make this contract. It had also the power, though not the right, to repudiate it, and this it did by adopting an amendment to its by-laws, as follows:

"Two thousand dollars shall be the highest amount paid by the Order on the death of a member, upon any benefit certificate heretofore, or hereafter issued. \* \* \*"

Upon notice of this amendment, the plaintiff, who had not assented to it, and who had complied with all the conditions of his contract, refused to submit to the alteration of it which the amendment purported to prescribe; and that this refusal was justified by law is unquestionable. *Supreme Council American Legion of Honor v. Getz*, 50 C. C. A. 153, 112 Fed. 119. He also asserted and exercised the right to rescind the contract, by reason of its anticipatory breach by the defendant, and accordingly he brought this action of assumpsit to recover the money he had paid under it, which, upon the facts thus far stated, he was prima facie entitled to maintain. *American Life Insurance Co. v. McAden*, 109 Pa. 399, 1 Atl. 256. But the defenses which have been interposed remain to be considered.

The ingenious argument which has been made on behalf of the defendant seems to rest upon an assumption which, in my opinion, is inadmissible. It assumes, as I understand it, that in an action at law against a corporation, brought by one with whom it had contracted, to recover as upon breach and consequent rescission of the contract, the internal affairs of the corporation, and the equities of its members inter sese, are for investigation and determination. This is certainly not the law. "Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members." *Bank of Augusta v. Earle*, 13 Pet. 586, 10 L. Ed. 274. "One of the objects of creating a corporation by law is to enable it to make contracts" (*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 589, 23 L. Ed. 328); and the charter of this defendant distinctly enabled it to make such contracts as that which it made with the plaintiff, and which, in express terms, was stated to be the contract of the corporate entity. By it, and subject to its conditions, the corporation agreed to pay Margaret A. Black \$5,000, and it is with this agreement of the corporation, and its declared purpose not to fulfill it, that this case is exclusively concerned. That the defendant is a "fraternal beneficial association," and that the law restricts the fund which it may accumulate, is of no consequence. Whatever its specific character, it had power to make the contract which it did make, and no restriction upon its accumulations, however imposed, can relieve it from legal responsibility for its breach. That the moneys which were paid by the plaintiff were used by the defendant in carrying out the objects of the association is also immaterial. The plaintiff is not seeking, and is not required, to identify the money which he paid to it. He is not asking to participate in the distribution of a

particular fund upon the ground that a contribution made to it by him can be distinctively recognized. Nor is he claiming, as upon a voluntary withdrawal from his membership in the association, to have the sums which, as a member, he had paid, refunded to him. His action is founded solely upon a contract. His demand is to be compensated for its breach, and to this he is entitled, no matter what may have been done with the money which was received from him. Nor does it make any difference that the disposition which was actually made of that money was warranted by law and by the practice of the association. It may be assumed that when this benefit certificate was issued the only obligation of the corporation which was really in mind was its undertaking to make the payment of \$5,000 to the plaintiff's wife, for which it expressly provided, and that it was expected that this obligation would be met by assessments to be levied at his death. But an anticipatory breach did in fact occur, and thereupon a liability, at least quasi contractual, attached, whether contemplated by the parties or not. *People v. Speir*, 77 N. Y. 144; *Hertzog v. Hertzog*, 29 Pa. 465; *Sceva v. True*, 53 N. H. 627. And the defendant having incurred this liability, cannot evade it by asserting that no specific provision has been made for its acquittal.

I do not doubt that if a contract has been in part performed, the plaintiff having received some substantial benefit therefrom, and if, upon a verdict in his favor, the parties cannot be placed in statu quo, such an action as this is not maintainable. But this rule is not applicable to the present case. The rights of the parties under the contract had attached, but the plaintiff had never received any actual benefit from it. He may, in some sense, perhaps, be said to have enjoyed the protection which it afforded in the event of his death; but, as that event did not occur, it had as yet been of no appreciable actual advantage to him, and no real disadvantage to the defendant. The parties, for anything that appears, upon the plaintiff's recovery are placed precisely in the same situation that they were in before the contract was made; for, although the company carried the risk, and the plaintiff's wife, at all times during the continuance of the contract, upon the happening of the event provided against, was entitled to the indemnity it secured, yet the company has paid nothing and the plaintiff has received nothing. As in the case of any other contract, the parties were each entitled, during its continuance, according to its terms. *American Life Insurance Co. v. McAden*, supra; *Marshall v. The Fire Insurance Co.*, 176 Pa. 628, 35 Atl. 204, 34 L. R. A. 159; *Kerns v. Prudential Insurance Co.*, 11 Pa. Super. Ct. 209. Careful examination of the judgments of the Supreme Court of the United States in *N. Y. Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, and in *Lovell v. St. Louis Mutual Life Insurance Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, has satisfied me that they are not in conflict with the decisions of the Pennsylvania courts above referred to. Both of these cases were founded upon ordinary policies of life insurance. In the first the policies had lapsed by reason of our Civil War having prevented the payment of premiums, and it was held that the insured were not entitled to have them revived, after the determination of the war, upon paying the premiums which had accrued during

its continuance, but only to the value of the policies at the time at which they had, without fault on their part, failed to comply with their conditions. In the second case the policy had been surrendered. The company had violated the understanding upon which the surrender had been made, and the court said "the amount to which the complainant is entitled is \* \* \* the value of his policy at the time it was surrendered." In both of these cases the question was as to the proper measure of damages under their respective special circumstances. In neither of them was it decided that in such a case as this the plaintiff's recovery of the amount of the payments he had made would not place the parties "precisely in the same situation they were in before the contract was made." *American Life Insurance Co. v. McAden*, supra. Moreover, there is no evidence that the benefit certificate involved in this suit had any surrender value whatever. The defendant, by declaring that it would not abide by its contract, entitled the plaintiff to insist that he should be restored to the situation which he occupied before it was made, and this can be done only by returning to him the money which he had paid under and in pursuance of it. It is admitted that \$61.39 of this money was refunded to him as having been unlawfully collected, and for this sum, therefore, the defendant is entitled to a credit; but I do not perceive that its receipt by the plaintiff in any way affects his general right of recovery.

A portion of the evidence was, by agreement of counsel and with the sanction of the trial judge, taken and reduced to writing out of court; and it is said in the defendant's brief that this evidence "shows that the cost of the plaintiff's insurance during his term of membership was a less amount than he would have been compelled to pay for a similar amount of insurance during an equivalent term under the computation made in accordance with the recognized standard tables." Accepting this statement for the purpose of disposing of the objections which were duly made by the plaintiff to the admission of the evidence to which it relates, I am clearly of opinion that the fact sought to be shown is irrelevant, and accordingly the evidence referred to is now excluded, with like effect as if it had been excluded upon the trial, and to this ruling the defendant will, upon due presentation of a bill of exceptions, be granted, nunc pro tunc, such exception or exceptions as would then have been demandable with respect thereto. Rev. St. § 700.

There is no dispute respecting the principal amount claimed by the plaintiff. It will be allowed, subject to the credit of \$61.39 heretofore mentioned. The date from which interest should be awarded is, it seems, open to question. *American Life Insurance Co. v. McAden*, supra. But this point has not been fully discussed by counsel, and the defendant, I think, should have the benefit of any doubt to which it may be subject. In *American Life Insurance Co. v. McAden* it was said that the defendant in that case certainly could not complain of an allowance of interest from the date of the demand, and it seems to be equally certain that the defendant in this one cannot complain that the judgment which follows includes interest only from the date at which the action was commenced.

Judgment will be entered for the plaintiff for \$4,053.03.



**HENDERSON v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR.**

(Circuit Court, E. D. Pennsylvania. February 10, 1903.)

No. 37.

**1. LIFE INSURANCE—BENEFIT ASSOCIATION—ACTION BY MEMBER FOR BREACH OF CONTRACT.**

The fact that a member of a fraternal insurance association, on learning that it had, without legal right, reduced the amount payable on his certificate below that called for by the contract, stopped payment of a check sent in payment of a previous assessment, does not preclude him from maintaining an action against it for breach of the contract.

At Law. Action for breach of contract of life insurance.

George Henderson, for plaintiff.

Murdoch Kendrick, for defendant.

DALLAS, Circuit Judge. This case has been tried by the court without the intervention of a jury, in pursuance of a stipulation filed under sections 649 and 700 of the Revised Statutes [U. S. Comp. St. 1901, pp. 525, 570].

The finding of the court upon the facts is a general finding for the plaintiff.

This action was tried with that of *Black v. Supreme Council American Legion of Honor* (April Sess. 1901, No. 15) 120 Fed. 580, and mainly upon the same evidence. Apart from differences in dates and amounts, which will be properly regarded in fixing the sum of the judgment presently to be rendered, the two cases are identical, except that in this one it additionally appears that the plaintiff, Henderson, upon being notified of the amendment by which the defendant corporation undertook to alter his benefit certificate, stopped payment of a check which he had previously sent to it in response to its last preceding demand upon him. But this fact, I think, does not materially distinguish the present case from that of *Black* against the same defendant, and therefore the opinion this day filed in that case is referred to as ruling this one.

Judgment will be entered for the plaintiff for \$2,463.19.

**EDWARDS et al. v. BAY STATE GAS CO. OF DELAWARE et al.**

(Circuit Court, D. Delaware. December 15, 1902.)

No. 202.

**1. EQUITY—PETITION OF INTERVENER TO BE GIVEN CHARGE OF SUIT—SUFFICIENCY OF GROUNDS.**

One among a number of interveners in a suit, who was admitted as a party without conditions, and has been in the case for 17 months, without taking any part in the proceedings or offering any evidence, is not entitled, on a petition filed after the testimony has been closed, to be given full charge of the suit, as complainant, on an allegation of collusion be-

tween the original parties, of which none of the other interveners complains, and of which he offers no proof, except certain testimony in the record, taken in a previous stage of the litigation, on other issues.

In Equity. On motion by intervener.

John McCrone, for petitioner.

Henry Major, for original complainants.

H. H. Ward, for defendants.

DALLAS, Circuit Judge. Upon a motion by Walter Mathison, an intervening party complainant, for an order authorizing him to conduct and manage the proceedings, etc., the court on June 24, 1902, allowed the original complainants until October 1, 1902, to introduce the evidence which they stated they still desired to offer; and the motion above referred to was denied, but with leave to Mathison to renew the application by petition after October 1, 1902. Within the time limited by this order the evidence for the complainants was completed, and was closed upon both sides. On November 4, 1902, Mathison filed a petition wherein he prayed "that it be directed that the said closing of the case be set aside, and that said case be reopened; that said original complainants be displaced in the prosecution of this action, and that your petitioner, as such intervening complainant, be authorized and granted leave to conduct and manage the proceedings in said action in their place and stead; also that pending the hearing and determination of this application said complainants and defendants be stayed or enjoined and restrained from giving any consents to the making of orders in respect to said action, and from consenting to discontinuance of the same, and from making application for judgment therein; and that such further order be made as may be just." Thereupon leave was granted to each and all of the parties to the cause, whether original or by intervention, to file joint or several answers to the said petition on or before November 22, 1902; and accordingly answers were filed by or on behalf of the original complainants and of the defendants, respectively, and upon these pleadings the matter came on for hearing, and has been argued by counsel.

The petitioner has been an intervening complainant for about 17 months. The order allowing his intervention imposed no terms upon him. He therefore then became, and thence hitherto has been, entirely at liberty to participate in the litigation, and to take part in the proceedings incident thereto. *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123. Yet to September 29, 1902, when the testimony was filed, neither he, nor his counsel, nor any one on behalf of either of them, has attended any meeting for the taking of testimony, or has suggested that any particular person be called as a witness, or that any question or questions should be asked of any particular witness; and although notice of the final meeting on September 19, 1902, was given to his counsel by the examiner, neither he nor his counsel then attended. These facts are stated in the answer of the complainants, and do not appear to be controverted. At all events, and at least as to this matter, the answer must be taken as true. 2 Daniell, Ch. Prac. p. 982.

The petition alleges fraud and collusion in the management and conduct of the case, but these allegations are denied by the answers, and have not been sustained by proof. Upon the argument it was suggest-

ed that an order directing evidence to be taken might be requisite; but the counsel for the petitioner expressed his unwillingness that such an order should be made, and stated that he relied upon the record to maintain his client's position. Now, by reference to the petition, it appears that by "the record" thus referred to is meant certain testimony which was given in a previous stage of this litigation, but not upon the present issue, nor by witnesses any of whom have since died, or who would not now be competent and compellable to testify. Therefore I am of opinion that the evidence to which my attention has been directed is not admissible upon the question now for decision; and I may add that, if it were, it would not suffice to maintain the averment of fraud upon which the petitioner founds his demand that his counsel shall be permitted to exclusively manage a cause of whose management to this time none of the several other interveners have made complaint.

The answer of the original complainants, which is signed by their counsel, states that they are advised that the allegations of the bill have been established by the proofs, and that they are now ready to print the record and to apply for final decree. I would not be justified in questioning the good faith of this statement, but deem it proper to say that the purpose which is thus indicated, to bring the cause to final hearing, should be promptly pursued.

At the hearing upon the application which has been discussed, the surviving defendants to this suit presented a petition "to the end that the status of the said Mathison as an intervening complainant in said cause may be judicially determined." This petition was directed to be filed, and Mathison has, by leave of court, since filed an answer thereto. Under these circumstances, the questions so raised are not at present determinable, and I intimate no opinion concerning them. Counsel have not been heard upon them, and it is not now, and may not become, necessary to decide them.

But for the reasons which have been indicated, the petition of Walter Mathison, filed November 4, 1902, is dismissed.

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**PETERS et al. v. TONOPAH MIN. CO. OF NEVADA.**

(Circuit Court, D. Nevada. February 2, 1903.)

No. 737.

**1 EQUITY—EXCEPTIONS TO ANSWER—FAILURE TO ANSWER IMMATERIAL ALLEGATIONS.**

An exception will not lie to an answer in equity for the failure to answer and admit or deny an allegation of the bill unless such allegation is material.

**2. SAME—IMMATERIAL ALLEGATIONS—RECORDING NOTICE OF MINING LOCATION.**

Neither the laws of the United States nor of Nevada require the notice of location of a lode mining claim to be recorded, and hence, unless a rule of the mining district requiring such recording is shown, an aver-

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¶ 1. See Equity, vol. 19, Cent. Dig. § 428.

ment in a bill that complainant recorded its notice of location of a claim is immaterial, and need not be answered.

3. SAME—ATTACHING EXHIBITS TO BILL.

An answer in a suit in equity in a federal court is not subject to exception because it fails to answer an averment of the bill that a true and correct copy of a plat referred to therein is attached and made an exhibit, there being no rule of pleading requiring the attaching of such exhibits.

In Equity. On exceptions to answer.

R. L. Johns, for plaintiffs.

W. E. F. Deal, Kenneth M. Jackson, and Campbell, Metson & Campbell, for defendant.

HAWLEY, District Judge (orally). This suit was brought in the state court to determine the rights of the respective parties to certain mineral land situated in Tonopah mining district, Nye county, Nev. The defendant made application for a patent to said land. The plaintiffs filed an adverse claim thereto in the United States land office. This suit was instituted in pursuance of the provisions of section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430]. The complaint sets forth in detail the various acts performed by the plaintiffs in locating and perfecting their title to the McNamara mining claim, a portion of which is in conflict with the mining claim and ground known as the "Buckboard," claimed by defendant. The cause was removed to this court upon the ground of "diversity of citizenship" between the parties, and in due time the defendant filed its answer. To this answer the plaintiffs filed five specific exceptions, two of which they have abandoned. The others read as follows:

"Third. For that the allegations contained in paragraph 3 of said complaint, in the last twelve lines thereof, are neither answered, admitted, nor denied in said answer.

"Fourth. For that the following allegations, contained in paragraph 4 of said complaint, are neither answered, admitted, nor denied in said answer, to wit: 'That said record of said mining claim contained the names of said locators, the date of said location, and such description of said claim by reference to natural objects and permanent monuments as would identify said claim.'

"Fifth. For that the following allegation, contained in paragraph 9 of said complaint, is neither answered, admitted, nor denied in said answer, to wit: 'A true and correct copy of which plat is hereto attached, and made a part hereof, marked Exhibit A.'"

Before proceeding to notice these exceptions specifically, or the allegations in the pleadings upon which they are based, it becomes necessary to ascertain the general rules that have been established in regard thereto. The law is well settled that, in the national courts, equity pleadings are not governed by state codes or statutes. The defendant in his answer—where the facts are within his knowledge—must either admit or deny all of the material allegations of the complaint. In *Pierce v. Brown*, 7 Wall. 205, 211, 19 L. Ed. 134, the court said:

"Material allegations in the bill of complaint ought to be answered and admitted, or denied, if the facts are within the knowledge of the respondent; and, if not, he ought to state what his belief is upon the subject, if he has

any; and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts."

See, also, *Trust Co. v. Cummings* (C. C.) 83 Fed. 767; *Story, Eq. Pl.* (10th Ed.) § 852.

If the answer fails to admit or deny any material allegation contained in the complaint, the plaintiff may, under the equity rules, except to the sufficiency of the answer. But all the authorities upon this point go to the extent that exceptions to an answer for insufficiency should not be sustained unless there is some material allegation in the bill of complaint which has not been fully answered by the defendant. 2 *Bates, Fed. Eq. Proc.* § 354; 1 *Beach, Mod. Eq. Prac.* § 335.

In *Hardeman v. Harris*, 7 How. 726, 729, 12 L. Ed. 889, the court said:

"It is not a sufficient foundation for an exception that a fact charged in a bill is not answered, unless the fact is material, and might contribute to support the equity of the case of the complainant, and induce the court to give the relief sought by the bill."

The real question presented by the exceptions is, therefore, whether or not the allegations in the complaint to which they refer are, or are not, material. The third exception refers to the allegations in the complaint that the "notice of location" was duly recorded at a certain time and place, and gives the name of the book in which the notice was recorded, etc. Is this allegation a material one? The United States laws do not require a record of the notice of location to be made, in order to locate a lode mining claim. Section 2324, Rev. St. [U. S. Comp. St. 1901, p. 1426], simply provides that:

"All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

The decisions in the state and national courts have uniformly held that no record of the notice of location is necessary unless the laws of the state, or the rules and regulations of the mining district in which the claim is located, require it. *Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co.*, 12 Nev. 312, 323; *Southern Cross Gold & Silver Min. Co. v. Europa Min. Co.*, 15 Nev. 383; *North Noonday Min. Co. v. Orient Min. Co.* (C. C.) 1 Fed. 523, 533; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* (C. C.) 11 Fed. 667, 678; *Haws v. Mining Co.*, 160 U. S. 303, 318, 16 Sup. Ct. 282, 40 L. Ed. 436; 1 *Lindley, Mines*, § 273, and authorities there cited.

The laws of this state, among other things, provide that the discoverer of a vein or lode may locate a claim thereon "by posting a notice of such location at the point of discovery," and declares what such notice shall contain. *Cut. Comp. Laws*, § 208. But this section does not require such notice to be recorded. Section 210 provides that "within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated by a location certificate," and provides what the certificate of location shall contain. It is true that several of the requirements in this section are the same as those required by

section 208, but, in addition thereto, it is provided that the certificate of location must contain other matters not called for by the location notice that was to be posted on the ground, notably, (5) "the dimensions and location of the discovery shaft, or its equivalent, sunk upon the claim"; and (6) "the location and description of each corner with the markings thereon." The certificate of location is separate and distinct from the location notice. It is the "certificate of location," not the "notice of location," of the claim, that is required by the state law to be recorded. The complaint is silent as to any provisions in the local rules or regulations, if any exist, in the Tonopah mining district. There being no law or rule requiring the recording of the notice of location, it is wholly immaterial whether it was recorded or not. It was an immaterial averment which was unnecessary to be alleged in the complaint, and the defendant is not required to answer it.

With reference to the fourth exception but little need be said. The reasons and conclusions reached in discussing the third exception are directly applicable to the fourth, and need not be repeated. The fact is that the material portion of the averment in the complaint to which reference is made in the fourth exception is denied in the answer.

The fifth exception is also without merit. The entire averment in paragraph 9 of the complaint must be considered, in order to determine whether, or not, the language of the extract quoted in the exception is material or not. This averment reads as follows:

"(9) That said Buckboard claim, as claimed by the defendant in its application in the United States land office at Carson City, Nevada, for a patent, as hereinafter set forth, crosses and overlaps and conflicts with said McNamara claim, and embraces two and eighty-five hundredths (2.85) acres of said McNamara claim, the property of said plaintiffs, as fully appears by reference to said plat of survey made from an actual survey by, and duly certified by, John G. Booker, United States deputy mineral surveyor for Nevada, filed with the adverse claim of said plaintiffs in said land office as aforesaid, and which plat of survey presents a correct description of the relative locations of said McNamara claim and said Buckboard claim, and shows the area in conflict, and the boundaries and extent of such conflict, a true and correct copy of which plat is hereto attached, and made a part hereof, marked 'Exhibit C.'"

Plaintiff was not required by any rule of pleading to annex the copy of the plat to the complaint, or to allege that it was "a true and correct copy." This is a matter of evidence, which it was unnecessary to plead. This averment in the complaint might have been left out without affecting the sufficiency, or in any manner impairing the other averments in paragraph 9 of the complaint. It could have been left out of the complaint without any injury to the plaintiff. These are the usual tests which have been applied to determine whether or not the allegations in the complaint are or are not material. *1 Estee*, Pl. § 190, and authorities there cited.

The material portions of the ninth paragraph in the complaint are denied in the answer, as will be seen by the following averment:

"And for further answer to said complaint, this defendant denies that said Buckboard claim, as claimed by the defendant in its application in the United States land office at Carson City, Nevada, for a patent, as set forth in said bill of complaint, crosses or overlaps or conflicts with said McNamara

claim, or embraces two and eighty-five hundredths, or any other acres or area, or any other part of said McNamara claim, or that said two and eighty-five hundredths acres, or any part thereof, is the property of said plaintiffs, or either of them, or as made from an actual or any correct survey by, or duly or otherwise certified by, John G. Booker, mentioned in paragraph 9 of said bill of complaint; and defendant denies that said plat of survey mentioned in said paragraph nine presents a correct description of the relative locations of said McNamara claim or said Buckboard claim, or either of said claims, or shows the correct area in conflict between said claims, or the correct boundaries or extent of such conflict, or that said McNamara claim, as originally located, conflicts with said Buckboard claim, or any part thereof."

For the reasons above given, the several exceptions are overruled.

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AMERICAN SUGAR REFINING CO. v. RICKINSON et al.

(District Court, S. D. New York. January 28, 1903.)

1. SHIPPING—DAMAGE TO SUGAR CARGO—UNSEAWORTHINESS OF VESSEL.

Sugar cargo stowed in a hold was damaged during a voyage by seawater, which leaked from a water-ballast tank, through a manhole, opening into the hold. After the vessel sailed, the valve admitting water to the tank was opened, and negligently allowed to remain open longer than necessary to fill the tank, and it was during the time it was so open that the leak was discovered. But it appeared that while in port the manhole cover had been taken off and replaced, and it was not shown that before sailing it was tested with such pressure as it was afterward subjected to. *Held*, that the damage must be attributed to the unseaworthy condition of the vessel at the commencement of the voyage, due to negligence, for which the owners were not exempted from liability by the Harter act (27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

In Admiralty. Action for damage to cargo.

Wing, Putnam & Burlingham, for libellant.  
Convers & Kirlin, for respondents.

ADAMS, District Judge. This action is to recover alleged damages of \$3,000 on the libellant's cargo of sugar laden in good order on the respondents' steamer "Albion," in Java during August, 1900, and discharged in New York in October, 1900. Three hundred and eighty-two packages were said to be partly empty and twenty-two entirely empty. The loss is attributable to the vessel's unseaworthiness, caused by a flow of sea water into the No. 3 hold, where the sugar in question was stowed, through a man-hole, opening into the No. 4 water ballast tank below. There were two man-holes opening into the tank in question, one on each side of the vessel. One of these holes was found to be leaking seriously after the voyage commenced at Java. When the vessel was loaded, the top of the tank was about 17½ feet below the water line.

The steamer started from Java about 6 o'clock in the morning. Some time after sailing, probably between 7 o'clock and 9 o'clock in the morning, the valve of the pipe leading into No. 4 tank was

¶ 1. Statutory exemption of shipowners from liability, see note to *Lloyd v. Insurance Co.*, 49 C. C. A. 11.

opened for the purpose of filling the tank and from some neglect it was left open until about 3:30 o'clock in the afternoon, when leakage was discovered and traced to the tank. The valve was then closed. Two hours would have sufficed to fill the tank.

The point in controversy is whether the owners exercised due diligence to make the vessel seaworthy, by causing sufficient strength to be given to the man-hole joint to resist the pressure caused by the entrance of the sea water. The owners had supplied all necessary appliances to make the vessel tight, if the valve governing the flow of water remained closed. The action of the crew after sailing set the cause of the leak in operation and if a proper examination, in conformity with the requirements of the Act (27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), was made before sailing, the defence of the respondents would be established. There is no sufficient proof, however, to satisfy such requirements. It appears that the carpenter of the ship, while in Java, lost his sounding rod and took off the man-hole cover in order to search for it in the tank. He testified that after doing so, he made the joint tight, so that there was no leakage, as appeared by the fact that the tank had been filled in port before sailing without developing any. Even if the carpenter's testimony in this respect is to be accepted, it still is not satisfactorily shown that the tank had been subjected to the amount of pressure, which afterwards caused the leak. The necessary conclusion from the facts is, that the carpenter failed to make a good joint, so that the ship started on her voyage in an unseaworthy condition, in the sense that the joint was not sufficient to resist the pressure caused by the opening of the valve to the tank. It was necessary that the joints should be strong enough for this purpose and in neglecting to see that they were so, before the vessel sailed, the owners failed in their duty and the Act affords no protection to them. I do not give much weight to the respondents' argument that the negligent allowance of several hours pressure was the cause of the leakage and the respondents are relieved because it was mismanagement of the ship's appliances by those on board during the voyage. It does not appear when after sailing, the leakage commenced. It can not be assumed for the respondents' benefit that the leakage occurred, as contended, after the pressure existed for several hours, tending to make the fault one of management. The fault was that the respondents failed to exercise due diligence while the vessel was still in port to make her in all respects seaworthy. *The Manitoba* (D. C.) 104 Fed. R. 145; *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830.

Decree for libellant with order of reference.



## NATIONAL SURETY CO. OF NEW YORK et al. v. STATE BANK OF HUMBOLDT, HUMBOLDT, NEB., et al.

(Circuit Court of Appeals, Eighth Circuit. February 2, 1903.)

No. 1,753.

**1. FEDERAL COURTS—EQUITABLE JURISDICTION—ADEQUATE REMEDY AT LAW—SUCH REMEDY IN STATE COURTS IMMATERIAL.**

The national courts have jurisdiction in equity in the absence of an adequate remedy at law in those courts. The test of their equitable jurisdiction is the absence of such a remedy in the federal courts. The presence or absence of a remedy at law in the state courts is not the test of the jurisdiction in equity of the federal courts.

**2. SAME—TEST ADEQUATE REMEDY AT LAW IN 1789 UNLESS SUBSEQUENTLY CHANGED BY CONGRESS.**

The equitable jurisdiction of the federal courts vested in them under the judiciary act of 1789, and, where it has not been subsequently changed by act of congress, the test of that jurisdiction is the adequacy of the remedy at law for wrongs of the character under consideration in the year 1789, when the judiciary act was adopted.

**3. SAME—STATE LEGISLATION MAY NOT IMPAIR OR DESTROY.**

The states did not grant, and they cannot by their legislation revoke, impair, or destroy, the equitable jurisdiction of the national courts.

**4. SAME—STATE LEGISLATION MAY ENLARGE.**

While state legislation may not impair or destroy, it may enlarge, the rights and remedies in equity in the national courts. "A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447.

Rights created and remedies provided by the statutes of the state to be pursued in the state courts may be enforced and administered in the national courts, either at law, or in equity, or in admiralty, as the nature of the rights or remedies may require.

**5. SAME—CONSTRUCTION OF STATUTES—SECTIONS 602-611, CODE OF NEBRASKA.**

Sections 602-611 of the Code of Nebraska, which authorize an original suit in the court, in which an unconscionable judgment, that the defendant was prevented by unavoidable casualty from defending against, was rendered, to enjoin its collection and to annul it, provide a cumulative remedy, and do not impair the original equitable jurisdiction of the circuit courts of the United States to grant appropriate relief for a like cause in cases in which the citizenship of the parties and the amounts in controversy give those courts jurisdiction.

**6. JUDGMENTS—JURISDICTION IN EQUITY TO RESTRAIN ENFORCEMENT FOR ACCIDENT.**

The federal courts have plenary jurisdiction to enjoin the enforcement of unconscionable judgments and decrees, to which the defendants had meritorious defenses, that they were prevented from availing themselves of by fraud, accident, or mistake. They have the same power to relieve on account of accident or mistake as on account of fraud.

**7. FEDERAL COURTS—JURISDICTION IN EQUITY TO RESTRAIN ENFORCEMENT OF UNCONSCIONABLE JUDGMENTS.**

A federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment.

But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree.

**8. SAME—EQUITABLE JURISDICTION TO RESTRAIN ENFORCEMENT OF JUDGMENTS OF STATE COURTS.**

The national courts, sitting in equity, have the same jurisdiction and power to restrain judgment plaintiffs in unconscionable judgments of the state courts from using them to extort money from defendants who ought not to pay them, that they have to enjoin such plaintiffs in like judgments of the federal courts.

**9. SAME—EFFECT OF SECTION 720, REV. ST.**

The federal courts are prohibited by section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], from staying proceedings of a state court or of its officers.

But it is no violation of that section for these courts to enjoin the plaintiff in an unconscionable judgment of a state court from using it to extort money from a defendant who ought not, in equity and good conscience, to pay it, because such an injunction acts on the person of the judgment plaintiff, and not upon the state court or its officers.

**10. FOREIGN CORPORATIONS—SERVICE—NEGLIGENCE OF STATE OFFICER IN REMITTING SUMMONS NOT ATTRIBUTABLE TO.**

The failure of an officer of a state, whom foreign corporations are compelled by the statutes of the state to appoint their agent to receive service of process as a condition of doing business in the state, to comply with a statute which requires him to send a summons to the defendant, to which it is directed, immediately upon its receipt, is not such fault or negligence of the defendant corporation as will estop it from securing equitable relief from an unconscionable judgment, which it was prevented from defending itself against by the neglect of the officer.

(Syllabus by the Court.)

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

This is an appeal from a final decree which dismissed the bill of the complainants, National Surety Company of New York and National Surety Company of Missouri, two corporations that sought an injunction against the State Bank of Humboldt, its attorneys, and John F. Cornell, the Auditor of Public Accounts of the State of Nebraska, to restrain them from enforcing a judgment of \$7,842.40 and costs which was rendered on May 17, 1900, in the district court of Richardson county, Neb., against the National Surety Company of Missouri, and in favor of the bank. These are the material facts which condition the rights of the parties in this court: The National Surety Company of Missouri made its bond, by which it agreed to indemnify the bank against such losses as it should sustain by reason of the fraud or dishonesty of its cashier between March 31, 1896, and April 1, 1897, and should discover prior to October 1, 1897. The bank sustained losses on account of the fraud and dishonesty of its cashier during the term of the bond, but it did not discover them until more than six months after the expiration of the term, so that no cause of action in favor of the bank upon the bond ever accrued. Nevertheless the bank commenced an action on the bond for the amount of these losses in the district court of Richardson county, in the state of Nebraska, against the National Security Company of Kansas City, Mo., and delivered the summons to the Auditor of Public Accounts of the State of Nebraska, who accepted service of it, but failed to send it to either of the appellants, or to notify them of the pendency of the action. The statutes of Nebraska required every surety company not incorporated under the laws of that state to appoint the Auditor of Public Accounts its attorney, on whom process against it might be served in any action, and commanded him to forward a copy of any process served upon him forthwith to the secretary of the company to which it was addressed. Comp. St. Neb. 1901. c. 16, §§ 175, 176.

¶ 8. Conclusiveness and effect of judgments as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.

¶ 10. Service of process on foreign corporations, see note to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3.

On May 17, 1900, judgment was entered by default in the action in the district court of Richardson county against the National Security Company of Kansas City, Mo., for \$7,842.40 and costs. On July 23, 1900, the term of that court closed, and it adjourned sine die. Neither of the surety companies had any notice or knowledge of the judgment, or of the action in which it was rendered, until August 6, 1900. On June 9, 1897, the National Surety Company of New York received the assets and assumed the liabilities of the National Surety Company of Missouri, so that, if the judgment against the latter is collected, the former must pay it. In this state of the case the surety companies prayed the court below to restrain the bank, its attorneys, and John F. Cornell, from enforcing the judgment, on the ground that they had a perfect defense to the claim on which it was founded, which they were prevented from presenting by the failure of the auditor to send them the summons, without any fault or negligence on their part; and the court below denied their prayer, because, in its opinion, sections 602-611, pp. 1340, 1341, and 1342, of the Compiled Statutes of Nebraska of 1901, provided the complainants with an adequate remedy at law, and deprived the federal courts of jurisdiction in equity to grant the relief they sought.

Charles J. Greene and Ralph W. Breckenridge, for appellants.

John L. Webster (Isham Reavis and Frank Reavis, 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.

The important question in this case is whether or not a federal court has jurisdiction in equity to restrain the parties to an unconscionable judgment of a state court from enforcing it, when the complainants in the bill had a perfect defense to the claim on which the judgment was founded, which they were prevented from presenting to the state court by accident or mistake, and when the statutes of the state have provided an original proceeding in the court in which the judgment is rendered to enable aggrieved parties to obtain relief against such judgments.

Much has been said and written by counsel for the respective parties in this suit upon the question whether or not the service of the summons upon the Auditor of Public Accounts of the State of Nebraska, and his acceptance thereof, constituted a service upon the Missouri corporation, and gave the state court jurisdiction of the action against it, and upon the question whether or not the action and judgment against the National Security Company of Kansas City, Mo., were, in effect, an action and judgment against the National Surety Company of Missouri. But, in our opinion, these questions do not condition the determination of this case; and, without deciding or intimating any opinion concerning them, the positions of counsel for the appellees will be conceded. For the purposes of the discussion and decision of this case, it will be admitted that the judgment against the security company is a judgment against the surety company, and that by virtue of the service upon, and the acceptance thereof by, the Auditor of Public Accounts, the state court acquired jurisdiction of the subject-matter and of the parties to the action, and lawfully rendered the judgment against the surety company.

The gravamen of this bill, however, is not that there was no service of the summons in the action at law. It is that in that action a

judgment which ought not, in equity and good conscience, to be paid, has been rendered against the surety company, when it had a perfect defense to the action, of which it was prevented from availing itself by accident or mistake, without fault or negligence on its part. It is conceded that the judgment was regularly and legally rendered after due service of the summons. Yet the fact remains that it is a judgment without cause, which the appellants ought not to be required to pay, and which they were prevented from defending themselves against by the failure of John F. Cornell, the Auditor of Public Accounts of the State of Nebraska, to send them the summons as the statute directed.

It is said that the complainants are entitled to no relief, because Cornell was the agent of the judgment defendant, the Missouri company, to receive the service, and his negligence was its negligence. In support of this contention the remark of Mr. Justice Gray in *Knox Co. v. Harshman*, 133 U. S. 152, 155, 156, 10 Sup. Ct. 257, 33 L. Ed. 586, where the county clerk was designated by the statutes of Missouri to receive service of process against the county, that "any neglect of the clerk in communicating the fact to the county court was neglect of an agent of the county, and did not affect the validity of the service or of the judgment," is cited. In that case the Supreme Court first decided that the judgment against Knox county was just and right, and that it had no defense to the cause of action upon which it was founded (page 155, 133 U. S., and page 258, 10 Sup. Ct., 33 L. Ed. 586), and then held that the failure of the county clerk to give notice of the service of the summons was so far the negligence of the county that it did not invalidate the service. That court did not decide that the failure of this clerk was such negligence of the county as would have deprived it of equitable relief if that failure had prevented it from interposing a meritorious defense. In the case at bar the validity of the service of the summons is conceded. It is further admitted that, if any fault or negligence of the surety companies prevented them from presenting their defense in the action at law, they are estopped from obtaining relief in equity. But how can it be fairly or justly said that it was the fault of these companies, or their negligence, that John F. Cornell, the Auditor of Public Accounts of the State of Nebraska, failed to discharge his statutory duty to send them the summons? They did not select him as their agent. They had no command or control of his action—no power to discharge or dismiss him. They were compelled by the statutes of the state of Nebraska to appoint and retain him as their agent to receive service of process, as a condition of doing business in that state. He was chosen, not by the surety companies, but by the state of Nebraska. His acts and proceedings were controlled and commanded, not by these corporations, but by the state. The state required him to send the summons to this Missouri corporation, just as it required that corporation to appoint him its agent to receive the service. Comp. St. Neb. 1901, c. 16, §§ 175, 176. The corporation obeyed the statute, and the officer of the state violated it. The corporation could not have anticipated its violation. It had a right to rely on the legal presumption that the officer of the state would do his duty. Nothing that the corporation could have

lawfully done, nothing that it could have failed to do, could have prevented the failure of this officer. The power of control is the test of the liability of a principal for the negligence of his alleged agent. If the principal cannot control and direct him in the discharge of a given duty, then he is not his agent in its performance and the alleged principal is neither chargeable with nor liable for his negligence in its discharge. *Brady v. Chicago & G. W. Ry. Co.*, 114 Fed. 100, 107; *Atwood v. Railway Co.* (C. C.) 72 Fed. 447, 454, 455; *Byrne v. Railroad Co.*, 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; *Hilsdorf v. City of St. Louis*, 45 Mo. 94, 98, 100 Am. Dec. 352; *Town of Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297, 300; *Miller v. Railroad Co.*, 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; *Wood, R. R.* § 388; *Donovan v. Construction Syndicate* (1893) 1 Q. B. Div. 629; *Rourke v. Colliery Co.*, 2 C. P. Div. 205. The neglect of Cornell to notify the surety companies of the pendency of the action against the Missouri corporation was not their fault or negligence, and it is no defense to their claim for equitable relief against this judgment, because they had no command or control of his action. The failure of an officer of a state, whom foreign corporations are compelled by the statutes of the state to appoint their agent to receive service of process, as a condition of doing business in the state, to comply with a statute which requires him to send a summons to the defendant, to which it is directed, immediately upon its receipt, is not such fault or negligence of the defendant corporation as will estop it from securing equitable relief from an unconscionable judgment, which it was prevented from defending itself against by the neglect of the officer. It is an unavoidable accident, which the corporation could neither have foreseen nor anticipated.

We have, then, an unconscionable judgment at law for \$7,842.40 in favor of a citizen of Nebraska, to which the appellants, citizens of New York and Missouri, respectively, had a good defense, which they were prevented, by unavoidable accident, unmixed with fault or negligence on their part, from availing themselves of. The appellees are about to enforce this judgment. Has the federal court, sitting in equity, the jurisdiction to prevent them from so doing? Fraud, accident, and mistake are three great heads of equity jurisprudence; and whenever injustice or wrong, irremediable at law, is about to result from either, power is vested in, and the duty is imposed upon, the courts of equity, to prevent the threatened injury. Their jurisdiction rests upon the fact that, unless they act, wrong will be perpetrated, which cannot be remedied; and the bills exhibited to them are appeals to the consciences of the chancellors, to prevent injustice. Counsel for the appellees concede that the federal courts have equitable jurisdiction to enjoin the enforcement of unconscionable judgments at law which have been procured by fraud, but they insist that they are without power to restrain the collection of those which are secured by accident or mistake. But the foundation of equity jurisdiction is the wrong that will be perpetrated if the court of equity does not act. Accident and mistake are as well established grounds for the action of a court of equity as fraud. It is as unjust—as abhorrent to the conscience of the chancellor—that one who does not

owe a judgment which has been secured against him by accident should be compelled to pay it, as it is that he should be compelled to pay one procured by fraud. The injury is the same in each case. Both cases fall under equally well recognized heads of equity jurisdiction. Both appeal with equal force to the conscience of the chancellor, and the conclusion is irresistible that each is entitled to command the same measure of equitable relief. The federal courts, sitting in equity, have the same power to prevent the enforcement of unjust judgments at law, procured by accident or mistake, that they have to prevent the collection of those obtained by fraud. They have plenary jurisdiction to restrain the enforcement of judgments and decrees to which the defendants had meritorious defenses, that they were prevented from interposing either by fraud or accident or mistake unmixed with their own negligence. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333, 3 L. Ed. 362; *Hendrickson v. Hinckley*, 17 How. 442, 444, 15 L. Ed. 123; *Hungerford v. Sigerson*, 20 How. 156, 161, 15 L. Ed. 869; *Gaines v. Fuentes*, 92 U. S. 10, 22, 23 L. Ed. 524; *Barrow v. Hunton*, 99 U. S. 80, 85, 25 L. Ed. 407; *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547; *Arrow-smith v. Gleason*, 129 U. S. 86, 97, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 596, 12 Sup. Ct. 62, 35 L. Ed. 870. The case last cited was a suit in equity to enjoin the enforcement of judgments, and the Supreme Court there reiterated, as the settled rule upon this subject, the declaration of Chief Justice Marshall, made more than 70 years before, in *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. Ed. 362, that:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

A careful examination of the cases cited by counsel for the appellees in support of their contention here discloses nothing inconsistent with this rule. There is not one of them which holds that the federal circuit courts have less power or jurisdiction to grant relief against unconscionable judgments on the ground of accident than they have to grant it on the ground of fraud, while in the opinions in *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. Ed. 362; *Hendrickson v. Hinckley*, 17 How. 442, 444, 15 L. Ed. 123; *Crim v. Handley*, 94 U. S. 652, 653, 24 L. Ed. 216; *Metcalf v. Williams*, 104 U. S. 93, 96, 26 L. Ed. 665; *Embry v. Palmer*, 107 U. S. 3, 11, 2 Sup. Ct. 25, 27 L. Ed. 346; *Knox Co. v. Harshman*, 133 U. S. 152, 154, 10 Sup. Ct. 8, 33 L. Ed. 249; and *Marshall v. Holmes*, 141 U. S. 589, 596, 599, 12 Sup. Ct. 62, 35 L. Ed. 870,—the Supreme Court expressly places accident on a par with fraud as a basis for such relief. In many of the cases which counsel cite, the gravamen of the bill was fraud, not accident, and in those cases the sufficiency of the allegations or of the proof of the fraud is naturally discussed at length. In the cases in which relief was denied, the ground of the denial was not that a meritorious defense was prevented by accident, rather than by fraud, but that the cases lacked one or more of the essential ele-

ments of a good cause of action for either fraud or accident. The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law. The case of *Barrow v. Hunton*, 99 U. S. 80, 25 L. Ed. 407, lacked the second element—the meritorious defense—and the court pointed out in that case the radical and controlling difference and the established line of demarcation between suits to enjoin the collection of judgments for errors and irregularities in the proceedings on which they are based, or for illegality or incorrectness of the judgments or decisions themselves, and suits to restrain the enforcement of judgments for new causes, such as frauds, accidents, or mistakes, that prevented meritorious defenses, of which the courts which rendered the judgments were not advised, and which they neither considered nor adjudged. It declared that suits of the former class would not, while suits of the latter class would, warrant the issue of an injunction to restrain the enforcement of the judgments; that the case then before it was, in the absence of a meritorious defense, of the former class, and for that reason the complainant was entitled to no relief. In *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, this distinction was affirmed, and this line of demarcation was broadened, deepened, and fixed. That case was declared to be one of the second class, and the enforcement of a decree of the state court was prohibited. In *Knox Co. v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 8, 33 L. Ed. 249, the defendant in the judgment had no defense to the action upon which it was founded, and for that reason its bill could not be maintained. For the same reason, *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552, fell in the first class of cases, and the complainant was defeated. *Beals v. Illinois, etc., Railroad Co.*, 133 U. S. 290, 10 Sup. Ct. 314, 33 L. Ed. 608, was a case based upon fraud in obtaining the judgment, and the bill was dismissed because there was a failure of proof of the fraud. *McNeil v. McNeil (C. C.)* 78 Fed. 834, was a suit in equity to restrain the enforcement of a decree of divorce rendered by a state court, on account of fraud in its procurement. The court held that it had jurisdiction to grant the relief, but denied it on account of the negligence of the complainant. *Little Rock Junction Railway v. Burke*, 27 U. S. App. 736, 747, 749, 13 C. C. A. 341, 347, 349, 66 Fed. 83, 90, 91, failed because there was an adequate remedy at law, by ejectment in the federal court, if there was any remedy. The facts stated in the case appeared on the face of the record in the state court, and were as available in ejectment as in equity. In *Allen v. Allen*, 38 C. C. A. 336, 97 Fed. 525, the gravamen of the bill was fraud, and it appeared that the very defense which the complainant alleged was prevented by the fraud was actually considered and adjudged by the court which rendered the judgment, so that the case presented no new cause or ground for relief, but fell in the first class of cases, specified in *Barrow v. Hunton*. In *Central National Bank v.*

Stevens, 169 U. S. 432, 464, 18 Sup. Ct. 403, 42 L. Ed. 807, the essential elements of fraud, accident, or mistake that prevented a meritorious defense were lacking; and the Supreme Court held that it would not sustain an injunction, because the proceeding was, in effect, a suit to review the decision of the court, the execution of whose decree it sought to enjoin.

This brief review of the cases cited for appellees will suffice to show what their careful reading will demonstrate—that they contain no decision that the federal circuit court may not lawfully enjoin the enforcement of an unconscionable judgment or decree of a state court, based upon an unfounded claim, which the defendant was prevented by unavoidable accident from defeating. More than this, they evidence this indubitable principle, which has now become so firmly established by repeated decisions of the Supreme Court that it is no longer debatable: A federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the courts which rendered the judgment or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, of which the federal courts cannot escape jurisdiction if they arise between citizens of different states, and involve the requisite amount (25 Stat. 433; 1 U. S. Comp. St. 1901, tit. 13, c. 7, § 629, p. 508), while cases of the latter class involve a jurisdiction which does not exist—a jurisdiction of the federal courts to review and revise the acts and decisions of courts of co-ordinate jurisdiction upon questions which they have lawfully considered and adjudged. *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; *Johnson v. Waters*, 111 U. S. 547, 4 Sup. Ct. 619, 28 L. Ed. 547; *Marshall v. Holmes*, 141 U. S. 582, 12 Sup. Ct. 62, 35 L. Ed. 870; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; *United States v. Norsch (C. C.)* 42 Fed. 417; *Young v. Sigler (C. C.)* 48 Fed. 182; *McNeil v. McNeil (C. C.)* 78 Fed. 834; *Perry v. Johnston (C. C.)* 95 Fed. 322.

The argument of counsel for appellees that, although the Circuit Court of the United States may enjoin a judgment plaintiff from enforcing an unconscionable judgment of a national court, it is without power to prevent him from collecting a like judgment of a state court, because section 720 of the Revised Statutes [U. S. Comp. St. 1901, p. 581] prohibits the issue of an injunction by a federal court to stay proceedings in a state court, and because such an injunction would, in effect, nullify the judgment of the state court, and tend to produce a conflict of jurisdiction between the state and the federal courts, has been carefully considered, but it is not persuasive. Section 720 [U. S. Comp. St. 1901, p. 581] forbids the federal courts from staying the proceedings of the state court, but it does not grant to litigants



of whom the federal courts have jurisdiction unlimited license to use the unconscionable judgments of the state court to inflict irremediable injury upon the defendants. An injunction, as in *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 138, which restrains a sheriff—an officer of the state court—from executing the judgment of that court, is a plain violation of the federal statute, because it stays the proceedings of the state court, and it cannot be sustained. But an injunction which forbids the plaintiff in such a judgment from making an inequitable use of it acts upon him—upon his person only. It forbids him from perpetrating a wrong, but it neither restrains nor stays the proceedings of the state court or of its officer, and it does not fall under the ban of the section of the statute under consideration. *Marshall v. Holmes*, 141 U. S. 589, 599, 600, 12 Sup. Ct. 62, 35 L. Ed. 870.

The constitution of the United States and the acts of Congress have conferred upon the federal circuit courts the jurisdiction to hear and determine controversies between citizens of different states in which the matter in dispute exceeds \$2,000 in value. This suit presents such a controversy. It is a new controversy, which has never been presented to or decided by the state court which rendered the judgment, the enforcement of which the complainants seek to prevent. It involves the question whether or not the appellants were prevented by unavoidable accident from availing themselves of a good defense to the claim on which that judgment is based, and, if so, whether or not the judgment plaintiff should be permitted to collect the judgment. The Circuit Court of the United States has jurisdiction of this controversy, and the appellants have the legal right to a hearing and decision of the questions which it presents, and to the relief which the decision of those questions entitles them. That court may not lawfully renounce that jurisdiction. It cannot rightfully deny to the appellants the right to the decision, decree, and writ to which they show themselves entitled. It is not the judgment of the state court against which these appellants level the injunction they seek. It is against the plaintiff in that judgment. It is against the unconscionable use by that plaintiff of the judgment which he has recovered, to perpetrate an unconscionable wrong. The basis of the suit is the threatened use of this judgment to extort from the appellants money which they ought not to be required to pay, and the federal circuit court is vested with the same power and charged with the same duty to enjoin the appellees from perpetrating this extortion by means of an unconscionable judgment of a state court, that it is to prevent them from effecting it by the use of such a judgment of a national court, by means of a fraudulent patent, deed, mortgage, or by the use of any other instrument or device against which they have no remedy at law. The extortion of \$7,842 from the appellants by the use of this judgment of the state court will inflict upon them as grievous an injury as would its extortion by a like judgment of a national court, and the Circuit Court of the United States has the same preventive power, and the appellants are entitled to the same measure of relief from it, in the one case as in the other. The decisions of the Supreme Court which have been cited, however, have so conclusively disposed of this question that more ex-

tended discussion would be unprofitable; and we leave it with this brief statement of the reasons which have induced, and which amply sustain, the rule that the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured by fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a federal court.

But the statutes of Nebraska provide that the state court in which this judgment was rendered has the power to vacate or to modify it, and the authority to enjoin proceedings before it, for unavoidable casualty or misfortune preventing the aggrieved party from prosecuting or defending (Code Neb. §§ 602-611) and these provisions of the Code prescribe an original suit for that purpose to be commenced by petition and summons within two years after the judgment is rendered (Id. §§ 603-610). It is a general rule that the absence of an adequate remedy at law is a *sine qua non* of jurisdiction in equity, and it is earnestly insisted by counsel for the appellees that the complainants in this suit were entitled to no relief in equity in the Circuit Court of the United States, because they had an adequate remedy at law in the state court which rendered this judgment, under these provisions of the Code of Nebraska. There are, however, many reasons why this contention cannot be sustained. The first, and one that is fatal to the position, is that it is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts, and the appellants have no such remedy. The fact that they have a remedy at law in the state courts is not material. *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; *Mayer v. Foulkrod*, 4 Wash. (C. C.) 349, Fed. Cas. No. 9,341; *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174; *Coler v. Board* (C. C.) 89 Fed. 257; *U. S. Life Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761. When the controversy which this bill discloses arose between these citizens of different states, and was presented to the Circuit Court of the United States, that court had jurisdiction to hear and determine it, and the appellants had the legal right to the opinion and the judgment of that court upon the questions which it presented. This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like rights or remedies in the state courts, or by the fact that those courts had or had not concurrent jurisdiction. Indeed, this right and this jurisdiction were provided by the Constitution, and granted by the acts of Congress, for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts which had concurrent jurisdiction to grant the relief and to administer the remedies which they were seeking in the national courts. The rights of these appellants to their hearing and decree in the federal court, and the jurisdiction of that court to determine their controversy, were independent of state legislation. The state of Nebraska did not grant, and it could not revoke or impair, that right or that jurisdiction. As the appellants had the right to the hearing and decision of their controversy by the national court, they were entitled to institute and to main-

tain in that court the kind of proceeding which, according to the established rules and practice of the United States Circuit Court, would present to it, and secure its opinion and judgment upon, the merits of their controversy. Under the rules and practice of that court, there was no action or proceeding at law which would accomplish that end. In other words, the appellants had no adequate remedy at law in the federal court, and yet they had the right to a hearing and to a determination of their controversy in that court, and to the relief at the hands of that court to which the law and its rules and practice entitled them. The conclusion is unavoidable that their suit in equity was well founded, and that it was the right and the duty of the court below to hear and to determine it upon its merits, and to grant to the complainants the appropriate relief.

Another reason why the proceeding provided by the Code of Nebraska does not oust the jurisdiction in equity of the national Circuit Court is that, while state legislation may enlarge, it cannot destroy or impair, that jurisdiction. The power of the circuit courts of the United States to administer rights and remedies in equity was vested in them, as a part of the judicial power of the nation, under the constitution of the United States and the judiciary act of 1789; and, as it was not granted by, it may not be revoked, impaired, or destroyed by, the act of any state. Unless changed by subsequent acts of Congress, the adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when that jurisdiction was vested—that which was when the act of 1789 was adopted. *McConihay v. Wright*, 121 U. S. 201, 206, 7 Sup. Ct. 940, 30 L. Ed. 932. As there were no adequate remedies at law for a wrong of the character of that of which the appellants complain in 1789, and as the Congress has since provided none, this case falls within the equitable jurisdiction of the Circuit Court, and must be there heard, determined, and relieved.

Moreover, the provisions of the Code of Nebraska which have been cited do not purport or attempt to destroy or to diminish the jurisdiction in equity of either the federal or the state courts. They simply provide a cumulative remedy, and leave those previously existing unaffected. *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366.

And finally the federal court, sitting in equity, has jurisdiction in an appropriate case to enforce the new right and to administer the new remedy created by these provisions of the Code of Nebraska. Rights created and remedies provided by the statutes of the states, to be pursued in the state courts, may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require. *Darragh v. H. Wetter Mfg. Co.*, 23 C. C. A. 609, 615, 616, 78 Fed. 7, 13, 14; *Cummings v. Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447; *Broderick's Will*, 21 Wall. 503, 520, 22 L. Ed. 599; *Gormley v. Clark*, 134 U. S. 338, 348, 10 Sup. Ct. 554, 33 L. Ed. 909; *Cowley v. Railroad Co.*, 159 U. S. 569, 582, 16 Sup. Ct. 127, 40 L. Ed. 263. "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the

state courts of the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447. It is only in equity that the remedy provided by the statute of Nebraska can be administered in the United States Circuit Court, because there is no adequate remedy at law in that court which will effect the issue of an injunction against the enforcement of a judgment at law, and the avoidance of that judgment, the relief which that statute prescribes.

Our conclusion is that the appellants had no adequate remedy at law which prevented them from invoking the aid of the United States Circuit Court, sitting in equity, to secure for them the relief which they have sought in this suit. In opposition to this view, counsel for the appellees have cited, and before reaching this conclusion we have carefully examined, *Nougue v. Clapp*, 101 U. S. 552, 25 L. Ed. 1026; *Furnald v. Glenn* (C. C.) 56 Fed. 372, 374; *Travelers' Protective Association v. Gilbert*, 49 C. C. A. 309, 111 Fed. 269, 55 L. R. A. 538; *Crim v. Handley*, 94 U. S. 659, 660, 24 L. Ed. 216; and other cases of less importance. But these cases do not rule the question here presented, and there were reasons other than the fact that there were adequate remedies at law in the state courts why the complainants failed in those cases. In *Crim v. Handley* the judgment defendant was guilty of negligence in his conduct of the trial of the action at law, which estopped him from obtaining relief in equity. *Nougue v. Clapp* was a bill in equity to recover \$20,000 damages, and to avoid a foreclosure sale under a decree of a state court, which had been rendered in a proceeding of which the defendant had notice, and to which he was a party. He had an adequate remedy at law to recover the \$20,000, and he had been guilty of negligence in the conduct of his defense in the state court. In *Furnald v. Glenn*, relief was denied because the state court whose decrees were assailed had not finally disposed of the case before it, and still had jurisdiction in the same case in which the decrees were rendered to right any wrong which was likely to result from them. And in *Travelers' Protective Association v. Gilbert*, 49 C. C. A. 309, 111 Fed. 269, 55 L. R. A. 538, the averments of the fraud upon which the complainants relied were too vague and indefinite to effect the statement of a good cause of action on that ground; and the negligence of the secretary, who was not an officer of the state, but an agent of the complainant, was held to be imputable to the association, and fatal to its bill. None of these authorities portrays the complete cause of action in equity which the case at bar presents. None of them presents all the elements of such an action which the record in this case discloses. Each contains some, but none all, of the essential facts entitling the complainants to equitable relief. In this case all these facts concur—the judgment which it is against conscience to allow to be used to extort money that is not owing from a defendant remediless at law, the complete meritorious defense to the claim on which this judgment is based, the fact that the defendant in the judgment was prevented from availing itself of its defense to the cause of action by an unavoidable accident, and the absence of any negligence of the defendant or of its agents. These facts appeal with compelling force to the conscience of a chancellor. They have been presented to a court to which the Constitution and the acts

of Congress have granted the power, and upon which they have imposed the duty, to grant the relief to which the complainants are equitably entitled; and the decree which dismissed their bill must be reversed, and the case remanded to that court, with instructions to enter a decree for the complainants.

It is so ordered.

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DAVIS v. TURNER et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1903.)

No. 458.

1. **BANKRUPTCY—DEBTS PROVABLE AGAINST PARTNERSHIP—NOTE SIGNED BY INDIVIDUAL PARTNERS.**

A note signed by the individual members of a bankrupt partnership, although under seal, may be shown by extrinsic evidence to be in fact a partnership obligation, and where it is shown that it was so intended, and was given for money lent to the firm and used in the firm business, it may be proved against the partnership estate in bankruptcy.

2. **CHATTEL MORTGAGES—VALIDITY—INFORMALITY OF INSTRUMENT.**

In general, no particular words are required to constitute a mortgage of personal property. The most informal instruments will be regarded in law as chattel mortgages if they show that a sale was made as security, and in equity any sale of chattels as security for a debt is regarded as a mortgage, although the fact that such was the purpose of the sale be not expressed by the instrument of sale, if it be proved by evidence aliunde.

3. **SAME—MORTGAGE OF PARTNERSHIP PROPERTY.**

A mortgage of partnership goods as security for a partnership debt is not invalid because signed by the partners individually, nor because of the addition of a seal to the individual names.

4. **SAME—SUFFICIENCY OF DESCRIPTION.**

The description in a chattel mortgage, signed by a number of persons, on "all the goods in the store where they are doing business, in E. City, N. C.," may be supplemented by parol evidence to identify the goods; and the mortgage is not void for indefiniteness of description where it was shown that the signers were associated in mercantile business as partners, and had but one place of business, which was in Elizabeth City, N. C., and that the stock of goods referred to was the one in their store at that place.

5. **SAME—SALE OF GOODS BY MORTGAGOR.**

A chattel mortgage given by a firm of merchants on their stock of goods is not void for fraud because the mortgagors remained in possession for a few weeks and carried on their business as usual, where there was no provision therefor in the mortgage, and there is uncontradicted testimony of the parties that the transaction was in good faith.

6. **SAME—DATE OF TAKING EFFECT—RECORD.**

Under the law of North Carolina, which makes a mortgage effective from the date when it is filed for record, a chattel mortgage given by bankrupts is good as against their other creditors where it was filed for record on the day before the filing of the petition in bankruptcy.

7. **BANKRUPTCY—LIENS—MORTGAGE GIVEN FOR PRESENT CONSIDERATION.**

A chattel mortgage, given by an insolvent firm in good faith within four months prior to its bankruptcy, is not void under the bankruptcy act, where it was given for a present loan of money which was used in paying debts of the firm, and was duly recorded so as to become effective prior to the bankruptcy, but is expressly protected by section 67d [U. S. Comp. St. 1901, p. 3449].

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¶ 4. See Evidence, vol. 20, Cent. Dig. § 2127.

Appeal from the District Court of the United States for the Eastern District of North Carolina.

Thos. C. Jones, R. H. Raper, W. S. Cartwright, and John F. Engle were partners under the firm name of Jones, Raper & Co., doing business as merchants in Elizabeth City, Pasquotank county, in the Eastern District of North Carolina. On the 28th day of March, 1902, the said firm filed a voluntary petition in bankruptcy, and were on the same day adjudged bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy. Among the debts offered for proof against the estate of said bankrupts was the following note:

"\$2,500.00.

January 1st, 1902.  
"For value rec'd (money) we, or either of us, promise to pay John L. Hinton two thousand and five hundred dollars, with interest, after date, said amount to be paid by the 1st of March, 1902. Witness our hands and seals.

"R. H. Raper. [Seal.]

"Thomas C. Jones. [Seal.]

"Florence E. Jones. [Seal.]

"W. S. Cartwright. [Seal.]

"John F. Engle. [Seal.]

"Witness: W. T. Davis."

There were some credits on this note, and the balance claimed to be due was \$2,325. Accompanying the proof of this debt was a deed in trust, executed by R. H. Raper, Thomas C. Jones, W. S. Cartwright, and John F. Engle severally, under seal, on the 1st of January, 1902, to secure the payment to John L. Hinton of the sum of \$2,500, evidenced by a bond of even date with the said deed. The property conveyed in the said deed was described as follows: "All the goods in store where they are doing business, in E. City, N. C." Indorsed on the deed was the certificate of the register of deeds of Pasquotank county that the same was filed for registration on the 27th day of March, 1902, at 6 o'clock p. m., and registered in the office of the register of deeds of Pasquotank county, N. C., the 28th of March, 1902, at 8 o'clock a. m., in Book 24, page 374. The debt evidenced by this note and mortgage was in the hands of Mrs. G. M. Davis, and claimed by her as her property, by reason of an assignment from John L. Hinton to her husband, W. T. Davis, and from W. T. Davis to her.

There seems to have been objection, though it does not appear in the record, to admitting this claim to proof as a debt against the estate of the bankrupts, on the ground that it was not a partnership debt. The referee, however, proceeded to take testimony with reference to the matter, and, upon the conclusion thereof, filed an opinion, in which he adjudged that the bond signed individually under the separate signatures and seals of R. H. Raper, T. C. Jones, W. S. Cartwright, Florence E. Jones, and J. F. Engle, the contract being clearly expressed and no evidence of fraud in its execution, with no evidence on its face that Jones, Raper & Co. was a party to its execution, it cannot be proved against the partnership assets of Jones, Raper & Co. until the partnership debts have been paid in full; and, further, that the deed in trust given for its security was void, first, for want of proper description and general vagueness, second, for failure of registration, third, on the ground of legal fraud in its execution. The holder of the claim petitioned the district judge to review the decision of the referee, and, upon the hearing, the judge affirmed the referee in his findings of fact and conclusions of law; and thereupon the case was brought, by appeal of claimant, to this court. The note was introduced, also the mortgages.

The evidence taken before the referee, as set forth in the record, was substantially as follows:

W. T. Davis testified that he witnessed the note for \$2,500; that the signatures to it were those of R. H. Raper, Thomas C. Jones, W. S. Cartwright, and John F. Engle; that he saw all of them sign it except Florence E. Jones, and that her husband, T. C. Jones, signed her name; that the note is now the property of Mrs. G. M. Davis, the wife of the witness; that it was assigned to witness by John L. Hinton without recourse; that he gave his own note

to Hinton, for \$3,000, for this note; that he assigned it to his wife in consideration of \$500; that he knew the goods described in the mortgage, and that they were the goods in the store of Jones, Raper & Co., on the corner of Main and Water streets, in Elizabeth City; that he was not solvent when he gave Hinton the \$3,000 note; that he negotiated the loan from Hinton to Jones, Raper & Co., and the latter agreed to pay him \$200 for the service, but no part of this sum had been paid; that the mortgage was delivered to him on the 1st of January, 1902, and that he did not have it recorded, because Mr. Hinton had never told him to; that Mr. Hinton gave him the mortgage to keep; that there was no agreement between witness and Jones, Raper & Co., or any one of the firm, that the mortgage should not be recorded; that the mortgage was not filed for registration until the 27th day of March, 1902; that Jones, Raper & Co. remained in possession of the goods, and continued business, after the execution of the note and mortgage, until the filing of the petition in bankruptcy; that very few goods were sold from the stock within the time, and that the stock on hand at the time of the adjudication was the same as when the note and mortgage were executed; that neither one of the partners in the firm was solvent on the 1st of January, 1902, and Mr. Hinton knew it—their property consisted only of their stock of goods in the store; that they were being pressed for money at the time, and he negotiated this loan from Mr. Hinton at their request, in order to get money to make payment upon their debts.

R. H. Raper was the next witness. He testified that he signed the note and mortgage introduced; that they were executed at the time they purported to be; that T. C. Jones, R. H. Raper, W. S. Cartwright, and J. F. Engle composed the firm of Jones, Raper & Co.; that the money borrowed from Hinton, for which the note was given, was borrowed for the use of Jones, Raper & Co., and was used for the benefit of the company in paying its debts. Witness identified this check which was introduced:

"No. \_\_\_\_\_.

Elizabeth City, N. C., Jan. 1st, 1902.

"First National Bank of Elizabeth City pay to the order of Jones, Raper & Co. (\$2,500.00) two thousand and five hundred dollars.

"[Signed] John L. Hinton."

And stated that that was the check which Hinton gave when the note and mortgage were executed; that the check was indorsed by Jones, Raper & Co., deposited in the bank to their credit, and checked out by the firm in making payments to creditors; that Jones, Raper & Co. received the full amount of the check credited on account of the firm; that at the time the firm was doing business in a store on the corner of Main and Water streets, in Elizabeth City; that they had no other store in Elizabeth City, and that the mortgage was upon the stock of goods belonging to the firm in that store; that the value of the stock at the time the mortgage was given was thirteen or fourteen thousand dollars, and at the time the petition in bankruptcy was filed ten or eleven thousand dollars; that after the execution of the note and mortgage, and before the petition in bankruptcy, very few goods were bought by the firm, probably about two or three hundred dollars' worth; that the stock of goods consisted of shoes, clothing, hats, caps, and gents' furnishing goods; that there had been no additions to the stock after the note and mortgage were given; and that the goods in stock at the time of the adjudication were the same as at the time of the execution of the note and mortgage.

It was admitted that the mortgage, which was signed under seal by R. H. Raper, T. C. Jones, W. S. Cartwright, and J. F. Engle, was filed for registration on the 27th day of March, 1902, at 6 o'clock p. m., and was registered in the office of the register of deeds for Pasquotank county, N. C., on the 28th day of March, 1902, at 8 o'clock a. m.

Jones, Raper & Co. set forth in the schedule filed with their petition in bankruptcy unsecured debts of the firm due to various persons, aggregating nearly \$9,000.

E. F. Aydlett, for appellant.

P. H. Williams, for appellees.

Before GOFF, Circuit Judge, and BRAWLEY and BOYD, District Judges.

BOYD, District Judge (after stating the facts). There are two questions presented in this case, the first being whether the claim of the petitioner, Mrs. G. M. Davis, is a partnership debt of the firm of Jones, Raper & Co., and provable as such against their estate in bankruptcy; and the second, whether the mortgage given to secure the said debt is valid and constitutes a lien upon the stock of goods of the bankrupt firm on hand at the time of the petition and adjudication. It is true that the obligation on its face imports individual liability on the part of the several persons who signed it, but is this conclusive as to the character of the debt, or is it susceptible of explanation by proof showing that the debt is in fact one for which the firm is liable? The doctrine of the common law that the sacredness of a seal cannot be invaded, and the consideration of a sealed instrument explained by parol testimony, has, in a great measure, passed beyond the realm of legal discussion in this country, and instead there has been accepted a doctrine more in harmony with the principles of justice and equity.

Pomeroy, in his work on Equity Jurisprudence, vol. 1, § 70, treating of the effect of a seal upon an instrument, says:

"Generalizing this particular rule, equity never gave the consequence to a seal which the common law gave; it always looked beyond this mere form into the real intentions of the parties, and rejected the dogma that a seal can only be discharged by an act of equal degree. These equitable doctrines have been transferred into the law of the United States."

The same author, treating on the subject, in section 384 of volume 1, says:

"Other doctrines of equity, by which the strict terms of contract and the somewhat arbitrary rules of law relating thereto are disregarded in order to promote the ends of justice, may also be left, at least partly, to this principle of looking into the real intent rather than the form."

In *Perry v. Hill*, 68 N. C. 417, it is held:

"The general rule that a written contract cannot be varied by parol is not denied, but it is not sought here to add to, alter, or contradict the writing in any particular, but only to show what was the consideration for the loan of the money for forty days without interest, of which loan the writing is evidence. The rule has never been held to exclude proof of the consideration of a written promise to pay money, at least when none is recited." Citing *Robbins v. Love*, 10 N. C. 82, and *Nichols v. Bell*, 46 N. C. 32.

In *Lane v. Wingate*, 25 N. C. 326, it is held that a person is not stopped by a bill of sale under seal, from himself to another, for property, in which he acknowledges to have received the price, from showing that the price of the property was a consideration of the agreement declared on; and in *Robbins & Savage v. Love*, 10 N. C. 82, which was a case in which A., being indebted to B. in the sum of \$1,000 for goods sold, conveyed to B. by deed a house and lot to satisfy the debt, and the consideration expressed in the deed was the \$1,000. B. sued A. for the debt, and the latter proposed to prove, by the subscribing witness to the deed, that it was made to and accepted by the plaintiff in payment of the goods. The court below refused to hear the testi-



mony, because it would contradict the written agreement and the deed. In passing upon this question, Hall, J., says:

"I think the defendant is at liberty to prove the contract, that it was agreed that the conveyance of the house and lot should be a discharge of the debt due for goods sold, notwithstanding the only consideration set forth in the deed was the one thousand dollars. It is no contradiction of the deed, but it is proving a distinct fact."

These principles have not been confined to individual transactions, but have also been applied to partnerships. In the case of *In re Warren*, Fed. Cas. No. 17,191, 2 Ware, 322, it is held that, where all the members of a firm have incurred a written obligation by signing their respective individual names instead of the firm name, it is merely a presumption that the obligation is individual rather than firm, but the presumption may be rebutted if in fact it is a firm obligation. The Supreme Court of Tennessee, in *Puckett v. Stokes*, 61 Tenn. 442, lays it down that, "where only one member of a firm signs his individual name to a note, the firm will be bound thereby, as one of the partners made the contract, and the credit was given to them as such." The doctrine is upheld in *Hubbell v. Woolf*, 15 Ind. 204, *Buckner v. Lee*, 8 Ga. 285, *Farmers' Bank v. Bayliss*, 41 Mo. 275, and in many other cases which might be cited, all to the effect that a note signed by the members of a firm in their individual names can be recovered against the partnership, when it is shown affirmatively that it was a partnership transaction and the partnership received the benefit of it.

In the case under consideration the bond for \$2,500 was signed by the four members of the firm of Jones, Raper & Co., each with his individual name and seal. The bond was given to J. L. Hinton, and bears date the 1st of January, 1902. Hinton's check for the amount of \$2,500, of even date with the bond, drawn upon a bank in Elizabeth City, N. C., in favor of Jones, Raper & Co., indorsed by Jones, Raper & Co., is among the exhibits in the case.

There were two witnesses, and only two, examined. These were W. T. Davis and R. H. Raper. Davis testified that he negotiated the loan from Hinton to Jones, Raper & Co.; that he did so at the instance of the firm, and for the firm; and that the loan was made by Hinton to the firm, and that the \$2,500 bond was given therefor. Raper testified that, acting for the firm, which was in need of money to meet its business obligations, he secured the loan of \$2,500, through Davis, from Hinton; that the check of Hinton was delivered to him, payable to Jones, Raper & Co.; that he indorsed the name of the firm on the back of it and deposited it in the bank, where the full amount was entered to the credit of the firm, and it was drawn out by the firm in the due course of its business, and used in making payments upon the firm's debts. In addition to this, it is shown that, on the day that the bond for \$2,500 was given, the four members of the firm executed a mortgage to Hinton, wherein was conveyed the stock of goods of the firm as security for the payment. There was no testimony whatever to contradict these facts, and the referee finds, as an additional fact, that there was no fraud in the execution of the bond. The referee, however, in his report, which was confirmed by the court in bankruptcy, holds as a matter of law that, because the bond is signed by

the members of the firm individually, under their separate signatures and seals, it is an individual debt, and cannot be proven, as against the partnership assets of Jones, Raper & Co., until all the partnership debts have been paid in full. In this conclusion we think there is error, and that, although the paper bears the signatures and seals of the individuals composing the firm, yet, from the uncontradicted evidence, it appears affirmatively and fully that the debt was contracted by the firm, for its benefit, and that the whole proceeds of the note were used in the due course of the partnership business. The undisputed evidence in the case establishes the fact beyond controversy that the bond to Hinton was for a firm debt, and we so hold, and that, as such debt, it is provable against the estate of the partnership in bankruptcy.

In considering the validity of the mortgage executed by the members of the firm of Jones, Raper & Co. at the same date as the bond, several questions arise. As shown by the statement of facts, the referee reported to the court as a conclusion of law that the mortgage, as against the partnership of Jones, Raper & Co., was void, first, for the want of proper description and general vagueness, second, for failure of registration, and third, for legal fraud, inasmuch as the failure to record was coupled with the fact that the parties executing the mortgage were allowed to remain in possession of the stock of goods, and conduct the sale and disposition of the same, and this conclusion of the referee was confirmed by the District Court.

It is evident that the instrument set forth in the record is not the work of an experienced draughtsman. The parties used a blank intended for the conveyance of real estate as security for debt in making the mortgage, but this does not invalidate it. It is set out in the face of the paper that the indenture is made on the 1st of January, 1902, between R. H. Raper, Thomas C. Jones, W. S. Cartwright, and J. F. Engle, of Elizabeth City, Pasquotank county, state of North Carolina, of the first part, and John L. Hinton. It is recited, in substance, that the parties of the first part are indebted to John L. Hinton in the sum of \$2,500, evidenced by their bond of even date, and bearing interest from date at 6 per cent. per annum, and due and payable on the 1st of March, 1902. It also states, in substance, that the said parties are anxious to secure the payment of the bond at maturity, and, for this consideration, and for the sum of \$10, they sell and convey "all the goods in store where they are doing business, in E. City, N. C." In the power of sale, which follows in the blank form, the word land is left, instead of inserting the goods described before, but there is a provision, if default be made in the payment of said bond, that a sale may be had, and, out of the moneys arising from the sale, the bond and interest thereon are to be paid. In general, no particular words are required to constitute a mortgage of personal property; all that is requisite in a formal mortgage is that there should be a sale of property by the mortgagor to the mortgagee as security for the payment of the debt. The most informal instruments will be regarded in law as mortgages, if they show that a sale was made as security, and in equity any sale of chattels as security for a debt is regarded as a mortgage, although the fact that such was the purpose of the sale be not expressed

by the instrument of sale, if it be proved by evidence aliunde. Jones on Chattel Mortgages, c. 2, § 34.

As to the effect it may have upon the case by reason of the fact that the parties signed the instrument in their individual names, there is an established principle that any partner may execute a valid mortgage of partnership goods as security for a partnership debt by signing the firm name or the individual names of the members of the firm, and it is immaterial whether he sign the name of each copartner separately or sign the firm name, and the addition of a seal to the individual names does not invalidate the mortgage, because a seal is unnecessary. Jones on Chattel Mortgages, § 46. The learned author, in the further discussion of this principle, lays it down that, although one partner signs the names of the several individuals composing the firm, the acquiescence of the other partners in such a transaction would place the validity of it beyond question, and it does not matter whether the acquiescence be given at the time of the transaction or subsequently. In our case, the names of the several partners were signed each for himself at the time of the execution of the mortgage, and in the mortgage is conveyed all of the goods in store where they are doing business. This would have been sufficient to bind the partnership, although one partner had done the act; certainly it is sufficient where all the partners join in the act. This doctrine is thoroughly discussed and upheld in a very learned opinion delivered by Chief Justice Gray, of the Massachusetts Supreme Court, in the case of Locke v. Lewis, reported in 26 Am. Rep. 631.

The remaining question as to the validity of the mortgage upon its face is as to the sufficiency of the description given of the property conveyed. "All the goods in store where they are doing business in E. City, N. C.," is the description given of the property conveyed by the instrument. R. H. Raper, Thomas C. Jones, W. S. Cartwright, and J. F. Engle are the persons to whom the pronoun "they" refers, because they are named as mortgagors in the conveyance. They were associated together in business at only one place, and, according to the testimony, they were in a building in Elizabeth City, N. C., where they conducted the business of merchants. The stock of goods was in this building at the time of the execution of the mortgage, and was worth about \$14,000. At the time of the bankruptcy the stock had been reduced by sales, and was worth ten or eleven thousand dollars, only about \$300 worth of goods having been added to it. It has been held that a mortgage on "all the property now in shop occupied by me," in a town named, is not void for uncertainty, but the property may be ascertained by testimony respecting the goods contained in the shop at the time of the delivery of the deed. A mortgage on "all of the tools, stock, and chattels" belonging to the mortgagor, in and about the wheelwright shop occupied by him, is not void for uncertainty. So a mortgage on all the dry goods, boots and shoes, millinery goods and gents' furnishing goods, and stock in trade, now in the store occupied by the mortgagor, is neither fraudulent on its face nor invalid by reason of the generality and indefiniteness of the description. Jones on Chattel Mortgages, § 65. And, whilst it is true that parol evidence is not admissible to

show that property not specifically included in a mortgage was intended to be embraced, yet such evidence is admissible to identify the particular property which the description covers.

In *Rountree v. Britt & Vinson*, 94 N. C. 104, a mortgage which conveyed, without additional terms, "my entire crop of every description," was held to be void for uncertainty, but the court says in that case that this difficulty might possibly have been cured by parol evidence offered to apply the description to the subject-matter to be conveyed. And in *State v. Logan*, 100 N. C. 454, 6 S. E. 398, the Supreme Court of the state, in treating of the subject of sufficiency of description in mortgages, says: "The description is sufficient when it, in terms or by reasonable implication arising from the facts stated in respect to its circumstances, relations, and connections, designates the property so that it can be certainly seen or ascertained. Moreover, such just interpretation must be given to the description as will effectuate the intentions of the parties, if this can be done consistently with the rules of law." In *State v. Garis*, 98 N. C. 733, 4 S. E. 633, the admissibility of parol evidence to identify property conveyed in a chattel mortgage is also upheld.

In this case we have the aid of the testimony of Raper, a member of the firm, which is undisputed, that his firm was doing business at only one place, and that was in the storehouse occupied by them in Elizabeth City, N. C., and that the stock of goods referred to in the mortgage was the stock of goods in that store. We are therefore of the opinion that the description is sufficient to cover and to convey this particular stock of goods, and that the mortgage is not void for vagueness or uncertainty. The general proposition of the referee that the mortgage is void for fraud, because the mortgagors were allowed to remain in possession of the goods, is untenable; and *Cheatham v. Hawkins*, 76 N. C. 335, the case which he cites in support of his position, does not sustain it. In that case the Supreme Court of North Carolina held that "a mortgage on a stock of merchandise, containing the provision that the mortgagor is to remain in possession and continue to sell the goods, approaches the verge of being on its face fraudulent, but it is not so"; and it is further held in that case that "the presumption of fraud which arises upon such mortgage can be rebutted by the party claiming under the mortgage." There is no provision in the mortgage under consideration that the mortgagors were to remain in possession of the goods and continue to sell, consequently there is no presumption of fraud arising by reason of the contents of the mortgage itself. It is true that the mortgagors remained in possession of the stock of goods for a short while, and continued to conduct their business as merchants, but both Raper and Davis, the only witnesses examined in the case, testified that the whole transaction was in good faith, and there is no suggestion that any part of the goods or any of the proceeds were diverted or disposed of in any other than the legitimate conduct of the partnership affairs. These facts, which must be accepted as true because they are uncontradicted, are sufficient, in our opinion, to rebut the presumption of fraud, even if such had arisen. The finding by the referee as a fact that the mortgage was withheld

from registration by request of Raper, a member of the firm, or was withheld from registration by agreement between the firm and Hinton or Davis, is not supported by the evidence. On the other hand, both Davis and Raper testified positively that no such request was made, nor was any such agreement entered into. This finding of fact can therefore furnish no basis for a legal conclusion, for upon the undisputed testimony the fact does not exist.

The only remaining question is as to whether or not the mortgage is a lien upon the stock of goods now in the hands of the bankruptcy court for the amount due upon the bond secured. "A mortgage in North Carolina is good against creditors from the time of its delivery to the register; in contemplation of law, it is then duly registered." *Parker v. Scott*, 64 N. C. 118. "The filing of a deed for registration is in itself conclusive notice." *Davis v. Whittaker*, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793. When the mortgage in question was filed for registration in the office of the register of deeds for Pasquotank county, N. C., on the 27th of March, 1902, by the laws of North Carolina it was then registered so as to be effective against other creditors.

The last contention in opposition to the claim of Mrs. Davis is that the mortgage is void, since it was made within four months of the adjudication in bankruptcy by the parties, who were at that time insolvent, giving a preference to a creditor of the firm. The provision of the bankruptcy law is that a person who, while insolvent, transfers any portion of his property to any one or more of his creditors with intent to prefer such creditors over his other creditors, commits an act of bankruptcy, and such preference is void. The purpose of this provision of the law was to prevent an insolvent person, or a person in contemplation of bankruptcy, from conveying his property so as to prefer one of his existing creditors over another, and thereby avoid an equal distribution of his estate among those to whom he is indebted; but this does not apply to a case where a person, although in debt beyond his ability to pay, conveys property in good faith as security for a present loan to be used in the due course of his business.

The national legislature, in view of the fact that transactions would arise where those engaged in business, and being in debt probably beyond their ability to pay at the time, would have occasion to pledge property to raise means, in enacting the bankrupt law, provided for just such emergencies in the following provision:

Sec. 67d. "Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." [U. S. Comp. St. 1901, p. 3449.]

This would seem to settle the point in question. The previous bankrupt act contained, substantially, a provision similar to that in the present law relative to the transfer of property in order to prefer a creditor, but did not make any exception for transactions based upon present consideration; and yet under that act it was held that, where the debtor in good faith makes a transfer for value given at the time, or in pursuance of an agreement made when the consideration passed,

such conveyance will not be an act of bankruptcy. Blumenstein's Law and Practice in Bankruptcy, 96, and authorities there cited.

The evidence in this case shows that the loan from Hinton to Jones, Raper & Co. was in good faith; that the money was used in the business of the firm in making payments upon its debts. The mortgage was given to secure the loan at the time it was made. The transaction is therefore not violative of the provisions of the bankrupt act, nor is the lien secured by the mortgage void as against the other creditors of the copartnership. For the reasons stated, we are of the opinion, therefore, that the claim held by Mrs. Davis is a partnership debt of Jones, Raper & Co., and provable against the estate; that the mortgage sufficiently conveys the stock of goods belonging to said firm as security for the payment of said debt; and that the debt and mortgage constitute a lien upon the stock of goods in the hands of the trustee, to be discharged in priority to the unsecured creditors.

The case is therefore remanded to the Court of Bankruptcy for the Eastern District of North Carolina, with directions that a decree in accordance with this opinion be entered, and the judgment of the District Court, sitting in bankruptcy, is reversed.

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KANSAS CITY, FT. S. & M. R. CO. v. KING, Comptroller.

(Circuit Court of Appeals, Sixth Circuit. June 19, 1902.)

No. 1,113.

1. TAXATION—SUIT FOR INJUNCTION—EQUITY JURISDICTION.

Where an assessment of railroad property by a state is valid on its face, and the tax levied on such assessment becomes a lien apparently valid, which casts a cloud upon the title to the property, a federal court of equity has jurisdiction of a suit to inquire into the validity of the proceedings, and remove the cloud, by enjoining the collection of the tax, if the assessment shall be shown to be illegal.

2. SAME.

Where the method of assessing the property of a railroad company adopted by a state board is within the powers conferred on it by statute, and does not result in an excessive valuation as compared with the property of other railroads, a court of equity is not authorized to enjoin the levy and collection of taxes thereon because, owing to the peculiar nature of the property of such company within the state, the method so adopted was different from that applied to other roads.

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

The complaint in this case is against illegal and discriminating taxation of the property of the Kansas City, Ft. Scott & Memphis Railroad Company, at Memphis, Tenn., the collection of which is sought to be enjoined. By the law of Tennessee (chapter 5, Acts 1897) a special method of taxing railroad property in that state is provided. Three commissioners are constituted ex officio the state tax assessors of railroads. These commissioners are to meet on the first Monday in May, and organize by selecting one of their number as president and choosing a secretary. It is made the duty of the owners of any railroad, telegraph, or telephone company in the state to file with the State Comptroller on or before May 1, 1897, and biennially thereafter, certain schedules. That required of common carriers owning

railroad property is to set forth a statement of all of its property, real, personal, and mixed, owned or leased by the company, setting forth therein the length in miles of its entire roadbed, switches, and side tracks, showing the number of miles lying in the state, in each county of the state, and each incorporated town therein, and the value of the whole, the amount of the capital stock, bonded debt, the gross annual receipts of the preceding fiscal year, the number of cars, their classes and value, the number of engines and their value, the location, description, and value of all depot buildings, warehouses, and other real estate, where located, and all real, personal, and mixed property belonging to the company, not before enumerated, together with its value. This schedule is required to be verified upon oath, and duly filed with the Comptroller. This officer is to turn the same over to the state tax assessors "and they shall immediately proceed to ascertain the value of said property for taxation." Sections 5, 6, 7, 8, and 10 of the act are as follows:

"Sec. 5. Be it further enacted, that said state tax assessors, in arriving at the valuation of said property, shall have in view, and look to, the capital stock, the corporate property, franchises of each company, and the gross receipts; and the market value of the shares of stock and bonded debt; and to ascertain these facts they are hereby invested with the power to summon before them any person or persons and call for any books, administer oaths, and examine any such person or books touching any matters deemed necessary to enable them to arrive at the correct value of such property; and they may issue summons to any county in the state to be executed by the sheriff of such county. Any person so called on to testify shall be guilty of perjury, if he shall testify falsely; and any person failing to attend when summoned, shall be guilty of a misdemeanor punishable by fine of \$100 and thirty days in jail.

"Sec. 6. Be it further enacted, that the road of any railroad property shall include all said tracks, switches, bridges, trestles, ties, rails and superstructure of every kind; that the line of any telegraph or telephone company shall include all wires, poles, instruments and rights of way.

"Sec. 7. Be it further enacted, that the roadbed, rolling stock, franchises, choses in action and personal property of a railroad company having no actual situs, shall be known as distributable property; and shall be valued separately from the other property; and after ascertaining the total value of such distributable property wherever situated, and after having deducted from this value \$1,000, said assessors shall divide the remainder by the number of miles of the entire length of the road, and the result shall be the value per mile of such distributable property for the purpose of taxation; and the value per mile of such distributable property shall be multiplied by the number of miles in this state, and the product thereof shall be the sum to be assessed against such property for state purposes; and the value per mile so ascertained shall be multiplied by the number of miles in each county or incorporated city, and the product shall be the amount to be assessed upon such property by said counties and incorporated towns, respectively.

"Sec. 8. Be it further enacted, that the depot buildings and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of such railroad, and shall be valued separately accordingly as the same may be located in any of the counties or incorporated towns in this state."

"Sec. 10. Be it further enacted, that said assessors shall in addition to the schedules hereinbefore required, take such additional proof and require such additional information of the value of any property to be assessed by them as may be deemed proper, but such additional evidence shall be reduced to writing and an opportunity afforded, if desired, to the owner of any property, to submit additional evidence or counter evidence to that required by said assessors, and the records of the assessors shall at all times be open to inspection to the owner or owners of any property assessable under the provisions of this act."

The owner of the property is authorized to appear and file exceptions to the assessment. After the state tax assessors have made their assessment

the same goes for final action to a board of equalization composed of the Governor, Treasurer, and Secretary of State. This board examines the assessment, and is authorized to increase or diminish the valuation placed upon the property, to require of the assessors additional evidence if desired. And the assessment is not deemed complete until corrected and approved by the board of equalization. Its valuation is conclusive and final. The tax is distributed by the Comptroller to the state, counties, and towns according to their respective interests, and becomes a lien upon the property from the 10th day of January of the year for which they are assessed. Other provisions are inserted, looking to the prompt collection of the tax so assessed.

The complainant company is not incorporated in Tennessee. It has its main line from a point on the west branch of the Mississippi river, and runs thence westwardly. It is a consolidated corporation under the laws of Kansas, Missouri, and Arkansas. At a point in Arkansas opposite Memphis on the Mississippi river it connects with the line owned and operated by the Kansas City, Memphis Railway & Bridge Company, by means of which trains of the appellant company are transported across the Mississippi river and into the city of Memphis, where it owns the property which has been assessed for taxation in Tennessee.

The appellant claims to operate in Tennessee under Act 1871, c. 55 (Shannon's Code, § 1488). This act, under certain conditions, grants to railroads of other states which intersect the line of the state of Tennessee at a point within five miles of any railroad in the state the right of way from such point of intersection to any point on the line of the road in the state, provided that such point of connection between the roads shall not be more than five miles distant from the state line. The property of the railroad company in Memphis consists principally of its terminals in that city, consisting of a large number of tracks and other facilities for storing cars, making up trains, connection with business plants and other railroads. The board of assessors, as to this property, for the years 1899 and 1900, after considering the testimony before it, made report to the state board of equalization as follows:

"Kansas City, Fort Scott & Memphis Railroad Company.

"Report of the Tennessee Railroad Commission, acting ex officio as state tax assessor of railroad, telegraph, and telephone property, made to the state board of equalizers upon the assessment of the property of the Kansas City, Fort Scott & Memphis Railroad Company for the years 1899 and 1900.

"History of Carrier.

"Length of Line and Terminal.

"This corporation was formed April 24, 1880, by the consolidation, in accordance with the laws of Kansas, Missouri, and Arkansas, of the following lines of railroad, to wit: Fort Scott & Springfield Railroad Company, Kansas City, Springfield & Memphis Railroad Company. The first of said lines (Fort Scott & Springfield Railroad) had been previously formed by consolidation with the following lines, said consolidation being under the laws of Kansas, viz.: Kansas City, Fort Scott & Gulf Railroad Company, Rich Hill Railroad Company, Fort Scott, Southeastern & Memphis Railroad Company, Short Creek & Joplin Railroad Company, Kansas & Missouri Railroad Company, Memphis, Kansas & Colorado Railroad Company. The Kansas City, Springfield & Memphis Railroad Company had been previously formed by the consolidation of the following lines under the laws of Missouri and Arkansas, viz.: Springfield & Memphis Railroad Company. This road runs from Kansas City, Missouri, to Memphis, Tennessee, with a number of branch lines in Kansas, Missouri, and Arkansas. Interrogatories were propounded by the commission to this company, which have been answered under oath, but answered in such a way as to throw very little light on the main questions sought by the commission in order to make their assessment. In said interrogatories the length of the line is given as 675.19



miles, length of side tracks 226.75 miles; total 901.94 miles. In their schedule the company set out mileage in Tennessee as follows:

Main track in Tennessee.....	0.40 miles
Side track .....	18.51 miles
<b>Total .....</b>	<b>18.91 miles</b>

"In the annual statement by the company to its stockholders for the fiscal year 1898, page 7, the total mileage for this system is set out as follows:

Total mileage .....	959.50 miles
And the mileage in Tennessee is placed at.....	21.16 miles

"The railroads that compose the system were all constructed under charters obtained from the states of Kansas, Missouri, and Arkansas, under corporate existence extending to the line between Tennessee and Arkansas. They have no charters from the state of Tennessee. In fact, their property in Tennessee consists alone of terminal facilities in the city of Memphis, the value of which is difficult to ascertain under the schedule and deposition filed by the company.

"In order to arrive at the valuations set out in this brief of assessment, the commission has had largely to depend on facts obtained from said annual statement, which are presumed to be correct, together with such facts as can be gathered from the said deposition taken by the commission on interrogatories. (Depositions of E. S. Washburn, filed July 6, 1899.)

"Stock.

"In deposition of Mr. Washburn he places the stock as follows:

Common stock .....	\$9,898,000
Preferred stock .....	2,750,000

"In quotation Supplement Financial Chronicle, for January, 1899, the common stock (p. 25) is quoted at 10c. and the preferred stock at 50c.

Actual value of stock .....	\$1,473,980
Actual value of stock per mile (959.50 miles).....	1,537

"Bonds.

"This property is covered by the following bonds:

Kansas City, Fort Scott & Gulf R. R.....	\$ 2,197,000
Fort Scott, Southeastern & Memphis R. R.....	571,000
Short Creek & Joplin R. R.....	94,000
Kansas & Missouri R. R.....	390,000
Memphis, Kansas & Colorado R. R.....	492,000
Kansas City, Fort Scott & Memphis R. R.....	13,617,000

Total bonded debt (see p. 36, annual statement 1898).... \$17,361,000

"For the purpose of this calculation we have considered all these bonds at par value. They range from 95c. to \$1.15 (see quotation Supplement Commercial & Financial Chronicle, January, 1899, p. 22), which would make them aggregate about par, or a little over.

"Average value bonds held per mile (959.50) miles, \$18,093.00.

"Earnings—Gross and Net.

The net earnings as per deposition of Mr. Washburn were..	\$ 1,119,427 16
According to the annual statement for 1898 (see pages 8 and 33) the gross earnings were.....	4,595,084 85
Operating expenses including taxes were.....	3,199,337 56
Net earnings .....	1,405,747 29
Or per mile net earnings (959.50).....	1,464 00
Making the entire road (959.50) miles worth as a 10 per cent. investment the sum of.....	14,057,472 90
Or per mile of road.....	14,640 00
The cost of the property (p. 28, annual statement 1898)....	25,519,775 80

"It, however, would not be equitable to average, on mileage basis, either the cost, stock, bond, or net earnings of the road, for the reason that this would place all lines—main line, branches, and side track—on the same valuation, whereas one is worth more than the other, has greater earning capacity, etc. The side tracks in Memphis are worth more than the side tracks in the country along the various sides of the road. These various calculations are simply made so as to approximately arrive at some valuation on which to make assessment of the property; the railroad company having failed to give sufficient data on which the commission could arrive at a satisfactory conclusion.

"Remarks.

"We have adopted the mileage at 959.50, because the railroad company has adopted it as to mileage. Then, again, it would not be proper to adopt the main line mileage for Tennessee on an average valuation, for the reason that there is practically no main mileage in Tennessee, and it would be ridiculous to simply assess .40 of a mile of road on a 'main line' basis.

"The property belonging to this corporation in Tennessee consists of terminal facilities, the corporate existence of the railroad assessed being outside of Tennessee.

The cost of the property is.....	\$25,519,675 80
The bond value of the company is.....	17,361,000 00
The net earning value of the property is.....	14,057,472 90

"It will be seen that the net earning value is very much less than either of the other bases.

"Suppose we take the last basis—net earnings—we have:

Value of the property on net earning basis.....	\$14,057,472 90
Deduct from this:	
Localized property in other states.....	\$418,256
Localized property in Tennessee.....	62,904
	<hr/>
	481,150 00
Value distributable property on this basis.....	13,576,322 90
Value per mile (959.50 miles).....	14,148 00
Value mileage in Tennessee, distributable property, 21.16 miles .....	299,371 68

"In order to show the average value per mile of this railroad property, we have, viz.:

Cost of property.....	\$25,519,675 80
Or per mile (959.50 miles).....	\$26,591
Stock and bond value road.....	\$18,834,980 00
Or per mile (959.50 miles).....	19,629
Net earnings value road.....	\$14,057,472 90
Or per mile (959.50 miles).....	14,650
Average value per mile (959.50 miles).....	20,285
Deduct average mile value of localized property:	
Localized property entire line.....	\$481,150 00
Average value (959.50 miles).....	501
Average value distributable property per mile.....	19,784

"Conclusions.

Value distributable and localized property in Tennessee, being in Memphis, Shelby county, Tennessee.....	\$351,144
Less localized property in Tennessee.....	62,904
Less exemption .....	1,000
Value retaining distributable property in Tennessee.....	296,240
Per mile .....	14,000

"While we have not and could not very well value this property in Tennessee on a mileage basis, it consisting of terminal facilities, and being very valuable, if estimated on a mileage basis, it would be at \$14,000 per mile.

"References.

"Schedule of railroad company, 1899.

"Deposition of Washburn, filed July, 1899.

"Annual statement of Kansas City, Fort Scott & Memphis Railroad Company, 1898.

"Quotation Supplement Commercial & Financial Chronicle, Jan., 1899.

"Assessment of the distributable property of the Kansas City, Fort Scott & Memphis Railroad Company property for the years 1899, 1900.

"The railroad commission of the state of Tennessee, acting ex officio as state tax assessors of railroad, telegraph, and telephone properties assessable for taxation in said state, after consideration of the distributable property of the above-named railroad, namely, its rolling stock, franchises, roadbed, side tracks, switches, bridges, trestles, ties, rails, and superstructures, pertaining to said roadbed, and all other property of said road other than localized property for the purpose of assessing the same for taxation, state, county, and municipal, for the years 1899 and 1900, find the terminals of said road to be Kansas City, Missouri, and Memphis, Tennessee, with 959.50 miles of entire main line, of which there is 21.16 miles of terminal line in Tennessee, and the number of miles, as hereinafter set out in each county and municipality of said main line, and compute the value for assessment for taxation of the said distributable property of the said road, and do so value the same for taxation, state, county, and municipal, for the years 1899 and 1900, as hereinafter set out to be apportioned, state, county, and municipal, as hereinafter set out, viz.:

Value of distributable property of entire line of road, 959.50 miles .....	\$13,434,000
Less legal exemptions.....	1,000
Assessable balance in Tennessee.....	296,240
Assessable value per mile.....	14,000

"Apportionment for Tennessee.

21.16 miles at \$14,000.00 per mile.....	296,240
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"Apportionment for Counties.

"Shelby.

21.16 miles at \$14,000.00 per mile.....	296,240
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"Apportionment for Municipalities.

"Memphis.

21.16 miles at \$14,000.00 per mile.....	296,240
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"N. W. Baptist, Chairman.  
 "J. N. McKenzie, Com.  
 "T. L. Williams, Com."

To this assessment the appellant company filed exceptions as follows:

"(1) It has assessed to the Kansas City, Ft. Scott & Memphis Railroad Company 21.16 miles of railroad in Tennessee, when in truth and in fact said company owns in the state of Tennessee only 18.18 miles of main and side track combined, and a half interest in 2.25 miles of track which has been assessed by this road as main line for the Kansas City, Memphis & Birmingham Railroad Company, at the rate of \$1,600 per mile, and also a half interest in .726 (or, roughly speaking, .73 of a mile) of side track situated upon Broadway, in the city of Memphis, all of which was returned for assessment as the property of Kansas City, Memphis & Birmingham Railroad Company. The net result of the action of the board in this matter is that the 2.25 miles of main line of the Kansas City, Memphis & Birmingham Railroad Company, in which this company has a one-half interest, now stands assessed at \$14,000 per mile in the name of this company and \$18,000 per mile in the name of the Kansas City, Memphis & Birmingham Railroad Company, or \$30,000 per mile.

"(2) This board has pursued a method forbidden by statute in arriving at the value of the distributable property of this company, in Tennessee, in

this, to wit, it found the aggregate value of the property of the company, wherever situated, and, after deducting exemptions and localized property in Tennessee, divided the remainder by the aggregate number of miles of main and side track, wherever situated, and multiplied the quotient by the aggregate number of miles of main and side track in Tennessee, whereas the statute laws of the state of Tennessee require the aggregate value of the property, less exemptions and localized property, to be divided by the number of miles of road, excluding side track, and multiplying the quotient by the number of miles of main line track in Tennessee. This is the construction put upon the statute by this board in assessing all other railroad property in Tennessee, and this company says that the same rule should be applied to the assessment of its property.

"(3) The value put upon its property of \$14,000 per mile is excessive."

After hearing, the board of assessors sustained the first exception, and reduced the assessment for the years involved, 1899 and 1900, from 21.16 miles to 18.18 miles. The second and third exceptions were overruled. The assessment, as corrected, amounting to \$254,452 for the years 1899 and 1900, with the records and papers, was duly certified to by the state board of equalizers, and was approved and confirmed by that body. Thereupon this bill for injunction was filed. Upon hearing it was dismissed by the Circuit Court.

C. H. Trimble, for appellant.

Charles T. Cates, Jr., for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

A preliminary question is made as to the right of a court of equity to entertain jurisdiction of the bill for injunction in this case. The objections raised in this proceeding to the legality of the assessment do not appear upon the face of the proceedings, but arise because of facts set forth in the bill, which show, as is alleged, unlawful discrimination in the assessment of the property of the complainant. This tax, by the law of Tennessee, becomes a lien upon the property. It creates an apparently valid incumbrance, which casts a cloud upon the title. We think it is settled that in such case the federal courts in equity may entertain a bill to inquire into the validity of the proceedings, and remove the cloud if the assessment shall turn out to be illegal. *Ogden City v. Armstrong*, 168 U. S. 224, 238, 18 Sup. Ct. 98, 42 L. Ed. 444. Upon this branch of the case nothing need be added to the full discussion of the subject in the opinion of Judge Taft, speaking for this court, in *Taylor v. Railroad Co.*, 31 C. C. A. 537, 88 Fed. 350.

The complainant seeks an injunction against the collection of the taxes assessed upon the grounds that the method pursued by the assessors in reaching a valuation was unauthorized by law, and contrary to the uniform practice of the assessors in valuing other railroad property in Tennessee. It is claimed that this property, other than the localized property, should have been assessed by following the method pointed out in section 7 of the act above quoted; that is, by dividing \$13,434,000, the assessed value of the entire distributable property, by 675.19, the number of miles of main line, excluding side track, and multiplying this by 2, the number of miles of main line in Tennessee; this 2 miles being arrived at by treating the two pieces of .4 of a mile and 1.6 miles, used for making connections with other railroads

and reaching its depots, as the length of main line in Tennessee, the remainder of the 18.18 miles in Memphis to be regarded as side tracks and spurs for yard and freight purposes, and not to be considered in determining the length of the road as defined in section 7. The purpose of this statute is to provide a scheme of assessment which shall provide an adequate means of taxing railroad property in Tennessee. In a general way it is intended to classify this kind of property into the "distributable property" described in section 7, consisting of road-bed, rolling stock, franchises, choses in action, and personal property having no actual situs, and the "localized property," consisting of depot buildings and other property, real, personal, and mixed, having an actual situs. The valuation of that embraced in the former class is to be distributed along the entire length of the road, according to the mileage in the respective taxing districts for state, county, and municipal purposes. The latter class is to be taxed according to its actual situs in the county or town where it is located. The tax assessors, as shown in their report, recognized that they were dealing with a peculiar situation. The terminal property of the appellant is composed of a large number of tracks, a network in fact, used to make connections, and to afford storage room for cars, and the means of handling, receiving, and delivering freight and making connections—a situation which may be generally described as embracing the terminal facilities of this railroad at Memphis. It is insisted for the railroad company that only that small portion of some two miles connecting with other roads can be regarded as main line, and included in the "entire length of the road," for the purpose of tax distribution under the statute. It is claimed that in this way the statute is consistently carried into effect, and this company taxed by the method which prevails in assessing other railroads in the state. It appears that in assessing a railroad traversing the state, which it is claimed the complainant's does, it has been the practice to find the "length of the road" without including side tracks, and assess the distributable property by multiplying the value per mile by the number of miles in the state included in the length of the road as thus ascertained. The practice of taxing distributable property by this mileage method is quite common, and is prescribed by statute in a number of the states. This means of reaching and distributing the value of railroad property for the purposes of taxation has met with approval in a number of Supreme Court decisions. They are collected in the opinion of Mr. Justice Brewer in *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031. Conceding the fairness of the mileage basis under usual circumstances, the learned justice adds:

"It is true, there may be exceptional cases—and the testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases—as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar

and large value of such facilities and such extra rolling stock. But whether, in any particular case, such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of the property within the state shall be absolutely determined upon a mileage basis."

These observations are pertinent to the present inquiry. The statute of Tennessee must be considered in all its parts as a means of carrying into practical effect the requirement of the state constitution that all property shall be taxed according to its value, so that taxes shall be equal and uniform throughout the state. It is the primary duty of the assessors to ascertain the value of the property for taxation. Section 4, Act 1897. In arriving at the valuation, the assessors are enjoined to have in view and look to the capital stock, the corporate property, franchises, and gross receipts of the company. To this end they are authorized to examine persons under oath, require the production of books and papers, and issue summons for witnesses. Section 5, *Id.* Testimony may be taken in addition to the schedule furnished by the company, to enable the assessors to better arrive at the true value of the property. These powers are conferred for the purpose of enabling the assessors to arrive at the true value of the property. Section 10, *Id.* For like purpose rules are laid down in sections 6 and 7 of the act of 1897. In section 6 it is provided that the road of any railroad shall include all "said" (side) tracks, switches, bridges, trestles, ties, rails, and superstructure of every kind. Section 7 provides a rule for distribution of the valuation of the property having no actual situs. Undoubtedly, wherever applicable, this rule must be followed, and in most cases it will work substantial justice; but as was said by Mr. Justice Brewer in *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, the law does not require that the valuation of the property within the state shall be absolutely determined upon the mileage basis. In the case in hand we cannot perceive any reason for calling the connecting part of these terminal tracks main line and the balance side tracks. We have a situation where the "length of the road" rule, as construed in practical application to other roads differently situated, will not afford a means of reaching the value of the property of this company in Tennessee. To treat the two miles as main line, and as furnishing a number by which to multiply the total valuation, divided by the number of miles of main line of the whole road, will value this property at about \$39,000—a sum which the testimony discloses to be so far below its true value as to give an absurd preference to this property in taxing railroads in Tennessee. This situation was apparent to the assessors, as their report discloses. While the mileage rule was inapplicable, they were, nevertheless, authorized by the statute to value this and all other property of the company in Tennessee for taxation. This property was not to be valued as a distinct and separate entity, but was to be treated as a part of the system to which it belonged. The principle had frequently been recognized by the courts. In *Franklin Co. v. Nashville, C. & St. L. Ry. Co.*, 12 Lea, 521, 539, it was said:

"The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost, after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway, assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of the land depends largely upon the use to which it can be put and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

This language was quoted with approval in *Railroad Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238, and in *Railroad Co. v. Backus*, 154 U. S. 429, 14 Sup. Ct. 1114, 38 L. Ed. 1031. The report of the assessors shows that the distributable property was valued upon the basis of the net earnings of the road at \$13,434,000. No complaint is made of this valuation, and it is less than an assessment would be based upon either the cost of the road or its stock and bonds. In their report the assessors say:

"While we have not and could not very well value this property in Tennessee on a mileage basis, it consisting of terminal facilities, and being very valuable, if estimated on a mileage basis, it would be at \$14,000 a mile."

One of the railroad assessors, in giving testimony, says of the method pursued in valuing this property:

"Under our construction of the assessment law for 1897, the railroad commissioners were of opinion that, if they could arrive at the value of all the property belonging to a corporation in the state of Tennessee by dividing the aggregate value of all said property by the main mileage, that they could do so, but that they had the right, if they saw proper, in arriving at the value of all the property of a railroad corporation in Tennessee, to divide the aggregate value of the property by its entire mileage, main and side track included; and in assessment of the Kansas City, Ft. Scott & Memphis Railway, as it was impossible to arrive at the value of the distributable property of this corporation in the state of Tennessee by assessing only .4 of the mile of main track, they assessed it with 18 miles of track, according to Mr. Bontecou's deposition, which was the main and side track of said road in the state of Tennessee. The commission took the aggregate value of the property, as arrived at by them, and divided it by the entire mileage of the railway, as set out in the annual statement, both main and side track, thereby arriving at the value of the road per mile, and multiplying the sum thus found by the mileage in Tennessee (18.18 miles), thus arriving at the assessable value of the property. This was the plan pursued for 1897 and 1898, was accepted by the railroads, and the commission did the same for 1899 and 1900."

In other words, the assessors treated the 18.18 miles of the Memphis terminals as so many miles of the entire road, and gave it a proportionate part of the distributable property. As the mileage plan, which would distribute this assessment by the number of miles of the length of the main line, was wholly inapplicable, and as the assessors were given ample authority to fix a valuation upon this property, it must be assumed that the Legislature intended to grant

sufficient authority as to ways and means to the assessors to enable them to reach the true valuation of the property to be taxed in Tennessee, considered as a part of the whole property. It is shown without contradiction that the valuation placed upon the terminal property is not excessive, either as regards its intrinsic worth or by comparison with the assessments of other railroad property in the state. A court of equity will only interfere in clear cases to enjoin the levy and collection of taxes. It has no power to set up its own methods, and order taxes to be levied as it may see fit. As was said by Mr. Justice Miller, speaking of the right to interfere by injunction, in *State Railroad Tax Cases*, 92 U. S. 613-615, 23 L. Ed. 663, quoted with approval by Mr. Justice Gray in *Pittsburg, C., C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32-39, 19 Sup. Ct. 90, 43 L. Ed. 354:

"One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or make a new assessment, or to direct another to be made by the proper officers of the state. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the states, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making or causing to be made a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner."

In this case the method adopted by the commissioners has not resulted in any overvaluation of complainant's property, or discrimination against it as compared with other railroads whose property is taxed in the same state, and is within the powers conferred by statute upon the assessors.

We perceive no ground for interference by injunction in a court of equity. Decree affirmed.

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HARTFORD & N. Y. TRANSP. CO. v. PLYMER.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 43.

1. CORPORATIONS—AUTHORITY OF AGENT—EMPLOYMENT OF BROKER TO SELL VESSEL.

Authority given by a corporation to its superintendent to sell a steamship may be presumed by those dealing with him with reference to the business to include authority to employ all usual and suitable means in making the sale, and where he employed a broker, who made the sale, and to whom he agreed to pay the usual commission, and the corporation subsequently ratified the sale, and received its proceeds, the questions whether the means employed were usual and suitable, and were within his authority, under the facts and circumstances of the case are for the jury.



**2. SAME—ACTION BY BROKER FOR COMMISSIONS—QUESTION FOR JURY.**

Plaintiff, a steamboat broker in New York, was authorized by the superintendent of defendant corporation having charge of its New York office to sell a steamer owned by defendant for \$150,000, subject to plaintiff's commission of 5 per cent., and plaintiff was the efficient agent in procuring the sale of the vessel at that price to the United States. The general manager of defendant, who was also a director, had previously authorized the superintendent to sell the vessel at the same price, and subject to the same commission, to another party, and on being informed that he had made the same offer for a sale to the government he acquiesced. The sale was confirmed by defendant's directors at a meeting in which the general manager took part. *Held*, that such facts were sufficient to warrant the submission to the jury of the question whether the superintendent was authorized to contract for the sale of the vessel through the agency of plaintiff, and subject to the payment of his commission.

**3. SAME—RATIFICATION OF SALE BY AGENT—EFFECT.**

Where the general manager of a steamship company, who was also a director, authorized its superintendent, in charge of one of its offices, to sell a vessel owned by the company at a stated price, less a broker's commission, assuming that the corporation would ratify his acts, and the superintendent made the sale through a broker, and it was subsequently ratified at a meeting of the directors of the company, the manager being present and participating as a director, such ratification must be presumed to have been made with knowledge by the corporation of the facts known at the time to the manager, and its effect was equivalent to an original authority to the superintendent to contract for the payment of the broker's commission. *Per* Wallace, Circuit Judge, concurring.

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

For opinion below, see 103 Fed. 674.

Herbert Gann, for plaintiff in error.

John T. Foley, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. Writ of error by defendant from judgment entered in favor of plaintiff in the court below on a verdict for \$9,098.22, for commission on sale of the Hartford, one of defendant's vessels. A motion for a new trial was denied. Error is assigned because of the refusal of the court below to direct a verdict in favor of defendant on the ground that there was no evidence to show that defendant authorized plaintiff to act as its broker in procuring said sale.

Plaintiff is a steamboat broker in the city of New York. Defendant is a Connecticut corporation, located in Hartford, Conn., and engaged in running a line of steamboats between Hartford and the city of New York, and having an office in New York. Its president and treasurer, E. S. Goodrich, attended to the finances of the company. Its general manager, C. C. Goodrich, had the general management of the traffic department. Both of these officers had their places of business in Hartford. Robert J. Noble was the superintendent of the New York office, and, as such, had charge of its general business in New York.

In the spring of 1898 the company owned three boats, namely, the

City of Springfield, the Hartford, and the Middletown. Frank E. Kirby was a consulting engineer in the employ of the United States government, charged with the duty of selecting, inspecting, and recommending steamers for service in the quartermaster's department of the United States army. It appeared that Noble first met plaintiff prior to the transaction here in suit in regard to the sale of the steamer City of Springfield, which Noble had been authorized to sell; that Noble offered the vessel to plaintiff, and told him, if he could sell it, "we would pay him a good commission"; and that Noble afterwards sold the boat, but not to plaintiff. It did not appear whether Noble was expressly authorized to pay, or did in fact pay, any commission to any one for said sale. President Goodrich testified that he authorized General Manager Goodrich to sell the Springfield, and that he (Manager Goodrich) "authorized Mr. Noble to contract the New York end of it"; that he (President Goodrich) did not know that Noble agreed to pay plaintiff a commission on the sale of the Springfield, "any more than I did in the Hartford case." He added: "I left the matter with [Manager] Goodrich. I presume he, in turn, left it with Noble." Noble testified that, acting under authority received from the company, he got the customer, made the price, and finally sold the Springfield, and the sale was consummated at Hartford.

The plaintiff testified that, having been requested by Kirby to find a steamer for the United States army, he called on Noble at his office, and asked him whether the Hartford was for sale; if so, at what price, subject to the usual commission of 5 per cent.; that Noble said he thought the company might sell at \$150,000, but he would communicate with the company and advise him; and that Noble also suggested that he (plaintiff) should write to the company, which plaintiff did; that he received no answer to his letter, but that on December 1st he called at Noble's office, and told him he had a customer who would pay cash for the vessel; that Noble said he (plaintiff) could offer it for \$150,000, subject to his 5 per cent. commission; that Noble said he had not received any word yet from Hartford, but sent him to look the vessel over; and that later in the day he telephoned Noble, asking whether he had heard from Hartford, to which Noble replied: "Yes, I have. You can sell the vessel at \$150,000, subject to your commission of five per cent. That is official. Go ahead." Plaintiff then offered the vessel to Kirby, and notified Noble. Kirby thereafter went to Washington, and recommended the sale to the United States government. Such sale was effected for \$150,000, and the plaintiff now claims his commission of 5 per cent. Kirby testified that before he reached Washington no one except plaintiff had called his attention to the Hartford.

The court, having duly charged the jury, submitted to them the following questions:

"(1) Did Noble have authority from the corporation to authorize the plaintiff to sell the vessel for \$150,000, subject to a five per cent. commission?"

"(2) Did Noble in fact authorize the plaintiff to sell the vessel for \$150,000, subject to a commission of five per cent.?"

"(3) Was the plaintiff the efficient agent—that is, the procuring cause—of the sale?"

The jury answered all the questions in the affirmative, and rendered a verdict as aforesaid.

The finding of the jury on the foregoing evidence disposes of the second and third questions.

The further evidence in support of an affirmative answer to the first question may be summarized as follows:

On December 1st Flint & Co., shipbrokers of New York, called on Noble to learn whether defendant would sell the Hartford. Noble telephoned Manager Goodrich, asking whether he would consider said offer, to which Goodrich replied:

"If they will take that boat, and pay for her before the 20th of the month, I will sell her for \$150,000. \* \* \* Perhaps we would allow them five per cent. off."

He authorized Noble to put this offer in writing, which was done by the following letter:

"Gentlemen: As per your request this is to confirm conversation over telephone this P. M. We will sell steamer Hartford delivered New York on or before December 25, 1898, for the sum of \$150,000 subject to commission of five per cent. payable on receipt of said sum.

"Yours truly,

Hartford & N. Y. Trans. Co.,

"Per R. J. Noble."

Noble testified that at that time Goodrich said, "If we can get \$150,000 for that boat, less the five per cent., I know I can get that ratified." that, just as he hung up the telephone, plaintiff came in, and asked whether Noble had heard anything from Hartford with respect to him; that he told him he was authorized to make said offer to Flint & Co., and immediately afterwards plaintiff told him he had offered the boat to the government, to which Noble merely replied, "Aha!" and plaintiff left the office. Noble further testified that the next day Kirby called on him, and inspected the boat, and that on said day he (Noble) telephoned Manager Goodrich that he had offered the boat to Kirby, and Goodrich replied: "That is all right. If they want her, I think I can make a sale of it at that price. I know I can get that ratified." Noble said that Goodrich acquiesced in his (Noble's) proposition to sell to the government, and authorized him to sell to the government for \$150,000. He further testified as follows:

"I assumed that when Mr. Kirby called that he (Manager Goodrich) would do just the same as he would do with Flint & Company. The theory was, if we were to get \$150,000, we were to get it right away."

Noble also testified that plaintiff suggested writing to Manager Goodrich, and he (Noble) said:

"I don't think Mr. Goodrich will be home to-morrow. If you write to the Hartford & New York Company at Hartford, they will open the letter in the office, and Mr. Goodrich hardly lives a day but what he is in telephone communication with the office, and they will open the letter, and probably consult with him about it."

Manager Goodrich confirmed Noble's testimony as above. He testified that he told Noble he was sure he could get a confirmation of a sale of such a character as that proposed to Flint. He testified that his telephone conversation with Noble was as follows:

"Mr. Noble says to me over the phone: 'We have an army officer in here, or have had one this morning, and I have taken the liberty to quote the price you gave Flint & Co. to him for the United States government through the War Department. Have I done right?' I said: 'I think the War Department is just as good as Flint & Co., and if they want it, if you limit them as to the time so we get the same opportunity we have with Flint & Co., as quick as the close of navigation comes we can turn the steamer over to them, and nearly get our boat ready for next season; and I ain't afraid to say the directors will confirm that as they would for Flint & Co.' The next matter that occurred was Mr. Noble telling me that Mr. Kirby had said to him that he should recommend our vessel, and that what he recommended was pretty certain to go through; that it looked as though it wouldn't be Flint & Co., it would be the United States government."

As to commission he testified as follows concerning the Flint sale:

"They insist on buying at the very lowest price they can buy,' and then I did tell him, if he would come within five per cent. of it, to go ahead, and make the trade. I said Flint & Co. should be conceded that much if that is all that stood between them on such a trade. Yes, sir, I did so understand it, and did so state."

President Goodrich testified that when he heard, about December 1st, that there was inquiry for the Hartford, he said he "thought he would consent to it if we got the price, and the price named was \$150,000; that my opinion was, if that price could be got, it would be confirmed by the board of directors"; that he told Manager Goodrich "we could go ahead on that, and, if the sale could be effected, it would be confirmed. \* \* \* The sale was subsequently made to the government through Mr. Noble. I think he had charge of it." The sale to the government was subsequently confirmed by vote of the board of directors.

In these circumstances the court was clearly justified in leaving to the jury the question of Noble's authority to contract for the sale of the steamboat to the government through the agency of the plaintiff. Noble was the representative of the company in New York. General Manager Goodrich had previously authorized him to sell the Springfield, and he had sold her, and the company had ratified the sale. When plaintiff called at the office to inquire whether this vessel was for sale, Noble referred plaintiff to the company, and advised him to write to the home office. The general manager, Goodrich, who was authorized to sell the vessel, received a letter from plaintiff, written November 28th, in response to this advice, stating that plaintiff had an inquiry by a client whose name was not disclosed for the purchase of a steamer similar to the Hartford, and asking whether defendant would allow plaintiff a commission of 5 per cent. in case such sale was effected. With this inquiry and notice of claim before him, Manager Goodrich telephoned Noble, "If we can get that \$150,000 for that boat, less the five per cent., I know I can get that ratified." Noble was authorized to contract to sell the Hartford to Flint & Co. for \$150,000, less a commission of 5 per cent., and he actually contracted to sell the Hartford to the United States government on the same terms, before consulting the general manager, acting under what he apparently supposed was a sufficient general authority to sell, provided the customer was responsible. That the president, the general manager, and Noble considered the authority as a general one

to sell, subject to above limitation, appears from their statements and conduct. The defendant corporation ratified Noble's offer to sell to the government upon the terms of sale authorized as to Flint, and has received and retained the fruits of the very sale of which plaintiff was the procuring cause. "This assent of the corporation thereto will be presumed, for, when a person has received and appropriated the fruits of a transaction done in his name and under apparent authority from him, he thereby furnishes the highest possible evidence of his approval." *Spelling on Private Corporations*, vol. 2, p. 832. *Walsh v. Hartford Fire Insurance Co.*, 73 N. Y. 10; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372.

It is contended by defendant's counsel that, even if the evidence authorized a finding that the company authorized Noble to sell the Hartford, there is no evidence that it authorized him to employ a broker to effect such a sale; and that the resolution of the board of directors ratifying the sale does not include the contract to pay broker's commissions, because the company was not informed of said employment, and it was not expressly authorized. In support of this contention he relies upon the rule that a ratification, in order to bind the principal, must have been made with full knowledge of all material facts. *Bennecke v. Insurance Company*, 105 U. S. 355, 360, 26 L. Ed. 990; *George Benninghoff v. The Agricultural Insurance Company of Watertown, N. Y.*, 93 N. Y. 495. But the only facts which defendant's president and general manager stated that they deemed material were that a sale for \$150,000, less a 5 per cent. commission, should be made to a responsible purchaser for cash, payable soon enough to enable defendant to get another boat for next season. All these requirements were satisfied by said sale, through this agent who had charge of it, and the ratification merely confirmed the assurance made by the defendant's president and manager to Noble that, if the government would do what Flint & Co. had offered to do, the directors would ratify such action. The open exercise of a power which presupposes an authority delegated to officers of a corporation, in connection with other corporate acts showing that such corporation must have contemplated the legal existence of such authority, raises a presumption that the exercise of such power was delegated to such officers. "And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, it may be presumed to have authorized or ratified the contract of its agent." *Pittsburgh, Cincinnati & St. Louis Railway Company v. Keokuk & Hamilton Bridge Company*, 131 U. S. 371, 383, 9 Sup. Ct. 770, 33 L. Ed. 157. *Rader's Administrator v. Maddox*, 150 U. S. 128, 129, 14 Sup. Ct. 46, 37 L. Ed. 1025.

An agent intrusted by his principal to do an act, or to take charge of a particular class of his principal's business, may be presumed by those dealing with him in reference to such business to possess authority to employ all the usual or suitable means incident to such business. *Spelling on Corporations*, §§ 126, 700; *Tyler v. Anglo-American Savings Association*, 30 App. Div. 404 et seq., 52 N. Y. Supp. 77; *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165,

174, 25 N. E. 303; *Argersinger v. MacNaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687. "An agent authorized to sell property, in the absence of any express limitation of his powers, is authorized to do any act \* \* \* in regard to the property found necessary to make a sale, and usually incident thereto." *Ahern v. Goodspeed*, 72 N. Y. 108, 114. He is authorized to adopt the ordinary means of accomplishing the business with which he is intrusted (1 A. & E. C. [2d Ed.] pp. 996, 1013), and according to the custom and usage of the market or place, whether known to principal or not (*Bailey v. Bensley*, 87 Ill. 556).

The question as to what is usual or suitable or as to what facts and circumstances will warrant a presumption of authority is for the jury. *Wharton on Agency*, § 187; *Spelling on Private Corporations*, § 178; *Merchants' Bank v. State Bank*, 10 Wall. 604, 644, 19 L. Ed. 1008; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, 550; *Conant v. American Rubber Tire Company*, 48 App. Div. 327, 62 N. Y. Supp. 972. Here the uncontradicted testimony showed that the customary rate of brokerage commission for the sale of steamboats in New York was 5 per cent. The conduct of Noble in speaking to various brokers about the *Hartford* when he was authorized to sell her and his actual dealings with plaintiff, as a broker, in attempting to secure her sale, are persuasive evidence of the general scope of Noble's authority, and of the course of business of this corporation in such matters, and of the means usually employed and naturally incident to such a sale. In these circumstances we think the court, in the absence of any evidence to the contrary, would have been justified in assuming upon the evidence, or in holding as a matter of which the court would take judicial notice, that, if the sale of such a vessel was intrusted to the superintendent of defendant's general traffic business in the city of New York, the services of a broker would naturally be required in order to find a customer and to effect such a sale. *Ahern v. Goodspeed*, supra.

But whatever question might otherwise have arisen on this point, the court, in its charge, fairly stated to the jury the law as to the issues involved, and submitted to the jury, upon the evidence already considered, the special questions whether Noble had authority from the corporation to authorize the plaintiff to sell the vessel for \$150,000, subject to a 5 per cent. commission, and whether Noble in fact authorized the plaintiff to sell the vessel for \$150,000, subject to a commission of 5 per cent. The jury have found these issues in favor of the plaintiff, and the evidence is abundantly sufficient to support said finding.

The judgment is affirmed, with costs.

WALLACE, Circuit Judge. I agree that the judgment should be affirmed, but place my concurrence upon these grounds:

Charles C. Goodrich was not only the traffic manager of the defendant corporation, but he was a director. Prior to December 8, 1898, he had authorized Noble to sell the steamship to the government for \$150,000, less a commission of 5 per cent.; that is, he had authorized him to sell the vessel to Flint & Co. upon those terms, and had sub-

sequently authorized him to sell to the government on the same terms. He had done this assuming that the corporation would ratify his acts. December 8th there was a meeting of the board of directors, Goodrich being present and participating; and by resolution the sale of the vessel was confirmed. That corporate act must be presumed to have been done with knowledge by the corporation of the facts known at the time to Goodrich. *National Security Bank v. Cushman*, 121 Mass. 490; *Bank of United States v. Davis*, 2 Hill, 451, 463; *Union Bank v. Campbell*, 4 Humph. 394; *Clerks' Savings Bank v. Thomas*, 2 Mo. App. 367; *United States Insurance Co. v. Shriver*, 3 Md. Ch. 381; *The President, etc., v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573. Its effect was equivalent to an original authority from the corporation to Noble to allow a commission upon the sale. I therefore think there was sufficient evidence to warrant the findings of the jury upon the three questions submitted to them, and that the trial judge properly refused to direct a verdict for the defendant.

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**KIPLING v. G. P. PUTNAM'S SONS et al.**

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 12.

**1. COPYRIGHT—INFRINGEMENT—RIGHT OF PURCHASER OF UNBOUND SHEETS TO BIND AND RESELL.**

One who has purchased unbound copyrighted volumes from the owner of the copyright or his licensee has the right, so far as the copyright statute is concerned, to bind and resell the same.

**2. SAME—EFFECT OF COPYRIGHT OF NEW EDITION.**

The copyrighting of the volumes of a particular edition of an author's works, which had been previously published some with and some without copyright, protects only what is original in the new edition, and does not enlarge the rights of the owner of the copyright as to any matter previously published.

**3. SAME—RIGHT OF LICENSEE TO SELL UNBOUND SHEETS.**

There is nothing in the copyright law which prohibits a licensee of the owner of a copyright for books from selling the same in unbound sheets, nor can the rights of a purchaser of such sheets with respect to binding and reselling the same be affected by any private agreement between the licensee and owner.

**4. TRADE-MARK—USE NECESSARY TO GIVE PROPRIETARY RIGHT.**

Conceding that an author might protect his writings by a trade-mark, the mere fact that an ornamental device was stamped on a single edition of his works published in this country without any notice that it was intended as a trade-mark, and that a similar device was printed some years before on a few volumes of his works published in India, in connection with the publisher's name, while other editions printed in this country and in England were without it, does not entitle it to protection as a trade-mark.

**5. UNFAIR COMPETITION—EVIDENCE TO ESTABLISH.**

Defendants purchased copyrighted sheets of plaintiff's works from licensed publishers, and bound them into sets, which they sold. There was no attempt to imitate any other edition in style or appearance, nor to deceive purchasers, the only similarity being in the use of a single device on the cover, similar to one used on another edition; nor was it shown that any purchaser was actually deceived. *Held*, that such facts did not entitle plaintiff to damages for unfair competition.

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

John L. Hill and A. T. Gurlitz, for plaintiff in error.  
Stephen H. Olin, for defendants in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. This action was commenced April 24, 1899, to recover \$25,000 damages for infringements of plaintiff's copyrights and trade-mark and for unfair competition in trade. In 1898 the defendants, who, for many years prior thereto had been engaged in publishing and selling books in the city of New York, purchased from authorized publishers about 30 sets of various copyrighted volumes of the plaintiff's writings, bound them in uniform and attractive binding and sold them without protest or complaint from any source. This enterprise being successful, the defendants, in the following year, determined to collect from his authorized publishers a more complete set of the plaintiff's works and sell them under the name of the "Brushwood" edition. About 200 copies of unbound sheets were thus collected. One hundred of these were for the defendants and 100 for E. P. Dutton & Co., a publishing house, having its place of business near the defendants on Twenty-Third street, New York. The defendants bound the sets thus purchased in 12 volumes in the exact form in which they were received from the publishers.

Volume 13 contained poems of the plaintiff, which had been published without copyright protection, the sheets being purchased from Coates & Co., who printed them from stereotype plates of an edition, apparently authorized by the plaintiff, under contracts by which he was to receive a royalty of 10 per cent. These plates were purchased by Coates & Co. of the receiver of the United States Book Company.

Volume 14 was made up of unbound copyrighted sheets of "The Seven Seas," purchased from D. Appleton & Co., and two uncopyrighted poems—"The Vampire" and "Recessional."

Volume 15 contained "A Ken of Kipling," by Will M. Clemens, and an index. The only portion of the edition printed by the defendants was this index; all else was in the precise form in which it was purchased by them. The binding was uniform for each set, but some sets were more expensively bound than others. Fifteen sets were bound in buckram and on the back of each volume there was stamped in gold, on dark green leather, an elephant's head enclosed in a circle. On the front cover, near the top, there was stamped in gold, on a panel of green leather, a similar elephant's head and also a fac simile of the plaintiff's signature. The elephant's head appeared only on the books composing these 15 sets.

The "Brushwood" edition thus made up was advertised and sold in the usual way.

Briefly stated these are the acts of the defendants of which the plaintiff complains.

In 1896 the plaintiff arranged with Messrs. Charles Scribner's Sons to publish a new subscription edition of his works, under his super-



vision, to be known as the "Outward Bound" edition. The first installment of this edition consisted of 12 volumes, the first volume being published in January, 1897, the last in October, 1898, and the others at intervals between these dates. The "Outward Bound" volumes were larger, wider and thicker than those sold by the defendants. On the center of the front cover of each volume was a medallion, stamped in low relief, of an elephant's head in white, surrounded by golden circles. The head also appears on the title page of each volume and is called a "seal" by the author.

There was evidence that, some 10 years prior to the "Outward Bound" edition, an elephant's head had appeared on the paper covers of several small volumes of the plaintiff's works printed in India, but under circumstances which indicated to the public that if it were intended as a trade-mark at all, it was the mark of the publishers and not of the author. There is no evidence in the record which can be regarded as constituting direct or constructive notice to the public that, at the time in controversy, the plaintiff was attempting to protect by a trade-mark his profession as a novelist and poet.

In May or June, 1899, the plaintiff authorized a "Big Syndicated Set" of his works, which was handled by the publishing house of Doubleday & McClure Company. It was revised and corrected by him and was called the "Swastika" authorized edition. It was printed from plates held by his publishers and consisted of 300,000 volumes, or 20,000 sets. No elephant's head appears on the volumes of this edition. Instead thereof, and occupying the same position, there is stamped on the cover of each volume a medallion in the center of which appear, in script, the letters "R. K."

The advertisements of the "Brushwood" edition first put out by the defendants caused some inquiries to be made by the Scribners and, in order to meet objections then suggested, new circulars and notices were immediately issued and published, making perfectly clear the genesis of the "Brushwood" books and the defendants' position regarding the same.

The plaintiff maintains that the selling of the "Brushwood" edition by the defendants violated his copyrights and trade-mark and that the defendants' conduct with reference to the "Outward Bound" edition, published by the Scribners and authorized by him, amounted to unfair competition in trade. The defendants insist that all the books sold by them, which were copyrighted, were purchased of plaintiff's authorized publishers, that the plaintiff has failed to establish a trade-mark and that in the sale of the "Brushwood" edition their conduct was in all respects fair and honorable.

The trial judge, being of the opinion that the plaintiff had failed to establish a cause of action, either for infringement or for unfair competition, directed a verdict in favor of the defendants. The plaintiff insists that this ruling was error and he also assigns as error various rulings upon the rejection and reception of testimony.

First.—It is contended by the plaintiff that in selling the "Brushwood" edition of his works the defendants have infringed his copyrights. There is no matter published in the "Brushwood" edition, secured to the plaintiff under the copyright law of the United States,

which was not purchased by the defendants of publishers duly authorized by the plaintiff to sell. The edition was made up, first, of volumes copyrighted by the plaintiff or his publishers, which, in legal effect, the defendants purchased of him; second, of certain poems written by the plaintiff, but published without the protection of a copyright, and, third, of matter written or compiled by others and over which the plaintiff exercised no ownership or control. Upon what theory, then, have the plaintiff's copyrights been infringed? Each one of them, whether valid or invalid, was respected by the defendants. That the defendants, having purchased unbound copyrighted volumes, were at liberty, so far as the copyright statute is concerned, to bind and resell them, is a well-recognized principle of law. *Harrison v. Maynard*, 10 C. C. A. 17, 61 Fed. 689; *Doan v. American Book Co.*, 45 C. C. A. 42, 105 Fed. 772.

It is of no moment that each volume of the "Outward Bound" edition authorized by the plaintiff and published by Charles Scribner's Sons, in 1897-98, was copyrighted. This new copyright protected only what was original in the "Outward Bound" edition. It did not operate to extend or enlarge prior copyrights or remove from the public domain the author's works which, by his own act, he had dedicated to the public. If, for instance, the Messrs. Scribner should publish a new edition of Fielding's works their copyright would cover only that part of the edition which is new. It would not enable them to hold a monopoly in Fielding's writings. Any other publisher could publish Fielding's works with perfect propriety. So, if the defendants were legally authorized to sell the works of the plaintiff found in the "Brushwood" edition, that right was not lost or impaired by the copyrighting of the "Outward Bound" volumes. It is contended that the plaintiff's copyrights were infringed by the defendants because the books or sheets which they purchased of his licensed publishers were unbound at the time and the publishers were unauthorized to sell them in this condition. It is not quite apparent how the intent and purpose of the copyright act can be limited by a private agreement between the author and his publisher. There is nothing in the law, surely, which prohibits the owner of a copyright from selling unbound books, if he desires to do so, and what he may do, his agent or licensee may do also. If Mr. Kipling had personally sold the unbound volumes to defendants it probably would not be contended that he could recover damages under the statute because they were bound and resold. He stands in no more favorable condition because the sale was conducted by his agents.

We are unable to find any provision in the agreements with plaintiff's publishers which prohibited the sale of the copyrighted sheets to the defendants, but if such a provision were present the plaintiff's remedy would be an action against the publishers for breach of contract. Whether such an action could be maintained by one who had participated in the profits of the sale is a question which would probably cause the pleader many moments of anxious thought. *Harrison v. Maynard*, *supra*.

The "Ken of Kipling," which appears in the "Brushwood" edition, was not copyrighted by plaintiff, and the defendants, so far as the

copyright law is concerned, had an absolute right to publish it in any form they saw fit.

They also were at liberty to make and publish an index of the matter contained in their volumes even though the index, as it necessarily must, contains words and phrases found in the text.

The court is not permitted to enter the domain of ethics and attempt a determination of this controversy according to the theoretical code of morals which, it is contended, should govern the relations between author and publisher. We must adhere strictly to the law, as we understand it, and, with the issue thus limited, we have no difficulty in agreeing with the Circuit Court that the plaintiff has failed utterly in establishing a cause of action under the copyright law.

Second.—The plaintiff insists that he has a valid trade-mark, consisting of an elephant's head, by which his productions have been known and protected and that the defendants have infringed by placing an elephant's head upon thirty sets of the "Brushwood" edition. The proposition that an author can protect his writings by a trade-mark is unique and, at first blush, seems somewhat startling. It is certainly offensive to the æsthetic and poetic taste to place such poems as the "Recessional" and "The Last Chantey" in the same category with pills and soap, to be dealt in as so much merchandise. We do not intend to decide that such a trade-mark is sanctioned by the law, but even if it were, it is manifest that the mark does not lose its characteristics because used to designate an unusual variety of "goods." In other words, the author, assuming that he may have such protection, must comply with the law if he would have a valid trade-mark.

A trade-mark is a word, symbol or device by which the wares of the owner are known in trade. Its object is, first, to protect the party using it from competition with inferior articles, and, second, to protect the public from imposition. The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic. The elephant's head was not registered as a trade-mark until long after the commencement of this action and there is no evidence that it was ever so used by the plaintiff until placed upon the "Outward Bound" edition, certainly there is no evidence that it was ever so used in this country or in England. There is proof that, in 1888, an elephant's head appeared upon six books written by the plaintiff and published at Allahabad, in India, by A. H. Wheeler & Co. There is nothing to show that the plaintiff ever publicly claimed the elephant's head as his trade-mark. On the contrary it appeared to be the mark of the publishers and not of the author. In each instance the head was surrounded by the words "A. H. Wheeler & Co.'s Indian Railway Library." If the words "Charles Scribner's Sons, Fifth Avenue, New York," had surrounded the medallion on the cover of the volumes published by that firm it is not probable that it would be seriously contended that this was notice to the world that the medallion was the trade-mark of Mr. Kipling. In short, there is nothing to show that the plaintiff ever publicly used the elephant's head as his trade-mark prior to its use on the "Outward Bound" edition and there was nothing connected with or incident to that

use to inform the public that the plaintiff asserted any right therein as a trade-mark. The court will take judicial knowledge of the fact that it is customary to publish books with ornamental designs stamped or printed on the covers, but no one, we venture to think, from the discovery of the art of printing to the present day, ever imagined that such pictures and ornaments were the trade-marks of the authors of the books. Indeed, there is a design, probably intended to represent a lotus flower, printed upon the back of each volume of the "Outward Bound" edition. So far as any knowledge of the public is concerned this lotus flower, or the initials "R. K." on the "Swastika" edition, might be claimed as trade-marks with as much reason as the elephant's head. The suit, in so far as it is based upon the infringement of a trade-mark, should be considered as if this were the only cause of action stated. It is thought that it must fail because of insufficiency of proof to establish a common-law trade-mark, either by direct notice or prior public use, and because there is an absolute failure to prove damages.

Third.—Has the plaintiff established a cause of action under the allegations of his complaint alleging unfair competition in trade? Actions of this character are based essentially upon fraud. Fraud must be proved, it cannot be inferred from unimportant similarities not calculated to mislead the purchaser. The action may be maintained where it appears that the defendant is destroying, or attempting to destroy, an honest business by dishonest means. The gravamen of the action is a fraudulent purpose on the part of the defendant to represent to the public that the plaintiff's business is his business and by fraudulent misstatements to deprive the plaintiff of profits which he would otherwise receive. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997.

Has the plaintiff proved the defendants guilty of such fraud? In answering this question we start with the proposition, about which we think there can be no doubt, that the defendants had an unquestioned legal right to sell all of the plaintiff's writings contained in the "Brushwood" edition. It is well-nigh impossible to suppose that any one intending to purchase the "Outward Bound" edition could be induced to purchase the "Brushwood" instead. There is no proof that any one was deceived. The two editions differ in almost all essential features. The volumes are unlike in size, shape, binding, color, arrangement and typography. In their advertisements the aim of the defendants was not to make the public believe that their edition was the same as the "Outward Bound," but that it was more complete than that or any other edition.

What, then, is the accusation against the defendants? When reduced to its last analysis it will be found to be the use of the elephant's head upon 15 sets printed for themselves and 15 printed for E. P. Dutton & Co. The use of this device was an impropriety, but, in view of all the surrounding facts and circumstances, it was wholly insufficient to sustain a charge of intentional deception. The conduct of the defendants was that of fair-minded competitors who had no purpose to misrepresent their own edition as the "Outward Bound" edition. They showed a disposition to remove all grounds of com-

plaint, both real and imaginary, and, upon being informed of them, promptly discontinued all the objectionable features of which the plaintiff had the least right to complain.

There is no proof of direct damage and the theory of consequential and remote injury advanced by the plaintiff is too speculative to be entertained.

The "Swastika" edition, published, in the spring of 1899, through the house of Doubleday & McClure Company, was properly received in evidence. As before stated this was an edition of 20,000 sets "authorized" by the plaintiff and made up, precisely as the "Brushwood" was made up, by purchasing unbound sheets from authorized publishers. On each of the 300,000 volumes were the words "Authorized Edition," but there was no elephant's head. On the "Swastika" boxes containing the volumes are the words "This Edition Sold Only in Sets." It was competent to show that, after the publication of the "Outward Bound" edition the plaintiff's conduct regarding that edition had been in many respects identical with the defendants' conduct of which he complains. The "Swastika" proof shows the plaintiff's acts to be in conflict with the law of unfair competition as interpreted by his counsel and wholly inconsistent with the theory of damages advanced in his behalf.

In view of the opinion entertained upon the merits we deem it unnecessary to pass upon the numerous exceptions taken to the rejection and admission of testimony.

The judgment is affirmed.

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JUDSON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 15, 1903.)

No. 31.

**1. UNITED STATES—CONDEMNATION PROCEEDINGS—POWER OF DISTRICT ATTORNEY TO AGREE TO ARBITRATION.**

A district attorney of the United States, authorized to institute and conduct proceedings to condemn land for a public building within a state, has the same power to bind the United States by an agreement to submit the matter of damages to arbitration, in accordance with a provision of the state statute applicable to such actions, as the attorney for an individual litigant would have.

**2. SAME—AGREEMENT FOR ARBITRATION—CONCLUSIVENESS OF JUDGMENT ON AWARD.**

Gen. St. Conn. 1902, § 958, provides that "when the parties to any action pending in court desire to refer it to arbitration each may choose one arbitrator and the court may appoint a third; and the award of such arbitrators returned to and accepted by the court shall be final and judgment shall be rendered pursuant thereto." In an action brought by the United States in that state to condemn land for a public building, in which in accordance with the state procedure it was the duty of the court, on application of the government, to appoint a committee to assess the damages, the District Attorney and the attorney for the landowner entered into a stipulation to submit all claims "to the arbitrament and determination" of three persons named, and that the "decision and award of a majority of said arbitrators" should be final when approved by the court. Such an award was made and submitted to the court by

the District Attorney, approved without objection, and judgment entered thereon. *Held*, that the stipulation was one for arbitration, and not for the appointment of a committee under the condemnation statute, and that the judgment entered upon the award was conclusive on the United States.

**3. ARBITRATION—WAIVER OF IRREGULARITY.**

Under the law of Connecticut as established by decision, where a pending cause is submitted to arbitration under the statute, which provides that each party may appoint an arbitrator, "and the court may appoint a third," the fact that all three arbitrators are selected by the parties does not invalidate their award, when the parties proceed to judgment thereon without objection.

**4. SAME—ACCEPTANCE BY COURT—GROUNDS FOR SETTING ASIDE.**

The provision of Gen. St. Conn. 1902, § 958, that an award by arbitrators shall be final "when accepted by the court," by implication gives the court power to reject an award; but such power is not arbitrary, and a court is not justified in rejecting an award, or in setting aside a judgment entered thereon, when no irregular or improper conduct on the part of the arbitrators is shown.

In Error to the District Court of the United States for the District of Connecticut.

This cause comes here upon writ of error to review a judgment accepting and confirming the report of Messrs. Tweedy, Mervin, and Bristol, a committee appointed to ascertain the value of land of respondent, and adjudging that the petitioner, the United States, pay into court for the use of said respondent, Judson, the sum of \$15,525 as the full value of the property and just damages for the taking thereof, and that upon such payment the land should become the property of the United States. The owner of the land is plaintiff in error. The facts are set forth in the opinion.

Styles Judson, Jr., and R. E. De Forest, for plaintiff in error.  
George P. Carroll and F. H. Parker, U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. In September, 1897, the Treasury Department requested the Attorney General to give such instructions to the United States Attorney for the District of Connecticut as might be necessary to have proceedings in condemnation instituted against certain real estate in the city of Bridgeport owned by Judson, in order that the United States might acquire title thereto, for an addition to the post office in that city, authorized by act of July 19, 1897. The Attorney General forwarded a copy to the District Attorney, with instructions to "institute proceedings on behalf of the United States for the condemnation of the land referred to."

The statutes of Connecticut give the consent of the state to the acquisition by the United States by purchase, condemnation, or otherwise for custom houses, post offices, etc. There is no suggestion that the methods by which the United States shall seek to condemn land are to be in any wise different from those to be pursued by the state, or by some of its political divisions. The method prescribed for the state, for counties, towns, and school districts, is by the appointment of a committee. Application is to be made to the appropriate court or judge, the owner being brought into court by summons or other civil process. Said court or judge, after due notice of said application, shall appoint a committee of three disinterested men, who,

after being sworn and having given reasonable notice to the parties interested, shall view the land, hear the evidence, ascertain the value, assess just damages to the owner or owners, and report their doings to said court or judge, who may accept the same, or may, in case of any irregular or improper conduct on the part of said committee in the performance of their duty, reject it; and in case of rejection said court or judge shall appoint another committee, who shall proceed in the same manner as the first one. The acceptance of the report of such committee shall operate as a judgment in favor of any person to whom damage is assessed. The land shall not be inclosed or used by the state until the amount is paid, and upon payment or deposit shall become the property of the state. Gen. St. Conn. 1902, tit. 31, "Eminent Domain," §§ 4102-4121.

The District Attorney undertook to have the land condemned by such a proceeding. A petition to appoint a committee who should view the land, ascertain its value, assess just damages, etc., as provided in the statute, was prepared October 18, 1897, and within a few days was served on Judson, and on some others whose lands were at first included, but as to whom discontinuance has since been entered. Petition was accompanied by a summons directing respondent to appear before the District Judge on the first Tuesday of December, 1897.

What happened on the return day does not appear. The record discloses no action for nearly six months. On May 28, 1898, which, as the bill of exceptions says, was "the day assigned for the appointment of the committee as prayed for," the District Attorney and the attorney for Judson appeared, and informed the court that the case would furnish no business at that time, as the parties would probably reach an agreement as to a committee. At that time they had agreed together as to the appointment of Messrs. Robertson and Marsh. Subsequently they executed the following instrument, entitled in the United States District Court, with the name of the pending action, "Lyman Gage, Treasurer, v. R. M. Judson." The title of the action was subsequently changed to "United States v. R. M. Judson":

"Know all men that we, Charles W. Comstock, United States Attorney for the district of Connecticut, and Robert E. De Forest, of Bridgeport, attorney for the said R. M. Judson, do hereby promise and agree, to and with each other, to submit, and do hereby submit, all questions and claims between the said United States and the said R. M. Judson, in the action above mentioned and pending in said court, to the arbitration and determination of Alex. C. Robertson, of Montville, Connecticut, Charles B. Marsh, of Bridgeport, Connecticut, and Frederick A. Bartlett, of Bridgeport, Connecticut, and a decision and award of a majority of said arbitrators shall be final and conclusive upon the approval of the award so made by the court.

"The hearings to be in Bridgeport.

"In witness whereof we have hereunto set our hands and seals this 8th day of June, A. D. 1898.

Charles W. Comstock. [L. S.]  
"Robert E. De Forest. [L. S.]"

The arbitrators viewed the property, heard evidence, ascertained the value, and assessed damages, the District Attorney taking part in all proceedings before them. On August 8th they signed an award of \$32,000 to Judson for his land and damages, and on August 10th the District Attorney and the attorney for Judson filed this award and the agreement to arbitrate in the United States District Court. On

October 5th the District Attorney appeared in court, stated that the government was satisfied with the award, and moved that it be accepted. Thereupon the District Judge made certain entries in his private minute book. These need not be set forth; they will be found in our former opinion, where their effect was discussed. *Judson v. Gage*, 39 C. C. A. 156, 98 Fed. 540. Suffice it to say that this court has held that they did not amount to a judgment. At the next term, however, on January 3, 1899, the court, upon the motion of the District Attorney, ordered and adjudged that the award be approved, judgment rendered thereon, and the land become the property of the United States upon payment of said award. Subsequently, at the same term of court, on February 6, 1899, the District Attorney moved that this judgment be reopened, the award set aside, and the condemnation proceedings instituted against Judson by the original petition in the case "gone forward with in the manner authorized by law." After hearing and consideration, the District Judge, on May 23, 1899, made an order vacating the judgment and the award. The grounds of such action will be rehearsed infra. Thereafter, on June 12, 1899, the court ordered that a hearing on the appointment of a committee be had on July 17, 1899. The matter was adjourned from time to time, awaiting the decision of the former appeal (39 C. C. A. 156, 98 Fed. 540), as to the effect of the entries of October, 1898; and on February 5, 1900, the court appointed Messrs. Bristol, Tweedy, and Merwin a committee to proceed in conformity with the statutes of Connecticut heretofore cited.

The committee thus appointed gave notice, viewed the land, heard evidence, ascertained the value to be \$15,525, assessed to Judson the said sum of \$15,525 as his damages, and on January 25, 1901, reported their doings to the District Judge. Remonstrance against the acceptance of the report was filed by Judson's attorneys, and an answer thereto by the District Attorney, all in conformity to Connecticut practice; and on January 7, 1902, after due consideration, the report of the committee was accepted and confirmed, and judgment entered directing the payment of \$15,525 by the United States, and that upon such payment the land should become the property of the United States. This writ of error was sued out to review such judgment.

These facts have been abstracted from the record with considerable difficulty, by reason of the clumsy manner in which it has been put together. It contains many papers which have nothing whatever to do with the matters sought to be reviewed by the writ of error. It seems as if all the papers which were to be found on file in the clerk's office, entitled in this cause, had been hastily gathered together without any regard to their logical sequence, and certified to this court, without the slightest effort to eliminate those which have nothing to do with this appeal.

The remonstrance against the acceptance of the report contains many averments of "irregular and improper conduct" on the part of the committee in excluding testimony offered on behalf of Judson. Of these, certainly one is most serious, and might, if it were analyzed, be sufficient ground for reversal; but such a reversal would leave the fundamental question undisposed of. The important point to be de-



cided is whether the court had authority to vacate the judgment of January 3, 1899, approving the award and decreeing accordingly. Of course, if he had no such authority, that judgment stands, it terminated the cause in the District Court, the subsequent proceedings were all irregular and unauthorized, and the judgment appealed from should be itself vacated.

When application was made to vacate the first judgment there was nothing before the court to show any irregular or improper conduct in the performance of their duty on the part of the persons who made the original award; there was nothing to show that their award was so high that the court should have refused to accept it; and the District Judge in the order vacating both judgment and award expressly states the grounds therefor as follows: "Inasmuch as the court was never called upon to appoint any committee to ascertain damages for the taking of the land in question, and inasmuch as the arbitrators herein acted without any authority from or appointment by the court." These grounds are more fully set forth in the following excerpts from the opinion:

"No order of appointment of a committee was ever made by the court, the court never having known the names of the persons acting as committee [prior to the presentation of their report]. The position of respondent is that the judge of a court may delegate to counsel the appointment of a committee; that thereupon they may agree upon such committee, and such committee may act without the names of the persons agreed upon having been approved by the court. \* \* \* [After citing several Connecticut cases, the opinion proceeds:] \* \* \* In all these cases it was held that the party had waived objection by not taking it until after the conclusion of the trial and decision against him. In all of these cases the party had a right to waive the objections. In all, except the criminal case, the party might have submitted his claims to a tribunal, or agreed upon the question at issue without the aid of the court. The District Attorney had no such right. He could not legally agree upon any sum to be paid for the land; he could not agree to submit the case to arbitration; he could not bind the United States by an agreement upon a committee; the United States cannot be estopped by his act in such a matter. While a committee nominated or assented to by a District Attorney might have been appointed by the court upon motion, it would have been the duty of the court to satisfy itself that the committee was a proper one before appointing it. It is possible that the court, if informed that certain persons had been agreed upon, might have considered the assent of the District Attorney sufficient evidence of their fitness without further inquiry. It is possible, and perhaps probable, that the court would have made some further inquiry of counsel or otherwise in regard to the qualifications of the committee agreed upon before appointing them. However this may be, the court certainly never did appoint them, unless it be the law that the judge, when informed that counsel would probably agree upon a committee, can then and there appoint such a committee as the counsel may thereafter agree upon."

The contention of respondent's counsel in this court is not that the judge may delegate to counsel the appointment of a committee, but that where a series of acts such as is above rehearsed has taken place, and an award has been accepted, without any remonstrance, and judgment confirming the action of the putative committee has been entered without objection, the party seeking to exercise the right of eminent domain, whether it be a town, or the state of Connecticut, or the United States, is estopped from asking to have that judgment vacated on the ground that individuals agreed upon by the counsel

for both sides were not actually appointed a committee by order of court before they began to act.

We are satisfied, however, that no attempt was made by the respondent's counsel and the District Attorney to usurp the judicial functions, and to choose a "committee," under the statutes first above cited, and concur in the finding of the District Judge that the three individuals were agreed upon, not as a committee, but as arbitrators. The form of the written agreement for submission, and of the decision filed awarding damages, and, indeed, the very circumstance that counsel undertook themselves to agree upon a choice of individuals, when the statute expressly provided that the "court or judge shall appoint" them, all most persuasively indicate that a reference to arbitration was what they had in view and carried out.

It will be necessary, therefore, to refer to the statutes of Connecticut which provide for arbitrations. In section 957, Revision 1902, there is provision made for the submission of any controversy to arbitration upon "an agreement signed and sworn to by any parties." It is unnecessary to state the details of this section, because it manifestly deals with a controversy which has not ripened into an action, and because the District Attorney neither by virtue of his office nor by any special designation was authorized to bind the United States by submitting such a controversy to arbitration. The next section (958) is as follows:

"Sec. 958. When the parties to any action, pending in court, desire to refer it to arbitration, each may choose one arbitrator, and the court may appoint a third; and the award of such arbitrators, returned to, and accepted by, the court, shall be final, and judgment shall be rendered pursuant thereto, and execution granted thereon, with costs."

The proceeding to condemn the property of Judson was an action pending in court, and as such could be referred under this section, precisely as other actions on contract or in tort may, in proper cases, be referred to be tried without a jury. An application for such reference is an incident of the action, to be anticipated by both parties when action is brought. It is an incident which, under universal practice, it is within the province of the respective attorneys to control. No provision of the section requires the seal, or the oath, or the signature of the party (as in section 957) to be presented to the court before reference is had. The assent to such an arbitration is one which it is within the attorney's power to give, by virtue of his office as attorney in charge of the party's litigation in such pending action, and, whatever differences there may be between him and his client as to whether such reference should or should not be agreed to, the other party has the right to rely on the attorney's power to represent his client in the procedure regulated by this section just as much as he has in any steps he may take conformably to the recognized procedure in pending actions. No one advances the proposition here that in the case of a private litigant the assent expressed by his counsel to an arbitration under section 958 could be repudiated by the client after the arbitrators had made their award, and no case cited warrants any such conclusion.

"Condemnation suits in behalf of the United States to acquire lands for public use are, by the act of Congress of August 1, 1888 [U. S.

Comp. St. 1901, p. 2516], to be conducted, as to matters of practice in the federal court having jurisdiction, in conformity as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such federal court is held. It has been decided by the Supreme Court that a proceeding to condemn land for public use is a suit at common law. *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449. Consequently, irrespective of the terms of the federal condemnation act, conformity of procedure is required, as in all suits at common law, by section 914 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 684].” In *re Secretary of the Treasury (C. C.)* 45 Fed. 396, 11 L. R. A. 275. In *Cooke v. U. S.*, 91 U. S. 389, 23 L. Ed. 237, it is held that when a government enters the domain of commerce it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same “diligence to charge the drawers and indorsers that is required of individuals, and, if it fails in this, its claim upon the parties is lost. *United States v. Barker*, 12 Wheat. 559, 6 L. Ed. 728. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world.”

This court held In *re Secretary of the Treasury*, 12 C. C. A. 235, 64 Fed. 472, that when “the United States institute a suit they \* \* \* stand with reference to the rights of the defendants precisely as private suitors, except that they are exempt from costs and from affirmative relief against them beyond the demand or property in controversy. *The Siren*, 7 Wall. 152, 19 L. Ed. 129.”

So, too, when the federal government undertakes to enter into a litigation with an individual, and to prosecute that litigation in conformity with the procedure of some particular state, it will be bound by the acts of its attorney as other litigants are when prosecuting or defending suits under such procedure. When such procedure recognizes the authority of the attorney, by virtue of his office, to bind his client by admissions made in pleading, by stipulations as to forms of proof, by failure to object to testimony, by consenting to proceed before 11 jurors, by moving for or agreeing to a reference, precisely the same rule must be applied to the United States appearing by its District Attorney. We are therefore clearly of the opinion that the District Attorney had authority to bind the United States by indicating a desire to refer the pending action against Judson to arbitration and by expressing a choice as to the arbitrators.

It may be noted that whereas sections 4103, etc., provide that the court “shall” appoint the committee, the section regulating arbitrations

of pending actions (section 958) provides that each side may choose one arbitrator and the court "may" appoint a third. This language would seem to indicate that if the parties choose to go on before the two arbitrators whom they have chosen they may do so. No Connecticut decision to which we are referred expressly decides that point, but abundant authorities from that state sustain the proposition that when to the knowledge of both sides there has been some irregularity in the initiation of the proceeding, and both sides have nevertheless gone on until final decision, they are mutually estopped from disputing the legality of the tribunal they have selected. This was held in *Smith v. Town of New Haven*, 59 Conn. 203, 22 Atl. 146, where the statute required a committee of three, whereas a committee of two only had acted. Other authorities are *Andrews v. Wheaton*, 23 Conn. 112; *Crone v. Daniels*, 20 Conn. 331; *Post v. Williams*, 33 Conn. 147; *Sherwood v. Stevenson*, 25 Conn. 431; *White v. Fox*, 29 Conn. 570; *Kimball v. First Baptist Church*, 2 Gray, 517; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085. All these causes were cited by the District Judge, and distinguished by him, on the theory that the "District Attorney could not agree to submit the case to arbitration"; but on that proposition we have reached a different conclusion.

We have, then, a case where both sides by their competent representatives agreed to refer a pending action to arbitration under section 958, where they each chose an arbitrator, where they each agreed to the one chosen by the other, where they both agreed to a third arbitrator, whom otherwise the court would have appointed, where they proceeded before the three persons thus selected without objection by either, put in their proofs, presented their arguments, and awaited the award without any suggestion that the tribunal of their own selection was incompetent to act. Under the procedure in Connecticut as administered by its courts, such objection came too late. Both sides were estopped when the award came before the court from insisting on the objection that the name of the third arbitrator, who was the choice of both sides, had not been presented to the court for its action before the arbitrators proceeded with the cause. Such is the plain import of the authorities cited, in the case of litigants other than the United States, and, as was pointed out before, this sort of arbitration being an incident of the procedure to condemn land, the same rule must apply to the United States when it is prosecuting a suit in conformity to such procedure.

There is another difference between the statutory provisions for trial by "committee" and trial by "arbitrators." In the former case, when the report is presented to the court or judge, he or it "may accept the same, or may, in the case of any irregular or improper conduct on the part of said committee in the performance of their duty, reject it." This confines the power to reject to cases where the irregular or improper conduct, etc., is shown. In section 958 the language is, "the award \* \* \* returned to and accepted by the court shall be final," etc. The power to accept would seem to carry with it the power to reject, and it was so held in *Re Curtis-Castle Arbitration*, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200. That case held, however, and it seems to be a leading case in Connecticut, that this did not import a

purely arbitrary power to reject; that "the duty imposed on a court in the acceptance of the award of arbitrators is closely similar to the duty in the acceptance of the report of a committee, or of an auditor, or of a referee. The same word is used by the statutes, and the duties imposed must be substantially the same." When the award of the arbitrators therefore was brought before the District Judge for his acceptance, on January 3, 1899, unaccompanied by any remonstrance showing any irregular or improper conduct in the performance of their duties by the arbitrators, he committed no error in accepting it, and entering judgment pursuant thereto. And, in accordance with the views above expressed, we are satisfied that the District Judge erred when he undertook to vacate such judgment and award solely upon the grounds that "the court was never called upon to appoint any committee," and "the arbitrators acted without any authority from or appointment by the court." The order of vacatur, therefore, entered May 23, 1899, should be vacated and set aside. Inasmuch as the judgment of January 3, 1899, disposed finally of the pending action by adjudging the value of his property and damages to Judson, and his said property to the United States upon payment of the award, the further action of the District Judge in appointing a new committee was without authority, and the subsequent judgment of January 7, 1902, undertaking to accept the subsequent award of such new committee, should be vacated and set aside.

The judgment of January 7, 1902, is reversed, and the cause remanded, with instructions to vacate the order of May 23, 1899.

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TEXAS & P. R. CO. v. CAU.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1903.)

On Rehearing.

For former opinion, see 120 Fed. 15.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We find nothing in the reasons presented for a rehearing to make us doubt the correctness of the decision heretofore rendered, and the rehearing is denied.

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BIRCKHEAD v. DE FOREST et al.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 3.

1. PARTNERSHIP—LIABILITY OF PARTNERS—FAILURE TO GIVE NOTICE OF DISSOLUTION.

A firm of attorneys had done business for plaintiff's testatrix for a number of years, one of the members making investments for her and looking after the securities taken. The firm dissolved, but no notice of the fact was given to the client, and the members continued to occupy the same office, and to use the firm name upon their signs, letter heads,

and in suits. Such member of the old firm foreclosed a mortgage taken by him for the client, using the firm name with the consent of the others. He bid in the property himself, making no cash payment, but the firm receipted for such payment on the records. He advised the client of his purchase, but not that the money was not paid, and in answer to her request to reinvest the money wrote her that he could probably do so on the same property. He subsequently remitted her the interest regularly, until her death, after which he became insolvent, never having made any reinvestment in her name. *Held*, that if decedent employed him in his representative capacity as a member of the firm the other members were jointly liable with him for the amount of the bid, to the extent of the mortgage, and that whether she did so deal with him was a question for the jury.

2. LIMITATIONS—ACCRUAL OF CAUSE OF ACTION—DEMAND.

The client having authorized the reinvestment of the proceeds of the mortgage, a cause of action in her favor to recover the same did not accrue, nor the statute of limitations commence to run against her, until demand, provided such demand was made within a reasonable time, and she would not be required to make it so long as she was led to believe that the money had in fact been reinvested, nor could the defendants allege their own wrong by setting up a misappropriation of the money to give a right of action without demand, which would entitle them to the defense of limitation.

3. SAME—ACTION AGAINST ATTORNEYS—NEW YORK STATUTE.

Code Civ. Proc. N. Y. § 410, as construed by the courts of the state, operates to shield clients from the effect of the six-years statute of limitations in actions growing out of the receipt and detention of money by attorneys, when the client does not have knowledge of the facts which entitle him to dispense with a demand, and to set the statute in operation only from the time he acquires such knowledge.

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

Treadwell Cleveland, for plaintiff in error.

Austin G. Fox, for defendants in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the plaintiff in the court below, and brings this writ of error to review a judgment for the defendants. The action was brought to recover money alleged to have been received by the defendants as copartners in the law firm of De Forest & Weeks, being the proceeds of a mortgage owned by Mary E. Birkhead, the plaintiff's testatrix, which was foreclosed by De Forest & Weeks as her attorneys. The defense to the action by the defendants, the two De Forests and Hall, was that they were not copartners with Weeks at the time of the foreclosure of the mortgage, and did not receive any of the proceeds. They also pleaded the six-years statute of limitations as a bar. Weeks did not defend the action. Upon the trial the jury was instructed by the court to render a verdict for the defendants. The assignments of error challenge the correctness of this ruling.

The evidence established the following facts: The law firm of De Forest & Weeks was constituted prior to 1878, their office being at the city of New York. Mrs. Birkhead resided at Baltimore, and before her marriage Mr. De Forest had been her guardian. After she became of age, and in 1878, the firm were her attorneys in litigation

to which she was a party. From that time until her death, in March, 1891, Weeks was intrusted by her with the care and management of investments in this state, including the loaning of funds on bond and mortgage, keeping the custody of the securities, collecting the interest, and reinvesting the principal from time to time. In 1884 he loaned for her \$6,000 to the Misses Carpenter, and took their bond payable to her, secured by a mortgage upon certain real estate in Dutchess county. The firm examined the title upon the loan, drew the bond and mortgage, procured the mortgage to be recorded, and received the compensation therefor. The bond was conditioned for the payment of the principal sum May 1, 1886, with interest semi-annually at 6 per cent. on the 1st days of May and November in each year. Weeks collected and remitted to Mrs. Birckhead the interest, \$180, which became due November 1, 1886. In February, 1887, he advised her by letter that he proposed to foreclose the mortgage, as the Carpenters found it necessary to sell the property, and there were difficulties in the way of their making title without a foreclosure. February 27, 1887, he caused an action to be brought in her name for the foreclosure of the mortgage, using the name of De Forest & Weeks as her attorneys of record. This action was prosecuted to a final decree, and the mortgaged property was sold under the decree in June, 1887, by a referee appointed by the court, Weeks becoming the purchaser at the sale upon a bid for \$6,500. No purchase money was actually paid by Weeks, but De Forest & Weeks as attorneys for Mrs. Birckhead receipted for the amount to the referee. Neither De Forest & Weeks, nor Weeks individually, rendered any bill to Mrs. Birckhead for services or disbursements in the foreclosure action, or ever received any compensation therefor. Pending the foreclosure Weeks had advised Mrs. Birckhead by letter that he should probably bid in the property himself at the foreclosure sale. In reply to this she expressed the hope that he would be able to reinvest the money. Subsequently he advised her that he had bid the property in at the sale, and should endeavor to sell it again at private sale, and would very possibly be able in doing so to have her mortgage continued. From this time until Mrs. Birckhead's death he remitted to her each May and November \$180, purporting to be interest payments received by him upon the Carpenter mortgages. After Mrs. Birckhead's death he remitted similar interest payments to the plaintiff, including one for November, 1892. No interest payment for May, 1893, was remitted, and in that month Weeks made a general assignment for the benefit of creditors. Irrespective of the assignment, it does not appear whether or not Weeks ever sold or conveyed the Carpenter property. It does appear, however, that no mortgage on the property to Mrs. Birckhead subsequent to the original was ever recorded with the clerk of Dutchess county.

The firm of De Forest & Weeks had been composed of the defendants and Weeks. It was dissolved December 31, 1886, but no notice of the dissolution was given to Mrs. Birckhead, or to many other clients of the firm, and until subsequent to her death the De Forests and Hall occupied the same office with Weeks, and the name of De Forest & Weeks continued upon the office signs. The De Forests, Hall, and

Weeks employed the same office clerks, and jointly contributed the expenses of office rent and clerk hire. Mr. De Forest in his testimony thus described the situation: "The firm name of De Forest & Weeks was continued, I think, until 1893. It was used in connection with the transactions of our law business, and it appeared upon the door; it appeared upon the signboard upon the building; it appeared on our letter heads; it appeared upon the books which were used for the binding up of papers. We saw no reason for not doing so. So far as any stranger was concerned, there was no change in the name under which the business was conducted." The name of De Forest & Weeks was occasionally used as the attorneys of record in suits. Mr. Hall testified: "That name was used continually right along, just as if the firm had never been dissolved, so far as the use of the name was concerned." The letters of Weeks to Mrs. Birckhead, though signed by him individually, were always written upon paper bearing the letter head of the firm.

There was no evidence tending to show that Mrs. Birckhead was ever informed that the property was sold at the foreclosure sale without a cash payment, and the evidence authorized the jury to find that she always supposed it had been sold for a sufficient sum to satisfy her mortgage in full, and that the purchase money had been paid by Weeks and reinvested for her, and that he had conveyed the property to the Carpenters, and by some arrangement with them had reinstated the mortgage upon the property. It was conceded upon the trial that Weeks used the firm name to foreclose the mortgage with the permission of the defendants.

Upon the case thus presented we think there were questions of fact for the determination of the jury.

Clients commonly intrust their legal business to some one of the members of a law firm in preference to the others, and the circumstance that a particular member is selected does not affect the liability of all the partners for the acts of each. The retainer or employment of one gives rise to a joint liability to all by the client, and reciprocally to a joint liability by all to the client. *Harman v. Johnson*, 22 Law J. Q. B. 297; *Warner v. Griswold*, 8 Wend. 665.

Although Mrs. Birckhead had intrusted the management of her affairs to Weeks personally, if in doing so she supposed him to be the representative of the firm in her transactions, it is clear that all the members of the firm were responsible to her for any breach of his professional duties to her prejudice. As to Mrs. Birckhead they maintained their original copartnership relations, and after the dissolution, as before, the several members continued to be copartners. When the firm consented to act as her attorneys in the foreclosure action, the several members became jointly liable for any miscarriage in the conduct of the proceedings. It is quite immaterial that she did not know whether the firm or Weeks personally had undertaken the conduct of the foreclosure action, if she supposed that in that proceeding he was representing the firm. Towards her their position was precisely the same as though they had been copartners between themselves. It was for the jury to determine upon all the evidence whether she dealt with



him in his representative capacity, or individually and without reliance upon the responsibility of the defendants.

If Mrs. Birckhead dealt with Weeks in his representative capacity, it would seem plain that the firm became liable to her for the amount of the bid at the foreclosure sale to the extent necessary to satisfy her mortgage. This is not because Weeks bid in the property himself; that act was impliedly authorized in advance, and the evidence would have authorized the jury to find was subsequently ratified by Mrs. Birckhead. But the firm was bound to see to it, in the absence of instructions from her to the contrary, that the avails of the sale were secured to her. Having accepted Weeks' personal responsibility in lieu of money, the firm became liable to her as for money received to her use. *Gilchrist v. Cunningham*, 8 Wend. 641; *Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386. They permitted the mortgage to be extinguished by the sale, and, instead of requiring the purchaser to pay in the amount of the purchase money, permitted him to retain it in his own hands. They thereby became responsible for it as though they had actually received it. It is true Weeks was authorized by Mrs. Birckhead to reinvest it, and if he had done so their liability would have been discharged; and if he had actually paid it to them, and they had paid it back to him for investment in a particular security, and he had so invested it, as there would have been no violation of duty against Mrs. Birckhead on his part, there would have been none on theirs. But, having permitted it to remain in his hands without seeing to it that it was applied to a legitimate purpose, they cannot escape responsibility for the consequences.

It remains to consider whether the statute of limitations was a defense to the action. This action was commenced September 26, 1894, and by the statute was barred if it was not brought within six years from the time the cause of action accrued. It is insisted for the defendants in error that the cause of action arose at the time of the foreclosure sale, in June, 1887. It is insisted for the plaintiff in error that because of Weeks' conduct in leading Mrs. Birckhead to suppose that her money had been reinvested the cause of action did not arise until she had knowledge of the facts. In applying the statute of limitations the federal courts in actions at law follow the rules which obtain in the courts of the state within which the action is tried. *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261. The construction given to such a statute by the courts of the state is, in effect, read into it and becomes a part of it. By the settled decisions of the courts of this state the cause of action for the breach of a contract arises at the time when an action could have been maintained for the breach, and the running of the statute is not intercepted by proof of a fraudulent concealment by the defendant of the cause of action, and the failure of the plaintiff to discover the breach by reason of the fraud. *Troup v. Smith's Ex'rs*, 20 Johns. 33; *Oothout v. Thompson*, Id. 277; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 Wend. 202. In *Engel v. Fischer*, 102 N. Y. 400, 7 N. E. 300, 55 Am. Rep. 818, speaking of the statute, the court said:

"Its plain language cannot be perverted to remedy the hardship of the particular case. It is a benign statute, and the legislature has written in it

all the exceptions which sound policy dictated to it. It may frequently operate to defeat just claims, and be used by dishonest debtors to escape the payment of honest debts. A cause of action may be barred before it is known to the claimant. The debtor may purposely conceal it, and yet the bar of the statute must inexorably be applied."

In *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548, the court held that a defendant cannot be deprived of the benefit and protection of the statute by any parol waiver, agreement, or estoppel, because this would be contrary to the policy of the statute.

Treating the amount of Weeks' bid as money in the hands of the defendants, and which came to their hands at the time of the foreclosure sale, it is not open to doubt that a demand was at that time a prerequisite to a right of action against them. Weeks having been authorized to invest the money in another mortgage for Mrs. Birckhead, he and his copartners were authorized to retain it for the purpose until a demand for its return. The case is therefore one for the application of the familiar rule that when a demand is necessary to perfect the cause of action the statute does not begin to run until the demand has been made, subject to the qualification that the demand must be made within a reasonable time.

In view of the facts it cannot well be asserted that the bar of the statute began to run because the demand was unreasonably postponed. The jury was authorized to find that it was postponed in reliance upon the representation of Weeks that he had reinvested the money pursuant to Mrs. Birckhead's request.

Doubtless, if it had appeared that Weeks had misappropriated the money, an action could have been maintained by Mrs. Birckhead without a demand. But this does not appear. Besides, it would not lie with the defendants to assert this. The wrongdoer "cannot allege his own wrong for the purpose of carrying back the injury to a time which would let in the statute." Angell on Limitations (5th Ed., sec. 72). In *Ganley v. Troy City National Bank*, 98 N. Y. 487, the action was brought against a bailee with whom certain treasury notes had been deposited for safe-keeping, and which had been sold by the bailee at the request of an unauthorized person, and the proceeds paid to him. The court said:

"By the sale the wrong was committed, and no demand was necessary to lay the foundation of an action for the conversion against the bank. \* \* \* In such an action, no demand being necessary before the right of action accrues, the statute of limitations commences to run from the time of the conversion, and not the time of the subsequent demand. But in all cases like this the owner of property wrongfully converted has a right also to sue upon the contract expressly made by the parties thereto, or implied by law from the facts and the relation of the parties. Instead of suing for the conversion, then this plaintiff had the right, as he did, to sue for the breach of the contract, and that action did not accrue until a demand. It is universally true that the statute of limitations does not commence to run upon a cause of action upon contract until it has accrued, and that where a demand is necessary before an action can be commenced the statute does not begin to run until after the demand. By the terms of this contract the defendant was bound to keep these treasury notes safe for Mrs. Ganley, and to deliver them up to her upon her demand, on the surrender of the receipt which was given her. She could not put the defendant in default upon its contract until a demand and an offer to surrender the receipt, and until that time her cause

of action did not accrue. In such a case a tortfeasor cannot allege his own wrong for the purpose of defeating an action upon the contract."

We conclude that the cause of action was not perfect until the demand was made, or until delay in making the demand was no longer justifiable, and, the action having been brought within six years thereafter, the statute of limitations was not a defense.

It has been urged by the plaintiff in error that section 410 of the Code of Civil Procedure has the effect to postpone the running of the statute until the facts constituting the cause of action were known to Mrs. Birckhead, or to the plaintiff. The courts of New York seem to have considered this section as meaning, among other things, to shield clients from the operation of the six-years statute of limitations in actions growing out of the receipt and detention of money by attorneys, when the client does not have knowledge of the facts which entitle him to dispense with the demand before bringing the action, and to set the statute in operation only from the time when he acquires knowledge. *Wood v. Young*, 141 N. Y. 211, 36 N. E. 193; *Bronson v. Munson*, 29 Hun, 54; *Grinnell v. Sherman* (Sup.) 14 N. Y. Supp. 544, 546; *Cornwell v. Clement*, 10 App. Div. 446, 42 N. Y. Supp. 295. While we might hesitate to attribute this meaning to the section in the absence of these decisions, we do not feel at liberty to disregard them.

We think that the assignments of error are well taken, and that the court erred in directing a verdict for the defendants. The judgment is accordingly reversed.

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RAINEY et al. v. POTTER.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 47.

1. CONTRACT—AGENCY TO EXECUTE—CHARTER OF VESSEL.

Defendants were coal dealers having an office in New York, which was in charge of a clerk, who was authorized to charter vessels to be used in their business. After some conversation with the clerk, plaintiff's broker called on him at defendants' office, and presented a memorandum of charter for a vessel owned by plaintiff, purporting on its face to be made with defendants, which the clerk signed with his own name. *Held*, that under such circumstances, the authority of the clerk to execute charter for defendants being admitted, unless he made known to the broker or to plaintiff that he was not acting for defendants, they were bound by the charter, and liable for a failure to carry it out.

2. TRIAL—ORDER OF PROOF.

Where a complaint alleged that a certain person was defendants' agent, and that defendants, through him, entered into the contract sued on, both of which allegations were denied, it is immaterial which one is proved first, and the admission of evidence of the agent's authority before the introduction of the contract was not error.

3. APPEAL—REVIEW—HARMLESS ERROR.

Where there was no dispute as to the terms of the written contract sued on as proved, the admission of evidence of prior negotiations is harmless error.

4. SAME.

The permitting of leading questions is largely discretionary, and they will not be held ground for reversal, where it is clear that they were not prejudicial.

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

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury for \$2,616.14 in favor of defendant in error, who was plaintiff below. The plaintiff, Potter, was the managing owner and agent of the schooner Jennie French Potter. Defendants, Rainey and Ellicott, were partners in the coal business in Philadelphia and New York. Their New York office was in the Bowling Green Building; the firm name, W. T. Rainey & Co., was on the door, and the office under the control of one Ernest M. Munn, who was their clerk in charge of the general affairs of the firm in New York. Concededly he had authority to charter vessels that were to be used in the firm's business. On May 4, 1900, after a conversation with Munn over the telephone, plaintiff's broker called at the New York office of the defendants, found him in charge, and presented to him a proposed contract or memorandum of charter, substantially in these words:

"Messrs. W. T. Rainey & Co.: We have this day chartered the Jennie French Potter to go to Newport News for Providence at \$.65, Boston and Portsmouth \$.75 or Portland at \$.80 shipper's option; eight days to load. Sundays and holidays excepted, five cents per ton a day demurrage after this time expires until loaded."

It was thereupon signed by Munn with his own name, "E. M. Munn." He asserts that before doing so he struck out the words "Messrs. W. T. Rainey & Co.," wrote in their place the words "C. J. Wittenberg," and at the same time stated to plaintiff's broker "those [i. e., Wittenberg] are the people to whom you will apply for the coal, and who will load the vessel when she gets to Norfolk." The witnesses for plaintiff insist that he made no such statement, made no change in the document, but simply signed it as above and delivered it to plaintiff's broker, it being supposed by the broker and by plaintiff that Munn signed it as agent for defendants. The schooner was not given a cargo when she got to Newport News. Defendants insisted that they had not chartered her, and after some delay the contemplated voyage was abandoned. The action was to recover demurrage and damages.

The charge to the jury begins with this statement: "There is not any question in the case but that the defendants had this office here in New York for the transaction of business of this kind, nor but that Mr. Munn was the manager there for them in the transaction of such business, nor but what Mr. Cox represented the plaintiff in going there to make this arrangement; there is no question about that. There is no question but what they did make a bargain, and no question about the terms. The question is, with whom did the plaintiff, through Mr. Cox, make that bargain through Mr. Munn acting for somebody?" This statement of the single issue which was left in the case when the testimony was closed is entirely accurate, and upon that simple question there was a sharp conflict of testimony between the witnesses. The verdict has, of course, determined that issue in favor of the plaintiff.

Howard Taylor, for plaintiff in error.

John McG. Goodall, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Upon the close of the case defendants moved to direct a verdict in their favor upon the ground that the testimony showed an instrument made by Munn personally with the plaintiff, and not one purporting to be made by the defendants with the plaintiff. This was denied, and exception reserved. Defendants' counsel also noted an exception to the charge "so far as it says that Munn must have made known to Cox

that he was not acting for defendants," and asked the court to charge that, "the contract having been signed by Ernest M. Munn personally, the burden is upon the plaintiff to prove that it was not his personal contract, but that it was in fact the intention of the parties that the contract should be made by somebody else than the person who signed it." To this the court responded, "That is a circumstance; I have left it to the jury"—and the defendants again excepted.

The passage in the charge which is complained of reads:

"If Munn told Cox that the right name was not in the paper, that Wittenberg was the man, and not Rainey & Co., so that he understood it, then he did not have any bargain with the defendants; but if he did not, and left him to understand that the defendants were the ones, then the verdict should be for the plaintiff."

Counsel for defendants states that the general question of law presented is "whether, because the transaction took place on the defendants' premises, Munn's failure to make the owner clearly understand that it was not the defendants' matter made the defendants liable." But this statement is incomplete. Munn was not only the agent of the defendants in their office, but he was an agent fully empowered to enter into just such contracts as this for them. No witness, not even Munn himself, suggested that the contract was a personal one, that the minds of the parties ever met on a contract with Munn, or even contemplated such a contract. The document itself proclaimed to every participant in the transaction that the contract was one for a charter by W. T. Rainey & Co. The court correctly charged that if before, or when, he signed it, Munn had struck out the firm's name and notified Cox that it was not to be their contract, they would not be bound. But if he did not do so, if, under the circumstances rehearsed above, the employé of the firm, who, as one of his employers testified, "had authority to charter vessels for W. T. Rainey & Co.," signed, even with his own name, a contract which showed upon its face that it was a charter to that firm, the jury were warranted in drawing the conclusion that the contract was entered into by him as agent for the firm under the authority to contract for them which it is conceded he possessed. Indeed, any other conclusion would be so contrary to the evidence (assuming that the jury disbelieved the statement that Munn struck out the firm's name and substituted Wittenberg's) as to justify the court in setting the verdict aside. Therefore the court was correct in charging that if Munn did not tell Cox that the right name was not in the paper, but left him to understand that the defendants were the ones, "the verdict should be for the plaintiff," for the facts in the case warranted no other inference. Defendants' counsel correctly states the situation presented by the pleadings, viz.: That prima facie the contract signed "Ernest M. Munn" was Munn's personally, that the question was one of the intent of the parties, and that the "burden was upon the plaintiff to prove it, if he and Munn intended that the defendants should be bound"; and he might add, the further burden to prove that Munn had authority to bind them. But the difficulty with his present contention is that plaintiff, partly with his own proof, partly with that supplied by defendants, has successfully borne the burden and established his case, it being once conceded, as

it must be under the verdict, that there was no substitution of the name of Wittenberg, nor any repudiation of the declaration on the face of the instrument that it was tendered as a contract to W. T. Rainey & Co.

There are 33 assignments of error, all based upon exceptions to evidence admitted. This unusual number is to some extent accounted for in the following excerpts from the brief of defendants' counsel:

"The choice was presented to us of either permitting the case to be conducted in a way that ordinarily, it would seem, would not be sanctioned by a trial judge, or of constantly making objections. Having embarked upon the latter course at the outset of the case, we had to continue until the end."

In consequence, very many of the exceptions are of such a character as not to require any extended discussion.

The first four questions which were objected to asked plaintiff's broker to state (a) whether he had done business with the firm of W. T. Rainey & Co. prior to May 4, 1900; (b) what had been the character of that business; (c) for how long a period he had been doing business with them at that time; (d) where was the New York office of defendants. They were objected to as irrelevant and immaterial, and not admissible, without any evidence of or the production of the written contract sued on. The position taken on the trial and urged on argument here is that inasmuch as the suit was on a written contract the only proper order of proof was first to introduce the written contract, or account for its loss and prove its contents; and that proof of Munn's authority to enter into contracts—the four questions evidently were directed to that issue—should not be admitted until afterwards. This is hypercritical. The complaint averred that Munn was defendants' agent, and that defendants, through him, entered into a written contract. Both averments were denied by the answer, and it was wholly immaterial which was first proved. It might well be urged that the logical order of proof would be first to show the authority to contract, and then the making of the contract. The three assignments of error, Nos. 1, 2, and 3, presenting these exceptions, are wholly without merit.

A number of the objections were to questions so framed that it might be expected that the answers would set forth negotiations between Cox and Potter prior to the signing of the written contract. Counsel was entirely sound in his proposition that all prior arrangements and understandings were merged in the written instrument, and could not be introduced to vary it; but whatever error there may have been in allowing the questions was entirely harmless. At the close of the case there was no dispute as to the terms of the contract, and no suggestion of any agreement not expressed in the written document. This disposes of assignments of error Nos. 4 and 5.

Some of the exceptions were originally directed, or eventually turned out to be directed, to the order of proof—a matter which rests largely in the discretion of the trial court. For example, a witness was asked how Munn signed the contract. The objection that the writing was the best evidence was sound. But when plaintiff's counsel promised that he would show the loss of the document it was within the court's discretion to allow the answer, subject to its being struck out if counsel

failed to redeem his promise. He did redeem his promise, showing that the document had been delivered to defendants' agent, Munn, from whose custody it had disappeared. That, coupled with timely notice to produce served on defendants, was sufficient proof of loss. Had the document been lost while in the custody of plaintiff or his agents more detailed statements as to search for it might have been required. Objection was taken to other questions as leading. Such questions are not only allowable, but desirable, when it is necessary to get quickly through the unessentials of the cause, and come to the issues really in dispute; but, even under most liberal rulings, plaintiff's counsel was a conspicuous offender. Such questions as these were addressed to his own witnesses on the direct: "He put on them the same signature which he put on this paper of May 4th?" "Did he say whether or not Mr. Munn had been acting for him when this contract was made?" "Were not the times of reporting of the Jennie French Potter at Newport News and the time of her finishing loading at Lambert's Point noted upon the original memorandum which was made on May 4th?" These were most flagrant violations of all rules, and had not the court's patience been wearied by a host of earlier objections, multiplied and pertinaciously insisted upon in a persistent effort to control the court's discretion as to the order of proof, it would no doubt have administered some sharp rebuke, which would have curbed the propensity of plaintiff's counsel to testify instead of question. But here again the subject is largely in the discretion of the trial court, and we cannot see, now that all the testimony is in leaving only a single point of dispute, that the answer to a single one of the leading questions could possibly have prejudiced defendants' case with the jury. As to some other exceptions, the testimony of defendant Rainey that Munn "had authority to charter vessels for W. T. Rainey & Co." has deprived them of all force. These considerations dispose of assignments 6, 7, 8, 10, 11, 12, 13, 15, 16, 22, 23, 28, 30, 31.

The answers to the questions which were objected to as irrelevant and immaterial, and which are included in assignments 17 and 18, lead up merely to the proof of return of the original contract to Munn. They were certainly relevant and material, although the form in which they were put might not quite clearly indicate it.

The remaining assignments of error deal with exceptions to what defendants' counsel describes as "self-serving declarations, arguments of the parties among themselves, and incompetent declarations of Munn." There was evidence in the case which may be fitly so described, but upon an examination of the whole case we are not satisfied that its admission was harmful error. To illustrate: Plaintiff, as part of his own case, put in testimony of a conversation of Cox with Munn after the abandonment of the voyage, when it appeared that a bill for the demurrage made out against "W. T. Rainey & Co." was presented to Munn, was examined by him, and no objection made that they were not the proper parties to pay it; it being further testified that Cox did not at that time mention the name of Wittenberg, or suggest that he had anything to do with the contract. The testimony was improper, when offered; it was no part of the *res gestæ*, being much too late in time; and Munn's narrative of a past transac-

tion, or his implied admission by silence in respect to its character, was incompetent. Subsequently, when proof was being taken for the defendant, Munn testified that when he signed the contract he struck out the name "W. T. Rainey & Co." and inserted "C. J. Wittenberg." It was a circumstance which might have weight in determining any question as to his credibility, that when he subsequently received a bill made out to Rainey & Co. he did not call attention to the fact that it ought to have been addressed to Wittenberg. Munn further testified that on this later occasion, when he received from Cox the "tow bill, with some memorandum to figure the amount of demurrage," he told Cox that he would "take the thing to Mr. Wittenberg at once and deliver it to him," etc. The evidence already given by plaintiff as to this same later interview would have been admissible in rebuttal of Munn's testimony, so that the error, which admitted it before such testimony was given, was harmless.

Five letters were introduced on plaintiff's prima facie, some of which are particularly objected to. The first was from plaintiff to "Mr. E. M. Munn, Messrs. W. T. Rainey & Co.," dated August 13, 1900. There was no evidence that it was delivered or mailed to defendants; it was not answered by them. It states that the writer is surprised that bill for demurrage has not been paid, that he has called once and tried to communicate several times by telephone, unsuccessfully, and closes with a demand for a "definite understanding at once." Before it was offered defendants' counsel admitted that demand for the money was made prior to the commencement of the action. This letter was no part of a correspondence, and was wholly irrelevant and immaterial, but the statement of its contents supra indicates that it could have worked no prejudice to defendants. The same remarks apply to another letter similarly addressed by plaintiff, dated August 31, 1900, which briefly states that unless the claim be settled on September 5th he will proceed to collect the same, and will charge interest from June 2d. It was not answered. It is true that in a subsequent letter of defendants written from Philadelphia September 4th the words occur, "Yours of the 31st ult. has been duly received"; but internal evidence shows that they refer to another letter of August 31st sent to Philadelphia, and hereinafter referred to. This second letter of demand was irrelevant and immaterial, but harmless. It may be noted that before either of these letters were admitted plaintiff's counsel assured the court that there were answers to them.

A letter from defendants written by one of the firm, August 25, 1900, to plaintiff, was put in, which referred to a conversation of the day before (its substance not given), and added that on taking the matters up with Mr. Munn he advised that he had never chartered any boats to load at Newport News or Norfolk for W. T. Rainey & Co., and asking to be furnished with a copy of the charter party. To this plaintiff sent a reply dated August 31st. This reply states that effort has been made to find the charter, which is supposed to be on the schooner. It gives a synopsis of it (as set forth in the statement of facts, supra); states that it is signed by "your agent Mr. Munn"; asserts that suit would be brought unless the claim is settled, and complains of delay since June 2d. It closes with this postscript: "Your Mr.



Munn knows very well the contents of this charter, as it is only a duplicate of the hundred or more that have been signed for you during the last few years by Messrs. Cox & Co." To this letter defendants replied September 4, 1900, acknowledging its receipt, stating that Munn asserts he "never receipted [signed] any such order as you set out in your letter," and adding: "He says there was an order such as you set out sent to him addressed to Messrs. W. T. Rainey & Co., and that he struck out the name W. T. Rainey & Co. and inserted therein the name of C. J. Wittenberg, for whom he was acting in the matter." It denied that the schooner was taken for the firm or in the course of its business, and declined to recognize the claim. Defendants' letter was, of course, not objected to. It contained admissions material to the issues, and exactly what such admissions were could not be told without introducing the letter to which it was a reply, and which purported to give the text of the so-called "order." To that extent the plaintiff's letter was admissible as a part of the mutual correspondence, and defendants' counsel so conceded on the trial. It does not necessarily follow, however, that the whole of it was admissible for plaintiff on the direct. The assertions in the postscript were not assented to by the reply, and should have been excluded as self-serving declarations; but whatever error there was in admitting them was cured when defendant Rainey testified that Munn had authority to charter vessels for them, thus withdrawing that issue from the case. Besides the statement of the contents of the "order," and of the fact that Munn signed, all else in the letter of August 31st was harmless.

We find no harmful error in the record, and the judgment of the Circuit Court is therefore affirmed.

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CANNON v. DEXTER BROOM & MATTRESS CO.

(Circuit Court of Appeals, Fourth Circuit. February 10, 1903.)

No. 459.

1. BANKRUPTCY—EXEMPTIONS—LAWS OF SOUTH CAROLINA.

A bankrupt in South Carolina, the laws of which state provide that a debtor shall not be entitled to a personal property exemption out of the property or the proceeds of property for which he has not paid the purchase money, cannot have the proceeds of merchandise for which he has not paid set apart to him as exempt.

Boyd, District Judge, dissenting, on the ground that it did not appear that the claims of the objecting creditors were for purchase money of the goods.

Appeal from the District Court of the United States for the District of South Carolina, in Bankruptcy.

F. W. Willcox, for appellant.

W. F. Clayton, for appellee.

Before GOFF, Circuit Judge, and PURNELL and BOYD, District Judges.

PURNELL, District Judge. On February 18, 1901, appellant filed a petition in bankruptcy, and was adjudged bankrupt the same day.

On the 4th day of January, 1902, the trustee set aside, as a personal property exemption under the laws of South Carolina, specific personal property valued at \$50 and \$450 in cash, proceeds of sale of merchandise. To this allowance creditors excepted, on the ground it did not appear that the stock of goods had been paid for; hence the bankrupt was not entitled to his personal property exemption from the proceeds of sale thereof. The District Court, sitting in bankruptcy, sustained the exception to the allowance of the exemption mentioned, and this action of that court is the only question presented in the record now before us.

Section 6 of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3424], provides:

"This act shall not affect the allowance to the bankrupts of the exemptions which are prescribed by the state laws which are in force at the time of the filing of the petition in the state wherein they have had their domicile," etc.

Exemptions must, therefore, be regulated by the state law. The laws of South Carolina provide that a debtor shall not be entitled to a personal property exemption out of property or the proceeds of property for which he has not paid the purchase money. The referee found as a fact, which finding was affirmed by the District Judge, that the stock of merchandise out of the proceeds of which the bankrupt was allotted his personal property exemption had not been paid for, and the bankrupt himself testified that the purchase money for the stock of goods had not been paid. So it does not affirmatively appear that the purchase money had been paid, but it does appear that the bankrupt was not in a position to avail himself of the provisions of the laws of the state.

In the case of *McGahan v. Anderson*, 51 C. C. A. 92, 113 Fed. 115, the question as to the personal property exemption was identical with the one at bar, and the court, speaking through Judge Jackson, in that case concurs with the court below—

"For the reason that under the provisions of the Constitution of South Carolina money derived from the sale of merchandise on which the purchase money is still due cannot be set aside as an exemption, and it would be unjust to the creditors to do so. \* \* \* The court is further of the opinion that the exception to the judgment of the court below as to the personal property exemption of \$500 should be overruled; this court holding that the allowance of \$75 as a personal property exemption and the disallowance of \$425 (proceeds of sale of merchandise upon which the purchase money had not been paid) is correct."

We see nothing in the case which distinguishes it from *McGahan v. Anderson*, and no reason why the rule therein laid down should not apply.

The judgment of the court below is therefore affirmed.

BOYD, District Judge (dissenting). The appellant, who was a merchant at Florence, S. C., was adjudged a bankrupt on the 18th of February, 1901. He filed his petition for an allotment of exempted property, and the trustee set apart to him clothing and other articles, valued at \$50, and the cash proceeds of the sale of the stock of mer-

chandise, \$450, making \$500. On the filing of the report of the allotment, the appellee, the Dexter Broom & Mattress Company, filed an exception to the report of the referee as to the allotment of the \$450 from the sale of the stock of merchandise; the ground of the exception being that the goods from which the exemption was made were sold to the said bankrupt by the said Dexter Broom & Mattress Company and other creditors, and had not been paid for, and that the bankrupt had exhausted his right to exemption because of his failure to turn over to the trustee, as shown by his books, a sum in excess of the amount allowed by law, and secreted the same from the trustee. The District Court, sitting in bankruptcy, sustained this exception, and held that the bankrupt could not claim the personal exemption of \$450 from the proceeds of the sale of the stock of goods as against the Dexter Broom & Mattress Company, because the goods had not been paid for. The bankrupt appealed to this court.

The only testimony taken upon the question presented by the exception of the appellee for personal exemption made to the bankrupt was the evidence of the bankrupt himself, and the only part of the testimony which refers directly to the question as to whether or not the goods he had in the store at the time of the bankruptcy were paid for is as follows:

"Q. Were the goods you had in stock paid for at the time you went into bankruptcy? A. Some were, and some were not. Q. Why is it, then, you were indebted \$3,000? A. I think most of those I had were paid for. I could not tell positively."

The books of the bankrupt were produced, and showed some irregularities in the entries, and it was suggested that there was \$500 in money, as shown by the books, not accounted for by the bankrupt to the trustee and turned over to the latter. While the books appear to have been badly kept, and some of the entries are incongruous, it is not sufficient, upon the face of them, to warrant the conclusion that the bankrupt withheld any of his estate from the trustee, especially in view of the fact that he states in his testimony that the books were kept by several persons, that sometimes entries got on the wrong side, and that he had not withheld any property.

However, this is not the important point in the case, the principal question being as to whether the bankrupt was entitled to have allotted to him, as part of his personal exemption, \$450 from the proceeds of the stock of goods on hand at the time of the adjudication. The appellee objected on the ground that the goods had not been paid for. The only evidence in the case was that some of the goods were paid for and some were not; that, in the opinion of the witness, the most of those on hand at the time had been paid for. But, whether it be true that the goods were paid for or not, can it avail the creditor who intervenes in the matter in successfully opposing the allotment? Neither the Dexter Broom & Mattress Company nor any other creditor offered testimony to show that any of the goods the bankrupt had in stock were sold by them. On the other hand, the referee reports that they had ample opportunity of designating such, if any, before the sale, which they did

not do. Indeed, it does not appear from the testimony in the record that the bankrupt ever bought any goods from the Dexter Broom & Mattress Company.

The provision of the South Carolina law that property should not be held as exempted against the purchase money is evidently intended for the benefit of the person to whom the purchase money is due; for it would be palpably unjust to permit one to buy property of a person, and then, when the seller undertook to collect the purchase money, to allow the purchaser to retain the property as exempted against the claim. But it is not consistent with the purposes of exemption laws to hold that property not paid for cannot be exempted as against any creditor. The proceeding provided under the laws of the state of South Carolina by which property can be pursued for the purchase money indicates very plainly that the intention of the exemption act is to protect the person from whom the property was bought. In a suit for the purchase money of property, that fact is ascertained in the trial, and thereupon, when the execution is issued, a certificate accompanies it, describing the particular property liable for its satisfaction; and in the case of *McNair v. Moore*, 64 S. C. 82, 41 S. E. 829, the contention that the claim of the homestead could not prevail as against the plaintiff's debt was not sustained, for the reason that the debt was not contracted for the purpose of purchasing the property in which the homestead was claimed, and for no other purpose, but it appeared that the said debt was contracted, in part at least, for other purposes.

In this case, as before stated, there is no evidence whatever that any part of the stock of goods from which the bankrupt's exemption was allotted was purchased from the excepting creditors. Consequently the purchase money for the goods was not due to them, no matter how much in debt the bankrupt may have been. If the creditors desired to pursue the goods for the purchase money, the referee states that they had the opportunity to offer evidence to show that they sold the goods to the bankrupt, and that the debt which they claimed was for the purchase money. Proof of these facts would have settled the case beyond controversy; but the proof was not given. It would destroy the effects of the exemption laws to hold that, because a person is in debt, the exemption cannot be had, for exemption laws are intended for the benefit of debtors. Under the facts in this case, the allotment of exempted property made by the trustee should have been confirmed by the District Court, and there was error to set it aside.

These views are in entire harmony with the opinion in *McGahan v. Anderson*, 51 C. C. A. 92, 113 Fed. 115; for in that case, which came also from South Carolina, this court concurred in one of the conclusions of the court below—

"For the reason that, under the provisions of the Constitution of the state of South Carolina, money derived from the sale of merchandise, on which purchase money is still due, cannot be set aside as exemption, and it would be unjust to the creditors to do so."

It would be a strange construction to say that the creditors referred

to in this decision were other than those holding the claim for the purchase money of the identical goods claimed as exempted. Therefore I think that the decree of the bankruptcy court should be reversed.

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CLARKE v. TOWN OF NORTHAMPTON.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 7.

1. MUNICIPAL BONDS—VALIDITY—SUFFICIENCY OF PETITION.

Under Laws N. Y. 1869, c. 907, § 1, as amended by Laws 1871, c. 925, § 1, providing for the issuance of railroad aid bonds by municipalities on petition of a majority of the taxpayers "who are taxed or assessed for property, not including those taxed for dogs or highway tax only," a petition which fails to show that the signers do not include persons taxed for dogs or highway tax only, or that it is signed by a majority of those taxed for property, not including such, was not sufficient to authorize the county judge to take jurisdiction of the proceedings, and an adjudication based thereon, and bonds issued in pursuance thereof, are void for lack of statutory power in the persons appointed to execute the same to bind the municipality.

2. SAME—RATIFICATION OF VOID BONDS—EFFECT OF PAYMENT OF INTEREST.

Where municipal bonds are void in their inception for want of power to issue the same, and not merely because of irregularities in their issuance, the payment of interest thereon by the municipality, however long continued, does not amount to a ratification which estops the municipality from pleading their invalidity.

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

F. B. Tiffany and H. J. Cookingham, for plaintiff in error.

F. L. Carroll, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. We agree with the opinion of the court below that the bonds in suit are void because created without any authority by the officers who issued them to represent the town of Northampton, and that the long-continued payment of interest upon the bonds by the town did not validate them by ratification or estoppel. That the bonds were created without any authority is conclusively settled by the decision in *Rich v. Mentz*, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. Ed. 1074. In answering in that case the first and second questions certified by the court by the judges of the Circuit Court, the court adjudged that a petition in form and substance such as the one in the present case was not sufficient to authorize the county judge to take jurisdiction of the proceeding under which the bonds purported to have been created. The bonds in that case, as in this, purported to be issued under the same statutory authority, the statute of this state of May 18, 1869, as amended in 1871; and, a distinct answer having been given by the court to the distinct question whether

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1950.

the county judge could take jurisdiction and proceed to render an adjudication, it is impossible to escape the effect of that answer as a controlling decision in the present case. It follows inexorably that the adjudication of the county judge was void, that the officers appointed by him to carry the adjudication into effect never became the agents of the town for that purpose, and that the statutory authority by which alone the town was empowered to lend its credit was never brought into existence. If the bonds had been issued irregularly by the agents of the defendant, within the doctrine declared in many adjudications, the payment of interest upon them for a series of years would amount to a ratification by the defendant, notwithstanding the interest was raised by taxation. But this doctrine is not applicable in cases where there is a total want of authority on the part of the town to issue obligations. *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Cowdrey v. Town of Caneadea* (C. C.) 16 Fed. 532. "The objection to them is not that they were issued irregularly, but that there was no power to issue them at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one." *Katzenberger v. Aberdeen*, 121 U. S. 172, 178, 7 Sup. Ct. 947, 950, 30 L. Ed. 911. Under these circumstances, any attempted ratification by the town was nugatory, and it could not estop itself even by the most solemn promise, unless made with statutory sanction.

The judgment is affirmed.

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**THE MAGGIE ELLEN.**

(Circuit Court of Appeals, Second Circuit. January 15, 1903.)

No. 46.

**1. COLLISION—SCHOONER ANCHORED IN CHANNEL—FAILURE TO MAINTAIN ANCHOR LIGHT.**

Evidence considered, and *held* to sustain a decree holding a schooner anchored in a narrow channel, in Narragansett Bay, in the night, solely in fault for a collision with a steamer, on the ground that she did not maintain a proper anchor light.

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

For opinion below, see 115 Fed. 442.

This cause comes here upon appeal from a decree holding the *Maggie Ellen*, a schooner anchored in a narrow fairway, solely in fault for a collision at night with the passenger steamboat *Shinnecock*, in Narragansett Bay.

Chas. C. Burlingham, for appellant.

Wm. J. Kelley, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

**PER CURIAM.** There is a flat contradiction between the witnesses called by the respective vessels on the question of an anchor light. Those called by the schooner insist that a clear bright light at the

regulation height above the deck was displayed all the time she was at anchor; those called by the steamer insist that no such light was displayed or produced until after the accident happened. These were not mere chance observers; they were all watching out for lights, and in a favorable position for seeing them. Although the weather was thick, as some witnesses state, there is nothing in the proofs to indicate that a light such as described would not be visible near at hand. A careful lookout would surely have resulted in the discovery of a proper anchor light, if it had been there. The District Judge before whom they were examined found that those on the Shinnecock showed great solicitude for the welfare of those aboard, and that careful lookout was maintained. We concur with him in this conclusion, and are of the opinion that their solicitude and carefulness failed to detect the schooner in time to avoid collision because a sufficient anchor light was not maintained.

The Maggie Ellen, and four schooners anchored to the west of her, were ranged across a channel three-fourths of a mile wide, so close to each other that when they swung on the turn of the tide they barely cleared each other. As to each schooner considered separately it cannot be said that she was in fault for anchoring in the channel under stress of weather, in view of the testimony that it was a common anchorage. Considered together, however, they constituted a dangerous obstruction to other vessels using the channel, and the last comer who completed the obstruction should show some good excuse for placing herself at that particular part of the channel instead of elsewhere. There is evidence that the Maggie Ellen, which was the last comer, could not beat into harbor to the east of Dutch Island, and could not tack across to the west side of the channel, because of the four other schooners already there. There is no evidence as to whether, when she saw them ranged there across the channel, she could not have gone back herself to find some anchorage further down the bay. It will not be necessary, however, to pass on this question, as for the reasons above indicated we have decided to affirm.

Decree of District Court affirmed, with interest and costs.

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CARTER v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 45.

1. RAILROADS—FIRES—EVIDENCE TO ESTABLISH NEGLIGENCE.

Stock owned by plaintiff was burned, while in an open car owned by defendant railroad company and standing in its freight yards, by fire which caught in the straw bedding of the car, and it was shown that a number of defendant's engines had passed on near-by tracks not long before the fire, some of which emitted sparks in large quantity, which fell near the car. There was also evidence which tended to show that the fire could not have been caused in any other way. *Held*, that such evidence was sufficient to make a prima facie case for plaintiff, and to require a submission of the question of defendant's negligence to the jury.

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

A. Delos Kneeland, for plaintiff in error.

Henry Galbraith Ward, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. This is an action to recover damages for the loss of fourteen mules and one horse, worth \$2,315, which were destroyed by fire, while in the lawful possession and control of the defendant, at or near Mantua station on the defendant's railroad in the city of Philadelphia. The defendant is a common carrier of freight and passengers. The live stock in question was loaded on one of the defendant's open rack stock cars at Marlboro, Md., to be transported to Oldtown, Me. The car, with several others containing plaintiff's property, reached Philadelphia about 7 o'clock in the morning of May 24, 1899, and remained at the lower freight yard for about an hour and a half, when it was removed to the upper freight yard at Mantua. It remained there for over four hours, was shifted from place to place and, much of the time, was in close proximity to the main tracks of the defendant where locomotives were constantly passing. The fire occurred about 1 o'clock in the afternoon. At that time the car was between two others, also containing the plaintiff's property, and was "about five tracks" distant from the main tracks. The live stock was in charge of three of plaintiff's servants whose duty it was to feed and care for the animals. The fire originated in the straw bedding and hay on the bottom of the car. It was first discovered near the center and spread rapidly towards the ends of the car. It was proven that trains were continually passing on the main line and cars were being shunted about by shifting engines in the yard. These engines, presumably the engines of the defendant, were throwing out smoke and sparks. Several trains passed on the main line within three quarters of an hour prior to the fire. One of these threw out "great volumes of smoke and sparks" in the direction of the burned car. One of the plaintiff's men who, earlier in the day, was sitting on a car near the one that was destroyed, had his clothing burned from the cinders thrown out by a passing locomotive. The band was burned off his hat and holes were burned in his trousers. These sparks were bright and would carry a distance of 150 feet. They could be plainly seen while moving that distance and were bright all the time. There was also evidence tending to show that the fire could not have been started by the carelessness of the plaintiff's employes or by any other person. At the time of the fire the plaintiff's men were about three car lengths away, they had not been smoking pipes or cigars and saw no one else doing so.

The trial judge was of the opinion that the evidence failed to establish the relation of shipper and common carrier between the parties. In this view we concur. There was some testimony tending to show a written agreement, but the contract was not in evidence and the court was not at liberty to speculate as to its terms. Upon the other branch of the case the court, though not entirely clear as to the cor-



rectness of the ruling, was inclined to the opinion that negligence was not sufficiently established and that in order to find negligence on the part of the defendant the jury would have to indulge in conjecture and guesswork. Accordingly a verdict was directed for the defendant and the plaintiff excepted. We think the case made by the plaintiff was prima facie sufficient and that in the absence of all explanation the question of negligence should have been submitted to the jury.

Property valued at \$2,315 belonging to the plaintiff was destroyed by fire while in a car of the defendant, on its premises and under its control. There was no vis major. Apparently the fire was the result of carelessness. Some one was to blame, and yet the circumstances were such that direct testimony was out of the question. No one saw the fire set. The only course open to the plaintiff, in these circumstances, was, first, to show that sparks from the defendant's engines might easily have lodged in the straw and hay of the open car and thus have caused the fire, and, second, by a process of exclusion, to make it apparent that no other cause for the fire existed. There was evidence that during the morning, and within a short time prior to the discovery of the fire, showers of live sparks from defendant's engines were falling in the immediate vicinity of the car in question; there was also evidence from which it might be fairly inferred that the fire could not have been caused in any other way. The proposition that such testimony is prima facie sufficient and calls for an explanation from the defendant is established by numerous well-considered cases in the state and federal courts. *Ann Arbor R. Co. v. Fox*, 34 C. C. A. 497, 92 Fed. 494; *Gulf Ry. Co. v. Johnson*, 4 C. C. A. 447, 54 Fed. 474; *Missouri Pac. Ry. Co. v. Texas & P. Railway (C. C.)* 41 Fed. 917; *O'Neill v. N. Y. O. & W. R. Co.*, 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 221, 67 Am. Dec. 155; *Peck v. N. Y. C. & H. R. Co.*, 165 N. Y. 350, 59 N. E. 206.

In the latter case the court of appeals of this state says:

"It was sufficient if the plaintiff proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition, or negligently operated. The emission of sparks, unusual in quantity or character, or of an extraordinary size, such as would not be emitted from well-constructed locomotives in proper repair, would justify the jury in inferring negligence, and though not shifting the burden of proof, would cast on defendant the duty of explanation."

In the case of *Flinn v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 11, 36 N. E. 1046, quoted in the defendant's brief, the court says:

"If there had been evidence that any particular engine emitted an unusual quantity of sparks of an unusual size, that might, within the authorities cited, have furnished prima facie proof that the engine was out of repair, and the burden would have been cast upon the defendant to show that it was in proper condition and that the emission of sparks was inevitable, notwithstanding the use of any ordinary care."

The testimony was taken out of court and only portions of the depositions were read at the trial. We have, therefore, had an opportunity, which the trial judge did not have, to consider the entire testimony bearing upon the defendant's negligence. The result of this ex-

amination is to convince us that sufficient was shown to require the submission of the question of negligence to the jury.

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

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GERMAN v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1903.)

No. 1,109.

**1. CRIMINAL LAW—INSTRUCTIONS—INTENT.**

A charge in a criminal case, in which intent was an essential element of the offense charged, that such intent might be presumed from the doing of the wrongful or illegal act, and that such presumption cast the burden on the defendant to overcome it by evidence sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no such guilty intent, is erroneous.

**2. SAME—INSANITY.**

An instruction in a criminal case is erroneous which places on the defendant the burden of proving the defense of insanity by a preponderance of the evidence, it being sufficient to prevent a conviction if, upon the whole evidence, the jury have a reasonable doubt of defendant's mental competency to distinguish between right and wrong, and to understand the nature of the act charged at the time of its commission.

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

For opinion on motion for new trial, see 115 Fed. 987.

Augustus E. Willson, for plaintiff in error.

R. D. Hill, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. Plaintiff in error was indicted and convicted of the offense of making certain false entries in the books of the Third National Bank of Louisville, Ky., while a clerk and accountant therein, in violation of section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497], and was sentenced accordingly to a term of imprisonment. Upon the trial the court charged the jury that the intent to defraud or to deceive, which is made an element of the offense, may be presumed from the doing of the wrongful or illegal act, and such inference or presumption throws the burden of proof upon the defendant to do away with that presumption of guilty intent, and must be sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no such guilty intent in the transaction. The charge upon this subject is identically the same as that under review in the case of McKnight v. U. S. (C. C. A.) 115 Fed. 972. For the reasons stated there, we think there was error in the charge in this respect.

There was testimony tending to show that the accused was insane, and therefore irresponsible, at the time of the commission of the offense. Upon the claim of insanity the court charged:

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1286.

"His plea that at those times he was of unsound mind imposes upon him the burden of proving to your satisfaction and by a preponderance of the evidence that when he committed each of the offenses charged, if he did so at all, he was at such time of unsound mind; but nevertheless I say to you that you should not convict him upon any count unless the evidence satisfies you, to the exclusion of a reasonable doubt, that he was not of unsound mind when he made the entry described in any count of either indictment."

The decision in *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499, settled the law for the federal courts upon this subject, and the jury cannot properly return a verdict of guilty, if upon the whole evidence, from whichever side it comes, there is reasonable doubt as to the mental competency of the accused to distinguish between right and wrong and to understand the nature of the act he is committing. The charge given imposes upon the defendant the burden of proving by a preponderance of the evidence that when he committed the offense, if he did so at all, he was at such time of unsound mind. This is erroneous, and the error is not cured by the subsequent instruction that the accused could not be convicted unless the evidence satisfied the jury to the exclusion of a reasonable doubt that he was not of unsound mind when he made the entries described in the indictment. In this state of the record the charge is at least misleading.

Judgment reversed, and cause remanded.

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WOOSTER v. TROWBRIDGE.

LEWIS v. SAME.

(Circuit Court of Appeals, Second Circuit. January 15, 1903.)

Nos. 113, 114.

1. **INSOLVENCY—CONTRACT MADE BY TRUSTEE—VALIDITY.**

A trustee for an insolvent corporation, who had instituted a suit for infringement of a patent, made an agreement with complainant by which the latter, who had a related suit, agreed to prosecute both at his own expense, and to divide the recovery with the trustee. The suit of the trustee was difficult and doubtful, and no substantial recovery was probable, but through the energy of complainant, and after nearly 20 years of expensive litigation, a substantial sum was recovered. *Held*, that the contract of the trustee, under the circumstances, was not improvident nor ultra vires, and that a court of equity would not refuse to enforce the same by giving complainant his share of the recovery, which but for his services would not have been received by the estate.

2. **PATENTS—CONTRACT FOR DIVISION OF DAMAGES RECOVERED FOR INFRINGEMENT—CONSTRUCTION.**

A contract between owners of related patents, who were laymen, by which they agreed to issue licenses together, that the second party should endeavor to induce all infringers to take licenses, and should retain a per cent. of all license fees recovered for the other party, and "of all other sums payable for damages for infringement," should not be so narrowly or technically construed as to exclude from its operation sums recovered for infringements, although awarded as "profits," and not as damages, the evident intention being that it should apply to all sums so recovered.

3. **SAME.**

Such contract, however, did not entitle the second party to a share of the sum recovered for infringement in a suit previously instituted by the

first party, and in relation to which the second party performed no service.

**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.

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

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, entered June 13, 1902. The decree provides that a fund of \$24,063, paid into the registry of the court April 19, 1897, be divided (after paying costs) equally between Emma C. Wooster and Charles H. Trowbridge, as trustee. The decree disallowed claims presented by A. Nelson Lewis, Ida Tillinghast and Emma C. Wooster. All parties appeal. Trowbridge alleges error in awarding to Emma C. Wooster one-half of the fund and insists that the entire amount belongs to him as trustee. Emma C. Wooster insists that the court erred in not sustaining her claim to an additional one-quarter of the fund. A. Nelson Lewis in his own right, and as assignee of Ida Tillinghast, alleges error in the disallowance of his claim. The decision of the Circuit Court is reported in 115 Fed. 722.

John A. Garver, for Emma C. Wooster.

Edmund Wetmore and John K. Beach, for Charles H. Trowbridge.

Henry Galbraith Ward and A. Nelson Lewis, for A. Nelson Lewis.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are fully and accurately stated in the opinion of the judge of the Circuit Court, and, as we concur in his disposition of the cause and, generally, in the conclusions reached by him, an extended discussion of the issues involved will not be necessary.

The fund, which is the subject of this controversy, was recovered in an infringement suit between Theodore A. Tuttle, as trustee of the Elm City Company, of New Haven, Conn., and Horace B. Clafin et al., commenced August 1, 1878, in the Circuit Court for the Southern District of New York. After nearly 20 years of litigation the defendants paid into court the sum of \$43,557. Claims amounting to \$19,493 were subsequently allowed and paid, leaving a balance of \$24,063 to be divided in the pending action and cross-action.

The claim of Mrs. Wooster, which was allowed by the Circuit Court, is based upon a tripartite agreement, executed June 16, 1883, by her husband and assignor, George A. Wooster, Tuttle, as trustee, and Charles B. Stoughton, Tuttle's solicitor in the infringement suit against Clafin & Co., and two other agreements made in February, 1888, explaining, modifying and ratifying the same. Briefly stated these agreements provided that Wooster would at his own expense prosecute the Clafin suit to a final determination and divide the recovery with Tuttle. If they were valid the Circuit Court was correct in awarding one-half of the fund to Mrs. Wooster.

In order to interpret the agreements properly it is necessary that they should be considered only in the light of the facts existing at their inception. The claim against Clafin & Co. was, in 1883, only a chose in action. The suit had not been pressed for five years and it was not

until the following year, 1884, that an interlocutory decree was entered. (C. C.) 19 Fed. 599.

The claims of the Crosby and Kellogg patent were designed to cover a sewing machine attachment, incapable, without the aid of subsequent improvements, of producing the finished product of the machines used by Claffin & Co. No one in 1883 could have predicted any substantial recovery. Certainly no one at that time dreamed of a recovery of \$40,000. The court making the award aptly characterized the suit as "both remarkable and unique." 22 C. C. A. 138, 76 Fed. 227; 27 C. C. A. 255, 82 Fed. 744. In 1883 the claim, if not desperate, was surely difficult and doubtful. It was one which could only be collected after years of arduous endeavor and by the expenditure of large sums of money. The situation was one which required the exercise of prudence and caution and especially so by one who was managing an insolvent estate for the benefit of creditors. There was nothing illegal, improvident or ultra vires in the contract of June 13th, as modified and explained by the subsequent contracts. They were prudent contracts for the trustee to make and we agree with the Circuit Court in the reasons given for upholding them. Indeed, the same proposition, by implication at least, was decided by this court when the question of allowing fees to the counsel employed by Wooster was before it for decision. 31 C. C. A. 419, 88 Fed. 124.

Wooster was the managing man in the litigation; new energy was instilled into it by his efforts; he employed counsel, procured witnesses and paid disbursements amounting to several thousand dollars. In short, it may be said, that but for his efforts nothing would have been realized for the creditors of the New Haven Company. To turn his representative out of court, upon the theory that the agreements which created the fund were illegal and beyond the power of the trustee to make, would be without precedent in a court of equity.

The claim of Mrs. Wooster to recover an additional one-fourth of the fund under the contract of September 7, 1877, was properly disallowed. This was an agreement between Tuttle, as trustee, and Alexander E. Kursheedt. It recited the ownership by the Elm City Company of the Crosby and Kellogg patent, the control of the Arnold patent by Kursheedt and the desire of both parties to unite their interests in the two patents and grant licenses thereunder. The parties agree that Tuttle will issue licenses, as he may be requested to do so by C. B. Stoughton, and deliver them to Kursheedt, who is to do all in his power to induce all persons infringing the Crosby and Kellogg patent to take licenses thereunder. The agreement then proceeds:

"In consideration of the premises, party of the first part (Tuttle) agrees that the license fees under said Crosby and Kellogg patent, and all other sums payable for damages for infringement thereof be made payable to the party of the second part (Kursheedt) as attorney, and said party of the second part shall retain for himself twenty-five (25) per cent. of all moneys so received, and shall immediately after the receipt of said moneys pay the balance, seventy-five (75) per cent. thereof, to said Stoughton, said Stoughton to retain twenty-five hundred dollars to meet any expense of litigation or other disbursements connected with enforcing the patent that party of the second part and said Stoughton may deem necessary."

The agreement was assigned to Mr. Wooster in February, 1890, and was by him assigned to Mrs. Wooster, and under it she claims 25 per cent. of the fund in court, which, she insists, is an award of "damages for infringement" of the Crosby and Kellogg patent.

The judge of the Circuit Court was of the opinion that, as the agreement gave Kursheedt an interest only in the damages payable for infringement of the patent, he acquired no right to participate in a recovery which was for profits, and not for damages. We are unable to concur in this construction. The parties to this agreement were laymen, probably unfamiliar with the subtle distinctions of the patent law. They were dealing with facts not theories; what they had in mind was the money collected from infringers and it is not to be presumed that in using the word "damages" to describe the money so collected they intended to recognize a fine-spun distinction between damages and profits. There is nothing in the record to warrant such an interpretation. On the contrary the agreement itself and all the surrounding facts and circumstances indicate that the word "damages" was used in the broad, popular sense as descriptive of the sums collected by Kursheedt for past infringements. We prefer to put the affirmance of the decision, in this regard, upon the ground suggested by the judge of the Circuit Court, as follows:

"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."

In the brief filed by the counsel for Mrs. Wooster he says correctly:

"The object of the Kursheedt contract was to compel infringers to pay for their previous infringement of the patent and to take out licenses for the future."

Kursheedt was made the attorney for the owner of the patent to make settlements and grant licenses and for his services he was to retain 25 per cent. of the amount received by him. In other words, he was to be paid for the work done. In order to guard against any possible miscarriage in this regard it was explicitly provided, for the protection of Kursheedt, that all sums for license fees or for past infringements should be payable to him. It was from the "moneys so received" that he was authorized to deduct his commission. It was as if Tuttle had agreed to make Kursheedt his attorney and had agreed to pay him one-quarter of the amount collected.

We are convinced that the parties never had in contemplation an agreement which permitted Kursheedt to recover one-quarter of a judgment entered 20 years after the date of the agreement in a suit which he did not institute or promote. The services of Kursheedt were enlisted because of his familiarity with the business and his personal interest in having the Crosby and Kellogg patent recognized. He agrees "to do all in his power to induce persons infringing to take a license and procure therefor the best terms and conditions that he can." It was in consideration of these services that he was authorized to retain 25 per cent. of the moneys received by him. It was never intended that Kursheedt should share in a fund which was due

entirely to the energy and persistency of others. It is not necessary to decide whether a trustee can make a contract giving a valuable interest in a fund to a person who did not create or help to create it, for the reason that we are convinced that this is not such a contract. It does not, under any reasonable construction, relate to the fund in controversy.

The Lewis claim remains to be considered. He asserts title through C. B. Stoughton, a man whose character for integrity, at the time in controversy, is conceded to be questionable. The contention of the claimant is that on or about November 2, 1878, and after the suit was commenced against Claffin & Co., Tuttle made an oral assignment of the entire prospective recovery to Stoughton in settlement of a bill for \$5,000 for services which he had rendered for the Elm City Company or its trustee. The evidence relied upon to establish the claim is carefully stated and discussed in the opinion of the judge of the Circuit Court and but little need be added. Tuttle testified to the alleged oral assignment. But Tuttle has made so many contradictory statements during the course of the litigation that he is admitted on all sides to be utterly unreliable as a witness. His testimony, therefore, except as it is corroborated, need not be considered.

It is contended that corroboration is found in an entry probably made by Tuttle in a book, kept by his bookkeeper, containing a schedule of the patents belonging to the Elm City Company. Opposite the Crosby and Kellogg patent are the words, "Sold C. B. Stoughton for counsel fees." The entry is without date and Tuttle had no definite recollection regarding it, but even if it were a contemporaneous entry it is wholly insufficient to transfer to Stoughton the claim against Claffin & Co. for past infringement, especially when an action had already been commenced to recover such claim. *Kaolatype Co. v. Hoke* (C. C.) 30 Fed. 444.

The conduct of Stoughton certainly does not strengthen the claimant's case, for when he was endeavoring to obtain money from Lewis he produced a forged assignment from Tuttle as evidence of his title. If Tuttle had actually assigned the patent and the claim against Claffin & Co. to him he had only to send the written assignment to Tuttle for execution and it would have been returned duly signed. It is incredible to suppose that an intelligent man would take the desperate chance of forgery to raise money when he could have obtained the genuine signature by simply asking for it.

It is thought that a claim based upon an oral assignment from Tuttle to Stoughton, which assignment cannot be established without resort to the testimony of Tuttle, who has repeatedly denied that he made it, is too doubtful to be sustained. We are also of the opinion that the claimant cannot in the present condition of the pleadings and proofs recover upon the theory of a quantum meruit.

The decree of the Circuit Court is affirmed, without costs.

**ELECTRIC STORAGE BATTERY CO. v. BUFFALO ELECTRIC  
CARRIAGE CO.**

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 111.

**1. PATENTS—INFRINGEMENT—SECONDARY BATTERIES.**

The Brush patent, No. 337,299, being the inventor's generic patent for a secondary battery, held valid, and infringed, on appeal from an order granting a preliminary injunction.

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

This cause comes here upon appeal from an order of the Circuit Court, Western District of New York, granting an injunction pendente lite against infringement of United States letters patent No. 337,299, granted to Charles F. Brush, March 2, 1886, upon an application filed June 13, 1881 for "secondary battery."

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The points raised upon this appeal have been heretofore decided adversely to the appellant by this court in *Accumulator Co. v. Brush Co.*, 2 C. C. A. 682, 52 Fed. 130, and *Thomson-Houston Co. v. Elmira & Horseheads Co.*, 18 C. C. A. 145, 71 Fed. 406. It is true that when this generic patent was before this court the earlier specific patents had not expired, but the legal propositions involved are not changed by such expiration.

The order is affirmed, with costs, on the opinion of Judge Hazel ([C. C.] 117 Fed. 314), which clearly and succinctly states those propositions, and indicates the bearing thereon of the cases above cited.

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**CIMIOTTI UNHAIRING CO. v. AMERICAN FUR REFINING CO.**

(Circuit Court, D. New Jersey. February 11, 1903.)

**1. EQUITY—EVIDENCE IN REBUTTAL—IRREGULAR INTRODUCTION OF EVIDENCE IN DEFENSE.**

A defendant cannot take advantage of his own irregularity in introducing evidence in defense on the cross-examination of complainant's witnesses to exclude evidence taken by complainant in rebuttal.

**2. PATENTS—SUIT TO RESTRAIN INFRINGEMENT—PARTIES.**

In proceedings brought in the joint names of the owner of a patent and another to restrain infringement, it is of no concern to the defendant what may be the terms of the agreement between the parties plaintiff with regard to the patent, whether, as claimed, it is simply an exclusive license to manufacture, or, as suggested, an unlawful combination in restraint of trade. All that can be asked is that the suit shall be carried on by those entitled to do so, of which, with both parties joined, there could be no question.

**8. SAME—COURTS—DECISIONS IN DIFFERENT CIRCUITS.**

The courts of one circuit are not controlled by the views taken with regard to a patent by the courts of another, nor absolved from an inde-

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¶ 3. See Courts, vol. 13, Cent. Dig. § 328.



pendent examination of the questions involved; such decisions being simply entitled to proper deference, as those of courts of equal standing and authority.

4. SAME—INFRINGEMENT—MACHINE FOR PLUCKING FURS.

The Sutton patent, No. 383,253, for a machine for plucking fur skins, was not anticipated by anything in the prior art, including therein the Lake (British) patent of 1881, and the H. W. Covert patent of 1884, the two machines differing essentially in the character of the brushes employed to depress the fur and in the effect of their operation; also *held* infringed.

In Equity. Suit for infringement of letters patent No. 383,258, for a machine for plucking furs, granted to John W. Sutton, May 22, 1888. On final hearing. See (C. C. A.) 118 Fed. 838.

Louis C. Raeger, for plaintiff.

Henry Schreiter, for defendant.

ARCHBALD, District Judge.\* The motion to strike out the expert testimony taken by plaintiffs in rebuttal is not entitled to prevail. The defendants introduced no direct or independent proofs, but in the course of the cross-examination of Carl Mischke, one of their own number, who was called as a witness by the plaintiffs, they offered a copy of the Lake (English) patent of 1881, and drew out from the witness the declaration that the machines they used were constructed in accordance with it. This they now rely upon to defeat the plaintiffs' case, and it was to meet and overcome it that the testimony which is objected to was taken. The introduction of the Lake patent was out of order at the time, and it is to be treated as if had been brought in when it should have been, at the close of the plaintiffs' evidence in chief. This would have cut off much of the so-called cross-examination of Mischke by his own counsel, and compelled the defendants to resort to direct proofs of their own in the ordinary and appropriate way. The irregularity with which they are so chargeable is not to be made the basis for striking out what would otherwise be legitimate and relevant evidence. The Covert patent of 1884 was similarly brought in, while Gustave Cimiotti was under cross-examination, and notice was then given by plaintiffs' counsel that immediately on the close of defendants' case he would take rebutting testimony on the subject of both these patents. The defendants were thus fully put on their guard as to what they would have to meet, and cannot claim to have been in any wise misled or prejudiced.

Neither is it of any concern to us what may be the terms of the agreement between the Cimiotti Unhairing Company and John W. Sutton, the owner of the patent in suit—whether, as contended by the defendants, it amounts to an unlawful combination in restraint of trade, or, as alleged by plaintiffs, is simply an exclusive license upon certain conditions to manufacture, use, and sell machines made in accordance with the patent. These proceedings are not brought to enforce the agreement, but to restrain an alleged infringement, and all that the defendants can ask is that they should be carried on by parties who are entitled to do so, as to which there can be no question, since the

\* Specially assigned.

Cimiotti Company and Sutton are both joined. The suggestion that the latter may know nothing of the suit because the bill is only signed by the former calls for scant consideration. It is brought in his name by responsible solicitors, and that is all we need to know.

The patent in suit, No. 383,258, which was issued to John W. Sutton, May 22, 1888, for a machine for removing the stiff hairs from seal and other furs, has been the subject of extended litigation in the Second Circuit, where it has been uniformly sustained both in the lower courts and the Court of Appeals. *Cimiotti Unhairing Co. v. Derbeklow* (C. C.) 87 Fed. 997; *Same v. Bowsky* (C. C.) 95 Fed. 474; *Same v. Mischke* (C. C.) 98 Fed. 297; *Same v. American Unhairing Mach. Co.* (C. C.) 108 Fed. 82, 85; *Same v. Nearsal Unhairing Co.* (C. C.) 113 Fed. 588; *Same v. American Unhairing Mach. Co.* (C. C. A.) 115 Fed. 498; *Same v. Nearsal Unhairing Co.*, Id. 507; *Same v. Comstock Unhairing Co.* (C. C.) Id. 524. These decisions are naturally, if not necessarily, of persuasive force here (*New York Filter Company v. Jackson* [C. C.] 112 Fed. 678; Id. [C. C. A.] Id. 1021); not that this court is controlled by them or absolved from an independent examination of the questions involved, but simply that they are entitled to proper deference as the decisions of courts of equal standing and authority. *Mast, Foos & Co. v. Stover Mfg. Company*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. While, therefore, they have been of material assistance in the disposition of the present case, I have considered it my duty to examine it on my own account, untrammelled by them; the conclusions which I have reached, although conforming to them, being substantially my own.

The case is by no means free from difficulty, and the margin by which the patent is to be sustained is a narrow one. Sutton was not the pioneer in the art of plucking or unhairing fur by machinery, the first to advance beyond the tedious hand process being the Cimiotti Bros., who secured a patent for what is known as a blast machine in April, 1881. Neither was he the first to conceive of the use of a separating brush in place of a blast, taking that in its largest sense; a patent having been issued in England to William Robert Lake, representing Lambert & Kokesch, of New York, almost simultaneously with that of the Cimiotti Bros., in June, 1881, and H. W. Covert having obtained another in this country in 1884, in both of which a brush or brushing device is shown. Both of these are brought forward as anticipations, and the serious question is whether they do not bear that character.

In the Sutton patent the invention is declared to consist (in a machine for plucking skins) of a fixed stretcher bar, means for stretching and intermittently feeding the skin over it, a fixed card above and near the edge of the same, a rotary separating brush that is intermittently moved up in front of the stretcher bar, an oscillating guard below the stretcher bar, a rotary and a vertically cutting knife working in conjunction for cutting off the projecting stiff hairs, and the mechanism for imparting the appropriate motion to these parts as described. The operation of the machine, as given in the specifications, is substantially as follows: After the skin to be unhaird is set in place with one end over the edge of the stretcher bar, the fixed card above it is

drawn backwards a few times so as to card back the fur and hair, and produce a parting in the fur, and is then set a little back from the edge; another card or brush at the back of the rotary knife then passes in front of the stretcher bar, and draws out the fur and hair; and the rotary separating brush is then moved up in front of the same, and there revolved so as to separate the fur from the hair, brushing the fur downwards, and then itself proceeds in the same direction, carrying with it the fur, which is immediately held in place by the oscillating guard that follows, leaving the stiff upstanding hairs on the edge of the stretcher bar in position to be removed by the action of the cutting knives. While all the parts involved must be regarded as contributing to the general result, the one which seems to be particularly effective is the rotary separating brush, and the chief feature of its action is the downward sweeping movement by which the fur is carried away from the edge of the stretcher bar out of reach of the knives. No one claim of the patent embodies all of the elements mentioned, nor in any is the downward action of the rotary separating brush made a feature, although described in the specifications and illustrated in the drawings. The third claim seems to me the most comprehensive, but the eighth is the one relied upon, and is as follows: "(8) 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." Nothing is said of the cutting knives in this claim, nor, as just suggested, of the special downward action of the separating brush; but, assuming that the functions of the several parts so assembled are the same as are assigned to them in the specifications, the question is, in what relation do they stand to the prior art?

On the face of things, and at first blush, it must be confessed that we seem to have little if anything different from what is disclosed in the Lake (British) patent of 1881 already referred to. That invention, as stated in the specifications, is said to consist in the general combination of (1) a holding device for supporting the skin, (2) a brushing or combing agent for drawing the fur away from the hairs, and (3) a clipping device to remove them when so separated. Enlarging upon this, the supporting device is described as a bar with slightly rounded edge over which the skin is stretched, set in a reciprocating frame, pivoted on eccentric bearings, so arranged that when the supporting shaft is revolved the [stretcher] bar will be slightly raised and lowered. This bar is caused to vibrate from the "fur opening brushes," employed to separate the fur and hair, to the cutting knives, and back again to the brushes, by means of an actuating shaft and crank, and the operation of the machine is given substantially as follows: The skin to be unhaired is carried over the stretcher bar on an endless apron, being first drawn underneath a compression plate, and in that position is presented to the brushing rolls for their action, by an intermittent feed. These brushing rolls, as represented, are two in number, set one slightly below and in advance of the other, the first, however, being able, as it is said, to be dispensed with. They are made to revolve

in the direction of the hands of a clock, and are described as being covered "with card-clothing, bristles, or teasels," the function assigned to them being to draw the fur over the edge of the stretcher bar and away from the compression plate, allowing the stiff hairs to stand up by themselves. This action of the brushes is effected as the stretcher bar is carried in the direction of the cutting knives, which are stationary, the stretcher bar being made to rise from the one brush toward the other by the action of a cam on the main shaft, and to escape from the intermediate or second brush on its return in a descending concave curve under it by a protuberance on the opposite side of the cam. There is some considerable ambiguity with regard to these motions, but I have taken those which are most favorable to the defendants, and at the same time justified as most natural and probable. Here, then, in a general way, we have all the elements of the patent in suit: (1) A stretcher bar (movable instead of fixed, but none the less an equivalent, as the Lake itself recognizes); (2) an intermittent feed; (3) a stationary card in the shape of a compression plate above the stretcher bar; (4) rotary separating brushes to open the fur and draw it over the edge of the stretcher bar; and (5) appropriate mechanism to move the stretcher bar up and into contact with the brushes, a plain equivalent for the reciprocal motion of the brush into position in front of the stretcher bar in the Sutton. Not only are these elements themselves apparently duplicated in the two patents, but, accepting in the Lake, the upward curve of the stretcher bar, moving forward from one brush to the other, as not only intended, but shown, it is a question whether in the consequent action of the brushes on the fur we have not the very downward sweep on which so much stress is laid as the one effective feature of the patent in suit.

What, then, is there to distinguish the one patent from the other? It is to be found, as it seems to me, notwithstanding what has been said, in the character of the brushes employed, and the different effect of the two devices on the fur and hair. The brushing rolls in the Lake are to be covered, as it is expressly specified, "with card-clothing, bristles, or teasels," and they are to operate by drawing the fur over the edge of the stretcher bar. This is descriptive of a carding and not a brushing action, as in the patent in suit. It is true that the specifications in another part speak of a brushing or combing agent as an element of the invention, which, standing by itself, might imply something different; but even in that connection the purpose is said to be to draw the fur away from the hair, which is, at least, consistent with carding or teaseling; what is controlling being that card-clothing or teasels would be inappropriate for anything else; and, although bristles are mentioned as an alternative, such bristles are to be understood from the connection as would produce the same effect. To strengthen this conclusion, the rolls as portrayed in the drawings are not like brushes, but like cards. The brushing rolls of the Lake patent, therefore, must be accepted as of this special and peculiar character, and intended to act by catching or engaging the mass of fur at the edge of the compression plate as card-clothing or teasels would engage it, drawing it down and over the edge of the stretcher bar, the resiliency of the water hairs being relied upon to make them spring up and be removed by

the cutting knives. If this be so, we have something quite aside from that which is found in the Sutton machine. The action there consists, as we have seen, in parting the fur over the edge of the stretcher bar and brushing or sweeping it down on the off side as the separating brush moves in that direction, the relatively soft bristles of which it is composed conducing to that result. The distinction which is thus made between the two patents, if this be the true construction of them, is a real and substantial one, as experience has proved. While the Sutton machines have been extensively employed from the first, and been eminently successful, there never was an effective Lake machine, and the difference in the character and action of the brushes is probably the reason for it. The Lake was inherently defective, and was abandoned by the inventors, Lambert and Kokesch, after spending some \$2,000, along with their attorney Shaw, in trying to produce something that would be operative; so that not only was the application which had been made in this country given up, but the British patent which had been granted was allowed to lapse a few years afterwards for want of the continuing fee. As a foreign patent, it stands simply for what is disclosed, and not for what by some possibility could be made out of it (*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Hanifen v. E. H. Godshalk Co.*, 28 C. C. A. 507, 84 Fed. 649; *Hanifen v. Armitage* [C. C.] 117 Fed. 845); and as a commercial failure there is no particular occasion to treat it any more favorably than we have to. Adopting the interpretation suggested above, which I am convinced is the true one, it is not in any respect an anticipation of the patent in controversy.

What has been said of the Lake is true also to a certain extent of the patent issued in 1884 to H. W. Covert. In that, as in the Lake, we have the same general combination of elements, the distinction between it and the Sutton consisting in the character and operation of the special devices employed to act upon and part the fur and hair at the edge of the stretcher bar. In this machine one of the cutting knives serves as a guard device, pressing down and holding back the fur, except so much as is released each time by the forward motion of the pelt. The layer of fur so released is then acted upon by a segmental rotary brush which passes over it at the edge of and at right angles to the stretcher bar, and draws it forward. As the brush leaves the fur, the hairs are supposed to spring back on account of their elasticity, to be caught and cut by the knives, while the fur is prevented from doing this by a revolving metal plate or wiper (kept damp by passing through a wet brush), which catches and plasters it down on the off side. It will be thus seen that the segmental brush merely opens or parts the fur, and that it is the metal wiper which is relied on to carry it down and away from the knives, the effective downward action of the Sutton brush being committed to that device. It must be confessed that this combination comes very close to the patent in suit, but at the same time I am not persuaded that it is an equivalent. There is this important difference: The Sutton brush engages the fur at the edge of the stretcher bar, and at once, without parting from it, sweeps it down and out of harms way; while the Covert brush, after simply opening and drawing forward a layer of the fur,

passes on and leaves it to be caught and carried down by the wiper, with the serious chance that in the interval between, the fur, like the hair, may also spring back into reach of the knives. The different functions of the agencies so employed and the materially different method in their operation sufficiently distinguish the one patent from the other, and leaves a place by itself for the patent in suit.

There is nothing in the record before me to show whether anything was ever done under the Covert patent, or how far it was found to be commercially successful. Mention was made at the argument of a so-called Covert machine in which a cylindrical roller covered with felt or carpet was substituted for the segmental rotary brush, and it seems to have figured in some of the cases in the Second Circuit. (C. C.) 98 Fed. 297; (C. C. A.) 115 Fed. 498. But it is not brought forward here, and no further notice need be taken of it. According to the views expressed in the cases where it was considered, it was a mere experiment, out of which nothing came.

There being nothing, therefore, in the prior art to affect the validity of the Sutton patent, the question of infringement is all that remains, and this is not involved in any serious difficulty. The machines in use by the defendants have all the elements of the claim in suit, and apparently infringe upon it. The defense set up is that they are constructed according to the Lake patent, and therefore do not; but unfortunately this position cannot be sustained. It is no doubt true that the general form of mechanism there specified has been followed, but it has been admittedly and necessarily modified in several particulars. Some of these changes merely go to relieve the obscurities found in the patent, but others are of a much more radical character. The Lake as a piece of machinery, of course, has operative parts, but whoever employs them is confined to what is there expressly shown. Not only must there be the same elements, but they must operate in the way there specified. You cannot work them over so as to make a new machine, and that is what has practically been done in the present instance. This patent has been dormant for over 20 years, and there has been a corresponding advance in the art to which it belongs. It is easy, now that our eyes have been opened, to see what to do to make it successful, and this is, of course, permitted provided it does not infringe on what others have invented and patented meanwhile. A comparison shows that all the changes which we find introduced in the defendants' machines are in the direction of the Sutton. The single brush employed is moved considerably below the position given it in the Lake drawings and description, and by increasing the irregularities of the cam, and timing them somewhat differently, the downward sweep of the brush is materially increased and changed. But, more than this, in place of the brushing rolls covered with card-clothing or teasels, or what would be the equivalent bristles, as required by the patent, we have ordinary bristle brushes substituted, entirely changing their action and function, and amounting to a clear departure. Whatever view be taken of anything else, this is sufficient to establish that the machines which the defendants are using are not Lake machines, whatever resemblance they may bear in their gen-

eral outline, but are modifications which appropriate the elements of the Sutton patent and infringe upon it.

Let a decree be drawn sustaining the bill, and referring the case to a master.

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PETERS v. UNION BISCUIT CO.

(Circuit Court, E. D. Missouri, E. D. February 13, 1903.)

No. 4,321.

1. PATENTS—ANTICIPATION—EVIDENCE OF PRIOR STRUCTURE.

The testimony of a witness as to the existence and use of a structure essentially the same as that of a patent 12 or 15 years prior to the time of giving the testimony, unsupported by any exhibit, is too uncertain and unreliable to establish anticipation.

2. SAME—INVENTION—EVIDENCE.

The fact that a large number of inventions have been made, and patents granted, relating to the same subject-matter, none of which discloses the device of a later patent, nor any which so successfully accomplished the result sought, is strong evidence that such patent discloses invention.

3. SAME—NEW COMBINATION OF OLD ELEMENTS.

The combination of two old elements in a single structure in a manner which produces a new and useful result, or an old result in a more facile, economical, and efficient way, may involve invention.

4. SAME—INFRINGEMENT—PACKAGE FOR BISCUIT.

The Peters patent, No. 621,974, for a method of and means for packing crackers, and the like, consisting of the use, with an ordinary collapsible and interlocking carton, of an inner lining of waxed or paraffined paper, so interfolded between the interlocking flaps of the carton as to form an integral structure, construed, and *held* not anticipated, and to disclose patentable invention; also *held* infringed.

5. SAME—LIABILITY FOR INFRINGEMENT—OFFICERS OF CORPORATION.

The managing officers of a corporation, who actually participated in the adoption and use by the corporation of an infringing device, are liable for the infringement, as joint tortfeasors.

6. SAME—SUIT FOR INFRINGEMENT—PARTIES.

A licensee whose license is not such as to amount to an assignment of the patent is not a necessary party complainant in a suit for its infringement.

In Equity. Suit for infringement of letters patent No. 621,974, for a method of and means for packing biscuits, crackers, or the like, granted to Frank M. Peters March 28, 1899. On final hearing.

Earl D. Babst, Boyle, Priest & Lehmann, and Offield, Towle & Linticum, for complainant.

Collins, Jamison & Chappell, Higdon, Longan & Hopkins, and Bakewell & Cornwall, for defendants.

ADAMS, District Judge. This is a suit to restrain the infringement of letters patent of the United States, No. 621,974, granted to Frank M. Peters, for new and useful improvements in methods of and means for packing biscuits, crackers, or the like. While the defendants allege in their answer that the invention of the patent was dis-

¶ 3. See Patents, vol. 38, Cent. Dig. § 470.

closed by a large number of prior publications, and that it was in public use for many years, and that it had been described and patented in a large number of foreign patents prior to the date of Peters' application, and that Peters had abandoned his invention before he made application for the patent, there is found no substantial evidence supporting any of these defenses. The real defenses, as made by the proof and argument, are that Peters' patent is void for want of patentable novelty, and that defendants do not infringe. These real defenses will therefore be considered in the order stated.

There are four claims alleged to have been infringed by the defendants, as follows :

"(1) The herein-described method of packing biscuits, crackers, or the like, which consists in completely enveloping the same in an uncut or continuous lining or protective sheet and an outer sheet or blank, of heavier, but flexible, material, provided with marginal flaps, by superposing the lining or protective sheet upon the blank, and then simultaneously folding both said sheet and said blank, by the aid of a suitable former, into the form of a box or carton, overlapping and tucking said flaps during said folding, and thereby interfolding the marginal portions of the lining or protective sheet with the flaps of the blank, and securing the flaps to hold the package closed, substantially as described.

"(2) The herein-described box or carton for crackers, biscuits, or the like, comprising an internal lining composed of a sheet of protective paper, completely enveloping the contents, and an outer sheet, of heavier, but flexible, material, having overlapping and interlocking flaps, with which the marginal portions of the lining sheet are interfolded, substantially as described.

"(3) The herein-described box or carton for biscuits, crackers, or the like, comprising an internal protective lining, composed of a single continuous or unbroken sheet, of material such as waxed paper, and an external covering, of heavier, but flexible, material, suitably cut and scored to provide overlapping and tucking flaps, said sheets being adapted to be simultaneously folded while one is superposed upon the other, and said flaps being overlapped and tucked, and the marginal portions of the lining interfolded therewith, and the package thereby secured without extraneous fastening means or perforating the lining, substantially as described.

"(4) The herein-described box or carton, comprising an internal protective lining, composed of a single continuous or unbroken sheet of material, such as waxed paper, and an external covering of heavier material, suitably cut and scored to provide overlapping and tucking flaps, and said lining sheet being of such dimensions as to provide a top fold adapted, when folded, to afford a triangular flap of greater length than the width of the box, and to be engaged by the top flap of the external covering, and pass therewith into the space between the edges of the front of the covering and the lining-sheet, said flaps being overlapped and tucked, and the marginal portions of the lining interfolded therewith, and the package thereby secured without extraneous fastening means or perforating the lining, substantially as described."

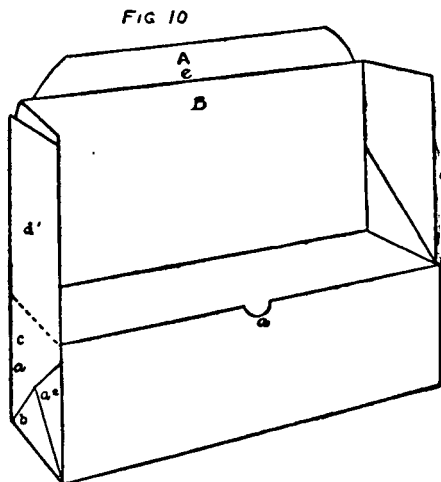
These claims, it will be observed, are, first, for a method or process of producing the box of the patent; second, for the box itself, resulting broadly from carrying out the process of production; third, for the box itself, with a certain limitation, consisting of scoring the external sheet so as to provide a more facile method of formation; fourth, for the box itself, with the limitation as to the scored external sheet, and a further limitation providing for a triangular flap in the lining or internal sheet, to be engaged by the top flap of the external sheet so as to fasten down the cover. The invention, as disclosed in the specification, is for a combination of any of the well-known forms



of blanks having overlapping and interlockable ends or flaps which prior thereto had been employed for making paper boxes with an interior lining sheet of waxed or paraffined paper, so that by a certain peculiar interfolding of the lining sheet between the interlocked flaps of the external sheet a new and useful result is secured. This result is claimed to be an inexpensive package for holding bakery products, which excludes moisture and dust, holds its contents firmly in position, prevents breakage, and preserves their freshness and flavor. In the language of the description:

"The resulting package is one in which the crackers are completely enveloped and inclosed in a protective envelope of paper, preferably waxed or paraffined paper, which is moisture proof and grease proof, without any openings which may gape and admit moist air to the contents; and this envelope is interfolded with the various flaps and sections of the paper box or carton (hereinbefore called the 'external sheet') within which it and the crackers are inclosed in such a manner that the interfolded portions of the lining sheet close the spaces between the flaps of the box or carton, and more effectually protect the contents thereof, while at the same time both the lining sheet and box or carton are so interfolded as to form, in effect, a unitary structure; it being impossible for the lining to move relatively to the box or carton, and the two holding the crackers firmly in place, and preventing movement and consequent breakage of these latter."

This box is produced by superposing a lining sheet upon a flat blank of any of the old forms of collapsible paper boxes, which are provided with interlocking flaps, folding them together simultaneously, and substantially as follows: Folding up the front section, turning in its end flaps, turning up the side flaps so cut as to partially cover the end flap of the first section, bringing the back section up against the former (over which the box is being constructed), turning in its end flaps, and locking the same by interposing its key into the slot made for its reception in the end flaps of the first-mentioned section. By this process, thus generally described, a box is produced like figure 10 of the patent, as follows:



The foregoing cut is intended to show a box so far formed as to be ready for filling. The further steps requisite to closing the box after it is filled involve bringing over the upper flap of the carton so as to form the covering or lid of the box, and tucking its lining inside of the section first turned up. By the use of the two elements, namely, the outside carton and the inside lining, and the interfolding and interlocking process just referred to, a box is produced completely lined with the paraffined or waxed paper; and this lining, by having its ends doubly interfolded between the end flap of the first section and the side flap, and also between the side flap and the end flap of the back section, and having the two main sections of the carton interlocked over these interfolded ends of the lining, is so firmly united to and interformed with the outside carton that the unitary structure referred to in the patent, namely, such a structure that its lining is impossible of movement relatively to the carton itself, and holds its contents firmly in place, preventing movement or consequent breakage thereof, is constructed. It is contended by defendant's counsel that this structure does not involve patentable invention.

This record is full of exhibits of boxes and packages used in the prior art. I have examined all of them, including a great variety of candy, popcorn, cracker, and tobacco packages; and apart from exhibit 16, to which I will refer later, it is, in my opinion, safe to say that none of them show the invention of this patent, or anything suggestive thereof. There are numerous packages formed of two sheets of paper—one a lining, and the other a heavier outside covering—and many of these are interfolded in various ways. Some of them have the flaps of the outside covering or carton interlocked, but none of them have the inside lining interfolded between the interlocking parts of the outside carton, and none of them produce the unitary and useful product resulting from such coexisting, cotemporaneous interfolding and interlocking of the separate parts. Likewise a large number of patents, domestic and foreign, are relied upon by defendant's counsel as disclosing the invention of the patent in suit. Most of them relate to collapsible cartons with interlocking flaps, the existence of which is conceded in the specification of the patent in suit, and the same are appropriated as one of the elements of the combination of the patent. Some of them relate to cartons with superposed sheets or linings, not, however, remotely suggesting the notion of so interlocking the flaps of the carton as to interfold and bind between them the ends of the lining so as to make a unitary structure. Others relate to bags with inner linings, but disclose nothing of the method or product of the patent in suit.

Defendant's expert selects the Howe and Davidson patent, No. 511,080, as the one which presents the nearest approach to the invention of the patent in suit; but this patent, when examined, is found to relate exclusively to the knockdown or collapsible carton, with no suggestion of the combination of such a carton with an inner lining so interfolded between its interlocking flaps as to form an integral part of it.

The Munson patent, No. 288,255, of date November 13, 1883, is especially relied upon by defendant's counsel, in argument, as disclos-

ing the invention of the patent in suit. I am unable, after a careful consideration of the patent itself, and the argument made on it, to agree with counsel. The device of the Munson patent appears to me to be merely an outside carton provided with a closing flap adapted to be engaged with a slot so as to close and secure the end of the box. The claims are as follows:

"(1) A paper box having a tubular body provided with flaps for closing one or both of its ends, and provided with a lining, attached to the inside of its body, that may be folded to close one or both of its ends independently of its folding flaps, substantially as described.

"(2) A paper box, the body whereof is provided at one or both ends with closing-flaps, one flap being provided with angular slots or pockets, as 11', and the opposite flap with corners adapted to enter and engage or be held in said pockets to close and secure the end of the box, substantially as described."

It is true, the description of the Munson patent refers to the interior wrapping or lining pasted or otherwise secured to the interior of the box, but no connection at all is shown between the folded ends of this lining and the interlocking flaps of the box. Considering the claims and description together, it is clear, in my opinion, that the invention of the Munson patent was merely a collapsible carton, involving no conception or suggestion of the device of complainant's patent.

Many other patents are called to the court's attention as anticipatory of complainant's invention, or as illustrating the prior art. They have all been duly considered, and, in my opinion, utterly fail to disclose the essential feature of the combination of the patent in suit. If the Howe and Davidson patent or the Munson patent, already considered, do not disclose complainant's invention, none of the others do. For these reasons, no detailed consideration will be given in this opinion to any of the other patents pleaded or found in the proof.

Exhibit No. 16, already alluded to as one of the unpatented structures relied upon by defendants as disclosing the invention of the patent, is, at best, a box made by witness Sallie Kemper, expressive of her remembrance of a box employed by her employers, at Nashville, some 12 or 15 years before she gave her testimony. If there were no confusion or inconsistency in the statements of the witness, and if the box, Exhibit 16, was intended by her to be a reproduction of the box as used 12 or 15 years ago by her employers, this kind of testimony, uncorroborated and unaccompanied by any exhibit of a box in actual existence at the time to which the evidence relates, would be too uncertain and unreliable to defeat a subsequent grant of the patent for the same device. *Barb Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; *Kraatz v. Tieman* (C. C.) 79 Fed. 322. In my opinion, however, this Exhibit 16 is not a fair expression of the understanding of the witness herself. Her testimony in relation to Exhibits 15 and 16, taken together, shows that counsel have misconceived her real meaning. For either and both of the foregoing reasons, Exhibit 16 is of no evidential value as an anticipation of complainant's invention. It results that neither in prior patents nor prior unpatented structures is the complainant's invention shown or suggested.

This conclusion leads next to a consideration of the essential nature, in and of itself considered, of the device of the patent, with a view of determining whether it discloses such inherent simplicity as to be classified as a development of ordinary mechanical skill, or as the result of inventive faculty. It is true, the paper box in question belongs to a comparatively humble and lowly art. The two elements which compose it are simple and well known, but the union of these two elements in the way and manner and for the purpose disclosed by the patent was obviously not well known at the time of complainant's invention. The large number of patents and exhibits found in this record looking towards the result achieved by the patentee disclose an unsatisfied need. The art had been diligently practiced for many decades, and divers devices for packing crackers, candy, and other like products had been resorted to; but none of them accomplished the desired purpose. Such being the case, when a patent is finally granted for a device which does accomplish the desired result, the court should not look with disfavor upon it. *Key Stone Manufacturing Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103. The simple scheme of subjecting the two elements before then each separately well known, to a process of unification, consisting of so folding and interfolding them as to create a hitherto unknown unitary structure, was left to the complainant. The argument that this new and peculiar combination was a mere aggregation of old elements, and a mere product of ordinary mechanical skill, so obvious as to be readily perceived and taken advantage of by those skilled in the art, is, in my opinion, fully answered by the fact that none of the numerous inventors in defendants' line of industry, and none of the skilled artisans engaged for years in that industry, with the problem urgently confronting them, ever did discover its solution. As said in *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177, "It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and bring it into notice." It seems to me that the step taken by complainant in uniting and unifying the two old elements in question in the way and manner already disclosed was the final step in the line of invention in the industry in question, which turned failure into success, within the true meaning of the doctrine announced by *Barb Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154. The treatment of the two elements in question, in my opinion, produced a new and useful result. It certainly disclosed a method of producing an old result in a "more facile, economical, and efficient" way; and the case is brought directly within the doctrine announced by the Court of Appeals of the Eighth Circuit in divers cases, and particularly the case of *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 45 C. C. A. 544, 106 Fed. 693. The "barb" of the *Barb Wire Patent*, supra, the "collar button" of *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, and the "dam" of *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895, are each and all of them very simple devices; but they served a new and useful purpose, and were held by the Supreme Court of the United States to involve patentable invention. The combination resulting in the box involved in the present

case is no more simple than the "barb," the "collar button," or the "dam" involved in the cases just cited. In my opinion, it took the inventive faculty to produce it. Moreover, the proof abundantly shows that prior to the invention of this patent the old paper cartons or boxes were inadequate to the demands of the service required of them; that the contents deteriorated rapidly in substance and flavor; that they were subjected to the baneful effects of air, moisture, and dust; and that the hermetically sealed tin cans or boxes would alone serve the purpose of successfully marketing the same. This tin box was so expensive as to be practically prohibitive. Since the introduction of the box of the patent, a radical change has taken place. This box has been found equal to the climatic and other local conditions of all parts of the country—from New Orleans to New York, from Florida to Minnesota, and California to Massachusetts. The uniform testimony from all these regions is to the effect that the contents of the box are preserved in their original freshness and flavor. Prior to 1899 the National Biscuit Company, one of the licensees of the complainant, had been putting up and selling its bakery products in the best carton or box then known to the trade. Since that time the same company has been using the box of the patent, and one of its bakeries, namely, the Kennedy Bakery, has increased its product nearly 13-fold per annum, and this I think the evidence shows to be largely the result of the use of the box of the patent. I am not unmindful of the argument of defendant's counsel to the effect that the advertising and labels upon the box have materially enhanced the sales, but, giving due consideration to all such facts, I am of opinion that the record fairly discloses that the large output in the Kennedy Bakery is chiefly the result of the employment of the box of the patent in suit. Not only so, but the defendants themselves recognize the great advantage and superiority of complainant's box by abandoning the box which they had theretofore employed—the same being one which they now insist discloses the invention of the patent—and by resorting to the use of complainant's box instead. The whole testimony, in my opinion, clearly shows that the box of the patent materially facilitates the distribution of inexpensive food products to consumers, and at the same time lessens the cost and enhances the intrinsic value of such products. Such being the case, the authorities are uniform to the proposition that doubt as to patentable novelty should be resolved in favor of sustaining the patent. *Smith v. Goodyear Dental Vulcanite Company*, 93 U. S. 486, 23 L. Ed. 952; *Consolidated Safety Valve Company v. Crosby Steam Gauge & Valve Company*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Gandy v. Main Belting Company*, 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272; *Magowan v. New York Belting Co.*, 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781; *Hobbs v. Beach*, 180 U. S. 383, 392, 21 Sup. Ct. 409, 45 L. Ed. 586; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, *supra*.

Have the defendants infringed? The defendant corporation, of which defendant Winkelmeier is president, and defendant Grubbs is general manager, is shown by the proof to have secured the services of one Sallie Kemper as its forelady. She had been for some months prior thereto in the employ of the National Biscuit Company, one of

complainant's licensees, engaged in the work of packing crackers. About two weeks after defendant corporation employed her, it abandoned their old form of packing box—the same being one of the boxes shown in the prior art—and began packing its product in the box now claimed to be an infringement of complainant's device. The forelady, Kemper, gave the necessary instructions, and had charge of making the change. The general offices of the defendant corporation not only presumably, but in fact, so far as Grubbs is concerned, participated in the conferences resulting in the change. Under such circumstances, I have no doubt that the corporation itself and its general executive officers are joint tort feasons in an infringement, if the same is made to appear. The executive officers of a corporation, who necessarily inspire all its acts, cannot shield themselves behind an artificial, and sometimes irresponsible, creation, from the consequence of their own acts, even though performed in the name of the artificial body. In determining the issue now under consideration—whether the defendants have infringed complainant's patent—it is fair, in my opinion, gathered from the evidence just epitomized, to presume at the outset that the defendants intended to do so. The relation of witness Kemper to the parties involved in this litigation, her conduct while in the employment of the National Biscuit Company, her conduct after entering defendants' service, the speedy transition by defendants, after Kemper entered their employment, from the method of packing their product then in vogue to at least a close approximation to the method of complainant's invention, all are very suggestive of wrongful premeditation and design. Be this, however, as it may, the package employed by defendants is, in my opinion, not essentially different from the box of the patent. It employs the elements of the claims of the patent in suit. It is constructed, practically, by the method described in the patent, and it produces the result accomplished by the patent. The outer covering, in the form of a recognized carton; the inner lining of paraffined or waxed paper; the interfolding of the ends of the lining between the interlocked flaps of the carton; the resulting unitary structure, fitted and adapted to snugly hold and protect the contents of the box from air, moisture, and dust—are all shown in defendants' package. The only difference pointed out in argument is that in the method of constructing their box the defendants turn up the side flap of the carton before they turn in the end flap of the first section. This results in so releasing the lining from its engagement with the end flap of complainant's first section that it may be pulled out in an upward direction when the lid of the box is open, without dismantling the box itself. This, however, in my opinion, does not essentially distinguish defendants' box from complainant's. Both have the ends of the lining so doubly interfolded between the interlocked flaps of the carton as to signally differentiate them from prior structures, and make a substantial, self-contained, unitary structure of the two elements.

Defendants' counsel, in argument and brief, have earnestly contended that the invention of complainant's patent, when understood in the light of the description and claims, involves such an interfolding of the inner lining within the flaps of the carton as will so effectually lock it

that it cannot be pulled out of the box when the lid is open without tearing the lining or dismantling the box. I am unable, after a most patient examination and analysis of the description and claims, to agree with counsel in this contention. In repeated instances found in the specification the patentee undertakes to make it plain that the lining is subject only to the interfolding process, while the ends of the carton or blank are alone required to be interlocked. The words "interlocked flaps" and "interfolded lining," or their equivalent, are repeatedly used in such juxtaposition and relation that violence would be done to language, to hold that the interlocking, in any case, is intended to relate to the lining itself. If the patent, when properly construed, required the lining to be interlocked by or within the flaps of the carton, the defendants' device does not infringe complainant's patent. Such, however, not being the true interpretation of the patent, the defendants' device, in my opinion, does constitute an infringement.

Some argument is made as to the invalidity of the first claim of the patent, on the ground that it is for an illegitimate process, within the meaning of the patent law. This may or may not be tenable, but as I believe the combination involved in the manufactured product itself, as broadly claimed in the second claim, involved patentable novelty and invention, and that the defendants have infringed the same, it becomes quite immaterial and unnecessary to formally pass on the contentions as to the first claim.

It was contended in argument that the failure to join the National Biscuit Company as complainant in this case constitutes a fatal defect of parties. This contention, in my opinion, is without merit. The bill alleges that the National Biscuit Company is a licensee of complainant, with conditional and limited rights in the use of the invention for packing bakery products. The answer touching this allegation is as follows:

"The defendants deny that such allegations, even if true, are material to this issue, or in any way prejudicial to, or afford any cause of action against, these defendants, or give any patentable quality to the alleged invention."

This portion of the answer is obviously in the nature of a demurrer, and cannot be treated as a denial of the allegations of the bill. It, in effect, admits the allegations as made, and challenges their legal sufficiency. It is claimed that the proof shows the allegations in question to be essentially true, but this I deem quite immaterial. The complainant pleaded such a conditional license in the National Biscuit Company as leaves the title to the patent in the patentee. Certainly the bill does not show any exclusive license, amounting to an assignment of the patent to the National Biscuit Company. Such a licensee is not a necessary party complainant in an infringement case. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504. Not until defendants filed their statement of points to be relied upon in argument did they raise any question as to defect of parties. This was too late. It should have been done by plea or answer, so as to clearly present the issue, and give the complainant an opportunity to meet it.

There will be a decree for an injunction as prayed for, and a reference to a master to take an account of profits and damages.

**COMMONWEALTH TRUST CO. et al. v. FRICK.**  
(Circuit Court, M. D. Pennsylvania. February 27, 1903.)

No. 9.

**1. FEDERAL COURTS—STATE PRACTICE—ATTACHMENT—RULE TO VACATE.**

Where a suit in equity was begun in a state court by foreign attachment, and the case was removed to the Circuit Court, the Circuit Court had jurisdiction of a rule on plaintiff to show cause of action, and why the attachment should not be dissolved on the pleadings; such rule being in accordance with the prevailing state practice.

**2. SAME—PATENTS—ACCOUNTING—ACTIONS—JOINDER OF PARTIES.**

Where the deceased owner of a third interest in a patent prior to his death had made a general assignment for the benefit of creditors, a bill to compel the owner of another third interest to account for profits could not be maintained by deceased's assignee for the benefit of creditors in conjunction with deceased's executrix as co-complainant, defendants' liability to plaintiffs, if any, being several, and not joint.

**3. SAME—CAUSE OF ACTION—STATEMENT.**

Where a bill for an accounting of profits derived from a patent depended on an agreement between plaintiffs' decedent and defendant, and the bill failed to allege whether the agreement was verbal or in writing, its consideration, how long it was to be in operation, and whether defendant was to have any compensation for what she did in organizing concerns to operate the patent, or as to expenses incurred, it was insufficient.

In Equity. Rule to show cause of action, and why attachment should not be dissolved.

H. M. Hinkley and H. A. Fuller, for plaintiffs.

Henry C. Terry and Willard, Warren & Knapp, for defendant.

ARCHBALD, District Judge. This is a bill in equity, brought against Mary E. Frick, a citizen and resident of New Jersey, by the Commonwealth Trust Company, assignee for the benefit of creditors of Abraham S. Patterson, in conjunction, as coplaintiff, with Mary M. Patterson, the executrix of the said Abraham S. Patterson, who is now deceased. It seems from the bill that Mr. Patterson in his lifetime had a one-third interest in certain letters patent relating to machinery for the manufacture of structural tubing, Mrs. Frick having another third, and Thomas J. Price the other. It is charged by the plaintiffs that Mrs. Frick and Mr. Price, making use of this patent, formed various partnerships, and entered into numerous agreements, the details of which are given in the bill, from which large profits were derived, and the suit is brought to compel an accounting by Mrs. Frick for Mr. Patterson's share, which it is claimed that she received. The bill was originally filed in the common pleas of Montour county, and, Mrs. Frick, being a nonresident of the state, a writ of foreign attachment was issued upon it in pursuance of the provisions of the Pennsylvania statute, Act May 23, 1887 (P. L. 163); and, the case having been removed by the defendant into this court, and a motion to remand refused, it now comes up on a rule taken on the plaintiffs to show cause of action, and why the attachment should not be dissolved. This is in accordance with the prevailing state practice with respect to such writs in actions at law (2 Troubat & Haly Pract. §



2271); and it must be regarded as having been adopted and carried forward by the statute, so far as applicable, in extending the writ to other cases. Had the case remained in the state court, therefore, the present rule would have been undoubtedly available to the defendant, and the federal court is invested with the same authority to entertain it. *Cady v. Associated Colonies* (C. C.) 119 Fed. 420. It may seem somewhat out of place in strict equity practice to move the court in this way, but it calls for no more, after all, than an examination of the plaintiffs' bill to see whether they have a case on the merits, and to relieve the defendant in a summary way from the oppressive effect of the attachment if they have not (*Vienne v. McCarty*, 1 Dall. 154, 1 L. Ed. 79); a control over the case which is equitable in character, and to be exercised, therefore, in this forum as much as in any other. In the case in hand a large amount of property has been seized on the writ, and bail in the sum of \$40,000 is demanded to dissolve it; so that the defendant is liable to serious injury unless she can obtain the present relief, if otherwise entitled to it.

It seems to me that no extended examination is required to show that the bill cannot be maintained as it stands. The suit is to enforce the alleged rights of Abraham S. Patterson to one-third of the profits received on account of the patent mentioned. If the general assignment for the benefit of creditors which he executed to the Commonwealth Trust Company in February, 1897, was effective to transfer the interest which he had in these properties—which is questioned—they are recoverable by the assignees, and by them alone. No one else is entitled to any part until it is found that more than enough has been realized from this and other property to satisfy the creditors for whom the trust was created, and that can only be told after an account has been filed, and distribution made in due course. At that time, if anything over remains, it will go to the personal representatives of Mr. Patterson, who is now deceased; but that gives them no standing to demand anything of Mrs. Frick here and now. On the other hand, if, as is contended by counsel for the defendant, nothing with respect to this patent passed by the assignment, then Mrs. Frick, if to account at all, must account not to the assignees, but to the decedent's estate, which is, of course, an entirely different and distinct matter. The extent of the liability in each case may be the same, but it is a several liability to one or the other, and not a joint liability to both. There is no suggestion in the bill as to why the assignee and the executrix are joined, and I can discover none. If it is to proceed further, therefore, one or the other would have to drop out, and with such an amendment the attachment would, of course, fall.

But this is not the only defect in the bill. The life of it is the alleged agreement between Mrs. Frick and Mr. Patterson, referred to in the tenth paragraph, with regard to which we have a most meager and inadequate statement. There was no suggestion when it was made, nor upon what consideration, nor whether it was in writing or by word of mouth. It is also pertinent to inquire how long it was to run, and whether Mrs. Frick was to have any compensation for what she did in the way of organizing business concerns to operate under the patent, as well as what was to be done with respect to the ex-

penses incurred. The plaintiffs set up, not a trust which might permit of the adjustment of these matters equitably, but an agreement which necessarily speaks according to its own terms, and we are entitled to have something definite and specific with regard to them. On the character of the agreement depends in large measure the question whether a bill in equity will lie, or whether an action at law must be resorted to (*Reeside's Ex'r v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503); and, as this goes to the jurisdiction, it is not to be left in doubt. If Mrs. Frick, according to the alleged agreement, was simply to pay over, without deduction, one-third of what she received, it is difficult to see why there is not a complete and adequate remedy at law; and the mere fact that the plaintiffs may not know how much it is does not necessarily entitle them to come into a court of equity. *Babbott v. Tewksbury* (C. C.) 46 Fed. 86. This is not all, perhaps, that could be said with regard to the bill, but it is enough to show that it is radically defective, and that the defendant should be relieved from the effect of the attachment which was issued upon the strength of it.

The rule to show cause is made absolute, and the writ of foreign attachment is dissolved.

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**BEARDEN et al. v. BENNER.**

(Circuit Court, S. D. Georgia, W. D. February 18, 1903.)

**1. PARTITION—EQUITABLE JURISDICTION.**

The power of partition in equity court discussed.

**2. SAME.**

This power will never be exercised where the title is denied or suspicious, until the party seeking a partition has had an opportunity to try his title at law.

**3. SAME—ADVERSE POSSESSION.**

A disseisin or adverse possession destroys the common possession, and bars a suit for partition so long as the ouster continues.

**4. QUIETING TITLES—PARTIES.**

Only those who have a clear legal and equitable title to land connected with possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title, except where this rule is dispensed with by statute.

**5. SAME—ACCOUNTING.**

An alleged necessity for an accounting in such cases does not confer jurisdiction in equity.

**6. PARTITION—DEMURRER.**

In taking order sustaining a demurrer to a bill for partition, where the title is in good faith placed in issue, the bill will be retained for a reasonable time in order that partition may be effected, in case complainants should prevail at law in the assertion of their legal title.

(Syllabus by the Court.)

In Equity.

James L. Anderson and Walter J. Grace, for complainants.  
Washington Dessau and Walter A. Harris, for respondent.

SPEER, District Judge. C. E. Bearden, H. F. Bearden, and Susie May Kunkel, formerly Bearden, citizens of Tennessee, have filed a bill invoking the equitable power of this court for the partition of a valuable business lot, with the improvements thereon, situated in the city of Macon, in this district. Briefly stated, it is averred in the bill that the title to the lot in dispute was vested in Charles A. Ells, Jr., and his sister Elizabeth M. Ells, by virtue of a devise in the will of their father, Charles A. Ells, Sr. This is not in dispute. Both the complainants and the defendant claim title by virtue of this devise. It further appears from the bill that on the 21st day of March, 1867, Elizabeth M. Ells entered into an antenuptial contract and settlement with William Morgan Bearden. The marriage was afterwards consummated, and the complainants before the court are the offspring thereof. Among other things, the antenuptial settlement provided as follows:

"That, for and in consideration of a marriage now about to be had and solemnized between the said above-named parties, the said party of the first part (William Morgan Bearden) does for himself, his heirs, executors, and administrators, covenant, grant, and agree that all the property rights and interest in property, of whatsoever nature, now vesting in, or hereafter to be acquired by, the said Elizabeth M. Ells, shall remain the separate property of the said Elizabeth M. Ells, free from the payment of any debt, default, or contract of her husband during her natural life, and the same at her death to vest in, and become the property of, such child or children as she may then have living," etc.

The contract contains another stipulation, as follows:

"And it is further agreed that should it at any time be deemed advisable by the said parties during this marriage to sell any part of said property for the purpose of reinvesting the proceeds thereof in other like property, that the same may be done by their uniting together in the execution of the deed or deeds of conveyance of the same."

The bill further recites that on the 25th day of November, 1889, Elizabeth M. Bearden, formerly Ells, and Charles A. Ells, Jr., her brother, executed a deed to John H. Benner conveying the premises in dispute. William Morgan Bearden was not a party to said deed, nor did he in any wise unite in the same. In November, 1898, Elizabeth M. Bearden departed this life, leaving the complainants her only children or representatives of children. The deed to Benner purported to convey a fee-simple title to all of the property, but it is alleged that the legal effect of this deed, so far as Elizabeth M. Bearden is concerned, was merely to convey her life estate, and that by virtue of the terms of the marriage settlement referred to, the fee-simple title to one-half undivided interest in said property vested in the complainants. Notwithstanding this fact, and that they are and have been entitled to possession since the death of their mother, Benner is in possession and claiming title to the entire property under his deed of November 25, 1889, refusing to recognize any right of possession of the complainants or any liability on his part to account to them for the rents, issues, and profits. This possession of Benner has been a continuous possession from the date of the death of their mother, the value of complainants' undivided half interest is \$15,000 or other large sum, and this half interest has been worth from \$100 to \$125 a month since the 1st day of December, 1898. This deed to Benner of November 25, 1889,

it is alleged, constitutes a cloud upon the title of complainants, inasmuch as it purports to convey to Benner not merely the life estate of Elizabeth M. Bearden to a one-half undivided interest, but purports to convey a fee-simple title to the whole. Benner has made improvements upon the property, the extent and value of which complainants, for the want of definite information, are not able to aver. They state that Benner claims the value of such improvements to be \$10,000, and that if complainants are entitled to recover they are accountable to him for their pro rata share of these improvements. This involves an accounting between Benner and the complainants as to the extent of the improvements made by him, the nature, character, and amount thereof, the amount of rents due by him, the determination of the question as to whether or not complainants are liable for any part of said improvements, and, if so, how much, and whether such amount is more or less than their share in the rents. It is stated that such accounting will necessarily be long and intricate, and cannot be satisfactorily had at law, and can only be had in a court of equity, where such matters are properly cognizable. Complainants desire a partition of this lot between themselves and the defendant, and, on account of the valuable improvements made upon the property and their peculiar location, a fair equitable division of the same by metes and bounds, it is alleged, cannot be had. It will therefore be necessary for the lot to be sold in order that such division may be made. They further recite the fact that Benner has during his possession mortgaged the whole of this property to a bank for the purpose of securing a loan of \$10,000, and, while this loan has been satisfied, he is liable to convey it anew, thus incurring danger of a multiplicity of suits, and opposing the interest of a bona fide purchaser for value to that of complainants. The bill waives discovery, and prays that complainants' title to a one-half undivided interest in the property be decreed and confirmed; that the deed from Charles A. Ells, Jr., and Elizabeth M. Ells to John H. Benner be decreed to have the legal effect of having conveyed to Benner, so far as Elizabeth M. Bearden, formerly Ells, is concerned, only her life estate in said property; that if necessary said deed be corrected and reformed so as to show the right and title of complainants, and thus remove the cloud resting upon their title; that the defendant be decreed to account for and pay over to complainants the rents, issues, and profits to which they are entitled, and that a decree ordering a sale of the land in dispute, under the directions of the court, may be had for the purpose of equitably and fairly apportioning the same between complainants and the defendant; and that after the sale of the property that the part of the proceeds to which complainants are entitled be paid over to them or their legal representatives. A preliminary injunction is prayed, restraining Benner from selling or incumbering the interest claimed by complainants. There is also a prayer for general relief.

To this bill the defendant has demurred on several grounds. While these are stated with scrupulous and extended particularity of detail, they may be condensed into the propositions that the complainants have a full, complete, and adequate remedy at law; that the bill is without equity; that the bill is multifarious; and that the plaintiffs

seek to try title to real estate, remove cloud from the title, to have a partition of land, an accounting and recovery of possession of real estate, a cancellation of an instrument, and the reformation of a contract. This, it is contended, is not within the power of a court of equity to grant in one proceeding.

The questions raised by the demurrer have been argued with ample citation of authority. A brief reference to the controlling principle, as settled by authoritative text-writers and decisions, will suffice for present determination.

The bill very clearly indicates that the defendant holds the possession of the land in dispute adversely to complainants and under claim of title to the fee in himself. This is not only conceded, but is alleged as one of the grounds for equitable relief. It is obviously sought under the guise of a prayer for partition. In proper cases this has been a long-established power in the equity courts. In the reign of Elizabeth the court of chancery began to assume jurisdiction in partition, and it became so common that the writ of partition and compulsory process against joint tenants and tenants in common created by act of Parliament in the reign of Henry VIII became obsolete, and was finally abolished in the early part of the last century. Under the English judicature act of 1873, proceedings for partition are now specially intrusted to the chancery division of the court. The writ of partition, as enacted by St. 31 & 32 Henry VIII, we have the authority of Chancellor Kent for stating, has been gradually re-enacted and adopted, with probably enlarged facilities for partition, in the United States. This, however, relates to statutory remedies granted in the several states, and, we may add, by act of Congress in the District of Columbia. *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644. The same eminent writer (*Commentaries*, 4th vol., p. 364) states that while—

“The jurisdiction of chancery in awarding partition is well established in England by a long series of decisions, and it has been found by experience to be a jurisdiction of great public convenience, a court of equity does not interfere unless the title be clear, and never where the title is denied, or suspicious, until the party seeking a partition has had an opportunity to try his title at law. The same principle has been acted upon in the courts of equity in this country.”

In a footnote to this paragraph it is stated, upon what seems conclusive authority, that a disseisin or adverse possession destroys the common possession, and bars a suit for partition so long as the ouster continues; citing *Clapp v. Bromagham*, 9 Cow. 530; *Adam v. Ames Iron Co.*, 24 Conn. 230. Many other cases might be added.

Nor does the claim that the jurisdiction is here required to confirm and quiet title of the complainants strengthen their rights to this proceeding. In *Orton v. Smith*, 18 How. 263, 266, 15 L. Ed. 393, it is announced that those only who have a clear legal and equitable title to land connected with possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. In a great many cases this rule is cited and approved. See *Rose's Notes U. S. Reports*, pp. 572-3. It seems to be distinguished and explained in *Holland v. Challen*, 110 U. S. 20, 3 Sup. Ct. 495, 28

L. Ed. 52, where the rule itself was dispensed with by a Nebraska statute; but the Supreme Court has been occupied to some extent since *Holland v. Challen* was decided in distinguishing that case, notably in *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873. In that case a suit in equity for real property against a party in possession was not sustained upon the ground that there was a plain, adequate, and complete remedy at law. And in *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, the time-honored and clearly marked distinction in the courts of the United States between proceedings in law and equity is somewhat fully discussed, the court observing:

"It has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity."

Nor can the court maintain jurisdiction in equity upon the alleged necessity for an accounting. This has been long settled. *Hipp v. Babin*, 19 How. 271-278, 15 L. Ed. 633. In that case the Supreme Court, through Mr. Justice Campbell, said:

"Nor can the court retain the bill, under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits, and improvements. The rule of the court is that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause. But when a party has a right to a possession, which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction."

This is a leading case and often cited. It is true that this proceeding might have been maintained under the hybrid practice adopted by the statute in Georgia. This may be convenient in some cases, but the courts of the United States are of course controlled by the constitutional provision, and the act of Congress above quoted intended to make the constitutional inhibition definite and always applicable in proper cases.

While the court must sustain the demurrer to the extent of denying the complainants' right to proceed on the bill at this time, it does not seem proper that the bill should be at once dismissed, with a possibility that the alleged rights may be concluded. The bill was brought in apparent good faith, upon what seems to be a claim of title, to be determined by the construction of a marriage settlement annexed as an exhibit. The complainants then, to use the language of Chancellor Kent, should be given the opportunity to establish their legal title in a court of law.

Order will be taken, therefore, dismissing the bill finally, unless the complainants shall bring their action of ejectment, conformably to the usual practice, to the next term of the Circuit Court having jurisdiction, or to the next term of such other court as may have concurrent jurisdiction. In case such proceeding in ejectment is instituted, this bill will be retained in its present status for a reasonable time, in order that partition may be thereafter effected in case complainants

should prevail upon the assertion of their legal title. The following authorities seem to sustain this course: *Brown v. Cranberry Iron & Coal Co.* (C. C.) 40 Fed. 849; 3 *Pomeroy's Eq. Jur.* § 1388.

It follows that the preliminary injunction in this case will remain of effect until such ejectment proceeding may be filed.

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EISELE v. ODDIE et al.

(Circuit Court, D. Nevada. February 2, 1903.)

No. 733.

**1. COMPLAINT—SEPARATE STATEMENT OF CAUSES OF ACTION—NEVADA STATUTE.**

Under Cut. Comp. Laws Nev. § 3159, which provides that, where two or more causes of action are united, they must be separately stated in the complaint, a complaint is demurrable which alleges in a single count an unlawful detention of real property, destruction and unlawful detention of personal property, an assault and injury to the person, and a threatened expulsion of plaintiff from a town, and prays damages in a lump sum, without alleging the amount of damages sustained by reason of either one of the unlawful acts charged.

**2. SAME—BILL OF PARTICULARS.**

The provision of Cut. Comp. Laws Nev. § 3151, that, in an action upon several accounts, it shall not be necessary to set out the items of such accounts, but that a bill of particulars may be demanded, has no application to a complaint setting up a number of separate causes of action in tort.

At Law. On demurrer to complaint.

Alfred Chartz and N. Soderberg, for plaintiff.

Kenneth M. Jackson, J. J. Kennedy, and Campbell, Metson & Campbell, for defendants.

HAWLEY, District Judge (orally). Plaintiff brings this action to recover damages. After stating the necessary facts to give this court jurisdiction, and averring plaintiff's ownership of certain real and personal estate, the complaint alleges:

"(5) That on or about the said 20th day of January, 1902, at Tonopah aforesaid, and while the plaintiff was so in the actual and peaceable possession of said lands and premises, tent and personal property, the said defendants, \* \* \* with a multitude of people, riotously, with violence and strong hand, and by force of arms, wrongfully and unlawfully entered thereon and assaulted plaintiff, and in a rude, angry, threatening, and forcible manner ejected plaintiff, and put him out of said lands and tenements, and took and converted to their own use the said personal property, and all thereof, and destroyed by fire the said tent and a large amount of said personal property, and threatened to expel plaintiff from said town of Tonopah, contrary to the form of the statute of Nevada, and to the damage of plaintiff in the sum of five thousand dollars.

"(6) That said defendants unlawfully withhold and keep possession of said land and premises, and said personal property, except such part thereof as said defendants destroyed as aforesaid, and have so held and kept possession of the same at all times since the said 20th day of January, 1902."

—And demands judgment against defendants, and each of them, in the sum of \$5,000.

† 1. See Pleading, vol. 39, Cent. Dig. §§ 113, 434.

To this complaint the defendants interposed a demurrer upon the grounds that said complaint does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united, and they are not each separately stated; that said complaint is uncertain in this: that it cannot be ascertained therefrom how much of plaintiff's demand is for the alleged conversion of the personal property, how much of plaintiff's demand for damages is for the alleged forcible ejection of plaintiff from the real property, how much of plaintiff's demand for damages is for the alleged withholding of plaintiff from the premises described in the complaint, how much of plaintiff's demand for damages is for the assault therein alleged to have been committed on plaintiff, nor how much of the plaintiff's demand for damages is for the alleged threatened expulsion of plaintiff from the town of Tonopah.

It will be observed that there are divers causes of action united in one averment, viz., the unlawful detention of real property, destruction and unlawful detention of personal property, injuries to person and property, and threatened expulsion of plaintiff from Tonopah, all blended together in one count, without being "separately stated," as required by section 3159, Cut. Comp. Laws Nev.; and the damages are claimed for a lump sum, without any attempt to set forth what amount of damages is claimed for each cause of action. It is manifest that the demurrer based on the ground "that said complaint states several causes of action, and they are not separately stated," is well taken. Counsel for plaintiff admits that the complaint does not, in this respect, comply with the provisions of section 3159, but contends that, under the provisions of section 3151, full relief could be afforded by the court ordering a bill of particulars to be furnished to defendants, instead of sustaining the demurrer. The answer to this contention lies in the fact that section 3151 has no application to this case. It is confined to actions brought upon several accounts, and provides that "it shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party within five days after a demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof." In support of his views, counsel cites and relies upon certain principles announced in *Tilton v. Beecher*, 59 N. Y. 176, 184, 17 Am. Rep. 337. A careful examination of the facts of that case clearly distinguishes it from this case in every particular. There the appellate court held that the lower court had power to require plaintiff to furnish a bill of particulars, in an action of crim. con., as to times, dates, and places. There was but one cause of action in the complaint, and the court was not called upon to review any rule of practice under a statute which declares that, where two or more causes of action are united, they must be separately stated; and the statute of New York in regard to cases where a bill of particulars might be demanded is totally dissimilar from section 3151 (Cut. Comp. Laws) of this state, in this: that it expressly declares that "the court may in all cases order a bill of particulars of the claim of either party to be furnished." *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757, cited by defendant, both in its facts and the principles of law applicable



thereto, bears close analogy to the case at bar. There the plaintiffs brought an action to recover damages for an alleged trespass and destruction of certain property; and the complaint, after stating the trespass, alleged that the defendant, in entering upon her premises, tore down the ceiling overhead, a partition wall, the plastering on the front of said building, and caused great damage to plaintiff's goods and business, and rendered said premises unfit for the uses and purposes of plaintiff's business, and thereby broke up and destroyed said business of plaintiff, and that the same was done in a threatening and terrorizing manner, so that she suffered great mental and physical distress, and that she was damaged thereby in the sum of \$5,000. The court held that the demurrer to the complaint should have been sustained, and, among other things pertinent to this case, said:

"In the present case the plaintiff should have alleged the value of the property destroyed, the amount of damage done to the premises occupied by her, and the damages sustained by the injury to her business. Each of these elements constituted a distinct portion of the plaintiff's claim, and was capable of exact statement; and the defendant had the right to be informed of the amount of the claim for each, so that he might be prepared with evidence at the trial to meet the claim. He might be willing to concede the amount claimed for each, and limit his defense to the claim for punitive damages."

The general principles therein announced have not been overruled or questioned by any of the subsequent decisions in that state, as claimed by plaintiff, but, on the contrary, have been affirmed and followed in *Foerst v. Kelso*, 131 Cal. 376, 63 Pac. 681, where the court expressly held, in an action for damages to the alleged injury of the plaintiff's person and health, and also to the injury of her real and personal property, that the complaint, which merely alleged damages generally, is demurrable for uncertainty in not stating what amount of damages was sustained to plaintiff's real and personal property.

It is proper to add that, in amending the complaint with reference to the amount of damages claimed under each separate cause of action, the plaintiff will not necessarily be required to state whether he claims exemplary damages in each particular cause of action, although there are several authorities where it has been held to be the better practice so to do. The general rule, however, seems to be that it is sufficient if he makes a case by his pleading and proofs upon the trial which will, under the law, entitle him to exemplary damages. *Peers v. Water Co.*, 119 Fed. 400.

The demurrer is sustained.

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In re JAMIESON.

(District Court, N. D. Illinois, N. D. January 31, 1903.)

No. 7,372.

1. BANKRUPTCY—OBJECTIONS TO DISCHARGE—VERIFICATION.

A specification of objections to the discharge of a bankrupt is not a pleading, within the meaning of Bankr. Act 1898, § 18c [U. S. Comp. St. 1901, p. 3429], requiring all pleadings setting up matters of fact to be verified, and such specification need not be verified.

In Bankruptcy. On demurrer to specifications of objections to discharge.

Collins & Fletcher, for bankrupt.

Ira W. & C. C. Buell, for objecting creditors.

KOHLISAAT, District Judge. Objections were filed to the application of the bankrupt for a discharge. To these objections bankrupt files his demurrer on the grounds that—First, the objections are not verified; and, second, that the objections are not sufficient in substance and in form.

The act requires all pleadings setting up matters of fact to be verified. What may be considered pleadings is not specified. For the purpose of making the proceedings under the act more specific, the Supreme Court adopted and established certain rules, orders, and forms to be followed in the execution and application of the statute. Among other forms prescribed by the Supreme Court are those pertaining to a discharge of the bankrupt. The forms laid down for the petition for discharge, and also for the presentation of objections to discharge, make no provision for verifying either, whereas the rules do, in relation to other forms, make such provision; thus indicating that the petition for discharge, and the objections thereto, are not considered "pleadings," within the meaning of the statute, and are not required to be verified. In this respect the court follows the form of objections prescribed under the act of 1867. These rules have the same weight in this case as though they were included in the express language of the statute. Such a construction of the law and of the Supreme Court rules and forms is reasonable in its practical application. The matters which may be urged by way of objections are peculiarly within the knowledge of the bankrupt. They may, and often do, come to light late in the course of the proceedings. To require the objector to make positive oath thereto would practically do away with objections to discharge. It is a matter of common experience and knowledge that the successful interposition of objections to discharge under the present act is a very difficult matter. I do not deem it in the interest of justice or right to so interpret the act as to enlarge its facilities in this direction by way of implication. The objections are sufficient in both form and substance.

The demurrer is overruled.

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SCOTT v. STOCKHOLDERS' OIL CO. et al.

(Circuit Court, E. D. Pennsylvania. February 23, 1903.)

No. 1.

1. CORPORATION—PROCESS—SERVICE—DENIAL.

Where the person on whom process was served as the secretary and general manager of a corporation defendant deposed that he was not "at the time" stated in the return secretary, or manager, or officer, or director of the corporation, and that he had no connection therewith except as stockholder, the fact that he failed to object that he was not secretary or manager "at or after the time" when the process was served did not justify the inference that he was such officer.

Samuel J. Houston and Lawrence W. Baxter, for complainant.  
Joseph R. Embery, for respondents.

DALLAS, Circuit Judge. The marshal has returned that on February 13, 1903, he served the subpoena in equity in this case "on the Dumble Development Company by giving a true and attested copy thereof to Theodore J. Dumble, secretary and general manager of said company"; but from the affidavits of Theodore J. Dumble it appears that he was not at that time secretary, or manager, or officer, or director of the Dumble Development Company, and that he had no connection with it except as stockholder, and was not an agent or representative of it. The affidavit filed in opposition to the motion to set aside the service does not meet that of Mr. Dumble. His omission to object that he was not the secretary or manager of the Dumble Company at or after the time when service of subpoena, bill of complaint, and motion for injunction and receiver was made upon him would not justify the inference, as against his positive oath to the contrary, that he was in fact such secretary or manager. Inasmuch as this court has, therefore, not acquired jurisdiction as respects the Dumble Development Company, a party interested to oppose the plaintiff's motion for injunction and receiver, it follows that that motion cannot be allowed; and, accordingly, the motion to set aside the service of the subpoena as to the Dumble Development Company is granted; and the motion for a preliminary injunction and for the appointment of a receiver is dismissed without prejudice.

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VAN v. PACIFIC COAST CO.

(Circuit Court, D. Washington, N. D. February 13, 1903.)

No. 1,030.

1. FALSE IMPRISONMENT—FACTS JUSTIFYING ARREST WITHOUT WARRANT.

It is not unlawful for a police officer to arrest and detain a person at the request of one on whom the officer has a right to rely, and while the person arrested was in the commission of an act supposed to be criminal, although it was not technically so, and such an arrest will not support an action for false imprisonment against the person causing it.

2. MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE.

Plaintiff hired to defendant for service upon a steamer during the season, and was furnished a suit of clothes to be worn on the vessel, which he was told would be his if he remained in the service through the season. He quit the service in violation of his contract, and as he was leaving the vessel carrying the suit he was arrested by a police officer, on request of defendant's agent, for the theft of the clothes. He was detained a short time, but released on the same day, because defendant did not prosecute. It did not appear that the agent had ever seen plaintiff before causing his arrest on information given him by one of the officers of the vessel. *Held* that, while not technically guilty of theft, there was probable cause for plaintiff's arrest, and on that ground, and because it did not appear that there was any malice on the part of the agent, an action for malicious prosecution could not be maintained.

Action to recover damages for causing the plaintiff to be arrested by a police officer upon an accusation of theft, which was not afterwards

prosecuted, the complaint alleging that the defendant's agent acted maliciously in causing his arrest, without any cause or warrant whatsoever. On the trial a verdict for the defendant was rendered, pursuant to a peremptory instruction of the court. Heard on motion for a new trial. Motion denied.

Carroll & Carroll, for plaintiff.

Piles, Donworth & Howe and C. H. Farrell, for defendant.

HANFORD, District Judge. Upon the trial of this action, after all the evidence had been introduced in behalf of the defendant as well as the plaintiff, and both sides had rested, the court granted a motion then made in behalf of the defendant for a peremptory instruction to the jury to render a verdict for the defendant. Said motion was granted by the court, upon the ground that by the uncontradicted evidence in the case there appeared to be probable cause for the accusation made against the plaintiff upon which he was arrested by a police officer, and there was no evidence of malice on the part of the defendant's agent who requested the officer to make the arrest. The motion for a new trial has been argued upon the theory that the action is to recover damages for false imprisonment, and that the court committed an error in holding that malice is an essential element of such an action.

In order to reach a correct conclusion in this case it is necessary to take our bearings from the pleadings. The complaint, after stating formal matters and the jurisdictional facts, contains a narrative in substance as follows: In the month of June, 1902, the plaintiff entered into the service of the steamship Spokane, owned by the defendant, which was then about to go on a trip with a party of excursionists, and plaintiff was presented with a suit of clothes, of the value of \$2.50, which were to be worn by him during that trip. The plaintiff's suit was recut, altered, and fitted to him at his own expense. Afterwards, during the same month, at the port of Seattle, he quit the service of the vessel, when there was a sum of \$4.80 due him, which the defendant's officers and agents refused to pay. On leaving the vessel the plaintiff attempted to take with him his belongings, including the said suit of clothes, but he was detained by an agent of the defendant, who accused him of stealing the said suit of clothes, and called a police officer of the police force of the city of Seattle, and said officer at the instance of said agent arrested the plaintiff, and took him into custody. Said agent at that time, in the hearing of the public, charged the plaintiff with stealing the suit of clothes, demanded that the officer take him to jail, and stated that he would go to police headquarters, and make a charge under oath against the plaintiff for the theft of said suit of clothes. The plaintiff was taken to police headquarters, and there detained for a short time, but was released on the same day for the reason that no one appeared at police headquarters to make any charge against him. In this there is no positive allegation that the suit of clothes belonged to the plaintiff, nor that he had any right to take it from the vessel. It is reasonably clear from what is stated, and the court must infer, that the plaintiff was arrested with the suit of clothes in his possession, while in the act of taking the same away from the

ship, without the consent of the owner; that he was arrested under the circumstances described, by a police officer, acting upon information furnished by the agent of the defendant, and upon a request to make the arrest preferred by the agent, and upon an accusation of theft. The court should also infer that the agent who accused the plaintiff is a person whose statements the officer had a right to believe and act upon. It is assumed in the argument that under the circumstances and conditions recited the arrest was unlawful, for the reason that the plaintiff was not technically guilty of larceny. But it is not true that it is unlawful for a police officer to arrest a person while in the commission of any act of an aggressive character and supposed to be criminal, but which is not technically criminal. By far too much immunity would be secured to the lawless and criminal elements, if the laws prohibited arrests upon suspicion, based upon probable cause, and I do not find any such unreasonable rule sanctioned by the authorities. On the contrary, any innocent person is liable to be subjected to detention while circumstances of an apparently criminating character are being investigated. The following is a fair statement of the general rule applicable to this case:

"Though a person be arrested and imprisoned without warrant, and for an alleged crime of which the officer arresting has no personal knowledge, and the person so arrested is in fact innocent, it is not false imprisonment if the officer acted upon information received from one on whom he had reason to rely." 12 Amer. & Eng. Encyc. of Law (2d Ed.) 741, citing *Filer v. Smith*, 96 Mich. 351, 55 N. W. 999, 35 Am. St. Rep. 603; *White v. McQueen*, 96 Mich. 249, 55 N. W. 843.

It is an essential element of an action to recover damages for false imprisonment that the imprisonment or detention must be unlawful; for when the law has been appealed to, and there has been no abuse of its process, there can be no basis for alleging that a legal wrong has been committed. In this case it was not proved by evidence upon the trial that the arrest and detention of the plaintiff was unlawful, and it may be reasonably inferred from his own pleading, and it was positively proven by the evidence, that he was taken into custody by an officer having at the time lawful authority to do so. Therefore the action cannot be maintained to recover damages for false imprisonment.

The narrative above recited is not the substantial part of the complaint, but should be regarded as matter introduced into the complaint merely by way of inducement. The pleader seems to have understood very well that an action for false imprisonment could not be maintained, for if he believed that the action could be maintained and a recovery had for false imprisonment without proof of malice he would not have placed upon his client an unnecessary burden by charging malice, as he has done in the seventh paragraph of the complaint, which reads as follows:

"That the said arrest and imprisonment of plaintiff was caused, as aforesaid, by said Miller in his capacity as assistant general agent of defendant, and by virtue of his duties to and instructions from defendant, and in its behalf and for its benefit; and that said charge made as aforesaid by said Miller, for and on behalf of defendant, was wholly untrue, false, and malicious, and was made without any cause or warrant whatsoever, and for the purpose

of annoying and disgracing plaintiff in the eyes of his fellows, and to bring upon him shame and scandal, all of which has injured and damaged plaintiff in the sum of five thousand dollars (\$5,000.00)."

This paragraph, in connection with other parts of the complaint, places the action upon a charge of malicious prosecution as its foundation; therefore to sustain it the plaintiff was bound to prove want of probable cause and malice, for these are essential elements of the action which he commenced, and it is my opinion that he failed entirely to introduce any evidence tending to prove malice on the part of any representative of the defendant, and that by his own evidence, and that of the witnesses called in his behalf, it was proved affirmatively that there was probable cause justifying the accusation upon which he was arrested. The evidence introduced on the plaintiff's side proves that the suit was worth at least five times the value placed upon it in the complaint; that when it was given to him upon his entering the service of the steamship Spokane he was told that it was to be worn on board the steamer, and that it would be his if he continued in the service until the end of the excursion season; that the steamer was placed upon the route from Puget Sound to ports in Alaska, as an excursion boat, for the season of 1902, during which she was expected to make four round trips; that the vessel had made but one round trip; that the plaintiff had signed shipping articles for the second trip, by which he was engaged to continue in the service, but without the consent of the master, and without being discharged, he quit the service, because he was dissatisfied on account of the failure of the steward, in whose department he was employed, to assign him to the particular work which had been promised him; that he demanded of the steward payment of a small sum of money which he claimed to have earned, which demand was refused, and he then said that he would not give up the suit of clothes until he received the money which he claimed, and when he was leaving the vessel with the clothes in his possession the steward reported the matter to the general agent of the defendant, who thereupon called a police officer and caused the arrest alleged in the complaint. There was no evidence tending to prove in any way that the defendant's agent, who is charged in the complaint with having acted maliciously, had any previous acquaintance with the plaintiff or motive for injuring him.

It is my opinion that the plaintiff was the aggressor in breaking a contract which he had voluntarily made, and in attempting to carry away from the vessel a suit of clothes which had been given to him conditionally, when he had not performed the conditions whereby he should have earned the same. The opposition from the defendant which he encountered was natural under the circumstances, and was not carried to such an extent as to constitute a tort.

Motion denied.

## ROSS v. ERIE R. CO. et al

(Circuit Court, E. D. New York. November 7, 1902.)

## 1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FRAUDULENT JOINDER OF DEFENDANT.

One of two defendants against whom action is brought as employers of plaintiff's intestate for his death may have the action removed on the ground of diverse citizenship, notwithstanding the other defendant is a citizen of the same state as plaintiff, the verified petition for removal alleging that deceased was never in the employ of the other defendant, and that it was fraudulently joined as a defendant solely to defeat the right of removal, and accompanying this being an affidavit of the other defendant that deceased was never in its employ, and that it had no connection with the accident, and plaintiff neither traversing the petition nor offering evidence in denial of its averments.

Jones & Nekarda (Paul Jones, of counsel), for plaintiff.

Stetson, Jennings & Russell (Allen Wardwell, of counsel), for defendants.

THOMAS, District Judge. The plaintiff brings this action on account of the death of his son, killed by the defendants' alleged wrongful act. The Erie Railroad Company is organized under the laws of New York, and the Pennsylvania Coal Company is created by the laws of Pennsylvania. The complaint alleges that "both said defendants have a general office for the regular transaction of business at No. 21 Cortlandt street, in the borough of Manhattan, city of New York, state of New York, having the same corps of officers, to wit, the president, secretary, and treasurer," and, upon information and belief, that at the time of the accident the Pennsylvania Coal Company was in possession of a certain colliery, at or near the town of Pittstown, aforesaid, "and operated and still operates a breaker, known as the 'Ewen Breaker,' located outside of said colliery, with the machinery and other appurtenances thereto belonging; that at said times the defendant, the Erie Railroad Company, under an agreement with the defendant the Pennsylvania Coal Company, managed, controlled, and still controls, the said colliery and breaker, together with the machinery and appurtenances attached to said breaker"; that the plaintiff's intestate "was in the employ and service of the defendants, in or about the said breaker, in the capacity of an oiler of various machinery used by said defendants therein"; that the defendants negligently permitted a large quantity of refuse material to accumulate so as to render unsafe access to the chute or pocket connected with the breaker; that under these conditions the defendants negligently ordered the plaintiff's intestate to leave his accustomed place of work, and to approach the defective chute, and to loosen the clogged and frozen refuse, so that it might be removed from such chute, without warning him of the dangerous and unsafe character of the material and the risks incident thereto, whereupon the refuse fell with great force upon the plaintiff's intestate, causing his death.

The Pennsylvania Coal Company duly petitioned for the removal

¶ 1. Diverse citizenship ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

of the action against it to this court, but the Erie Railroad Company answered in the state court. The petition for removal, verified by the secretary of the coal company, avers, "that the defendant Erie Railroad Company did not own, operate, manage, or control either by agreement with your petitioner, the defendant the Pennsylvania Coal Company, or otherwise, the breaker or colliery referred to in the complaint, or any of the machinery or appurtenances belonging thereto; and your petitioner further avers that Neal Ross, the person on account of whose death this action is brought, was never in the employ of the said Erie Railroad Company; and your petitioner further avers that the defendant Erie Railroad Company was and is fraudulently and improperly joined as a party defendant to this action for the sole purpose of defeating the right of your petitioner to remove this cause to the United States Circuit Court." Accompanying the petition is an affidavit of the assistant secretary of the Erie Railroad Company denying that the Erie Railroad Company ever owned, operated, managed, or controlled the property or breaker in question, or that the plaintiff's intestate was ever in the employ of the Erie Railroad Company, or that such company, or its agents or servants, had any connection with the accident.

The plaintiff relies upon the rule that there can be no removal because one of the defendants is a citizen of the same state as the plaintiff, and does not and cannot petition for the removal. *Bixby v. Couse*, 8 Blatchf. 73, Fed. Cas. No. 1,451; *Sewing Machine Company's Cases*, 18 Wall. 553, 21 L. Ed. 914; *Vannevar v. Bryant*, 88 U. S. 41, 22 L. Ed. 476; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907; *Hanover Fire Ins. Co. v. Keogh* (C. C.) 7 Fed. 764. This rule is applicable only in cases where all the defendants have been properly joined. The petition in the present action alleges that the resident defendant, the Erie Railroad Company, has no connection with the cause of action, and that it was joined fraudulently for the purpose of preventing removal of the action to this court, at the instance of the coal company. Where parties are not jointly liable, but are joined merely to prevent removal, a removal should be granted. *Hax v. Caspar* (C. C.) 31 Fed. 499, 501; *Clark v. Chicago, M. & St. P. Ry. Co.* (C. C.) 11 Fed. 355; *Prince v. Illinois Cent. Railroad Co.* (C. C.) 98 Fed. 1, 2.

The averments in the petition in the action at bar are the unwarranted association of the Erie Railroad Company with the coal company, for the purpose of preventing removal of the action. If the plaintiff disclaimed these allegations, he should have joined issue upon the facts alleged, or at least controverted the same. But no evidence is offered repelling either the alleged facts or the accusation, and, within the practice of the court, it must be accepted as true. *Durkee v. Illinois Cent. Railroad Co.* (C. C.) 81 Fed. 1; *Prince v. Illinois Cent. Railroad Co.* (C. C.) 98 Fed. 1, 2; *Dow v. Bradstreet* (C. C.) 46 Fed. 824, 827, 828; *McCormick v. Illinois Cent. Railroad Co.* (C. C.) 100 Fed. 250; *Diday v. New York, P. & O. R. Co.* (C. C.) 107 Fed. 565; *Hukill v. Railroad Co.* (C. C.) 72 Fed. 745; *Carlisle v. Sunset Telephone & Telegraph Co.* (C. C.) 116 Fed. 896. The



matter was discussed in *Warax v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 72 Fed. 637, where Judge Taft states as follows:

"Plaintiff's petition seeks to hold the railroad company and Snyder, its engineer, as joint tort feasons. If, on the statements in the petition, he is able to do so, then the cause is not removable (citing cases), unless it be made to appear, to the satisfaction of the court, that one of the defendants was fraudulently joined for the purpose of defeating the jurisdiction of the federal court. In order that such joinder should be regarded as fraudulent, it must appear, by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action. No proof is offered in this case, except the fact that suit was once brought on the same cause of action against the railroad company without joining Snyder, the engineer. This may be regarded as a circumstance tending to show that the purpose in joining Snyder was to avoid the jurisdiction of the federal court, but it does not show, or have any tendency to show, that the averments of the petition with respect to Snyder, upon which the right to join Snyder is asserted, were unfounded in fact. One who has a real cause of action for joint tort against two persons cannot be deprived of the right to bring his action against both in the case, and to have the case heard with both as defendants, merely because he joined them for the purpose of avoiding the jurisdiction of the federal court. If the right exists, the motive for its exercise cannot defeat it."

This statement is quoted at length to illustrate that the plaintiff, whatever his motive, may avoid the jurisdiction of the federal court by properly joining two defendants. But it will be observed that no evidence was given, other than that suggested, which was certainly insufficient. The petition in the case at bar claims that there was no cause of action against the Erie Railroad Company, gives in evidence facts to support that contention, and charges that the Erie Railroad Company has been fraudulently joined, and these allegations are supported by the affidavit of the assistant secretary of the Erie Railroad Company. Hence there is evidence of the truth of the verified petition, while the plaintiff neither traverses the petition nor offers evidence in denial of its averments. Therefore it must be accepted as true. In such case the coal company is entitled to a trial in this court, and the motion to remand is denied.

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J. S. TOPPAN CO. v. McLAUGHLIN et al.  
(Circuit Court, D. Massachusetts. February 26, 1903.)

No. 1,454.

1. **CONTRACTS—EVIDENCE AS TO IDENTITY OF PARTY.**

Where there is a direct conflict in the oral testimony of the parties who made a contract with respect to the party in whose behalf it was made, the correspondence between them both before and after it was made becomes of paramount importance, and, if pertinent, is controlling.

2. **SAME.**

Evidence considered, and held to show that a license under a patent was granted to a partnership, and not to a corporation having the same name, subsequently organized, so that the corporation could not maintain a suit thereon.

In Equity.

Gilman & Rusk and J. Murray Marshall, for J. S. Toppan Co.  
William Quinby, for McLaughlin and others.

COLT, Circuit Judge. This bill is brought by the J. S. Toppan Company upon an exclusive license granted by the defendants McLaughlin and Simonds under their patent, No. 575,831, dated January 20, 1897, covering a flexible metallic steam conduit. The license was granted January 2, 1899, for the term of four years.

The first question to be determined is whether the complainant is the licensee named in the license. The complainant is a corporation, and the successor of a copartnership of the same name, both being known as the J. S. Toppan Company. When the license was executed, the Toppan Company was doing business as a copartnership, and the corporation was not in existence. It was not until November 1, 1899—10 months after the date of the license—that the corporation was organized under the laws of Illinois, and the partnership terminated by turning over its assets to the corporation. The original bill alleged that the license was "granted unto the plaintiff." Five months later, after the filing of the answer and a cross-bill, the bill was amended by adding the following paragraph:

"That the complainant was not legally incorporated at the time of the execution of said license, but the said McLaughlin and Simonds well knew that the complainant corporation was to be organized, and said license was delivered to one James S. Toppan, to be held by him, and to be an asset of the complainant corporation, upon its being legally organized, and upon a distinct agreement with said McLaughlin and Simonds that it was the complainant which was to manufacture, use, and sell the said conduits embodying said invention, according to the terms of said license."

The complainant's case on this vital point rests on the proposition that the license was in fact made in behalf of the Toppan corporation, to be organized some time in the future, and that meantime the business under the license was to be conducted by the copartnership. This proposition is supported by the testimony of James S. Toppan, George L. Toppan, his son, Grace D. Toppan, wife of George L. Toppan, and, in a general way, by one D'Este. On the other hand, McLaughlin and Simonds, the licensors, positively deny that the license was made in behalf of the Toppan corporation, or that they had any knowledge of such a corporation until nearly a year after the license was given. Their testimony is to the effect that the license was negotiated with the copartnership, executed by the copartnership, and operated under by the copartnership until it was revoked by them for failure to make returns. They have never in any way recognized the corporation as their licensee.

Where there is such a direct conflict in the oral testimony, documentary evidence, like the correspondence between the parties, becomes of paramount importance. Such evidence, if pertinent, is controlling, since it is the best evidence, and in every way more satisfactory and convincing than the recollection of witnesses as to conversations which occurred more than two years before. In my opinion, the correspondence between these parties, when read in connection

with the license, is consistent with the testimony of the licensors, and inconsistent with the testimony of James S. Toppan and his son. There is not a word in the license, or in the correspondence prior to its execution, and for 11 months thereafter, which in any manner hints, suggests, or intimates that it was made in behalf of the Toppan corporation. The first reference of any kind to a Toppan corporation is in a letter to McLaughlin, dated December 5, 1899, a month after it was organized. In another letter to McLaughlin, written on December 16th, a few days later, this significant passage is found:

"Fearing that you may think it strange our wanting further delay, we want to acquaint you with a few facts. When we first took hold of your joint, we were not an incorporated company, but we soon found that in order to do ourselves mutual justice in the introduction of this device more money would be required than we had anticipated, and in order to push the joint effectually we decided to incorporate, and placed the matter in our attorney's hands, with instructions to prepare the necessary papers."

In this letter, penned nearly a year after the date of the license, J. S. Toppan says he desires to acquaint McLaughlin with a few facts, and then goes on to inform him, in substance, that when the copartnership took hold of the patented device it was not an incorporated company, but soon after it was decided to incorporate, and the matter was placed in the hands of an attorney to prepare the necessary papers. According to this statement, the decision to incorporate was not determined upon until some time subsequent to the license. The first formal step to organize the corporation appears in a communication to the Secretary of State under date of October 25, 1899.

This evidence strongly confirms the testimony of the licensors, and is entirely irreconcilable with the recollection of complainant's witnesses.

The correspondence between the parties began with the following letter and reply:

Chicago, Nov. 29, 1898.

Mr. M. P. McLaughlin, Boston, Mass.

My Dear Sir—Will you kindly inform us if you are in a position at this time to consider a proposition regarding the handling of your new Flexible Steam Heat Conduit?

We shall be pleased to take the matter up with you at such time as you are prepared to entertain the matter, and we believe that we are in a position to give you satisfactory representation.

Trusting that you will give this matter your due consideration and favor us with an early reply, we remain

Yours very respect.

The J. S. Toppan Company,  
By W. R. Toppan.

Boston, Dec. 1, 1898.

The J. S. Toppan Co., Chicago.

Gentlemen—Yours of Nov. 29 recd. I am ready to entertain a proposition from you in the matter of my Flexible Stm. Heat Conduit. I have sold the right for use of the Conduit on the Boston & Maine R. R., and also the right for 50 for the equipment of the new Southern Union Station, now building in Boston.

Yours truly,

M. P. McLaughlin,  
Boston Shop, B. & M. R. R., Boston.

This was a communication from the Toppan copartnership to one of the licensors respecting a proposition to handle the flexible joint.

The copartnership styles itself in this letter "The J. S. Toppan Company," and it is so addressed by McLaughlin in his reply. The same designation of the copartnership is found in the license executed a month later. In that paper the party of the second part is "The J. S. Toppan Company," and it is signed "The J. S. Toppan Company." So throughout the correspondence down to December, 1899, there is nothing to show that anything else was meant or intended by the words "The J. S. Toppan Company" than the Toppan copartnership which began the correspondence on November 29, 1898.

The terms and conditions of the license were fully discussed. As first drawn, it was for two years, and the "two" was then changed to "four." This modification is referred to in a parenthetical insertion at the end of the license. Again, through some oversight in signing the license for the Toppan Company, J. S. Toppan signed his own name without the prefix "per" or "by." This omission formed the subject of correspondence between the parties, and was subsequently corrected. These incidents indicate the care taken to have the license fully and accurately embody the agreement of the parties.

Under all the circumstances of this case, it is almost impossible to conceive that so important a matter as a license running to a corporation not in existence, instead of to an existing copartnership, should be left to an oral understanding between the parties, and should remain unnoticed in the license, and in the correspondence for nearly a year thereafter.

Upon the issue whether the license was given to the corporation or the copartnership, the burden of proof rests with the complainant. Not only has it failed to sustain this burden, but the whole evidence, interpreted in the light of the surrounding circumstances, and the existing state of affairs, irresistibly points to the conclusion that the license was granted to the copartnership.

The license provided that, in the event of failure of the licensee "to make returns or to make payment of royalties" on the first days of April, July, October, and January of each year, the license might be terminated on 30 days' notice. No returns having been made for nine months, the licensors sent the following letter of revocation:

Boston, Mass., Oct. 31, 1899.

J. S. Toppan Company,  
Great Northern Building, Chicago, Ill.

Gentlemen: In accordance with the 6th paragraph of Articles of Agreement, dated Jan. 2, 1899, between the J. S. Toppan Company and ourselves, Milton P. McLaughlin and S. W. Simonds, we hereby notify you that inasmuch as you have failed in every particular to carry out the conditions and agreements expressed in the said license, for more than thirty days, the said license shall be terminated on the first day of December, 1899.

We further notify you to immediately pay us the royalties which shall accrue up to the first day of December, 1899, on all of the joints referred to in said license, which you have manufactured and sold or may manufacture and sell up to the first day of December, 1899.

And we further notify you that we shall prosecute any infringement which you may make upon our patent No. 575,831, granted Jan. 26, 1897, on and after the first day of December, 1899.

Yours respectfully,

M. P. McLaughlin.  
S. W. Simonds.

To this letter there was the following reply:

Chicago, Nov. 6, 1899.

Mr. M. P. McLaughlin,

Care Boston & Maine R. R. Shops, Boston, Mass.

Dear Sir—I wired you this morning as follows:

"I have elected to buy your flexible steam conduit patent. Letter to-day." which I hereby confirm. I desire to say that I have elected to buy the flexible steam conduit patent, No. 575,831, and will place in your hands \$1,200.00, in accordance with your favor of May 31st, 1899. I shall leave here on or before the 8th inst., for Boston, Mass., and shall be prepared to take an assignment of the Letters Patent, in accordance with your proposition which is hereby accepted.

Respect,

J. S. Toppan.

By reason of this notice and J. S. Toppan's reply, the licensors contend that the license was revoked, and that such revocation was acknowledged by the Toppan Company. In reply to this contention it is insisted (1) that no returns were necessary during the period named, because no conduits were made or sold; and (2) that the 30-days notice required under the license was not given, as the notice was not received by the Toppan Company until November 4th. It is unnecessary, however, to pass upon this question of revocation. The complainant's case stands or falls upon the grant of a license to the corporation. If no license was granted, no revocation was necessary. So far as the copartnership is concerned, the revocation is immaterial, since the license terminated on November 1, 1899, when it turned over all its assets to the corporation, which has since conducted the entire business. With respect to the few conduits which were sold by the copartnership during the preceding October, the royalties, amounting to \$6.20, have been paid. So far as the corporation is concerned, the question of revocation is unimportant, since we find that it never had a license, and has never been recognized in any way by the defendants McLaughlin and Simonds as their licensee.

Bill to be dismissed, with costs.

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In re B. H. GLADDING CO.

(District Court, D. Rhode Island. February 5, 1903.)

No. 307.

1. BANKRUPTCY—DEBTS ENTITLED TO PRIORITY—WAGES OF CLERKS DURING VACATION.

"Wages due to workmen, clerks or servants which have been earned within three months" given priority by Bankr. Act, § 64b (4) [U. S. Comp. St. 1901, p. 3447], means wages which are owing at the time of the bankruptcy, although they may not then be "due" in the sense of being immediately payable, and which have accrued within three months. It was not the purpose of this clause to make a distinction between wages due which have been earned and wages due which have not been earned, or to determine the wage earner's right by an inquiry into the amount of work done during the period of employment. The purpose is merely to limit priority to wages which have accrued within three months. The fact that during the three months clerks of a bankrupt were given vacations "with pay," such pay to be withheld, however, until the end of the year, during which time the employer became bankrupt, does not deprive the clerks of the right to prove their claims for such pay nor to priority.

## 2. SAME—CONSTRUCTION OF CONTRACT.

A notice was posted by an employer that its clerks would be entitled to vacations with pay according to length of service, but that vacation payments would be withheld until the following January, and further stating that "It is understood and agreed that employes taking vacations agree that if for any reason employment is severed, voluntarily or otherwise, before January 1st, the vacation pay will be forfeited." Prior to the succeeding January the employer became bankrupt. *Held*, that the condition subsequent was solely for the benefit of the employer, its object being to secure a continuance of service from the clerks; that such object having been defeated by the bankruptcy, the court would not enforce the forfeiture and deprive the clerks of pay to which they were equitably entitled.

In Bankruptcy. On review of referee's decision disallowing the claim of Thomas F. Little for wages.

Walter D. Brownell, for claimant.

Walter B. Vincent, for trustee.

BROWN, District Judge. This is a petition to revise the referee's decision disallowing the claim of a clerk for wages during a period when the clerk was on a vacation. The B. H. Gladding Company, the employer, posted in its store a notice, the material parts of which are as follows:

"General Notice.

"No. 15.

June 11th, 1902.

"The vacation period will extend from Monday, June 30th, to Sat., September 13th. Employees who have been continuously employed since January 1st, 1902, will be entitled to one week's vacation with pay. Employees continuously employed since July 1st, 1901, will be entitled to two weeks' vacation with pay. Vacation payments will be withheld, as has been the custom, until the following January, and it is understood and agreed that employees taking vacations agree that, if for any reason employment is severed, voluntarily or otherwise, before January 1st, 1903, the vacation pay will be forfeited."

The clerk took two weeks' vacation, according to this notice. The B. H. Gladding Company became bankrupt October 18, 1902. The bankruptcy act gives priority, by section 64b (4) [U. S. Comp. St. 1901, p. 3447], to "(4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant." Upon a proper construction of this language, it includes wages owing at the date of bankruptcy, even though, by contract between the wage earner and bankrupt, payment is to be deferred to a date later than the date of bankruptcy. The term "due" is one of double meaning. At times it means a sum now payable; at times it signifies a simple indebtedness, without reference to the time of payment. In *U. S. v. Bank of North Carolina*, 6 Pet. 36, 8 L. Ed. 308, the court said, "Here, the word 'due' is plainly used as synonymous with owing." See, also, 10 Am. & Eng. Enc. Law (2d Ed.) 279. The mere fact, therefore, that payment of wages was to be deferred or withheld, would not deprive the wage earner of priority, provided the right to wages had accrued before bankruptcy.

A further question is as to the effect of the limiting clause, "which have been earned within three months before the commencement of

proceedings." It was obviously not the purpose of this clause to make a distinction between wages due which have been earned and wages due which have not been earned; but merely to limit the priority to wages owing which had accrued within a limited period. The relation of the parties as employer and employed was not affected by the fact that the employer voluntarily released the clerk from the obligation to perform services during a vacation period. To attempt distinctions between wages due which are earned and wages due which are not earned, by an inquiry into the amount of work done by the wage earner, would be entirely impractical. If we disallow claims for a week's vacation, we must also disallow claims for half days when stores are closed, and for days and hours when there is nothing to do. Wages are "earned," in the sense in which that term is used in the bankruptcy act, so long as a bona fide contract of hiring exists, and the clerk or servant continues in the master's employment and does all that he is required to do. The practice of giving vacations with continued pay is very general in all departments of business. Vacation wages cannot be regarded as a mere gratuity, given in recognition of past or present services. By continuing the relation of employer and employé during a dull season, the employer holds his working force in readiness for the active season. The relation of the employer and employed is as strictly a business relation as it is during the working season, and there is full legal consideration for the master's promise to pay wages during this period.

A further question arises as to the legal effect of the following paragraph:

"Vacation payments will be withheld, as has been the custom, until the following January, and it is understood and agreed that employees taking vacations agree that, if for any reason employment is severed, voluntarily or otherwise, before January 1st, 1903, the vacation pay will be forfeited."

This language must be construed as a provision for the benefit of the employer, designed to protect him in case an employé should leave, or be discharged, after vacation, and to secure the continuance of the services of his employés. It shows clearly on its face that the contract or regulation was one made in contemplation of the continuance of business, for it says, "Vacation payments will be withheld, as has been the custom, until the following January." The expressions, "vacation payments will be withheld," "vacation pay will be forfeited," when construed in connection with the statements, "Employees who have been continuously employed since January 1st, 1902, will be entitled to one week's vacation with pay. Employees continuously employed since July 1st, 1901, will be entitled to two weeks' vacation with pay"—indicate that vacation wages, like other wages, accrue and are owing as each week passes. The employé is to have a "vacation with pay." That the payments are to be withheld, and subject to forfeiture, affords no indication whatever that there is any failure of consideration, if the employé does not continue to work until January 1, 1903. The employés are, by the terms of the notice, entitled to a vacation and pay in accordance with the length of past services. They are liable to a forfeiture of pay upon the happening of a condition subsequent.

It seems clear that the phrase, "if for any reason employment is severed, \* \* \* vacation pay will be forfeited," has no application to the contingency of bankruptcy. Its object is to secure a continuance of service during the fall season, to benefit the employer in a particular way; and neither he, nor any one claiming under him, can have any legal or equitable right to use the clause for a purpose entirely foreign to its object. A state of bankruptcy must defeat the original object. It is sound construction to say that a clause inserted for an object which could not be attained in a state of bankruptcy has no application to a state of bankruptcy. The attempt to apply this clause in the administration of the bankrupt's estate would lead to absurd and inconsistent results. It would entirely reverse the rules of priority established by congress; for the wage earner, who by law is given priority, would not only be deprived of his priority, but would be debarred altogether from any claim to a dividend from the bankrupt's estate. Ordinary rules of construction compel us to hold that a clause which was intended merely to secure a continuance of service should not be converted into an agreement which deprives the wage earner of his ordinary legal status as a creditor. Furthermore, a court of bankruptcy, in the administration of estates, is guided by principles of equity. If we assume that the bankrupt corporation had an arbitrary right to forfeit the wages of its clerks, it is evident that its officers have not exercised that right, and that they do not desire that the right should be exercised. There is certainly no reason why a court of equity should invoke a forfeiture, especially when this would lead to a result directly opposed to the general policy of the bankruptcy act.

The decision of the referee is reversed, and the claim is allowed as a claim having priority. A like order will be made in each of the cases involving similar claims.

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**HOYE v. GREAT NORTHERN RY. CO. et al**  
(Circuit Court, D. Montana. January 31, 1903.)

No. 661.

**1. CONNECTING RAILROADS—TRANSFER OF CARS—DUTY OF INSPECTION.**

When, by agreement between railroad companies owning connecting lines, cars are transferred from one road to the other, both companies owe the duty to employes of the receiving company to exercise reasonable care to see that such cars are in proper repair; and, where such an employe is injured by reason of a defect which existed when a car was so transferred, he may join both companies as defendants in an action for the injury.

**2. REMOVAL OF CAUSES—SEPARATE CONTROVERSY—ACTION FOR JOINT NEGLIGENCE.**

An action to recover for a personal injury alleged to have resulted from the concurring negligence of two defendants, each of whom owed a separate duty of care to the plaintiff, is not removable by one defendant, who is a nonresident of the state, on the ground that it involves a separable controversy.

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¶ 2. Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.



On Motion to Remand to State Court.

W. F. O'Leary, for plaintiff.

I. Parker Veazey, for defendants.

KNOWLES, District Judge. This is an action originally brought in the district court of the Eighth judicial district of the state of Montana to recover damages from the defendants jointly for personal injuries sustained by the plaintiff by reason of the alleged negligence of the defendants. The case was removed into this court by the defendant the Great Northern Railway Company on the ground that the plaintiff is a citizen of the state of Montana and that the defendant Great Northern Railway Company is a corporation organized and existing under the laws of the state of Minnesota, and a citizen of said state, and that there is a separable controversy between it and the plaintiff, as presented by the pleadings in this case. The plaintiff has filed his motion to remand the case to the state court upon the ground that this court has no jurisdiction. It is alleged that each of the defendants did, during the times mentioned in the complaint, operate and maintain certain railroad lines owned by them, and the locomotives, cars, yards, shops, tracks, switches, and all tools and appliances, appurtenances, and real estate customarily owned and used by railroad companies in operating railroads, and were jointly and severally engaged in the business of carrying freight and passengers for hire; that the lines of the said defendants connect at or near Pacific Junction, in the state of Montana, where cars could be, and frequently were and are, transferred from the one line of railway to the other.

The question presented by this motion is one not free from doubt. It would seem that the plaintiff was an employé of the Montana Central Railway Company, and not of the defendant the Great Northern Railway Company; that the defendant Great Northern Railway Company delivered to the Montana Central Railway Company, at said Pacific Junction, a certain freight car, equipped in the customary manner with iron rods or bars attached to the side and ends of the car and forming a ladder for ascending and descending the same, and with a handhold attached to the top of the car; that the aforesaid handhold of said car was defective in this, to wit, that the same was loose; that the defendant had notice of the defect in this car at the time of its delivery by it to the defendant the Montana Central Railway Company; that the defendant Montana Central Railway Company knew, or by the exercise of reasonable care might have known, of the defect in this car, and that it carelessly and negligently transferred said car from said Pacific Junction to a part of its railway line near Great Falls, Mont., known as the "B. & M. Smelter Lower Line," and there required the plaintiff, in the course of his duties as a switchman, to ascend the same, and that while so engaged in his duties, and having ascended the same, he grasped the said iron handhold at the top of said car, and that the same gave way, and he was precipitated from the top of said car upon another car standing on a parallel track, and received the injuries complained of. It is claimed that the defendant Montana Central Railway Company failed to properly inspect said car, and turned the same over to be used by the plaintiff; and that, if it had

properly inspected said car, it would have discovered said defect, and could have remedied the same. It will thus be seen that the injury was caused by the defect in the car used.

It was held in *Teal v. American Mining Company et al.* (Minn.) 87 N. W. 837, that a railway carrier transferring a car of its own to a connecting carrier for use upon its line owes the servants of the latter the duty of exercising due care in inspecting and putting the car in a reasonably safe condition for the purpose used. The negligence of the latter in receiving and using the car cannot relieve the former for an injury to such servants, caused by a defective car negligently transferred to it. In this case the mining company receiving the car and that used it was joined as a defendant with the railway company which had transferred it. In the case of *Moon v. N. P. R. Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194, it was held, where connecting railroads mutually agree to transfer the loaded freight cars of each over their respective lines, each is under obligation to exercise due diligence in providing reasonably safe cars for the service contemplated. Such duty is not limited to the corporation as such, but is extended to and is owed to their servants who must necessarily handle the cars, and who may be exposed to danger arising from their unsafe condition. It was also held in this case that where, "under a mutual agreement between common carriers to transfer the loaded freight cars of each over their respective lines, the receiving company is liable to its employes if it undertakes to use the cars of the other company without due inspection, and they turn out to be defective and unsafe by reason of defects ascertainable by reasonably careful inspection; but the negligence of the receiving company to perform this duty will not relieve or excuse the delivering company from liability for injuries resulting from its negligence in delivering unsafe and defective cars." In the case of *Consolidated Ice Machine Company et al. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688, it was held, where the negligence of two or more persons directly concurs to produce an injury to another, although one may have undertaken one part and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be liable. In this case the ice company undertook to build a tank for making ice for a brewing company. The brewing company was to fix a location for the plant, and put in proper supports for it. In providing the place where the tank was to be erected, the brewing company put in, as a support, an insufficient truss. The ice company knew that this truss was insufficient. It sent one of its employes through the roof of the house in which the tank was being erected. The tank fell on account of the defective truss. The employe, Keifer, fell from the roof on account of this, and was killed. Both companies were held to be liable jointly, although the party killed was the employe or servant of only the ice company, and there was no contractual relation existing between the brewing company and the person killed. In the case at bar the plaintiff was injured on account of the defect in the car with knowledge of which both the defendant companies were chargeable, and it would seem, under the decisions above quoted, that both companies were required

to exercise reasonable care in regard to this car; that this care was due to the employes of the Montana Central Railway Company by the Great Northern Railway Company, although the plaintiff was not an employe of that last-named company. Under these circumstances I am inclined to hold that both defendant companies are jointly charged with negligence, and that there is no separable controversy in this case as to the Great Northern Railway Company.

It is therefore ordered that the case be remanded, with costs to the plaintiff.

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GREEN v. INDIAN GOLD MIN. CO.

(Circuit Court, D. Montana. February 24, 1903.)

No. 204.

1. COMPLAINT—MOTION TO STRIKE OUT—STATEMENT OF LEGAL CONCLUSION.

In an action by a servant to recover for a personal injury alleged to have been caused by the negligence of the master, a paragraph in the complaint stating the bare legal conclusion that it was the duty of defendant to provide plaintiff with a reasonably safe place to work and to keep the same in a reasonably safe condition, which arises by implication from the facts alleged in other paragraphs, is surplusage, and will be stricken out on motion.

At Law. On motion to strike paragraph from complaint.

McHatton & Cotter, for plaintiff.

Forbis & Evans, for defendant.

KNOWLES, District Judge. This is an action brought by the plaintiff against the defendant to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant, while the plaintiff was in its employ as a laborer in its mine, in Madison county, Mont. Upon the ground that the same is immaterial, redundant, and surplusage, and does not state facts constituting or tending to constitute a cause of action, the defendant moves to strike out the following paragraph from the plaintiff's complaint:

"That it was the duty of the said defendant to furnish and sufficiently and safely timber the said tunnel through which this plaintiff was obliged to pass in running the said cars, in the course of his employment, so as to properly support the roof and sides thereof, and that it was the duty of the said defendant to keep the said tunnel properly and sufficiently timbered and in a reasonably safe condition during all of said times, so as to render ingress and egress in and out of said tunnel safe, so that plaintiff could pass through the same in performance of his duties as such servant."

Considering this paragraph with reference to its relation to the other facts set out in the complaint, it is entirely unnecessary, because the other facts alleged sufficiently raise the implication of law that it was the duty of the defendant to provide the plaintiff with a reasonably safe place in which to work and to keep the same in a reasonably safe condition. That is all that can be required by the rules of pleading, be it under the common law or under the Codes. Tested by this rule, the paragraph objected to is not an allegation of facts, but a mere naked legal conclusion, and is objectionable and

repugnant to both systems of pleading. See Gould's Pleadings, §§ 2, 3 & 4; 1 Estee's Pleadings, §§ 182 & 185; Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 569, 578, 11 Sup. Ct. 656, 35 L. Ed. 278; U. S. v. Ames, 99 U. S. 45, 25 L. Ed. 295; Chicot County v. Sherwood, 148 U. S. 529, 536, 13 Sup. Ct. 695, 37 L. Ed. 546; Am. Electric Construction Co. v. Consumers' Gas Co. (C. C.) 47 Fed. 43; Gilchrist v. Helena H. S. & S. R. Co. (C. C.) 47 Fed. 593; Phinney v. Mutual Life Insurance Co. (C. C.) 67 Fed. 493; Montgomery v. Northern Pacific Railway Co. (C. C.) 67 Fed. 445.

Standing alone and taken at its best, this paragraph amounts to a bare allegation of duty, such as the law naturally creates upon the relation of master and servant. It is unaccompanied by any allegation of the facts sufficient to create it, and is, therefore, under the authorities, insufficient and decidedly objectionable. *Bailey v. Bussing*, 29 Conn. 1; *McCune v. Norwich City Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278; *Norwich v. Breed*, 30 Conn. 535; *Hewison v. New Haven*, 34 Conn. 138, 91 Am. Dec. 718; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 27, 33 Am. Rep. 1; *Atwood v. Welton*, 57 Conn. 515, 18 Atl. 322; *Buffalo v. Holloway*, 7 N. Y. 494, 57 Am. Dec. 550.

Many other cases could be cited to the same point. For the reasons herein given, and upon the authorities, I am of opinion that the paragraph objected to may safely be stricken out without impairing the efficiency of the complaint with reference to its stating a good cause of action. Upon general principles and under the well settled rules of good pleading, it is decidedly objectionable. The defendant's motion is granted.

Let paragraph 5 of the plaintiff's complaint be stricken out.

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#### In re LAZORIS.

(District Court, E. D. Wisconsin. March 2, 1903.)

**1. BANKRUPTCY—TRUSTEE—ELECTION—AUTHORITY OF ATTORNEY.**

An attorney, representing claims duly filed against a bankrupt's estate, is not entitled to vote at a meeting of creditors for the election of a trustee, without a proxy or special power for that purpose.

**2. SAME—ELIGIBILITY OF TRUSTEE.**

That a trustee in bankruptcy, elected at a meeting of creditors, was a stockholder in a corporation having a claim filed amounting to nearly one-half of the bankrupt's entire indebtedness, and that it might become the trustee's duty to move to have such claim expunged or reduced, did not render such trustee ineligible to act.

In Bankruptcy. On questions arising before the referee at the meeting of creditors for election of a trustee certified for the opinion of the court: (1) Whether an attorney of the court, representing claims duly filed, is entitled to vote thereupon without formal powers of attorney; (2) whether disapproval of the election of J. A. Barling as trustee was authorized by the fact that he was stockholder of a corporation creditor having a claim filed "amounting to nearly half of the

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 26, 173.

entire indebtedness," wherein duty may arise "to move to have such claim expunged or reduced."

Bloodgood, Kemper & Bloodgood, for trustee.  
Francis Williams, for creditors.

SEAMAN, District Judge. The questions certified by the referee are answered as follows:

1. The bankruptcy act vests the right to vote for a trustee in the creditors who have unsecured claims filed and allowed, and by section 1 (9) [U. S. Comp. St. 1901, p. 3419] it is provided that the term "creditor" "may include his duly authorized agent, attorney or proxy." The election of a trustee is one of the necessary proceedings in bankruptcy administration, and the authority of an attorney to represent his client at the meeting of creditors would seem to be implied from the fact of employment as attorney. In the absence of express provision otherwise in the act or general orders in bankruptcy, I should incline to the view that no special authority to so represent the creditor was required thereunder of an attorney of the court who has entered formal appearance and obtained allowance of the creditor's claim. But the concensus of opinion in other districts appears to deny such implied authority to vote at the meeting, and to require a proxy or special power. In *re Scully*, 5 Am. Bankr. R. 716, 720, 108 Fed. 372, and prior cases cited. In *re Henschel* (D. C.) 109 Fed. 861, and (impliedly) on appeal, 51 C. C. A. 277, 113 Fed. 443. Uniformity in practice is desirable, so far as practicable, and I have no doubt of the power of the court to establish such requirement by rule, and that instances may arise where it is needful. In conformity, therefore, with the decisions referred to, the rule is adopted for this district that attorneys must have express authority in some form from the creditor to vote on his behalf at such meetings. As the majority vote for trustee in this instance was thus authorized, the election is not affected by such rule.

2. The majority of the creditors represented at the meeting for the election of trustee are entitled to appoint a trustee or trustees. Their selection is subject to approval or disapproval by the referee for cause only. In *re McGill*, 45 C. C. A. 218, 106 Fed. 57. Mr. Barling was thus appointed at the meeting in question, and the only ground stated by the referee for disapproval is this: That he is a stockholder of a corporation appearing as a creditor, having a claim filed "amounting to nearly half of the entire indebtedness," and that it may become his duty "to move to have such claim expunged or reduced." The fact alone of interest as creditor is no disqualification. *Collier on Bankruptcy* (3d Ed.) 283. If the claim of the corporate creditor of which he is stockholder were disputed at the meeting, in whole or in part, or the interest or attitude of the appointee appeared to be antagonistic to the general creditors, the referee would be justified in withholding approval, but the mere possibility that a contest may arise is insufficient ground to set aside the choice of the creditors, where the policy of the law permits a creditor to be named. No valid objection appearing to the trustee so selected, the appointment must stand.

## FILER &amp; STOWELL CO. v. RAINEY et al.

(Circuit Court, N. D. Illinois, N. D. January 31, 1903.)

No. 26,286.

## 1. EXECUTORS—SUIT AGAINST IN ANOTHER STATE—JURISDICTION.

A suit cannot be maintained against foreign executors in Illinois, in either a state or federal court, where there is no property of the testator's estate within the jurisdiction.

## 2. JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT.

A nonresident defendant in an action begun by attachment and the garnishment of money due him released such garnishment by the giving of a bond as provided by statute. He died pending the action, which could not be revived against his executors because of their nonresidence. *Held*, that a suit in equity by plaintiff against such executors to establish his right to enforce the bond was not one to enforce a lien on property, which could be maintained in a federal court in a district of which neither plaintiff nor defendants were inhabitants, against defendants' objection.

In Equity. On motion to dismiss for want of jurisdiction.

Pardridge & Pardridge, for complainant.

Herrick, Allen, Boyesen & Martin and F. F. Norcross, for defendants.

KOHLSAAT, District Judge. Complainant began proceedings by attachment against defendants' testator, W. J. Rainey, a citizen of Ohio, in the circuit court of Cook county, Ill.; garnishing moneys due him from O. Gara King & Co. Afterwards said Rainey secured the release of said garnishment under a recognizance bond, as provided by the statute of Illinois. Thereby the funds garnished were discharged from the lien of the garnishment and paid over to said Rainey. Afterwards Rainey removed said cause to this court, and later demurred to some of the counts of the declaration filed in said cause, and pleaded the general issue to the remaining counts. He then died. Defendants herein were appointed executors of his estate by the probate court of Cuyahoga county, Ohio, in April, 1900. After a lapse of more than a year from the time of Rainey's death, this court ordered a scire facias to issue against said executors to revive said cause. This was never served, by reason of their nonresidence. Thereupon complainant filed this bill to "enforce the lien of said attachment, and retain the benefit of the recognizance" aforesaid. The bill prayed that complainant might have a trial of the issues in the attachment suit, either in said attachment suit or herein, and that the attachment be sustained; that complainant might have a judgment or decree against said executors for the amount found to be due; that said executors be required to pay same, and, failing to do so, that complainant have recourse to said recognizance to enforce such judgment or decree; and for other relief. The defendants filed a special appearance, and moved to dismiss the bill: (1) Because complainant alleged that it was a citizen of Wisconsin, and that the defendants were citizens of Ohio; (2) because two of the defendants were citizens of New York,

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 2344.

and three of them citizens of Ohio; (3) because defendants were foreign executors appointed by said Cuyahoga county, Ohio, probate court.

It is conceded that there is no estate of defendants' testator situate in Illinois, and that his will has not been proved here. Without the presence of property in this state, there would be no jurisdiction to appoint executors or administrators. The recognizance bond is not property. The suit was, after the giving of the recognizance, simply a suit in personam, under section 15, c. 11, Rev. St. Ill. It is a well-settled rule of law that the powers and rights of an administrator or executor are local, and limited to the state under whose law they are appointed, except as they may be recognized by the statutes of other states through courtesy. There is no law in Illinois which gives jurisdiction to this court or any state court to try a suit against a foreign administrator or executor, in the absence of estate situate here, and their qualification as provided by statute. If there be no estate here, they cannot be qualified to act when sued here. These executors cannot be sued in this jurisdiction. *Insurance Co. v. Taylor*, 2 Biss. 446, Fed. Cas. No. 12,607; *Judy v. Kelley*, 11 Ill. 214, 50 Am. Dec. 455; *McGarvey v. Darnall*, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861. There being no res in this jurisdiction, there is no warrant for the modification of the rule that a suit must be brought in the jurisdiction where either plaintiff or defendant resides, when objection is made, as is here the case. The suit cannot be maintained.

The motion to dismiss as to all the defendants is sustained, and the bill is dismissed for want of jurisdiction.

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UNITED STATES v. BEAN et al.

(District Court, D. Montana. January 31, 1903.)

No. 65.

1. PUBLIC LANDS—ACTION FOR UNLAWFUL CUTTING OF TIMBER—SURVIVAL.

The United States may maintain an action against an executor to recover the value of timber alleged to have been unlawfully cut and removed from public lands by his testator, the trespass being one from which the estate received a benefit.

2. SAME—EFFECT OF STATE STATUTES.

The right to maintain such an action is not limited or affected by a state statute requiring all claims against the estate of a decedent to be first presented to the executor for allowance.

At Law. On demurrer to complaint.

Carl Rasch, U. S. Atty., and F. A. Maynard, Special Asst. U. S. Atty.

A. J. Campbell and W. W. Dixon, for defendants.

KNOWLES, District Judge. In this case Margaret P. Daly, as the executrix of the last will and testament of Marcus Daly, deceased, was sued for the value of a large amount of lumber alleged to have been cut and taken from the lands of the government of the United

States by her testator and his codefendants. This case is one of six brought by the plaintiff against the said Margaret P. Daly and other defendants, involving large quantities of lumber, and of large value; and it is alleged that the said defendants wrongfully and unlawfully took the said lumber, and disposed of the same to their own use and benefit.

The said executrix, Margaret P. Daly, by her counsel, has filed separate demurrers to the complaints generally, on the ground that the same do not state facts sufficient to constitute a cause of action against her as executrix aforesaid. The point raised by these demurrers is that the charge in each of said complaints is for a tort alleged to have been committed by Marcus Daly in his lifetime, and that a right of action did not survive, as against his personal representative, except by virtue of the statutes of Montana, and that, if plaintiff resorted to the rights given by said statutes of Montana, it must abide by the provisions of law for the collection of claims against an estate, in this: that the said claim should be first made out in the manner provided by statute, and presented to the executrix for allowance. There is no allegation in the complaints that this had been done. I find, however, that it is not true that the right to bring this action only exists by virtue of the statutes of Montana, but that it existed at common law in such a case as this. Here it appears that the defendant's testator, with the other defendants, obtained the lumber sued for, and converted the same to their own use and benefit. Marcus Daly thus received a benefit from the trespass alleged in the complaint, and, by virtue of numerous decisions, his estate would be liable for this benefit. *Hambly v. Trott*, 1 Cowp. 371; vol. 2, *English Ruling Cases*, 1; 3 *Williams on Executors*, pp. 232, 233; 1 *Woerner's American Law of Administration*, \*p. 618; 1 *Jaggard on Torts*, p. 41; 2 *Addison on Torts*, p. 558; *Webb's Pollock on Torts*, p. 81; *Schouler on Executors* (3d Ed.) § 372; *Cooper v. Crain*, 9 N. J. Law, 175.

Now, having this right outside of the statute, the question arises as to whether or not the United States can be incumbered in maintaining its actions by any state law? I am inclined to believe that they cannot, unless specially named therein, and the demurrers are therefore overruled.



UNITED STATES v. NORTHERN SECURITIES CO. et al.  
 (Circuit Court, D. Minnesota, Third Division. April 9, 1903.)

No. 789.

**1. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSTRUCTION OF ANTI-TRUST LAW.**

The generality of the language used in the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), declaring illegal "every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form.

**2. SAME—APPLICATION OF ACT TO INTERSTATE CARRIERS.**

The anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) applies to interstate carriers of freight and passengers, and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable.

**3. SAME—CORPORATION TO ACQUIRE STOCK OF COMPETING RAILROADS—LEGALITY.**

The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce, and is in violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates.

**4. CORPORATIONS—POWERS—NEW JERSEY STATUTES.**

The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation.

**5. SAME—INTERSTATE COMMERCE.**

A state cannot invest a corporation organized under its laws with the power to do acts in the corporate name which would operate to restrain interstate commerce.

**6. CONSTITUTIONAL LAW—RIGHT OF PRIVATE CONTRACT—LIMITATION BY INTERSTATE COMMERCE CLAUSE.**

The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce.

**7. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT TO ENJOIN.**

The fact that the purpose of an illegal combination between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, cannot be urged to defeat a suit by the United States to restrain the exercise of the power so illegally acquired

by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the anti-trust law (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

8. SAME—DEFENSES—QUESTIONS OF PUBLIC POLICY.

Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), and the court, in a suit to enjoin it as such, cannot consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress.

In Equity.

Philander C. Knox, Atty. Gen., D. T. Watson, Special Counsel, James M. Beck and W. A. Day, Asst. Attys. Gen., and John M. Freeman, for the United States.

George B. Young and John W. Griggs, for the Northern Securities Company.

George B. Young, for James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker.

M. D. Grover, for the Great Northern Railway Company.

C. W. Bunn, for the Northern Pacific Railway Company.

Francis Lynde Stetson and David Willcox, for defendants Morgan, Bacon, and Lamont.

Before CALDWELL, SANBORN, THAYER, and VANDEVANTER, Circuit Judges.

THAYER, Circuit Judge. This is a bill, exhibited by the United States, to restrain the violation of an act of Congress approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which is commonly termed the "Sherman Anti-Trust Act." The case was heard before a Circuit Court composed of the four Circuit Judges of the Eighth Circuit, pursuant to the provisions of a recent act of Congress, approved February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the Circuit where the suit is brought, when the Attorney General files with the clerk of the court wherein the case is pending, a certificate that it is one of "general public importance." Such a certificate has been filed, and in accordance with the mandate of the statute the case "has been given precedence over others and in every way expedited."

From admissions made by the pleadings, as well as from much oral testimony, we reach the following conclusions as respects matters of fact:

Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul, and Minneapolis, in the state of Minnesota; thence across the continent to Puget Sound. These roads are, and in public estimation have ever been regarded as, parallel and competing lines. For some years, at least, after they were built, they competed with each other actively for transcontinental and interstate traffic.

In the spring of the year 1901 they united in purchasing about 98 per cent. of the entire capital stock of the Chicago, Burlington & Quincy Railway Company, and became joint sureties for the payment of bonds of the last-named company, whereby the purchase was accomplished, which were to run 20 years, and bear 4 per cent. interest per annum. The amount of stock so acquired was of the par value of about \$107,000,000, and, as it was purchased at the rate of \$200 per share, the bonded indebtedness of the two companies was thus increased to the extent of \$200,000,000.

Subsequent to the acquisition of the stock of the Burlington Company, and in the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single owner. To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the state of New Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern Companies. The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.

In accordance with this plan the defendant the Northern Securities Company (hereafter termed the "Securities Company") was organized under the laws of the state of New Jersey on November 13, 1901, with a capital stock of \$400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor. When the Securities Company was organized, it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity.

Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of \$115 per share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of \$180 per share, and using its own stock at par to make the purchase.

The Securities Company subsequently made further purchases of stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about \$95,000,000, using for that purpose its own stock to the amount of about \$171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders

of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement, and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company.

The scheme which was thus devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule that every one is presumed to intend what is the necessary consequence of his own acts when done willfully and deliberately, we must conclude that those who conceived and executed the plan aforesaid intended, among other things, to accomplish these objects.

The general question of law arising upon this state of facts is whether such a combination of interests as that above described falls within the inhibition of the anti-trust act or is beyond its reach. The act brands as 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." Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

What is commonly termed a "trust" was a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the anti-trust act was approved. Combinations in that form were accordingly prohibited; but Congress, evidently anticipating that a combination might be otherwise formed, was careful to declare that a combination in any other form, if in restraint of interstate trade or commerce—that is, if it directly occasioned or effected such restraint—should likewise be deemed illegal.

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the nation, and its opinion has been reiterated in no uncertain tone, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial; that the words "in restraint of trade or commerce" do not

mean in unreasonable or partial restraint of trade or commerce, but any direct restraint thereof; that an agreement between competing railroads, which requires them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one state to another, and which, by that means, restricts temporarily the right of any one of such carriers to name such rates for the carriage of such freight or passengers over its road as it pleases, is a contract in direct restraint of commerce within the meaning of the act, in that it tends to prevent competition; that it matters not whether, while acting under such a contract, the rate fixed is reasonable or unreasonable, the vice of such a contract or combination being that it confers the power to establish unreasonable rates, and directly restrains commerce by placing obstacles in the way of free and unrestricted competition between carriers who are natural rivals for patronage; and, finally, that Congress has the power, under the grant of authority contained in the federal Constitution, to regulate commerce, to say that no contract or combination shall be legal which shall restrain interstate trade or commerce by shutting off the operation of the general law of competition. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Taking the foregoing propositions for granted, because they have been decided by a court whose authority is controlling, it is almost too plain for argument that the defendants would have violated the anti-trust act if they had done, through the agency of natural persons, what they have accomplished through an artificial person of their own creation. That is to say, if the same individuals who promoted the Securities Company, in pursuance of a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and prorate or divide them among all the shareholders of the two companies who had transferred their stock—the result would have been a combination in direct restraint of interstate commerce, because it would have placed in the hands of a small coterie of men the power to suppress competition between two competing interstate carriers, whose lines are practically parallel.

It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad; and, so

long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts.

The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in *Pearsall v. Great Northern Railway*, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. *Pennsylvania R. Co. v. Commonwealth (Pa.)* 7 Atl. 368, 371; *Farmers' Loan & Trust Co. v. New York & Northern Railway Co.*, 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76; *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word "controlled," as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

What has been done through the organization of the Securities Company accomplishes the object which Congress has denounced as illegal more effectually, perhaps, than such a combination as is last supposed. That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter.

It is manifest, therefore, that the New Jersey charter is about the only shield which the defendants can interpose between themselves and the law. The reasoning which led to the acquisition of that charter would seem to have been that while, as individuals, the promoters could not, by agreement between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them the power to operate the roads in harmony, and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and, by placing the same stock in the name of such artificial being, accomplish the same purpose. The manifest unreasonableness of such a proposition, and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect that the law, as administered by courts of equity, looks always at the substance of things—at the object accomplished, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished.

So far as the New Jersey charter is concerned, the question, broadly stated, which the court has to determine, is whether a charter granted by a state can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce over which Congress has absolute control. Presumptively, at least, no charter granted by a state is intended by the state to have that effect or to be used for such a purpose; and in the present instance it is clear that the state of New Jersey did not intend to grant a charter under cover of which an object denounced by Congress as unlawful, namely, a combination conferring the power to restrain interstate commerce might be formed and maintained because the enabling act under which the Securities Company was organized expressly declares that three or more persons may avail themselves of the provisions of the act and "become a corporation for any lawful purpose." Laws N. J. 1899, p. 473. This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however extensive and comprehensive these powers may seem to be, the state of New Jersey has said, "You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any state wherein you see fit to exercise your powers."

But aside from this view of the subject, if the state of New Jersey had undertaken to invest the incorporators of the Securities Company with the power to do acts in the corporate name which would operate to restrain interstate commerce, and for that reason could not be done by them acting as an association of individuals, then we have no doubt that such a grant would have been void under the provisions of the anti-trust act, or at least that the charter could not be permitted to stand in the way of the enforcement of that act.

The power of Congress over interstate commerce is supreme, far-reaching, and acknowledges no limitations other than such as are prescribed in the Constitution itself. *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697, 26 L. Ed. 238; *Champion v. Ames* (decided Feb. 23, 1903) 23 Sup. Ct. 321, 47 L. Ed. —. No legislation on the part of a state can curtail or interfere with its exercise; and, in view of repeated decisions, no one can deny that it is a legitimate exercise of the power in question for Congress to say that neither natural nor artificial persons shall combine or conspire in any form whatever to place restraints on interstate trade or commerce. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

It is urged, however, that such a combination of adverse interests as was formed, and has been heretofore described, was lawful, and not prohibited by the anti-trust act, because such restraint upon interstate trade or commerce, if any, as it imposes, is indirect, collateral,

and remote, and hence that the combination is not one of that character which the Congress of the United States can lawfully forbid. The following cases are relied upon to sustain the contention: *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, to a few men acting in concert and in its name and under cover of its charter, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do, to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers, and generally to prescribe the policy which they shall pursue. It matters not, we think, through how many hands the orders come by which these aims are accomplished, or through what channels. The power was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstanding the manner of its exercise, by controlling the means of transportation, to wit, the cars, engines, and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage.

The cases cited above, and on which reliance is placed to sustain the view that the restraint imposed is merely indirect, remote, incidental, or collateral, are not relevant, for, as was fully explained in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 238, 240, 243, 20 Sup. Ct. 96, 44 L. Ed. 136, one of these cases (*United States v. E. C. Knight Company*) dealt only with a combination within a state to obtain a practical monopoly of the manufacture of sugar, and it was held that the combination only related to manufacture, and not to commerce among the states or with foreign nations; that the fact that an article was manufactured for export to another state did not make it an article of interstate commerce before transportation had been begun, or necessarily subject it to federal control; and that the effect of the combination then under consideration on interstate commerce was at most only incidental and collateral. But while commenting on its previous decision in *United States v. E. C. Knight Co.*, the court took occasion to say, in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 136, that, when a contract is made for the sale and delivery of an article in another state, the transaction is one of interstate commerce, although the vendor has also agreed to manufacture the article so sold, and that combinations to control and monopolize such transactions would be in restraint of interstate commerce.

In the other cases (*Hopkins v. United States* and *Anderson v. United States*) it was held that the business of the members of the *Kansas City Live Stock Exchange*, which was under consideration by the court, was not interstate commerce and that the act did not affect them, and that, even if they were so affected, the particular agree-



ment which was involved did not operate as a restraint of interstate commerce.

We fail to find in either of these cases any suggestion that a combination such as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce. No combination, as it would seem, could more immediately affect it.

Again, it is urged tentatively that, if the existing combination which the government seeks to have dissolved is held to be one in violation of the anti-trust act and unlawful, then the act unduly restricts the right of the individual to make contracts, buy and sell property, and is invalid for that reason. With reference to this contention it might be suggested (as it has been by the government) that, as the situs of the stock which the Securities Company has bought is in the states of Wisconsin and Minnesota, which respectively chartered the Northern Pacific and Great Northern Companies, and as the stock owes its being to the laws of those states, and as each state has forbidden the consolidation of competing and parallel lines of railroad therein, and has likewise prohibited any consolidation of the "stock and franchises" of such roads, the contention last mentioned is entitled to little consideration in the case at bar.

But waiving and ignoring this suggestion, the argument advanced in behalf of the defendants is met and answered, so far as this court is concerned, by the decision in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 228, 229, 20 Sup. Ct. 96, 102, 44 L. Ed. 136, where it is said, *inter alia* :

"Under this grant of power to Congress (the power to regulate commerce between the several states and with foreign nations), that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, interstate commerce. \* \* \* We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts, limits the power of Congress and prevents it from legislating on the subject of contracts of the class mentioned. \* \* \* It has been held that the word 'liberty,' as used in the Constitution, was not to be confined to the mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. \* \* \* But it has never been, and in our opinion ought not to be held, that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective, among other things, of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision of the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, not merely indirectly, remotely, incidentally, and collaterally, regulate

to a greater or less degree commerce among the states. We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes, or that it was intended to include, a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts."

These observations, as a matter of course, preclude further controversy over the power of Congress to limit to some extent the right to make contracts when enacting laws for the regulation of commerce between the states.

Learned counsel for the defendants further contend as follows: That the anti-trust act was not intended to include or prohibit combinations looking to the virtual consolidation of parallel and competing lines of railroad, although such a combination operates to stifle competition; that no relief can be granted to the government in this instance, because the combination or conspiracy of which it complains had accomplished its purpose, to wit, the organization of the Securities Company and the lodgment of the majority of the stock of the two railroads in its hands before the bill was filed; and, finally, that the combination proven was one "formed in aid of commerce and not to restrain it"; in other words, that it was one formed to enlarge the volume of interstate traffic and thus benefit the public.

The court cannot assent to either of these propositions.

The first, we think, is clearly untenable for the reasons already stated and fully disclosed in the decisions heretofore cited.

Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce, that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it.

Relative to the third contention, which has been pressed with great zeal and ability, this may be said: It may be that such a virtual consolidation of parallel and competing lines of railroad as has been effected, taking a broad view of the situation, is beneficial to the public rather than harmful. It may be that the motives which inspired the combination by which this end was accomplished were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or it may be that the combination was the initial

and a necessary step in the accomplishment of great designs, which, if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve and to the country at large.

We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them are issues which no court is empowered to hear or decide, involving, as they do, questions of public policy which Congress must determine. It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce; that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination—and we have little hesitation in answering this question in the affirmative—then the anti-trust act, as it has been heretofore interpreted by the court of last resort, has been violated, and the government is entitled to a decree.

A decree in favor of the United States will accordingly be entered to the following effect: Adjudging that the stock of the Northern Pacific and Great Northern Companies, now held by the Securities Company, was acquired in virtue of a combination among the defendants in restraint of trade and commerce among the several states, such as the anti-trust act denounces as illegal; enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies; also enjoining it from voting such stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction, supervision, or influence over the acts of said companies or either of them by virtue of its holding such stock; enjoining the Northern Pacific and Great Northern Companies, respectively, their officers, directors, and agents, from permitting such stock to be voted by the Northern Securities Company, or any of its agents or attorneys on its behalf, at any corporate election for directors or officers of either of said companies; and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said companies, or to direct the policy of either; and, finally, permitting the Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies any and all shares of stock of those companies which it may have received from such stockholders in exchange for its own stock, or to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies.

#### The Decree.

It was ordered, adjudged, and decreed as follows, to wit:

That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress, approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monop-

olies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant the Northern Securities Company was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employes, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor.

HENRY C. CALDWELL,  
Presiding Judge.

WALTER H. SANBORN,  
AMOS M. THAYER,  
Circuit Judges.

In re IRVIN.

(Circuit Court of Appeals, Eighth Circuit. February 2, 1903.)

No. 28.

**1. BANKRUPTCY—HOMESTEAD—BUSINESS BLOCK—OCCUPATION AS RESIDENCE.**

A bankrupt, six days before his failure, and in contemplation of bankruptcy, moved his family from a rented house formerly occupied by them into a room in his store building, formerly rented as a billiard hall. The building was primarily intended for business purposes, and not for a home, and there had been no previous attempt to make it a homestead. *Held*, that the building was a homestead under Ark. Const. art. 9, §§ 3, 5, providing for a homestead owned and occupied as a residence and selected by the owner, and for its exemption from execution.

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Eastern District of Arkansas, in Bankruptcy.

For opinion below, see 116 Fed. 35.

J. M. Moore and W. B. Smith, for petitioner.

J. G. Wallace, for bankrupt.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is a petition to review a decree of the District Court adjudging that the property in question was the homestead of the bankrupt. On review of the decision of the referee, the bankrupt court found the facts to be as follows:

"The facts necessary for the determination of the issues involved, as found and certified by the referee, are as follows:

"The bankrupt claims as exempt as his homestead lots 6, 7, 8, 9, and 10 in block 14, in the town of Casa, Ark. The lots are in the business part of the town, and there is on them a wooden building 44 feet wide and 100 feet long, and in the southeast corner of the building a room 20 by 50 feet, both buildings under one roof, and divided by a frame partition. Entrance to this room was from the store and also from the street. The entire building was erected by the bankrupt in 1901, and the large room was used by him exclusively as a storehouse, and the smaller room rented out by him, and was used at one time as a billiard hall, and, up to the time he moved in, as a restaurant. On December 14th, six days before his failure, and in contemplation of bankruptcy, he moved his family, which up to that time had resided in a rented dwelling house in another part of the town, into the smaller room, making it the home of his family, which consists of himself, wife, and six children. Until he moved into this room there was no effort to impress this property with the homestead character, though when built the bankrupt stated that he intended the buildings for a store and a home to live in. At the time the debts due from the bankrupt were contracted, no part of the premises was used as his homestead, and, from the character and arrangements of the building until he moved into it, the referee finds the buildings were primarily intended for business purposes, to the exclusion of a home for the family, and that the bankrupt had no other homestead."

The Constitution of the state of Arkansas contains the following provisions on the subject of homesteads:

"The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, ad-

ministrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

"The homestead in any city, town or village, owned and occupied as a residence, shall consist of not exceeding one acre of land, with the improvements thereon, to be selected by the owner, provided the same shall not exceed in value the sum of two thousand five hundred dollars, and in no event shall such homestead be reduced to less than one-quarter of an acre of land without regard to value." Article 9, §§ 3, 5.

Under these provisions of the Constitution it is well settled that an insolvent debtor may acquire a homestead that will be free from the claims of his creditors, both prior and subsequent. It has been distinctly held that the acquisition of a homestead by an insolvent debtor is not a fraud upon his creditors. *Backer v. Myer* (C. C.) 43 Fed. 702; *First National Bank v. Glass*, 25 C. C. A. 151, 79 Fed. 706; *Huenergardt v. Brittain Dry Goods Co.* (C. C. A.) 116 Fed. 31. And it is not material when the debtor occupies the premises as a homestead, provided they are so occupied before creditors acquire a lien thereon by attachment or other judicial proceedings. This rule is applicable to a trustee in bankruptcy, and, as the bankrupt was occupying the premises as a homestead some time before he was adjudged a bankrupt, they constitute no part of his estate in bankruptcy, and the trustee has no right to the same. In a town or village the Constitution gives a debtor the right to have and hold a homestead "not exceeding one acre of land with the improvements thereon." The debtor is not required to occupy and use as a dwelling all "the improvements" on the lot, for that would make it obligatory on him to occupy his barn and other outhouses for living purposes; and no more is he required to occupy every room in his dwelling for domestic purposes. He may devote a part of his dwelling to business purposes. Our ancestors very generally carried on their business pursuits in their dwelling houses. And the Supreme Court of Arkansas holds that a storehouse entirely separate from the residence on the homestead, and not used as an appurtenance and convenience thereto, is a part of the homestead so long as the homestead does not exceed the constitutional limit of area and value. *Klenk v. Knoble*, 37 Ark. 208; *Gainus v. Cannon*, 42 Ark. 503; *Berry v. Meir* (Ark.) 66 S. W. Rep. 439. In *Gaines v. Cannon*, supra, the court said: "It is a strange and irrational idea, sometimes advanced, that a man ought to lose his homestead as soon as he attempts to make any part of it helpful in family expenses." There are decisions in other states to the same effect, but, as we are only concerned in knowing and applying the law of Arkansas to the case in hand, it is not necessary to cite them. The premises in question having been impressed with the character of a homestead before the debtor was adjudged a bankrupt, his trustee in bankruptcy cannot rightfully claim the same as part of the bankrupt's estate.

The decree of the District Court is approved and confirmed.

## HALE v. KANSAS CITY SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit. February 3, 1903.)

No. 1,213.

## 1. MASTER AND SERVANT—INJURY OF SERVANT—FELLOW SERVANTS.

Where, as in Louisiana, the liability of a master for an injury of an employé by the negligence of a fellow servant is a matter of general law, not affected by statute, a railroad company is not liable for the injury of one member of a train crew, which occurred through the negligence of another member of the same crew, and without fault or negligence on the part of the company.

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

W. P. Hall, for plaintiff in error.

J. D. Wilkinson, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the Supreme Court of the state of Louisiana the liability of an employer to an employé for damages resulting from the negligence of a co-employé or fellow servant is considered a question of general law and not controlled by any express statute. See *Hubgh v. New Orleans & Carrollton R. R. Co.*, 6 La. Ann. 495, 54 Am. Dec. 565; *Satterly v. Morgan*, 35 La. Ann. 1166; *Towns v. Railroad Co.*, 37 La. Ann. 630, 55 Am. Rep. 508; *Wallis v. Railroad & Steamship Co.*, 38 La. Ann. 160; *Dandie v. Railroad Co.*, 42 La. Ann. 689, 7 South. 792; *Bell v. Lumber Co.*, 107 La. 725, 31 South. 994. In *Mexican Central R. R. Co. v. Sprague*, 52 C. C. A. 318, 114 Fed. 544, this court found from the record and evidence that under the specific laws of Mexico, as construed by the Mexican courts, the common-law doctrine as to the nonliability of an employer for the negligence of a fellow servant did not exist in Mexico. In *Railroad Co. v. McDuffey*, 25 C. C. A. 247, 79 Fed. 934, the Circuit Court of Appeals for the Second Circuit held upon proof that under articles 1053 and 1054 of the Civil Code of Canada, as construed by the Canadian courts, "where an accident causing injury to a servant was the result of the negligence of a fellow servant, the employer would nevertheless be liable in damages to the injured person," etc. These last two mentioned cases, and others to the same purport, cited by counsel for plaintiff in error, turned upon local laws and their proper construction, and are not applicable in the instant case. Under the late decisions of the Supreme Court of the United States the employés of a railroad company specifically engaged in operating a train of the company are fellow servants, and, under the general law, for the damages to one through the negligence of the other the employer, without fault himself, is not liable. See *Railroad Company v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *New England Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. As the petition and amended petition in this case show that the damages sued for were caused through the negligence of fellow servants of the deceased, and in no wise show any

negligence attributable to the railway company, the Circuit Court properly sustained the demurrer to the said petitions, and dismissed the suit.

The decision of the Circuit Court is affirmed.

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BEACH v. MACON GROCERY CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1903.)

No. 1,206.

1. BANKRUPTCY—PETITION TO ADJUDGE A PERSON A BANKRUPT—SUFFICIENCY—AMENDMENT.

The petition to adjudge an involuntary bankrupt, if not sufficient because not alleging that he is not a wage earner or a person engaged chiefly in farming or the tillage of the soil, though containing averments consistent with his being a merchant and not chiefly engaged in tilling the soil, may be cured by amendment.

2. SAME—SECOND PETITION TO REVIEW.

A petition to revise proceedings in bankruptcy on the ground of the insufficiency of the petition of creditors will be denied, the same matter having been involved in former proceedings by the same petitioner, and therein fully disposed of.

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

John P. Ross, for petitioner.

John I. Hall and Olin J. Wimberly, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case the petitioner asks a review of the proceedings in the District Court overruling a demurrer which raised the question whether in the petition of creditors to adjudicate a natural person an involuntary bankrupt it is necessary to specifically allege that the alleged bankrupt is not a wage earner nor a person engaged chiefly in farming or the tillage of the soil. The petition in the case is in the form prescribed in general orders of the Supreme Court, and besides contains averments consistent with the alleged bankrupt being a merchant, and not chiefly engaged in tilling the soil, and for that reason it is probably sufficient, or, if not sufficient because of the omission to specifically charge that the alleged bankrupt is not within the excepted class, the defect is one that may be cured by amendment.

However this may be, we deny the petition in this case, because this same matter as to the sufficiency of the petition of creditors, asking that petitioner herein may be adjudged an involuntary bankrupt, was involved in proceedings heretofore brought in this court by this same petitioner, which were disposed of at the last term of this court (see *Beach v. Macon Grocery Co.* [C. C. A.] 116 Fed. 143), wherein, if there were any errors or defects in the said petition the same were fully concluded and disposed of, and the petitioner herein is not entitled to any second petition for review of the same proceedings.

Petition denied, with costs.



## PALMER v. MAHIN et al.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1903.)

No. 1,744.

1. **LIBEL—WHAT CHARGES ARE LIBELOUS PER SE—COMPENSATORY DAMAGES.**  
An unprivileged publication, in writing or print, of a false charge that another is guilty of a crime, or of a false charge that tends to expose another to public hatred or contempt, is libelous per se; and such a publication entitles the victim of the libel to full compensation for the damages to his reputation, business, and feelings which it has caused, regardless of the intent or motive with which the publication was made.
2. **SAME—SUCH A PUBLICATION RAISES CONCLUSIVE PRESUMPTION OF DAMAGES, AND THE ONLY QUESTION FOR THE JURY IS THE AMOUNT.**  
The unprivileged publication of such charges raises a conclusive legal presumption that the victim has sustained some damages, and the only question for the jury is their amount.
3. **SAME—CHARGE OF BLACKMAILING AND EXTORTION.**  
The charge that one is a blackmailer, and has brought blackmailing suits to extort money wrongfully, is libelous on its face. So is the charge of inducing the publication of a libel in order to found suits upon it to extort money wrongfully.
4. **SAME—EXEMPLARY DAMAGES—WHEN ALLOWABLE.**  
In addition to compensation for his actual loss, the jury may allow to the victim of a libel exemplary damages when the publication was inspired by ill will or by a willful intent to injure, or was made in violation and in reckless disregard of the rights of the person defamed.
5. **SAME—MATTER IN MITIGATION—WHEN ADMISSIBLE.**  
The publisher of such a libel may plead and prove that when he sent it forth he believed the statements it contained to be true, that he was then innocent of any intent to injure, or of any ill will towards his victim, or that he made the publication by mistake or inadvertently, for the purpose of mitigating the exemplary damages. But matter in mitigation of damages for the unprivileged publication of a libel is inadmissible to reduce or affect the compensatory damages to which the person defamed is entitled, because these damages are the same, whatever the motive, intent, or care with which the publication was made.
6. **SAME—MITIGATION OF DAMAGES—TESTIMONY.**  
It is incompetent for the publisher of a libel to testify, in mitigation of damages, that he believed he was justified in making the publication, and that he made it for the public good.
7. **SAME—COMPENSATORY DAMAGES—INFORMATION RECEIVED FROM ANOTHER.**  
The fact that the information from which an unprivileged publication was made was derived from another, and that the name of the informant was stated in the libel, is no justification for its publication, and no defense to a claim for compensatory damages therefor.
8. **SAME—RETRACTION—PUBLICATION OF DENIAL OF VICTIM IS NOT.**  
A retraction of a charge is a withdrawal of it by the party who made it. The publication of a statement that the victim of a libelous charge denies it is not a retraction of it.
9. **SAME—EVIDENCE—SUBPENA FOR SUBSCRIPTION LISTS TO PROVE DAMAGES.**  
It is always competent for the plaintiff in a libel suit to prove the extent and locality of the circulation of the newspaper which published it. The shipping, mailing, and subscription lists, and the proper account books, of the proprietor of such a newspaper, constitute the best

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¶ 3. See Libel and Slander, vol. 32, Cent. Dig. § 34.

¶ 5. Mitigation of damages in libel and slander cases, see note to Sun Printing & Publishing Ass'n v. Schenck, 40 C. C. A. 168.

evidence of these facts; and, upon proper affidavit of the materiality and necessity thereof, the plaintiff is entitled to a subpoena duces tecum, directed to the person in control of this evidence, commanding him to produce it at the trial.

**10. SAME—EVIDENCE OF FALSITY OF CHARGES.**

While, in the absence of a plea of justification, the plaintiff is entitled to recover without proof of the falsity of the charges, he has the right to make that proof, because only in this way can the difference between a technical misstatement and a cruel and irremediable falsehood be shown, and the proper measure of damages applied.

**11. SAME—CHARGE OF BLACKMAIL—BUSINESS AND INTENT OF PLAINTIFF ADMISSIBLE TO REBUT.**

Where the plaintiff is charged with bringing blackmailing libel suits, it is competent for him to prove his business, reputation, and standing when the libel which was the foundation of those suits was published, the effect of its publication upon his reputation, business, and feelings, and his acts when he learned of the publication, because this evidence tends to show the basis of the suits, and the intent of the plaintiff in bringing them.

**12. SAME—MATTER IN MITIGATION—INTENT.**

Nothing is competent to show the intent of the defendant in publishing a libel for the purpose of mitigating the damages which was not known to the libeler when he made the publication.

(Syllabus by the Court.)

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

On October 3, 1892, John Mahin published in the Evening Journal, a newspaper of which he was the editor and publisher, at Muscatine, in the state of Iowa, an article which charged that Tyndale Palmer had robbed his employers; that he was an embezzler to the tune of \$440,000; that he, in company with one Freitas, had sold patents of his employer for \$510,000, had reported the sale of them for \$80,000, and had retained \$10,000 of this amount as his salary, and all the difference between \$80,000 and \$510,000. These charges were false. On November 27, 1893, Palmer wrote to Mahin that the charges in the article he had published were absolutely false, asked of him a retraction and reparation, and informed him that he would submit the proofs of the falsity of the charges to his inspection upon his agreeing to make satisfactory retraction and settlement if the evidence proved unequivocally that the charges were not true.

Mahin did not answer this letter, but on January 27, 1894, he copied into his newspaper an article from the Ottumwa Courier, which had published the libelous article of October 3, 1892, in which the statement was made that Mr. Palmer had written to that paper that the charges in the article of October 3, 1892, were absolutely false, and that he was prepared to offer conclusive proof that they were not true; that this matter came to the Courier as an item of telegraphic news, and it knew nothing about it, beyond the facts it had stated; and that, if an injustice had been done, it regretted the same, and suggested that Mr. Palmer turn his attention to the news agency that sent the matter to the newspapers. At the foot of this copied article Mr. Mahin added in his Journal that that paper was substantially in the same boat as the Courier; that it did not, however, like the blackmailing tone of Palmer's letter; that he wanted the Journal to give him a financial salve for his hurt; that it was not in that kind of business; that it never intended to do injustice to any one; and that, when it was shown that injustice had been done, it would be found prompt to make amends, but not quite so prompt when threatened with a suit as when without it.

On July 10, 1894, Palmer wrote to Mahin that he was prepared to demonstrate to him that the charges of October 3, 1892, were unfounded; that the time had come when he must complete arrangements to commence an action in order to avoid the statute of limitations; that the financial loss

caused him by the publication was serious, but that he did not expect any one newspaper to pay more than its due proportion; that he was ready to adjust the case outside the courts; that the only basis of settlement on which he could meet any paper was just reparation and unequivocal retraction; that, if Mahin would recognize that basis, he would meet him in a most reasonable and liberal spirit; and that, if they were unable to agree, he suggested a reference of the entire matter to arbitration. On July 17, 1894, Mahin answered that the matter complained of came to him in plates from Kellogg, of Chicago; that the plates were inserted in his paper, without inspection, as soon as received; that he knew nothing about it, and had no intent to do any injustice to any one, and that as soon as he heard from Palmer he gave his denial to his readers; and that Palmer would never get a cent of money out of his paper unless he got it at the end of a lawsuit. Thereupon, on October 1, 1894, Palmer commenced an action against the Journal Printing Company, the alleged proprietor of the Evening Journal, for \$50,000 damages for its publication of the article of October 3, 1892. On April 25, 1895, that action was dismissed, without prejudice, for want of prosecution.

On October 1, 1894, Mahin published in his Evening Journal a long article, now in suit, which stated the fact that the Journal Printing Company had been sued for \$50,000 by Palmer and Freitas on account of the publication of the article of October 3, 1892; that the Journal Company was innocent of intentional slander of the plaintiffs in those actions; that the matter was supplied by the Kellogg Company, and was published without scrutiny; that, as soon as Palmer informed it that the charges were false, it gave him the benefit of his denial in its paper, and it disavowed any intention to do him an injury. That article also contained these statements: "We knew nothing about him then, and were willing to accept his statement that he was an honest but injured man. We know more of him now. His subsequent conduct, and especially the bringing of suit, satisfies us that he is a blackmailer; and we would not be surprised if it should transpire that he was the means of having the report concerning himself put into the press dispatches for the express purpose of going around as he is now doing, extorting money by threats of suing the papers which published the report. \* \* \* We are glad to know that no respectable attorney in Muscatine would have anything to do with these blackmailing cases, though some were solicited. The attorney who has them in charge should be disbarred for unprofessional conduct. He must know that the suits are intended only to force money from the respondent on the theory of a compromise before they come to issue. \* \* \* We understand that several other papers in Iowa have been served with notices of suits by this precious pair. The Keokuk Constitution is one, and, if we mistake not, the Waterloo Courier and Ottumwa Courier are also in the list. In all these papers a Philadelphia dispatch appeared, stating, in effect, that Palmer and Freitas, while acting as agents of the Auer Incandescent Light Company in South America, had embezzled \$440,000 of its funds; this being, as alleged, the difference in the amount of sale of the company's franchise and the amount which they reported to their employers."

On April 25, 1895, Mahin published an article in his Evening Journal which stated that the suits of Palmer and Freitas against the Journal Printing Company had been dismissed, rehearsed some of the statements of the article of October 1, 1894, relative to the circumstances of the publication of the article of October 3, 1892, and contained this statement: "As will be remembered, the Journal, on being served with notice of the suit, published an article referring to the case, expressing surprise that an attorney could be found in Muscatine who would take the case, denouncing it as a blackmailing scheme, whereupon Warner amended, and added \$10,000 more in each case."

On April 26, 1895, Mahin published another article, devoted largely to the discussion of a publication in the News Tribune relating to the dismissal of Palmer's action against the Journal Printing Company on the day before. This article contained these statements: "The News Tribune seems to be unhappy over the fact that the Journal Printing Company was not made the victim of the Tyndale Palmer blackmailing scheme." The article then pro-

ceeded to state that the News Tribune had taken the view that the action against the Journal Printing Company had been dismissed too quickly, and before the plaintiff had received a proper opportunity to oppose its dismissal. The article then continued: "This is the News Tribune's version of the affair, evidently furnished by one of the attorneys in this blackmailing case. As a matter of fact, however, the case was never intended to come to trial. There was nothing in it to maintain an honest action. All that was intended was harassment, with the hope of extorting money from the defendant in the way of a compromise. This is the view the Journal took of it from the beginning. \* \* \* Meanwhile we must express our surprise that the News Tribune, or any other newspaper, for that matter, would show any sort of sympathy for one who would undertake, as Palmer has done, to levy blackmail on the press of the country. His methods are such that, if they should be successful, they would virtually put the newspapers of the country at the mercy of the most unscrupulous adventurers."

On March 9, 1897, Mahin published an article in his Evening Journal which contained a telegraphic dispatch to the effect that an action for libel brought by Palmer against the Youngstown Vindicator had been dismissed, and that the costs therein had been assessed against the plaintiff. The article contained these comments upon this dispatch: "The above is the right way to dispose of such cases. There ought, however, to be a way to prevent suits being instituted when it is plain, as has been in the Tyndale Palmer case, that the sole purpose is to wrongfully extort money, not to secure justice or vindication, because in these cases it was expressly stated that retraction would not be accepted as satisfaction, but a money salve must be applied. Clerks of courts or judges should have the right to reject feigned cases or blackmailing suits, and thus save innocent defendants from costs incident to employing attorneys, besides other expenses and a great deal of unnecessary harassment."

On September 26, 1896, Palmer brought an action in the court below against John Mahin, the editor and publisher of the Evening Journal, for the composition and publication therein of the articles of October 1, 1894, April 25, 1895, and April 26, 1895. On March 2, 1899, he commenced an action against John Mahin, the editor and publisher, and the Journal Printing Company, a corporation, the proprietor of the Evening Journal, for \$20,000 damages for the publication of the article of March 9, 1897. Mahin answered the petition against him on September 27, 1898, with a general denial, a denial of damages, and an averment that he made all the publications in his paper in good faith, upon information received from what he believed to be a reputable and responsible source, and without any intention to injure anybody. On April 22, 1899, the defendants in the second action entered a general denial, and the cases stood upon these issues until the day before they were set for trial, when, on motion of the defendants, they were permitted to file amended answers. These amended answers contained no plea of justification—no denials of anything except a questionable denial of publication and ill will. They consisted, substantially, of allegations in mitigation of damages, to the effect that the original article of October 3, 1892, was published innocently, upon information received from sources upon which the defendants believed they had a right to rely; that they had made a retraction; that they subsequently learned that the plaintiff, together with one Dove, an attorney, and one Freitas, had organized a scheme to have more than 300 suits brought against the newspapers which had published the article of October 3, 1892, for the purpose of recovering damages aggregating several millions of dollars; that special effort was to be made against the newspapers published in small towns, such as Muscatine, to compel their publishers to pay money for the alleged injury to the plaintiff; that Palmer, through his attorney, wrote circular letters to attorneys throughout the state of Iowa, in which he sought to employ them on a contingent fee, and to induce them to procure a republication of the original libel; and that, from the information which they received, they believed they were justified in writing the articles upon which the actions are founded, and in that belief they had written them. The two cases were consolidated, were tried together upon the issues which these pleadings presented, and there were verdicts and judgments for the defend-

ants. The writ of error which presents them to this court questions the rulings of the Circuit Court in the course of the proceedings which led to this result.

John E. Craig (Tyndale Palmer, on the brief), for plaintiff in error.

William McNett (James C. Davis, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The unprivileged publication, in writing or print, of a false charge that another is guilty of a crime, or of a false charge which tends to expose another to public hatred or contempt, entitles the person thus defamed to recover of the publisher full compensation in damages for all the injury to his reputation, business, and feelings which the defamatory publication caused. A written or printed article of this character is libelous in itself. From its publication the conclusive presumption of actual damages to its victim, and of legal malice, that is to say, of "an act done wrongfully, without legal justification or excuse," at once arises. The fact that the publisher was without malice in the popular acceptance of that term, that is to say, without ill will, bad motive, hatred, or intent to injure his victim, constitutes no defense to the latter's claim for compensatory damages, and no evidence to mitigate or reduce their amount, because the actual damages to the party libeled are the same whether they are inflicted by the publisher with a good or an evil intent, and the victim is as clearly entitled to full compensation for a wrong inflicted with a laudable motive, or through mistake or inadvertence, as from one perpetrated with a diabolical purpose or intent. The intent or purpose with which such a publication is made is immaterial in the trial of the claim for the actual or compensatory damages which the party injured may seek. It is important only when a claim for exemplary damages is to be considered.

In addition to fair compensation for the injury caused to his business, reputation, and feelings which one thus libeled is entitled to recover, regardless of the motive, purpose, or intent of the publisher, a jury is empowered to allow exemplary or punitive damages to the person defamed when the publication was made with ill will, or with a willful intent to injure the victim, or in violation and in reckless disregard of his rights and feelings. In mitigation of these exemplary damages, the publisher may plead and prove that he was actuated by no evil intent, no ill will, no purpose to injure the victim of his publication, when he sent it forth; that when he made the publication he knew certain facts which reasonably tended to show that the charges he made were true; and that, in reliance upon these facts, he published the charges in that belief, or that they were published by mistake or through excusable inadvertence. But this matter in mitigation affects the exemplary damages only.

A statement of these and many other rules and principles of the law applicable to the case in hand, together with the reasons and authorities sustaining them, may be found in the cases of the *Times Publishing Co. v. Carlisle*, and the *Journal Co. v. Carlisle*, 94 Fed. 762, 36 C. C. A. 475. The sharpness and persistence of the contests in those cases, the importance of that litigation and of the questions it involved, and the careful and exhaustive arguments of the learned and eminent counsel who represented the respective parties to it, led to a deliberate and thoughtful consideration by this court of the crucial questions which conditioned the decision of those cases, and of many of the general rules and principles that govern the administration of the law of libel. It is sufficient now to refer to the opinion in those cases for a discussion of these rules, and of the reasons and authorities which sustain them, without repeating it here, and we turn to the application of the principles there announced to the facts of the case in hand.

On October 3, 1892, the defendant Mahin published in his newspaper the false charge that the plaintiff, Palmer, and his associate, Freitas, had robbed Palmer's employer, and had embezzled \$440,000 of the latter's money. The moment that charge was published, a perfect and indefensible cause of action to recover of the publisher fair compensation for all the injury which that publication caused to the reputation, business, and feelings of its victim accrued to Palmer, and a conclusive presumption of law arose that he had sustained damages in some amount. Whether there also arose a cause of action for exemplary damages, or the fact that the charges made in that article were received in plates from Kellogg & Co., and were inserted by the defendant Mahin without scrutiny, would have defeated a recovery of damages of this character, is not material to the questions in issue in the case that is now before us. The fact that they were published by mistake and without examination constituted no defense to Palmer's cause of action for his actual damages in that case, and no evidence in mitigation of those damages in any event. It is no justification for the publication of a libel, and no defense, in whole or in part, to a claim for compensatory damages for the injury caused thereby, that another had previously written or published the charge, and that the libeler merely repeated it. *Times Pub. Co. v. Carlisle*, 94 Fed. 762, 767, 36 C. C. A. 475, 480; *Sans v. Joerris*, 14 Wis. 666; *Inman v. Foster*, 8 Wend. 602; *Odgers, Libel & Slander*, p. 124. Palmer wrote to the defendant Mahin that the charges contained in the article of October 3, 1892, were false, and that his publication of them had inflicted injury upon him, and demanded reparation and retraction. He had a legal right to reparation—to compensation for the injury which the publication had inflicted upon him—and the legal duty was imposed upon the defendant Mahin to make this reparation. He refused to do so, and published in his newspaper a statement that Palmer had denied the charges, and had offered to submit to him conclusive documentary proof of their falsity. Palmer subsequently commenced an action against the Journal Printing Company for \$50,000 damages for the publication of this libel. This action was subsequently dismissed without prejudice, and is not here for our considera-

tion. The first of the articles which are the subject of this litigation was published on October 1, 1894, and this was the situation of the parties when that publication was made: Mahin had published charges against the plaintiff that were libelous per se. Palmer had brought an action against the printing company for the damages he had sustained thereby. The publisher of the libel was without defense to Palmer's claim for compensatory damages, at least.

Let us turn now to the trial of the actions that are before us for consideration. As these actions were tried together by consent of the parties to them, and as the difference in the liability of the two defendants, if any, is immaterial to the consideration and decision of the crucial questions which must determine the issue before us, no attempt will be made in this opinion to distinguish between them, but this case will be discussed as though each of the defendants was liable for the publication of all the articles. When these actions came on for trial, the complainants alleged and the answers admitted that the defendants had written, and the proof was plenary that they had published, without any justification for so doing, the false charges which are found in the articles of October 1, 1894, April 25, 1895, April 26, 1895, and March 9, 1897, and which are set forth at length in the statement which precedes this opinion. These charges were, in effect, (1) that Palmer's conduct satisfied the defendants that he was a blackmailer; that the actions which he had brought against the Journal Printing Company and the proprietors of other newspapers which had published the original libel of October 3, 1892, were blackmailing cases; that there was nothing in the case against the Journal Printing Company to maintain an honest action; that Palmer had undertaken to levy blackmail on the press of the country; and that the sole purpose of his suits to recover damages for the publication of the original libel was "to wrongfully extort money, not to secure justice or vindication"; (2) that they would not be surprised if it should transpire that he was the means of having the reports concerning himself, upon which this libel was based, put into the press dispatches for the express purpose of going around extorting money, as he was then doing, by threats of suing the papers which published the report; and (3) that in the Keokuk Constitution, the Waterloo Courier, and the Ottumwa Courier a Philadelphia dispatch appeared, stating, in effect, that "Palmer and Freitas, while acting as agents of the Auer Incandescent Light Company in South America, had embezzled \$440,000 of its funds; this being, as alleged, the difference in the amount of sale of the company's franchise and the amount which they reported to their employers." The legal effect of the allegations of these complaints was that the defendants had republished the original libel, and that they had published charges that Palmer was a blackmailer; that he was guilty of wrongfully extorting money by threats of baseless suits; and that he might have caused the telegraphic dispatch which was the foundation of the original libel to be inserted in the press dispatches for the purpose of laying the foundation for the practice of this extortion.

The articles in which these charges are contained are voluminous. All their parts have been thoughtfully considered together, and each

one of the articles has been studied separately, for the purpose of determining what those who read them must have understood from all the statements they contained. These articles have been carefully read and searched throughout, again and again, in vain, to find anything in any of them to indicate that the terms in which these charges were made were used in a Pickwickian sense, that they were not intended to convey their ordinary meaning, and that they might have been understood by those who read them in some other way than as accusing the plaintiff of embezzlement, extortion, and procuring the publication of the original libel in order to furnish the opportunity for the extortion; and this court is unanimously of the opinion that neither the articles themselves, nor the facts and circumstances surrounding their publication, contain any evidence whatever from which the deduction can be lawfully drawn that these publications were intended to convey any other meaning, or that they could have been understood by those who perused them in any other sense. They were therefore libelous in themselves. They charged the plaintiff with the crime of extortion and embezzlement, and tended to expose him to public hatred and contempt.

The answers of the defendants contain no denial of the writing of these accusations; no denial that they were false; no plea of justification; no allegation, even, that the defendants believed the charges to be true when they published them; nothing but matter in mitigation of damages, which was material only in measuring the amount of exemplary damages to which the plaintiff might be entitled, and a technical denial of ill will and of the publication.

It inevitably follows that at the trial the plaintiff was entitled, upon the face of the pleadings and proof, to a judgment against the defendants for such an amount as would compensate him for the injury he had actually sustained by reason of the defamatory publications. The libelous character of these articles raised the conclusive presumption that he had sustained some damages, but left their amount for the consideration of the jury.

In addition to these compensatory damages, the plaintiff was entitled to recover such an amount of exemplary damages as the jury, in their discretion, might allow, after they had considered the competent evidence of the intent and purpose of the defendants in publishing the articles, and the matter in mitigation of the punitive damages which the defendants might lawfully introduce. The republication of the false charges in the original libel, and the publication of the false statements that Palmer's well-founded actions for damages for the original publication were baseless and blackmailing cases, after he had notified the defendants by letter and by an action against the Journal Printing Company that the original accusations were not true, furnished ample evidence to compel the trial court to submit to the jury the question of punitive damages. When the trial came on, and the publication was proved, there was no defense to a recovery by the plaintiff of all the actual damages he had sustained, and the only issues for the jury to determine were (1) the amount of damages which would compensate the plaintiff for the injury to his reputation, business, and feelings which the publication of the articles described in the



complaints had caused; and (2) whether or not they should allow exemplary damages, and, if so, in what amount. A careful review of the proceedings in these cases, as they are portrayed in the record before us, in view of the issues open to the consideration of the jury, and in the light of the legal principles adverted to in the earlier part of this opinion, has forced us to the conclusion that the learned court below fell into error in some of its rulings, to which brief reference will now be made.

It submitted to the jury the question whether or not the publications were libelous, and allowed them to determine that they were not so, and to return verdicts for the defendants on that ground, when the articles were clearly libelous upon their faces, and the court should have so instructed the jury, and should have farther charged them that the plaintiff was entitled to their verdict for compensatory damages, and that the only question for their consideration was the amount of the damages to be allowed.

It refused to instruct the jury, as requested by the plaintiff, that the publication contained in the article of October 1, 1894, of the statement that "we should not be surprised if it should transpire that he was the means of having the report concerning himself put into the press dispatches for the express purpose of going around, as he is now doing, extorting money by threats of suing papers which published the reports," was libelous per se, when it should have so charged, because that statement contains matter tending to expose the plaintiff to public hatred and contempt, and accuses him of the crime of extortion.

It refused to charge the jury, as requested by the plaintiff, that the defendant Mahin was liable for compensatory damages, and might be liable for punitive damages, for publishing in the article of October 1, 1894, the original charge, in these words: "In all these papers [certain papers, mentioned in the article, which Palmer had sued] a Philadelphia dispatch had appeared, stating, in effect, that Palmer and Freitas, while acting as agents of the Auer Incandescent Light Company in South America, had embezzled \$440,000 of its funds; this being, as alleged, the difference in the amount of sale of the company's franchise and the amount which they reported to their employers"—when it should have given the instruction requested. The statement which has been quoted neither was, nor did it purport to be, a narration of any judicial proceeding, so that it was not a privileged communication upon that ground, as claimed by counsel for the defendants. It appeared to be, and in fact was, a statement of an alleged occurrence, not in any court, but in the places of publication of certain newspapers before any judicial proceedings were instituted. The fact that the republication of the old libel was preceded by a statement of its alleged source was no justification for its publication. Injury to a fair reputation by the repetition of a libel and the mention of the name of an earlier libeler is indefensible. *Times Pub Co. v. Carlisle*, 94 Fed. 762, 767, 36 C. C. A. 475, 480.

Moreover, the fact that the defendant Mahin published this charge of embezzlement after he had been notified by a letter and by a suit

that it was not true is such persuasive evidence of ill will toward and of an intent to injure the plaintiff as to warrant the submission to the jury, under proper instructions, of the question of the allowance of exemplary damages.

The court refused to instruct the jury, as requested by the plaintiff, to the effect that a retraction is the withdrawal of a charge; that a statement by the libeler that the victim denies the charge is not a retraction; that the article of January 27, 1894, did not constitute a retraction of the original charge; and that this article might be considered on the question of malice—when such an instruction was fully warranted by the facts of the case.

The court denied the application of the plaintiff for a subpoena duces tecum to Harold Mahin, commanding him to produce in evidence at the trial the mailing lists, subscription lists, shipping lists, books, records, and accounts of the defendants which showed the extent and the places of the circulation of the Muscatine Evening Journal during the years 1892, 1894, 1895, and 1897, when these articles were published, when it should have granted that application. The motion was founded on an affidavit of counsel for the plaintiff that Harold Mahin was in possession and control of these papers and books, and that they were material and necessary for the trial of the case. Their materiality and necessity in order to prove the plaintiff's damages are evident from the pleadings themselves. He was entitled, in any event, to such damages as would fairly compensate him for the injury he had suffered from the publication of the articles in the Evening Journal. The extent of that injury was conditioned by the extent and by the locality of the circulation of the newspaper which published them. The shipping, mailing, and subscription lists of that paper, and its books of account with its subscribers, constituted the best, and probably the only definite, evidence of these facts. In actions for libel by publications in a newspaper, it is always competent for the plaintiff to prove the extent to which, and the locality in which, the paper containing the publications circulated. *Locke v. Chicago Chronicle Co.*, 107 Iowa, 390, 78 N. W. 49; *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144. And the circuit court had ample power to issue the subpoena sought, under the act of conformity (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) and sections 4658 and 4659 of the Code of Iowa of 1897.

The court ruled out competent evidence offered by the plaintiff, tending to show the extent and character of his business shortly before and at the time of the publication of the libel of 1892, and the effect of that publication upon his reputation and his business, when this evidence was material and admissible. The defendants had charged in their newspaper that the actions which the plaintiff had brought on account of the publication of October 3, 1892, were blackmailing suits, instituted to extort money wrongfully. It is true that the answers in these cases admitted the falsity of those charges, and that it was not necessary to the maintenance of his actions that the plaintiff should prove this fact. But he had the right to do so, and the evidence which he offered had a direct tendency to show that the actions he brought for the earlier publication were not blackmailing

suits, but were founded upon causes of action well grounded in law and in fact. While it is not necessary for a plaintiff to prove the falsity of libelous charges when there is no plea of justification, it is always competent for him to do so, to enhance the damages, for it is only thus that the essential character of the publication may be seen, and the difference between a technical and all but harmless misstatement and a cruel and irremediable falsehood may be distinguished, and the proper measure of damages applied. *Malloy v. Bennett* (C. C.) 15 Fed. 371; *Press Pub. Co. v. McDonald*, 73 Fed. 440, 443, 19 C. C. A. 516, 519.

For the same reason the court erred in excluding the testimony of the plaintiff describing the course he pursued and the acts he did in seeking to ferret out the source of this original libel, and to save his business and vindicate his character, when he learned of its publication. When the defendants charged that the plaintiff was a blackmailer, and that he was guilty of extortion in commencing his earlier actions for the original libel, and intimated that he might have provided the opportunity to practice this extortion, they assailed his intent—his good faith—and he had the right to produce and to submit to the jury any evidence which reasonably tended to show that he acted in good faith, with the intention to do no more than to vindicate his character and recover the damages to which he was lawfully entitled. His direct testimony to his purpose and his motives was, indeed, admissible. But his testimony relating to the course he pursued and detailing the acts he did when he learned of the publication was not less so, because men judge the purpose and the intentions of their fellows oftener and more wisely by their deeds than by their words.

The court erred in permitting the witness Mahin to testify to the effect that, before publishing the articles complained of, he received information in writing and print that over 1,000 papers had published the original libel, and would be called upon, by suits or otherwise, to respond therefor, in the face of the objection of the plaintiff that this testimony was secondary evidence, and in the face of his demand for the writings and the print from which this information was derived before it should be received.

The court erred in receiving in evidence in mitigation of damages, for the purpose of showing the intent with which the defendants made these publications, the papers in four suits, two of which were entitled *Tyndale Palmer v. Roberts & Roberts* and *Tyndale Palmer v. The Constitution Democrat*, and two of which were entitled *Joao Francisco De Freitas* against the same parties, in the absence of any proof that any of the defendants were aware of these papers or suits before they published the libels here in question. It is not competent to show the good intent or good faith of a libeler, in mitigation of damages, by proof of facts of which he had no knowledge when he made the publication. *Edwards v. Kansas City Times Co.* (C. C.) 32 Fed. 813; *Hatfield v. Lasher*, 81 N. Y. 246; *Morey v. Morning Journal Association*, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528.

The court erred in permitting the defendant Mahin to testify, over the objection of the plaintiff, that he believed, from the facts and circumstances within his knowledge, that he was justified in writing the articles, and that he had in view the public good. It was undoubtedly competent and proper for the defendant to testify, if that was the truth, that he believed that the charges he published were true, and that he had no ill will against, or intent to injure, the plaintiff. But his belief, from the facts and circumstances within his knowledge, that he was justified in writing or publishing the libels, was incompetent and pernicious testimony, because it had no tendency to show whether he was influenced by a good or evil intent—a worthy or a wicked motive. He may have believed that he was justified in publishing the libels and in violating the rights of the plaintiff, because the latter had brought suit against him or against his company, the Journal Printing Company, and because he thought he was justified in returning evil for evil. The rule which permits a person whose purpose or intent is in issue to testify directly upon this subject is sufficiently liberal, and ought not to be farther extended. If the defendants believed that the accusations they made were true, and published them without ill will or intent to injure the plaintiff, these facts would certainly go as far with any jury toward mitigating the damages as the testimony of the defendant that he believed he was justified in publishing them. And if they did not believe that the charges were true, if they published them with ill will and with an intent to injure their victim, the fact that they believed they were justified in perpetrating such a wrong upon him ought not to relieve them, in whole or in part, from the damages which a jury might allow for so flagrant a violation of the law.

The plaintiff has assigned many other errors in the trial of this case, but a sufficient number has already been considered to demonstrate the necessity of another trial, and to draw the general lines within which it should be conducted. Further discussion is accordingly pretermitted, and the judgments below are reversed, with directions to grant new trials in both of the actions.

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#### THE SLINGSBY.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 50.

**1. MASTER AND SERVANT—FELLOW SERVANTS—SERVANTS OF SEPARATE MASTERS IN SAME WORK.**

When A. and not B. is the one who selects and retains an individual at the particular piece of work to which he is assigned, such individual does not become B.'s servant merely because the latter indirectly pays for his services and gives him his working orders.

**2. SAME—INJURY OF SERVANT.**

A firm of stevedores contracted to discharge and load a vessel, being required to furnish all labor and appliances except winches and winch-

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¶ 1. Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Canadian Pac. Ry. Co. v. Johnston, 9 C. C. A. 596, 25 L. R. A. 470; Flippin v. Kimball, 31 C. C. A. 286.

men. The captain detailed a seaman to run the winch, and, through his negligence, plaintiff, an employé of the stevedores, was injured. As to the operation and movements of the winch in handling cargo, the winchman was under the direction of the stevedores. *Held*, that since the stevedores had no power to discharge the winchman, or to require him to perform any other duty, or to substitute any other person in his place, he did not become their servant while in the service, but remained the servant of the ship, which was liable to plaintiff for his negligence.

8. ADMIRALTY—LIBEL IN REM—LACHES.

One having a cause of action in rem against a foreign vessel is not required to find out whether the owners have other property within the jurisdiction which might be attached, nor chargeable with laches, where he libels the ship on her second trip to the port, where she had previously been out 41 days in all since the cause of action arose.

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

For opinion below, see 116 Fed. 227.

This cause comes here upon appeal from a decree in favor of libelant against the steamship *Slingsby* for personal injuries sustained while engaged in discharging cargo. The cause of the injury was alleged to be the negligent starting of the winch without orders, while the libelant was assisting in tightening up the rigging and tackle used in connection with the hoisting derrick. The facts relevant to the assignments of error are sufficiently set forth in the opinion.

J. Parker Kirlin, for appellants.

Wm. C. Beecher, for libelant.

L. Sidney Carreal, for respondents.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. It is contended that the court erred in holding that the proof showed that the winchman, Johnson, negligently started up the winch without orders. This assignment of error is without merit. The winchman, a foreign sailor, had disappeared before the trial, and his testimony was not produced. Libelant, however, called other men who were employed about the work, and who neither heard nor saw any orders; orders are sometimes given by waving an arm. In addition to that, another employé of the stevedores, also named Johnson, testified that he was the one who gave orders to the winchman, and after describing the orders given immediately prior to the accident, and what was done in response to them, added: "Travers was going to give a pull, and pull out the fall [which had fouled with the bitt], and the first thing I knew the winchman went ahead with the winch." The testimony fully sustained the finding.

There is some dispute on the testimony as to whether the derrick was rigged in the proper way, but the District Judge saw the witnesses, and we find no reason to differ from his conclusion that there was no contributory negligence on the part of the libelant nor any negligence on the part of any of the persons with whom he was working except the winchman. The real question in the case, to which

argument has been principally addressed, is whether the winchman was or was not the fellow servant of libelant.

Libelant was employed by the firm of stevedores (Trecartin and Turner) who were engaged in discharging cargo. The winchman was an able seaman, regularly shipped on the *Slingsby*, with which he had made two voyages. The contract between the stevedores and the vessel is in writing, and was put in evidence. By it the stevedores agreed to "discharge and load," which imports that they will furnish all the labor and appliances required to do so, except as may be otherwise specified. The only additional relevant clause in the contract reads as follows: "Steamship to furnish winches, drivers (rope runners and slings furnished by stevedores)." The District Judge held that the winchman was the servant of the ship, and that for his negligence libelant, who was the servant of the stevedores, was entitled to recover against her. The claimant insists that this is error. His contention is thus epitomized in the brief:

"The whole direction of the servant being in the hands of independent contractors, and the original employers having relinquished all control over him, while he was engaged in the performance of the work that was being done by the contractors, the latter, and not the shipowners, are to be treated as the masters."

It is well settled that A. and B. may by their respective servants undertake the doing of some particular work, each selecting and paying his own servants, and retaining the right to discharge them from service for proper cause. In such case each servant remains in law the servant of his particular employer, and the circumstance that they all work at the same time, and that the orders which direct the joint application of their individual energies are given by some one foreman or overseer or director, does not change their legal relations. The servants of A. do not become fellow servants with the servants of B. So, too, it is equally well settled that A. may lend or hire his servants to B., to be employed either in B.'s work, or in A.'s putting them so entirely at B.'s disposal that they become *pro hac vice* B.'s servants and fellow servants with all others in B.'s employ. Within which category a particular case is to be grouped depends upon its own peculiar facts, and before examining the authorities cited by the appellant it will be best to set down the facts in this case which have either been proved or are to be fairly inferred from the testimony. The winchman was in the general employ of the shipowners, selected by them as an able seaman, and received his pay from them. Neither of these circumstances is of much moment. Persons in the general employ of one man may nevertheless be in the special employ of another, and the price which the stevedores charged for unloading was undoubtedly less than it would have been had not the ship furnished winches and drivers. Indirectly, therefore, the pay for his work as winchman may be said to have come from the stevedores. He was selected for the particular work of running this winch by the ship's captain, selected because the captain "had always found him a good man; that is the reason [the captain] put him there." Neither about his selection generally nor about his assignment to work at this winch did the stevedores have anything to say. Once assigned and at work

he took his orders from the stevedores' representatives. Whether he should hoist or hold or lower, should work fast or slow, should suspend work or resume it, were all regulated by their orders. To that extent he was subject to their control, but they had no authority to change the character of his work, or to direct him to do anything else except to run that particular winch. If dissatisfied with the way in which he did the work, the stevedores might complain to the captain, who would then have made a change, if he saw fit to do so, putting in his place some other servant of the ship selected by himself. If there had been no complaint at all about the winchman, if, on the contrary, the stevedores were highly pleased with the careful way in which he did the work, and were most solicitous to retain him, nevertheless the captain could have removed him in order to employ him in other ship's work, and have substituted another member of the crew in his place. If objection were made by the stevedores to the winchman, and the captain nevertheless declined to make any change, all that they could do would be to decline to proceed with the work. They could not remove him, nor, if he had left the winch, could they send any of their own men to run the ship's machine on the ship's deck. It will thus be seen that, although the general method of doing the work was determined by the stevedores, who could dispose of their own immediate servants as they pleased—such a one to the slings, such another to the guy rope, and so on—could remove and substitute human agencies at their own pleasure, the fact remains that Johnson's presence as winchman was determined by the ship, which selected and which alone could remove him. Of all the tests which have been suggested, and the authorities are far from uniform, it would seem that this, the power of substitution of one man for another, is the most satisfactory. It may not in all cases be as apparent as it is in this one that B. has no power to remove or differently employ the individual whom A. has selected and assigned to a special line of work, but when it does the amount of control which B. exercises over the individual is surely insufficient to establish, even *pro hac vice*, the relation of master and servant. And it is thought that whatever variances there may be between the conclusions herein expressed and those enumerated in some of the authorities cited are due to variances in the facts, which are not always quite fully set forth in the reports of those authorities. Those relied on by appellant are:

*Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205. There the defendants were sinking a shaft in their colliery. One Whittle had contracted to do the sinking and excavating at a certain price, defendant to provide and place at his disposal the necessary engine power, ropes, etc., together with the engineer to work the engine. It was held that the engineer was a fellow servant of Whittle's employés. Cockburn, C. J., says that although his mind fluctuated during the argument he was led to the opinion he formed by certain answers to interrogatories. Stating their substance, he says: "The company, having already an engine and attendants on the spot, say to the contractor: 'We will let you have them to do your work and be under your control.' \* \* \* It appears to me that the defendants put the

engine and this man at Whittle's disposal, just as much as if they had lent both to him." As the other judges express it, "the engineer was to be under the orders and control of the contractor."

In *Donovan v. Laing* [1893] 1 Q. B. 629, defendant's crane for loading ships with a man in charge of it was hired to a firm of wharfingers. The man in charge was held a servant of the firm. Lord Esher says: "As to the working of the crane, he was no longer defendant's servant, but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment." The statement of facts does not show whether this assumption of the learned Master of the Rolls was fully warranted by the proof, but the decision is to be taken as authority only in cases where this right to discharge from the particular employment exists.

In *Murray v. Currie*, L. R. 6 C. P. 24, defendant employed a stevedore to unload his vessel. The stevedore employed his own laborers, among whom was the plaintiff. Defendant furnished winches, and at the time of the accident one of the ship's crew was running the winch. It appeared that the ship furnished several of the crew to work at unloading under the stevedore. The ship selected those of the crew who were employed in unloading, but the stevedore selected the work for them and had control over it, and "could have refused to employ Davis," if he chose, while the defendant "could not have taken him away from the work." This is a widely different case from the one at bar.

In *The Joseph John*, 30 C. C. A. 199, 86 Fed. 471, the United States Circuit Court of Appeals, Fifth Circuit, per Pardee, Circuit Judge, says: "The winchman was for the time being in the service of and under the control of the stevedores;" but the statement is extremely meager, and there is nothing to show what measure of control as to removal from service the stevedores possessed.

In *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285, defendants who were manufacturers of fireworks sold some to a committee of citizens, and sent with the fireworks two of their employes to assist in handling them. An accident resulting, it was held that these were servants of the committee. The committee, however, had full control over them; it could use them or not to handle the fireworks as it pleased; could discharge either or both from that employment at any time, and substitute whomsoever it pleased.

In *The Turquoise* (D. C.) 114 Fed. 402, the winchmen were held by Judge McPherson not to be servants of the ship, because "during the night, when the accident happened, they were working under a special contract of hire, either for the consignee or the head stevedore." What the terms of that special contract were, the report of the case does not disclose.

In *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218, defendant, a municipal corporation, was engaged in transporting gravel over a temporary track by means of a locomotive, open gravel cars, and train hands hired by it from a railroad company. The court held that the conductor was the servant of the defendant, saying:



"The fact that the running of the train was entirely under the control of the conductor does not show that he and the others were not servants of the city. A locomotive, and cars without men to run them, would have been useless. Instead of hiring trainmen outside, the city hired them of the railroad, with the train. No doubt it was expected by the company and the city that the men hired by the company would continue to run the train till the work was finished. But there was nothing in the contract which prevented the city from discharging the men, and hiring others in their places, if it saw fit to incur the additional expense which would be thus caused."

The contract is not given in the report, so it is impossible to say whether the Fitchburg Railroad actually turned over a valuable engine to the municipality with full power to discharge the railroad's engineer, and substitute in his place whomsoever the municipality might select. If it did, undoubtedly the latter acquired full control both of the engine and the engineer, but that is not the case at bar.

The appeal at bar is from Judge Thomas, who disposed of the case in a brief memorandum, because he had recently discussed this question in *The Lisnacrieve* (D. C.) 87 Fed. 570. Reference may be had to that case for a careful résumé of the authorities. In that as in this the winchman was held to be the servant, not of the stevedores, but of the ship, because "the shipowners chose him. The stevedore was obliged to take him or no one. The ship alone had knowledge of his competency; had alone investigated or tested it. The ship placed or retained him in charge of the winch. The stevedore could not send him to or from it."

It is unnecessary to multiply citations. The authorities are not uniform, and it is useless to undertake to harmonize them. See *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537, and *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673. It would be a difficult matter to formulate a test which would be at once comprehensive enough and specific enough to cover all possible cases. Suffice it to say that when, as in this case, A., and not B., is the one who selects and retains the individual at the particular piece of work to which he is assigned, such individual does not become B.'s servant merely because the latter indirectly pays for his services and gives him his working orders.

It is further contended that the District Court erred in not finding that the libellant's claim against the vessel had been barred by laches. The accident happened October 7, 1897. The vessel sailed for foreign parts October 16, 1897, while Travers was still in the hospital, and did not arrive in New York again until September 20, 1899. She remained in this port until October 22, 1899, when she sailed for Wilmington, N. C. She next returned to New York on November 17, 1900, and was libeled on the 22d of that month. The mere statement of these facts is sufficient to show that there was no laches in proceeding against the steamer. She was within the jurisdiction only 41 days all told between the injury and the libel. Appellant's contention, however, is that action might have been brought against R. Ropner & Co. personally. They are residents of England, and could not have been served; but an attachment might have issued against them as nonresidents, and been levied upon property of theirs found here. Evidence was put in showing that several other vessels belong-

ing to the same owners were from time to time in the port of New York and might have been attached in such an action. But it is not shown that libellant knew what vessels R. Ropner & Co. owned, and we are satisfied that he was under no obligation to find out, and to keep track of their movements from port to port.

The decree of the District Court is affirmed, with interest and costs.

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TEXAS & P. RY. CO. v. PUTMAN.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1903.)

No. 1,166.

**1. RAILROADS—NEGLIGENCE—BRAKEMAN—PERSONAL INJURIES.**

In an action by a brakeman for injuries alleged to have been caused by the engineer's negligent application of the air brakes, resulting in his being thrown from the engine, the evidence considered, and *held* to make a question for the jury as to the engineer's negligence.

**2. SERVANTS—NEGLIGENCE OF FELLOW SERVANTS—ASSUMPTION OF RISK.**

Under the statutes of Texas a servant of a railway company does not assume the risk of injury through the negligence of his fellow servants.

**3. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

In an action by a brakeman for injuries alleged to have been caused by the engineer's negligence in suddenly applying the air while plaintiff was on the pilot of the engine preparatory to getting off to run ahead and open a switch, plaintiff testified that he was not told to go on the pilot, and there was no rule either requiring or forbidding it, but that it was necessary in order to reach the switch in time to open it ahead of the engine. *Held* not to show contributory negligence, so as to relieve defendant of the burden of proving it.

**4. SAME—INSTRUCTIONS—DISCOVERED PERIL.**

In an action by a brakeman for injuries alleged to have been caused by the engineer's negligence in suddenly applying the air while plaintiff was on the pilot of the engine, so as to throw him off in front of the engine, defendant alleged that plaintiff's position on the engine was one of danger, and that he was guilty of contributory negligence in being there. There was evidence that the engineer knew of plaintiff's position. *Held*, that a charge on the doctrine of discovered peril was justified.

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

In this case the plaintiff, Mark Putman, for cause of action alleges: That on the 29th day of December, 1899, he was in the employment of the Texas & Pacific Railway Company as a brakeman on a freight train. That it was his duty, on the approach of the train to a station where the train was to go on a side track, to leap from the train as soon as it slacks or stops, and open the switch, so as to enable the train to enter the side track. That in performing this duty it is required of him, and customary for him, as soon as the train nears the switch, to be in position to immediately jump from the train. To do this it is expected of him to descend from the cowcatcher. That handholds are placed on the sides of freight cars, with running boards along the boiler of engines, and handholds. Owing to the presence of a bridge at or near Benbrook, the switch is at the east end of the siding. That, as the switch is only 100 feet west of a bridge, it was customary for the engineer to stop just west of the bridge to permit the brakeman to go ahead and open the switch. Plaintiff was at the time head brakeman. The conductor

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¶ 2. Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

and engineer, on leaving Ft. Worth, were given a time order for Benbrook to get there ahead of the east-bound passenger train. The train was run at nearly one mile per minute, and it was necessary to make a quick stop for the switch. Plaintiff passed out of the cab window along the engine to and upon the drawhead in front of the engine, waiting for it to slack the speed that he might leap off, run ahead, and open the switch. While he was holding to an iron rod upon the engine, suddenly, and without warning, and without necessity for so doing, one or more of the employes of the defendant engaged in the work of operating the locomotive or cars which constituted the train on which plaintiff was working negligently, by applying the brakes upon the locomotive, or the cars, or both, or by some other means unknown to petitioner, stopped the train in such a violent and sudden manner as to break the hold of plaintiff upon the iron rod, and to hurl him in front of the engine. He fell under the engine. His leg was crushed, and had to be amputated, injuring him, etc. Plaintiff sues for \$25,000. Was, when hurt, 19 years old. The defendant, the Texas & Pacific Railway Company, for answer plead, first, a general demurrer; second, general denial, and that Putman was not required, as a brakeman, to go out on the running board on the engine to get on the ground, and it was not necessary for him to do so in the proper performance of his duty as a brakeman, and that the plaintiff was guilty of contributory negligence in getting off the engine as he did. After all of the evidence had been heard, the defendant requested the court to charge the jury to return a verdict for the defendant, which was refused. The case is here on a writ of error.

T. J. Freeman and B. G. Bidwell, for plaintiff in error.

C. K. Bell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case, delivered the opinion of the court.

In this case four errors are assigned, only two of which were pressed in the oral argument. One of these is to the effect that the court erred in refusing to give the jury the first special charge requested by the defendant, which charge requested the court to instruct the jury to find for the defendant. The theory upon which this assignment is based is that there is no proof in the record of negligence of the defendant, and because the plaintiff, as a matter of law, assumed the risk of the danger by which he claims to have been hurt. One effect of the refusal to give this requested charge has been to bring up for our review the full statement of the evidence admitted on the trial and the whole of the court's charge to the jury; all of which are embraced in the one bill of exceptions reserved and allowed, on which the error just stated is assigned, and on which is also assigned the other error alluded to as having been pressed in the oral argument, to the effect that the court erred in charging the jury the law applicable to the doctrine of discovered peril, which the plaintiff in error contends does not apply in this case. The theory upon which this assignment is based is that the undisputed evidence is (so plaintiff in error contends) that the engineer was the exclusive judge of the necessity for applying the air in emergency, and it would be his duty to do so whenever he thought proper, without reference to where the plaintiff was on the train.

The material parts of the judge's charge are substantially as follows:

"Upon the issue of negligence of the defendant the burden is upon the plaintiff, and to entitle him to recover it must be shown to you by a prepon-

derance or greater weight of the evidence that the plaintiff received his injuries substantially as alleged, and that his injuries were caused by reason of the negligence of the defendant company.

"The burden of proving that the plaintiff was guilty of contributory negligence rests upon the defendant, and, unless the defendant has shown to you by a preponderance or greater weight of the evidence that the plaintiff was guilty of negligence which contributed to his injuries, the defendant would fail in its plea of contributory negligence.

"Negligence, in a general sense, is an omission to perform a duty imposed by law for the protection of one's own person or property or that of another.

"Contributory negligence is negligence not only upon the part of the one committing the injury, but also upon the part of him upon whom the injury is committed, and by which they both contribute thereto.

"Ordinary care is such care as an ordinary prudent person would exercise under similar circumstances. More than this the law does not require; less than this is negligence.

"One who enters the employ of a railroad company as brakeman takes upon himself those risks which are usually incident to that employment. By his acceptance of the dangerous and hazardous service, he assumes the risk of any connected therewith, except the negligence of his employer or his fellow employes; and he cannot recover for injuries caused by reason of the performance of his duties unless the same were caused by the negligence of his employer or his fellow servants. If the plaintiff, so engaged as brakeman in the service of the defendant railway company, and in the customary discharge of his duties, went out on the front end of the locomotive, or cowcatcher, for the purpose of enabling him to jump from that position to the ground and run forward and throw the switch in order that the train might enter upon the side track, he assumed all the risk ordinarily incident to that service and incident to the performance of such service in the manner in which he performed it. And if he met with an accident in the performance of same he cannot recover, unless it was caused by the negligence of his fellow servants engaged in the operation of the train, and without any contributory negligence on his part.

"On the other hand, he does not assume the dangers and risks arising from the negligent manner of operating trains, and in the discharge of his duties as brakeman he has the right to assume that his fellow servants will exercise ordinary care in the operation of trains.

"If you believe from the evidence that the plaintiff did go out upon the front end of the engine, and take a position on the drawhead that extends over and above the pilot for the purpose of enabling him to more speedily open the switch, and if you believe that in so doing he failed to exercise ordinary care for his own safety, and was thereby guilty of negligence, then, and in that event, he cannot recover in this action.

"But you are further charged that negligence on the part of plaintiff will not always exempt the defendant from liability. In the operations of trains it is a rule of law that, if a person negligently exposes himself to a risk of injury, it is the duty of those operating the train, after becoming aware of his danger, to use ordinary care for the purpose of avoiding injury. Therefore, if you believe from the evidence that Mark Putman, in attempting to discharge his duty, negligently took a dangerous position on the front end of the engine while same was in motion, and thereby exposed himself to risk of injury; and if you believe the engineer operating said engine, knowing of his dangerous position, negligently stopped or slackened the speed of his engine so suddenly as to cause the plaintiff to be thrown therefrom and injured; and if you believe that his injury was proximately caused by the engineer negligently stopping or slackening the speed of said engine; and if you further believe that at the time of the accident, in his position on the drawhead over the pilot of said engine, plaintiff was exercising that degree of care and caution that a reasonably prudent man would have exercised under like circumstances—then you are charged that plaintiff would be entitled to recover, even though you believe it was negligence, in the first instance, for plaintiff to take his position on the front end of the engine.

"Again, if you believe that Mark Putman, in attempting to discharge his duties to the defendant as brakeman, went to the front end of the engine and took his position on the cowcatcher while the train was in motion, and if you believe that in so doing he acted as a reasonably prudent brakeman would have acted under similar circumstances in the discharge of his duties, and if, while in that position, he was acting with due care and caution to guard against injury; and if you further believe that the engineer operating said engine knew of the position of plaintiff, and unnecessarily stopped or slackened the speed of the engine by the use of his air in emergency, as it is termed; and if you believe such action on his part constituted negligence, as herein defined—then plaintiff would be entitled to recover for any damages he may have sustained in consequence thereof.

"On the other hand, if you believe from the evidence that plaintiff was thrown from said engine, or fell therefrom, before the brakes on said engine and cars were set by the engineer, then, and in that event, you will find a verdict for the defendant. Or if you believe from the evidence that the setting of the brakes on the engine and cars, if you find they were so set before plaintiff fell from said engine, were not set violently, and so as to cause plaintiff to lose his hold, then, and in that event, you will find for the defendant."

To which charge of the court the defendant below excepted, because the court refused the first special charge asked by the defendant; because there is no proof of the negligence of the defendant, and because the plaintiff assumed the risk of the danger by which he claims to have been hurt; and because the plaintiff is guilty of contributory negligence in going on the pilot of the engine at the time and under the circumstances in which he did. Further, the defendant excepted to that part of the charge of the court in which the jury was told that the burden of proving contributory negligence is on the defendant, because there is no proof of what the plaintiff did but his own evidence, and the law is that, where plaintiff discloses the fact that he is guilty of contributory negligence, it is not correct to charge that the burden is on the defendant, because it has already been shown by the plaintiff. The defendant further excepted to that part of the charge which applies the doctrine of discovered peril, because it does not apply to this kind of a case, for the reason that the evidence (the defendant contends) shows that the engineer was the exclusive judge of the necessity of applying the air in emergency, and it would be his duty to do so when he thought it proper, without reference to where the plaintiff was on the train. The defendant contended further that there is no evidence that the engineer knew that the plaintiff was on the pilot of the engine; that there is no such issue raised in the pleadings; that the plaintiff does not complain of this as an act of negligence, and should be confined to the negligence pleaded by him.

Taking these grounds of exception to the charge seriatim and successively, we note, as to the proof of the negligence of the defendant, that the plaintiff, testifying on the stand, said, in substance, that he was sitting on the drawhead, with his feet on the south side (the train was running west on a track due east and west); that there was a brake rod running down beside him, and that he had hold of that with his left hand, and that he had his right hand on the knuckle of the drawhead; that immediately before he fell the train was running about 15 or 20 miles an hour; that at the instant before he fell

they stopped the train suddenly; the speed was checked so quick that it tore his hold loose, and caused him to be thrown right in front of the engine; that the train was stopped just as suddenly as it could be; that in stopping it jerked him right down over the pilot; that he had not been sitting there more than a minute or two—just a short time; that he knows how engines are stopped, having worked on an engine; that they stop an engine with air brakes; that the train from which he fell had air brakes; that a train can be stopped easy—that is, gradually—with the use of air brakes, or, in emergency, air brakes can be used, so that the brakes will clamp the wheels on each side, exert a very strong force, and stop the train just as suddenly as it can be stopped; that the train in question, and at the time in question, was stopped so suddenly it threw him right forward; that he had been on engines, and had seen the emergency air applied, and did not think anything else could have stopped it so suddenly; on a passenger train, on approaching a station, the engineer applies the air gradually, stopping gradually; instead of throwing the lever around, he turns it easy; there is a rule about applying the emergency brakes; it is when there is danger—if a bridge is on fire, or the train is about to strike a wagon crossing the road with people in it, or in like cases of extreme danger; that he did not see any reason for the application of the air in emergency; that he saw no reason why the engineer should do it, unless he was afraid he would run by the switch; that, if he had run by the switch, he would have to run back, he would have to back up; he would have to back further down the track in order to get a start.

It seems clear to us that this testimony, taken in connection with all the plaintiff said as a witness under examination before the jury, tended to prove that the engineer unnecessarily, without reasonable cause, or any cause that would justify such use of the air brakes, did, by their use, bring this train to a sudden stop, when it was running at the rate of 15 or 20 miles an hour, and that this directly caused the injury which the plaintiff received.

As to the second ground of exception—that the plaintiff had assumed the risk of the danger by which he claims to have been hurt—according to the rules of the common law still in force in many of the states, the plaintiff would have been held to have assumed the risk of the negligence of his fellow employés; but that has been changed by statute in Texas.

As to the ground that the plaintiff was guilty of contributory negligence in getting on the pilot of the engine at the time and under the circumstances in which he did, the plaintiff, on cross-examination, testified:

“It was necessary for me to go out there that way in order to make the time we were supposed to make. The reason I did not get off the end of the pilot beam, there is a flagstaff on each end of the pilot beam; and then it is too high to jump off of. The drawhead, I think, runs into the pilot beam. It is not much higher than the drawhead, but from the drawhead you slide down on a piece of iron or step, and then down only about 8 inches to the ground; that is where you get to before you get off. I do not know that that is more dangerous than other places. There was a flagstaff on that engine that morning. I had my lamp in my right hand, over the outside of the knuckle. I walked from the running board to the pilot beam. I stepped

from the running board to the steam chest, and from the steam chest to the pilot beam, and then went in front of the engine and sat down on the draw-head. I could have gotten off the engine steps where the engineer and fireman get on and off, but I could not have opened the switch before he got there. I couldn't run that fast. I couldn't tell how fast he was going to run, and I would be behind, and would have to go ahead to open the switch. There was no rule of the company requiring me to get off on that pilot. It was voluntary whether I did or not. I acted on my own judgment and discretion. There was no order to do it."

On redirect examination he said:

"I state that I went out on that front end of the engine voluntarily. It is the duty of a brakeman to do his work as rapidly as possible. You are supposed to do it as quick as you can. If he don't, he will get what railroad men call 'turned in.' The conductor will turn him in. If I had gotten off the side of the engine, I would have had to overtake the engine after it crossed the bridge, and then throw the switch before it got there. There is no rule prohibiting brakemen from getting out on the front of the engine."

We do not think that this proof, made by the plaintiff's own testimony, shows, as a matter of law, contributory negligence on his part, or to such a degree tends to show contributory negligence as a matter of fact as to relieve the defendant from the general rule that the burden of showing contributory negligence is on the defendant.

As to the exception that the case is one to which the doctrine of discovered peril has no application, based upon the suggestion that the engineer was the exclusive judge of the necessity of applying the air in emergency, and the further suggestion that there is no evidence that the engineer knew that the plaintiff was on the pilot of the engine, the witness Cain, who was the engineer, testifies:

"I saw the plaintiff when he got out of the cab window. I knew he was out there on the front end. From the time he went out the cab window until he fell, I don't see how he could have had time to get out on the pilot and sit down. I didn't know he was on the pilot, sitting down. I have heard that he claimed he was there. I knew he got out. I didn't know he was sitting down out there. I couldn't see him from my side."

The fireman testifies that a short time before the train came to a stop the plaintiff, Mark Putman, went out on the engine; that he got out of the cab through the fireman's window. "He went out on the running board, and I got down on the deck. I didn't know what he was going down there for. I didn't know he was going out there in order to get off and throw the switch. Sometimes they go out there for that purpose. Sometimes they go out there, and sit down on the front end. I don't know what they do it for. If they were going to head in there, I would suppose he was going out there for that. I knew we were going to head in there. Of course, it was generally supposed that he was going out there to get off and throw the switch. I didn't know at the time. I supposed it was for that. I saw him go out there on the running board, and I got down on the deck. I didn't know he was sitting on the pilot."

Many witnesses were examined for the defendant; some, whose testimony tended to show that the engineer did not apply the air in emergency until after or just as it was discovered that the plaintiff had fallen off the engine. Some of the testimony also tended to show that with the train going at the rate of 15 or 20 miles an hour the

most sudden stop of the engine that could be brought about by the use of the emergency air would not cause one to be projected forward from the engine. There is also rebutting proof on this point. It appears that the defendant on the trial earnestly contended that the plaintiff was negligent in getting out on the engine under the circumstances, and that this negligence on his part contributed directly to the injury which he received. It was to meet this contention that the judge instructed the jury as to the doctrine of discovered peril. We conclude that on the issue of negligence charged against the defendant there was some proof, and a conflict in the testimony, which required the case to be submitted to the jury in the absence of such a clear showing of contributory negligence on the plaintiff's part as would defeat his recovery. We think that such a clear case was not shown, and that, therefore, the first of the two grounds of error to which we have confined our consideration was not well taken. And, there being an issue of fact as to the contributory negligence pleaded and attempted to be proved, and there being also proof tending to show that the engineer did know substantially the position of the plaintiff, and the perilous character thereof, it was a case which called for proper instruction applying the doctrine of discovered peril. The exception goes no further than to object to its being applied at all, and does not question the correctness of the judge's charge as a statement of that doctrine to be observed by the jury, and to aid them in the solution of the issues presented to them.

It follows that the Circuit Court did not err in its action to which these exceptions are levied, and the judgment is therefore affirmed.

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JOSEPH DRY GOODS CO. et al. v. HECHT.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1903.)

No. 1,210.

1. **APPEAL—INTERLOCUTORY ORDER APPOINTING RECEIVER—EX PARTE HEARING.**  
 In Act March 3, 1891 (creating the circuit courts of appeals) § 7, as amended by Act June 6, 1900, c. 803 [U. S. Comp. St. 1901, p. 550], which provides for appeals from interlocutory orders or decrees granting or continuing an injunction or appointing a receiver "upon a hearing in equity," such phrase is not used in a technical sense, and an appeal lies from an order appointing a receiver, although the hearing was ex parte and without notice to the defendant, the purpose of the statute being to give the right of appeal to a defendant whose property is taken from his possession by such order.
2. **RECEIVERS—AUTHORITY TO APPOINT—APPOINTMENT WITHOUT NOTICE.**  
 Notice should be given, and the defendant afforded an opportunity to be heard, before the appointment of a receiver, except in cases of imperious necessity, requiring immediate action by the court, and where protection can be afforded the plaintiff in no other way, and it is error for the court to act without notice except in such cases.
3. **SAME—GROUNDS AUTHORIZING APPOINTMENT.**  
 The appointment of a receiver is an extraordinary remedy, and cannot properly be resorted to in a suit the sole purpose of which is to collect a debt, where it is not alleged that the debtor is insolvent, or that he has not property subject to execution sufficient to satisfy the decree prayed for.



#### 4. JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP—ARRANGEMENT OF PARTIES BY THE COURT.

A federal court is without jurisdiction of a suit for the specific performance of a contract in which the complainant owns only a part interest, when the owner of the remaining interest, who is joined as a defendant, is a citizen of the same state as his codefendants, the other parties to the contract. In such case he must be arranged by the court on the side of the complainant in the controversy.

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

This is a suit in equity, brought by Robert Hecht, the appellee, against the appellants and J. R. Fried. The bill appears in the record, and contains 21 sections, embracing 14 closely printed pages. It is not deemed necessary to give a summary of the contents of the bill, as the averments, so far as material to the decision to be made, will appear in the opinion. The purpose of the bill was to collect a debt, enforce the specific performance of a contract, and secure the issuance of an injunction and the appointment of a receiver.

C. A. Turner and Geo. S. Jones (Isaac Hardeman and B. M. Davis, on the brief), for appellants.

John I. Hall and Olin J. Wimberly, for appellee.

John P. Ross, for receiver.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

SHELBY, Circuit Judge. On October 22, 1902, the bill having been presented to one of the judges of the Circuit Court, he made an order, without notice to the defendants, appointing a temporary receiver, who was directed to demand and take possession of the moneys, books, papers, and other property of the Joseph Dry Goods Company. The receiver took possession as directed by the order of the court. The defendants were required to show cause on October 31st why a permanent receiver should not be appointed. The dry goods company, by sworn petition, applied to the judge who made the order, seeking a revocation or modification of the order. This application was set down for hearing on the 24th of October, 1902, and notice given plaintiff's attorneys. The attorneys filed a writing addressed to the judge, stating that other professional engagements prevented their presence before the court, and giving grounds of objection to the revocation of the order appointing the receiver. The following order was entered October 24, 1902:

"Upon hearing the application of the Joseph Dry Goods Company for an order to dissolve or modify the order granted on the 22nd day of the present month appointing Walter J. Grace, Esq., temporary receiver, and it appearing to the court that said temporary receiver, from his statement in open court, has in hand, of the property of said Joseph Dry Goods Company, six thousand five hundred and sixty and  $\frac{49}{100}$  dollars, besides a large amount of personal property, consisting of a stock of merchandise, choses in action, and the books of said Joseph Dry Goods Company, it is, after hearing and considering said application, and the argument of counsel in behalf thereof, counsel for the

¶ 4. Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

complainant being absent in attendance upon Pulaski superior court, and not heard except in a letter, and written by them in resistance to said application, it is ordered that the application to give bond and have said order dissolved is refused and denied, but said order of Oct. 22nd inst. is so far modified as that the said Walter J. Grace, Esq., shall retain in his hands the cash received by him, except that he shall pay therefrom a check given by the said Joseph Dry Goods Company to R. N. Lamar for sixty-five dollars and seventy cents, insurance on said property, and shall pay to A. Damo one dollar as watchman for guarding said property last night. The stock of merchandise, notes, and accounts, choses in action, and other property of said Joseph Dry Goods Company, and the books in the hands of said temporary receiver, the said Walter J. Grace, Esq., shall at once return to said Joseph Dry Goods Company, and said defendants are restrained from making any changes in the books or records of said company, or either of the defendants."

The defendants, the company and Joseph, applied to one of the judges of the Circuit Court for an order allowing an appeal from the two decrees—the one of October 22d appointing the receiver, and the one of October 24th refusing to revoke, but modifying, the first decree—and the appeal was allowed. It is assigned here, with proper specifications, that the court below erred in the two decrees rendered.

1. The appellee, plaintiff below, moves to dismiss the appeal because the decrees appealed from were rendered *ex parte* and not "upon a hearing in equity," and that motion raises the first question to be considered.

The statute to be considered, as first passed in 1891, allowed appeals from interlocutory orders granting or continuing an injunction "upon a hearing in equity." Judiciary Act March 3, 1891, § 7, 26 Stat. 826, 828 [U. S. Comp. St. 1901, pp. 546, 550]. At that time there had been in force for many years equity rule 55, which provides "that special injunctions shall be grantable only upon due notice to the other party by the court in term or by a judge thereof in vacation after a hearing which may be *ex parte* if the adverse party does not appear at the time and place ordered." There was also in force at that time, and now, a statute enacted in 1872, which, when notice was given of a motion for an injunction, conferred on the circuit or district court, or a judge thereof, power to grant an order restraining the act sought to be enjoined until a decision was had on the motion. Rev. St. § 718 [U. S. Comp. St. 1901, p. 580]. Further as to issuing injunctions out of the circuit court, see Rev. St. § 719 [U. S. Comp. St. 1901, p. 581]. It may be that the Congress, in using the words "upon a hearing in equity," had in view equity rule 55 and this statute allowing the temporary restraining order. The temporary restraining order is, in effect, an injunction intended to operate till the "hearing" on the question of granting the injunction, notice of the motion to grant the same having been served contemporaneously with the service of the order. The injunction being granted after such notice would be "upon a hearing in equity," within the meaning of the statute. The statute as first enacted did not allow an appeal from the appointment of a receiver. It related to injunctions only. It was construed not to allow an appeal from an interlocutory order appointing a receiver, even in a case where the order required the defendant to turn over property to a receiver, the order

being in the nature of a mandatory injunction. Highland Ave. R. R. v. Equipment Co., 168 U. S. 627, 18 Sup. Ct. 240, 42 L. Ed. 605. After such construction was placed on it, it was amended June 6, 1900, so as to read as follows:

"Sec. 7. That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: provided further, that the court below may in its discretion require as a condition of the appeal an additional bond." Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550].

The material change was to insert the words "or a receiver appointed," thereby allowing an appeal from an interlocutory order appointing a receiver. The plain intention of the Congress by the amendment was to allow the defendant, who was by such order deprived of the possession of his property, to have the decree reviewed by the circuit court of appeals. If the act had been written allowing an appeal from the appointment of a receiver as an original and separate act, the words "upon a hearing in equity" might well have been omitted, for there was no statute allowing such appointment (as in the case of restraining orders) without a hearing. The words when used in the act, when it related to injunctions only, were useful in distinguishing the temporary restraining order from the injunction granted at the hearing after notice. Orders granting injunctions and orders appointing receivers are, in the understanding of the legal profession, entirely independent. The distinction between the two is recognized in the text-books and in the Reports. But the words in question may have some significance when applied to orders appointing a receiver. Such orders are, in a certain sense, rendered on a hearing in equity. The mode of seeking the appointment of a receiver in equity is on motion, based on the averments and prayer of the bill, or on motion or petition filed in the pending case, where the bill does not show all of the facts necessary to the relief. Such motion or petition is heard by the court before making an order either granting or denying it. There is a hearing in equity, although it is *ex parte*. A "hearing in equity" technically is the trial of the case, including the introduction of evidence, the argument of the solicitors, and the decree of the chancellor. 10 Enc. Pl. & Pr. 8. It is clear that the words are not used in such technical sense, for the statute applies to interlocutory orders and decrees only. It is true the statute does not say on an *ex parte* hearing, nor does it say on the hearing of both parties, nor on an adversary hearing. But the words "hearing in equity" could not have been used in their technical sense, as we have shown; and, therefore, we must place on them some other interpretation, and one that will not defeat the purpose of the Congress. The words when first used related to the

granting or continuing of the writ of injunction, and in that connection they distinguished the *ex parte* restraining order from the injunction which followed, which was granted after notice and on an adversary hearing. They do not have that meaning when applied to an order appointing a receiver. When a motion to appoint a receiver is heard by the court and granted, whether on the averments and prayer of the bill or on a petition in the pending suit, there has certainly been a "hearing" in the ordinary sense in which the word is used. The court hears, considers, and grants the motion. The order or decree, if the motion is granted, comes within the intention of the act. The decree made *ex parte* is just as effective in depriving the defendant of his property as if he had notice and was present contesting, and it is more likely to need correction by review than one made when both parties are heard. It does not seem probable that the Congress intended to grant the appeal if the defendant was given the opportunity to contest the motion and to allow no appeal if he was denied the right to be heard. If an appeal is allowed only from an order or decree made on a hearing of both parties, the purpose of the statute could be defeated by *ex parte* appointments of receivers. The appointment could be made without notice, without hearing the defendant, and without rule to show cause why the appointment should not stand or be made permanent. The result would be that there would be no right of appeal simply because the court granted the plaintiff's motion to proceed *ex parte*. Such construction would enable parties to defeat the intention of Congress, which was to allow a review of such orders and decrees. In this case after the *ex parte* order was made appointing the receiver, the defendant appeared and by petition sought to have the court vacate the order. The plaintiff resisted this motion by filing written objections to such action. The court refused to vacate, though it modified, the order. The appeal is taken from both orders, the *ex parte* order appointing the receiver and the order refusing to vacate the appointment. Considering both motions, there has been a hearing of both parties. Both were heard, in fact, on the last motion. The appeal was taken within 30 days of the date of the first decree. In what has been said it is not our intention to intimate an opinion of the court as to whether an appeal would or would not lie from a decree granting a restraining order under Rev. St. § 718 [U. S. Comp. St. 1901, p. 580]. The motion to dismiss the appeal is overruled.

2. It is not doubted that a court of equity should appoint a receiver without notice to the defendant where an emergency exists which calls for such action. In Georgia it is provided by statute that "under extraordinary circumstances a receiver may be appointed before and without notice to the trustee or other person having charge of the assets." Civ. Code Ga. 1895, § 4904. This statute is only confirmatory of a principle of equity procedure and jurisdiction. Cases occur where it is necessary to the ends of justice for the chancellor to act at once and without notice to the defendant. But notice should be given and the defendant furnished an opportunity to be heard, except in cases of imperious necessity, requiring immediate action by the court, and where protection can be afforded the

plaintiff in no other way. It is error for the court to act without notice except in such cases. We adhere to our rulings on this subject. *Cabaniss v. Mining Co.* (C. C. A.) 116 Fed. 318; *Timber Co. v. Watkins*, 48 C. C. A. 254, 109 Fed. 101; *High on Recr's* (3d Ed.) 111, 112; *Smith on Recr's*, § 5; *Gluck & B. on Recr's*, § 16. We find nothing in the record before us showing such emergency. The defendants were entitled to notice before action was taken on the prayer for a receiver.

3. But if notice had been given, the appointment, we think, could not be sustained. The ultimate purpose of the bill is to collect the plaintiff's part of a debt which Adolph Joseph owes to J. R. Fried & Co., a partnership, since dissolved, composed of Fried and the plaintiff. The debt is alleged to be due, and it is averred that the plaintiff's share of it is \$4,450. If plaintiff obtains a decree for that sum, and collects it, he would have all he sues for. Taking the averments of the bill as true, and conceding the jurisdiction of the court and the equity of the bill, ultimately he would obtain such decree and execution thereon. There being no averment in the bill that the defendant Joseph is insolvent, it does not appear that there would be any difficulty in collecting the decree. If the decree, when rendered, would be collectible, there is no necessity for seizing property for its satisfaction in advance of its rendition. The appointment of a receiver is an extraordinary remedy, and cannot be properly resorted to unless a necessity for it is shown. It follows that in a case like this a receiver should not be appointed unless the insolvency of the defendant debtor is shown. The court should not resort to so harsh a remedy when it is not alleged that the defendant has not property subject to execution with which to satisfy the decree when rendered. There having been no allegation or proof of the insolvency of the defendant against whom the decree for the debt is sought, it was not shown to be necessary for the court to take possession of the stock of goods and money for the purpose of making it available to the plaintiff to satisfy a decree he might obtain. *Baker v. Bank*, 94 Ga. 87, 21 S. E. 159; *Haines v. Carpenter*, 1 Woods, 262, Fed. Cas. No. 5,905; *Word v. Word*, 90 Ala. 81, 7 South. 412; 17 Enc. Pl. & Pr. 725.

4. This bill is brought by a citizen of New York against a corporation organized under the laws of Georgia and two citizens of Georgia. As the pleader has arranged the parties, the necessary diversity of citizenship is alleged to give the court jurisdiction. The pleader's arrangement of the parties, however, is not conclusive on the court. The court must look into the real facts of the case, and, if necessary, rearrange the parties according to the nature of the controversy, and will then view the array to determine its jurisdiction. *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *Carter on Jurisdiction Federal Courts*, 142, and cases there cited. The ultimate purpose of this suit, as we have said, is to collect a debt which the defendant Adolph Joseph owes the plaintiff. But its basis as an equity proceeding is a contract made by J. R. Fried & Co., a partnership, of which the plaintiff was a member, and Adolph Joseph. That contract contains this clause:

"And whereas the said Adolph Joseph, guardian, contemplates organizing a corporation and placing said property therein as the capital stock, now when said corporation is formed he (Joseph) agrees in the event said notes, or any part thereof, so given to the said J. R. Fried & Company are not paid, that he will hypothecate with said J. R. Fried & Company such stock as may be issued by said corporation to him as guardian to said J. R. Fried & Company until said notes are paid. In the event said corporation is not formed, upon the transfer of said property hereinbefore described, by the said Samuel Evans to the said Adolph Joseph, guardian, then the said Adolph Joseph, guardian, agrees that he will at once secure the payment of any balance that may be due on said notes to said J. R. Fried & Company."

If the defendant Joseph had complied with this provision of the contract, this bill, in its present form at least, would not be before the court. The debt thereby secured due to J. R. Fried & Co., and for which the stock was to be hypothecated, is now owned by the plaintiff and J. R. Fried, one of the defendants. The plaintiff owns 40 per cent. of the debt, and Fried owns 60 per cent., as shown by the bill. The bill contains a formal prayer for the specific performance of this contract. If the plaintiff obtained such relief, he would get not half as much benefit from the decree as the defendant Fried. Fried and Joseph are both citizens of Georgia, and the defendant corporation is chartered in that state. Applying the rule we have quoted, so far as this branch of the case is concerned, we must arrange Fried on the side of the plaintiff, and, that being done, the jurisdiction of the court is defeated. The court has not jurisdiction to enforce a contract at the suit of a citizen of New York and a citizen of Georgia against citizens of Georgia.

On an appeal like this from an interlocutory order appointing a receiver, the appellate court may dispose of the case on its merits and dismiss the bill (Smith v. Vulcan Ironworks, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810); but we do not understand that it is required to do so. The record shows, and it was admitted in argument at the bar, that Joseph is indebted to the plaintiff, though not in so large a sum as is claimed—a debt which in equity and good conscience he should pay. We are reluctant to dismiss the bill when the plaintiff may be able to so amend it as to obtain some of the relief for which he has prayed. While the bill in its present form should be dismissed for want of jurisdiction, we do not hold that it may not be so amended as to avoid the objections to it.

The decrees of the Circuit Court are reversed, and the cause remanded.

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AMERICAN PRESS ASS'N v. DAILY STORY PUB. CO.\*

(Circuit Court of Appeals, Seventh Circuit. October 31, 1902.)

No. 864.

1. COPYRIGHT—LOSS OF RIGHT TO PROTECTION—INADVERTENT OMISSION OF NOTICE BY LICENSEE.

The owner of a copyrighted literary production does not lose the exclusive property therein given by the copyright because a licensee authorized to publish the article on the express condition that he print

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\* Rehearing denied February 7, 1903.

therewith the usual copyright notice inadvertently omits to do so, and any one who copies and republishes the article so published, though without actual knowledge of the copyright, does so at his peril.

Grosscup, Circuit Judge, dissenting.

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

The American Press Association, a citizen of the state of New York, is engaged in the business of securing original and selected matter for publication, which it prepares in the form of electrotype plates, and leases for publication to its subscribers for an agreed consideration. The matter thus distributed is sometimes copyrighted matter, and sometimes not; the former being published with the requisite copyright notice, and the latter credited to the source from which it is obtained. The appellee, the Daily Story Publishing Company, a citizen of the state of Illinois, is engaged in supplying newspapers and periodicals throughout the United States with short, copyrighted stories, under a form of contract which gives to such newspapers the exclusive right to publish the stories furnished, within a limited territory, but upon the express condition that they shall, at the time of such publication, print with each story a full copyright notice, as required by the copyright laws of the United States. January 8, 1900, the St. Louis Globe-Democrat, a patron of appellee, published a copyrighted story, entitled "And After"; omitting, through mere inadvertence, any notice that the same was copyrighted. Soon after, the story thus published was appropriated by the appellant and distributed to its patrons by means of its customary plates; proper credit being given to the Globe-Democrat for the story. As a matter of fact, the story belonged to the appellee, and had by it been copyrighted and furnished to the Globe-Democrat under a contract giving that paper the exclusive right to publish the story within the territory covered by the city of St. Louis, upon the express condition that that paper should and would print with the story, in compliance with the statutes of the United States, the copyright notice, as follows: "Copyrighted 1899 by Daily Story Publishing Company;" and the St. Louis Globe-Democrat expressly agreed so to do. The Daily Story Publishing Company sold to other newspapers the exclusive right of publication of the story in their respective territories; being other than the territory granted to the St. Louis Globe-Democrat, and under like contract and condition as that with the St. Louis Globe-Democrat. The appellant had no knowledge that the story had been copyrighted. Both associations acted in good faith; the Daily Story Publishing Company believing that the Globe-Democrat had protected its copyright, and the American Press Association believing that the story was not copyrighted. Upon learning that newspapers were publishing the story without license, the appellee presented to the various papers publishing the story bills for damages, threatening suit for their recovery. The appellant promptly informed the appellee of the manner in which the story was obtained, and assumed responsibility for its use by its patrons, and announced that the publication would be immediately discontinued, which was done. The appellant filed its bill in the Circuit Court to restrain appellee from collecting in any manner from its patrons any damages or compensation, or from instituting any suit therefor; insisting that the appellee had lost its right of copyright by such publication by the St. Louis Globe-Democrat. Upon hearing, a decree was entered dismissing the bill for want of equity, from which decree this appeal is taken.

Louis C. Ehle, for appellant.

Jacob Newman, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. It is doubtful if this bill can be sustained under any head of equitable jurisdiction. It might be entertained to prevent a multiplicity of suits, if any legal duty is imposed upon the appellant to protect its customers from the demands of the

appellee. It is questionable if any such duty is averred or exists. *Wolfe v. Burke*, 56 N. Y. 115.

The copyright of the appellee was property, of which it could not be legally deprived without its consent. Title to copyright is no more lost by the theft of the manuscript, or piratical publication of it, than is one's title to a horse lost by the stealing of it, or by the unlawful sale of it to a stranger. Indeed, the statute with scrupulous care has sought to protect the owner from unauthorized use of the subject of the copyright. It has hedged about the publication of a copyrighted article by a stranger with restrictions seldom applied to other kinds of property. It forbids the printing, publication, or importing, selling or exposing for sale, of a copyrighted book, without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses (Rev. St. § 4964 [U. S. Comp. St. p. 3413]), and forbids the printing or publication of any manuscript whatever, without the consent of the author or proprietor first obtained (Rev. St. § 4967 [U. S. Comp. St. p. 3416]). It is clear, therefore, as Mr. Drone observes, that "when piracy is charged two defenses are open to the alleged wrongdoer: He may show either that he is the author or the assignee (that is, the owner) of the copyright, or that he has a license in writing from the owner to publish." *Drone on Copyright*, 305. So the question arises whether the publication by the appellant was in any sense with the consent of the appellee; and that in turn depends upon the question whether the *St. Louis Globe-Democrat*, wrongfully publishing the story without notice of copyright attached, was, in so doing, the agent of the appellee or its licensee. If the former, the appellant is justified; and, if the latter, it is without justification. "The distinction between an assignment and a license is that by the former the ownership of the copyright is vested in the assignee, while by the latter the licensee acquires the privilege of publishing, but no proprietary rights in the copyright." *Drone on Copyright*, 305. The contract between the *St. Louis Globe-Democrat* and the appellee gave to the former the exclusive right to publish the copyrighted story in its newspaper within the city of St. Louis. This right was upon the express condition that the *St. Louis Globe-Democrat* should print with the story the usual copyright notice. This did not constitute the *Globe-Democrat* the agent of the appellee, but it conferred a license, and the wrongful act of omitting the publication of the copyright should not, we think, be visited upon the appellee. In *Saxlehner v. Eisner & Mendelsohn*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, Saxlehner contracted with the Apollinaris Company, Limited, of London, to sell them a certain quantity yearly of Hunyadi Janos water in Great Britain and other countries, and agreed not to fill any orders coming from the territory granted to the company, but to make them over to the company. It was contended that the conduct of the Apollinaris Company was such as to show an abandonment of the name and label, and that Saxlehner was estopped by their act in further asserting title to them. The court, speaking by Mr. Justice Brown, observed at page 33, 179 U. S., and page 13, 21 Sup. Ct., 45 L. Ed. 60:



"This defense presupposes that the Apollinaris Company had power to bind Saxlehner by its admission and contract. Certainly the contract gave it no such power in express terms. Saxlehner did not purport to make the company his agent. He agreed to sell the company a certain number of cases of his water at a certain price, and also agreed to sell to no one else during the pendency of the contract."

Here the appellee did not purport by its contract to make the Globe-Democrat its agent in any respect. It merely sold that paper the exclusive right of publication of the copyrighted story within a limited territory, and upon the express condition that it should be printed with the usual copyright notice. By oversight the Globe-Democrat in respect of this condition violated its contract, but we cannot comprehend why that breach of contract should be visited upon the appellee.

It is not material, we think, that the appellant in publishing this copyrighted story was not aware that the story was protected by copyright. It published it at its peril, and ignorance will not avail. Drone on Copyright, 403; Lee v. Simpson, 3 C. B. 883.

It is urged that the situation is like the familiar case where one has delivered to another for use his check or draft, signed in blank, with authority to the payee to fill in an amount to be ascertained or agreed upon, not exceeding a given sum, and, filled in by the payee with a larger amount, it is passed by him to a bona fide holder for value without notice, and the maker is held liable. We need not be curious to ascertain whether such holding is bottomed upon the ground of negligence, or of agency and implied authority. It is based upon the latter ground in Bank of Pittsburg v. Neal, 22 How. 98, 108, 16 L. Ed. 323. But whether liability be rested upon one or the other ground, or upon both, the supposed analogous case, we think, has no application to the matter in hand, since here was no agency and no negligence. If the objection to liability be based upon the ground of implied authority it must fail, because there can be no implication of authority in direct contradiction to the express terms of the contract. In the case supposed, liability may properly be sustained upon the ground that the maker has placed in the hands of another the means by which to defraud a third person. The maker trusted the payee with the means to impose upon another, when by proper care he could have prevented such imposition, and so liability in that case may well be predicated upon the theory that "he who trusts most shall lose." But in the case before us there was no imposition practiced upon the appellant. There was no inducement held out by any one. There was no solicitation of its action. The appellant has of its own motion appropriated to itself the literary production of another, supposing indeed that it had the legal right to do it. It does that, however, at its peril, and the case is not different from that of an innocent copying of a piratical publication of a copyrighted work, or the innocent purchase of a horse to which the seller innocently supposed he had good title. A copyright article published without authority is not "current information," free for the use of all. Nor, we think, can the appellee be bound by the action of the Globe-Democrat upon the ground suggested—that, where one of two innocent parties must suffer, he who most immediately

conducted to the injury should bear the loss. The doctrine is well put in *The Monte Allegre*, 9 Wheat. 616, 641, 6 L. Ed. 174:

"When one of two innocent parties must suffer, he to whom is imputable negligence, or want of employment of all the means within his reach to guard against the injury, must bear the loss."

Here the appellee was guilty of no negligence, and omitted no means within its reach. It took care by its contract to require, as a condition concurrent with publication, that the *Globe-Democrat* should print the copyright notice with the publication of the story. It might well be held that, failing compliance with the condition, the publication was unauthorized and piratical. At all events, the appellee was diligent to protect its rights, and omitted no act to guard against possible injury. It surely cannot be insisted upon that it was the duty of the appellee to require proof copy of the imprint before its publication. The one party was located at Chicago; the other, at St. Louis—distant from each other some nine hours by rail. In the case of a daily newspaper, to require such sending, examination, and return of proof would be an exaction of impossible diligence. The appellee in no way contributed to the act of the *Globe-Democrat*, or to the appellant's act of appropriation of the story, except in this: that it sold the right to the *Globe-Democrat* to publish the story in connection with and conditioned upon the publication of the proper copyright notice. It certainly contemplated no abandonment of its copyright. It sought by solemn provision of contract to protect, defend and preserve that right. It exercised its legal right in the only way possible, and sought to protect the use of that right as the law requires. Under such circumstances the legal maxim may well be applied, "*Qui jure suo utitur neminem lædit.*" To visit the appellee with the loss of its copyright, as a consequence of the error of the *Globe-Democrat*, would be to punish an innocent party in protection of one who, without solicitation or inducement and without compensation, has appropriated the property of another.

GROSSCUP, Circuit Judge. I doubt the correctness of the proposition of law upon which this case is decided. I do not doubt, of course, that title to copyright is not lost by theft or piracy of the manuscript. Had the *Globe-Democrat* no authority, or color of authority, other than that of the theft of another person's intellectual production, the patrons of The American Press Association, though innocent, could not defend themselves against the Daily Story Publishing Company's claims of royalty. They would, in such case, be in a situation somewhat analogous to that of an innocent purchaser of a chattel from one who had stolen the chattel.

But the *Globe-Democrat* did not steal the article. It had authority for the publication. Its relation to the transaction was more nearly that of a vendee on conditional sale; and in cases of conditional sale, before property can be taken from the hands of innocent third persons, it must be shown that there was something more than a mere promise, upon the part of the vendee, to perform a condition. There must be shown a clear purpose, that pending performance of condition, the vendor should retain title; so that the supposed vendee

is in fact, merely bailee, until the condition is performed. *Chicago Railway Company v. Merchants' Bank*, 136 U. S. 282, 10 Sup. Ct. 999, 34 L. Ed. 349; *Arkansas Cattle Company v. Mann*, 130 U. S. 78, 9 Sup. Ct. 458, 32 L. Ed. 854. Even in cases of conditional sale, in some states—notably Illinois, Kentucky, Maryland and Pennsylvania—a bona fide purchaser from a vendee in possession, acquires good title. *Lincoln v. Quynn*, 68 Md. 304, 11 Atl. 848, 6 Am. St. Rep. 446. *American & English Encyclopedia of Law*, vol. 6, page 489, note 4. Such seems also to be the English decisions under the English Bankruptcy Act.

But I doubt if the question here involved should be controlled entirely by the law relating to conditional sales of chattels. The considerations are not the same. The two great underlying purposes of the copyright law, is to protect the author, and to encourage the free circulation of literature upon which no copyright mark is attached. The latter is quite as important as the former. Thus the statute provides a penalty for a false copyright notice upon an uncopyrighted article. It provides also a penalty for piracy. But it provides no penalty for failure to affix a copyright notice upon a licensed article.

I think the considerations that ought to govern this case are more nearly akin to those equitable considerations governing the delivery of blank bills of exchange, or promissory notes. Thus if A. executes and delivers to B. his bill of exchange or promissory note, leaving the amount blank, but stipulating that it shall not exceed, say one hundred dollars; and B., contrary to such stipulation, fills up the amount with a larger sum, and transfers it to C., who pays for it in good faith the larger sum, C. may recover of A. the full amount thus paid, notwithstanding B. may have exceeded his authority. In short, as between A. and B., and persons having knowledge of limitations upon the authority, the note would be good only for the sum named—one hundred dollars—but as between A. and a third person acting in good faith, the note or bill of exchange is good for the sum paid by such third person. Such a blank note or bill of exchange, is, notwithstanding the limitation or condition upon the authority, to be treated as a letter of credit for an indefinite sum. *Daniel on Negotiable Instruments*, section 142. It may be said that in cases of blank bills or notes the injured third person has parted with something of value. That is true. But will not the right of each individual to make use of current information, unhindered by royalty suits, where no sign denoting copyright is exposed, receive an equally favorable reception? Is the parting with money the only contingency that will invoke this equitable discrimination as to authority as between the parties to the transaction, and authority as to third persons who have innocently acted on the faith that authority was given? I cannot give to the proposition decided the concurrence of a judgment satisfied with itself.

The decree is affirmed.

## KERR v. SOUTHWICK.

(Circuit Court of Appeals, Second Circuit. January 15, 1903.)

No. 22.

## 1. CANCELLATION OF INSTRUMENTS — GROUNDS — INCHOATE AND INCOMPLETE AGREEMENT.

Pending a suit by complainant against defendant for infringement of a patent, the parties substantially agreed orally upon a settlement by which complainant was to take a decree establishing the validity of his patent, and for an injunction, and defendant was to pay the costs, and thereafter take a license under the patent, and pay royalties. Defendant dictated a memorandum of the agreement, which was signed by both, and which contained substantially all the things then agreed on, except a provision for the termination of the license in case of a failure to pay royalties. *Held*, that complainant was not entitled to have the instrument canceled in equity after he had taken his decree and defendant had paid the costs, on the ground merely that it was inchoate and incomplete.

## 2. DECREE—CONFORMITY TO PLEADINGS—GRANTING RELIEF INCONSISTENT WITH BILL.

A suit to cancel an instrument by which complainant agreed to grant defendant a license under a patent on the ground of fraud, after a finding therein that the instrument is valid, cannot be retained for the purpose of construing the instrument and enjoining defendant from representing that it operated in itself as a license, since, if a suit for the latter purpose could be maintained at all, it is entirely inconsistent with the cause of action stated in the bill.

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

For opinion below, see 109 Fed. 482.

John S. Seymour, for appellant.

Henry D. Williams, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. This action was commenced in November, 1899, to set aside, for fraud and undue influence, an agreement between the parties, signed March 27, 1897, which is as follows:

"Memorandum of Agreement between Kerr & Company and G. W. Southwick.

"In consideration of the payment by G. W. Southwick of five per cent. to the said Kerr on the gross cash receipts of wire belt lacing sold by the said Southwick, the said Kerr will grant to the said Southwick license to sell and use wire belt lacing in any part of the United States under Patent No. 456,993, now owned by the said Kerr.

"And it is understood and agreed that the sale of said wire belt lacing sold by the said Southwick, his agents or representatives, is to carry licenses to use it as prescribed in said patent to the purchaser of said wire belt lacing.

"And it is further agreed by the said Kerr that he will at all times use his best efforts to prevent any one from using the belt fastener described, illustrated and claimed in his patent No. 456,993 with any lacing wire other than that made by said Kerr or sold by said Southwick.

"It is also agreed between the parties that if it is mutually agreed to bring suit against any one to maintain the validity of said patent, the said Southwick will pay such portion of the expenses as may be agreed upon between the parties at the time. If through any verdict or decision of the Court the patent in suit is made invalid this agreement is annulled. Any notices issued by the said Kerr, his agents or representatives in relation to the decision of the Courts or decree of injunction against the said G. W. Southwick and

Company will contain mention that the said Southwick is licensed to sell wire belt lacing and make fasteners as prescribed by the patent in suit. It is agreed between the parties that they will maintain a standard price on wire belt lacing and that the limit of discount will be fifty per cent. off list price of \$2.00 per hundred feet.

"And the said Southwick agrees to purchase the wire belt lacing from the said Kerr; the price on the same is not to exceed twenty-four cents per pound in fifty foot coils, the end of each securely tied, and the said Kerr agrees to keep the quality of said wire fully up to the standard and to fill all orders from the said Southwick for wire belt lacing promptly. Any failure on the part of said Kerr to furnish the said Southwick with wire belt lacing, or if at any time the quality is not up to the standard, the said Southwick has a right to purchase wire for the purpose elsewhere.

"Approved and agreed by the parties this 3—27—1897.

"Hugh Kerr.

"George W. Southwick."

This agreement was made in the following circumstances :

The complainant was the owner of letters patent No. 456,993 for improvements in belt fasteners, the belts being fastened at their joints with the lacing wire by means of a new and improved stitch. The complainant was engaged in manufacturing and selling the patented lacing under the name of "Kerr & Co." The defendant was engaged in similar business, but the complainant insisted that the lacing so made and sold infringed his patent and, in 1896, commenced an infringement action against defendant and one Taftt, which proceeded with ordinary diligence until the spring of 1897, when the parties met and, at the suggestion of the defendant, entered into negotiations for a settlement. These negotiations were carried on by the defendant on the one side and by the complainant and his counsel on the other, the principal meetings taking place in the law office of the latter. The complainant also consulted and received advice from other friends in whose judgment he placed confidence. After the matter had been discussed in all its aspects, the main features of the settlement were agreed on as follows:

The complainant was to have a decree sustaining his patent and an injunction against the defendant, who was to pay \$250 or \$300 costs. The defendant was to receive a license and pay a royalty on gross receipts and any notices published or sent to the trade announcing the decree and injunction were to contain a statement of the defendant's license.

The counsel for complainant, doubting the propriety of asking the court for a decree against a party who was already licensed, declined to draw up a license until after the decree had been actually entered. The defendant naturally desired, before signing a consent that an injunction should issue against him as an infringer, some written assurance that a license would be granted him and accordingly he dictated to a stenographer in the office of complainant's counsel the agreement above quoted and had it copied in duplicate. The parties left the conference and went down in the elevator together and, on reaching the ground floor, the complainant, after reading it, attached his signature to the agreement. "It is the principal object of this suit," says the complainant's brief, "to have this document surrendered up and canceled."

The bill is framed on this theory and the proof is directed towards the establishment of the proposition that the complainant was a weak, feeble, irresponsible old man wholly incapable of transacting business, and absolutely under the domination of the defendant, who is pictured as a shrewd, sharp, plausible and unscrupulous schemer, who prepared the agreement surreptitiously and procured its execution by fraud and undue influence. We do not think that this view is sustained by the proofs.

The evidence is wholly insufficient to sustain a charge of fraud and undue influence. The agreement, so far as it went, was substantially correct. It was not a final settlement; no one has pretended that it was. It was a memorandum which settled the negotiations as far as they had proceeded and they had proceeded almost to a conclusion.

At the argument it was, in substance, conceded that if the agreement had contained a provision for the termination of the license upon failure to pay royalties, it would have been substantially in accord with the previous understanding. That such a license would have been accepted by the defendant but for the unfortunate disagreement between the parties, which took place subsequently, there is no reason to doubt. If either party occupied a position of advantage toward the other it was the complainant and not the defendant. The defendant was alone, the complainant, an intelligent and careful business man, had the advice from the beginning of his lawyer and his friends. The negotiations were carried on in the office of the complainant's solicitor, an accomplished patent lawyer, who certainly would not permit his client to be imposed upon. That he was not imposed upon is evidenced by the oral agreement and by the very memorandum in controversy. So far from being unilateral as against the complainant it would not be difficult to establish the proposition that the advantages preponderated in his favor. He got rid of a vexatious and expensive patent suit, the result of which was uncertain. He obtained a recognition of the validity of his patent from one of his chief competitors in trade. The defendant paid him \$300 in cash and agreed to pay him royalties upon all sales in the future.

An agreement, which contains nothing unfair, which is a truthful statement of the understanding between the parties so far as it attempts to state the understanding, cannot be treated as invalid for fraud because it is inchoate and incomplete. We prefer to think that the defendant is not the accomplished rogue he is represented to be and that his conduct on the 27th of March can be accounted for without attributing a sinister motive to his every word and action.

Unquestionably the defendant is a shrewd business man accustomed to prompt action and anxious to economize time. Is it not probable that, tired out by the interminable and indeterminate character of the negotiations and discouraged by the prospect of further delay, he concluded to take the matter in his own hands and procure something from the complainant which would protect him from a decree and an injunction which treated him as an infringer? Some of the subsequent acts of the defendant were unfair and indefensible, but this was after he had been treated as an infringer and when both

parties were in a position of armed neutrality. Each was engaged in an effort to forestall the other with the trade and though some of the letters and circulars of the defendant were untrue those of the complainant did not state the whole truth. They were misleading and furnished some provocation, though, of course, no justification for the defendant's statements. The attempt to prove the defendant guilty of forgery has been wholly unsuccessful.

The complainant ratified the memorandum agreement, by acting pursuant to its terms, and also by retaining the \$300 and the decree and injunction. He was also guilty of laches in delaying the commencement of the action for over two years after he had knowledge of the facts upon which his cause of action rests.

We have thus considered the questions of fraud and undue influence as bearing upon the validity of the March agreement in so far as they may legitimately affect the decision of the court upon the issues presented by the defendant's appeal.

We do not deem it necessary to discuss at greater length all of the questions presented by the briefs, for the reason that the validity of the March agreement is only indirectly involved on this appeal. The trial judge did not find it to be fraudulent and did not set it aside. He says:

"The memorandum (March 27, 1897.) does not widely differ from the proposed terms of settlement then under discussion; it was at least approved by complainant when signed. \* \* \* The memorandum ought not to be canceled for it is the defendant's evidence of an agreement for a license which he was at the time certainly, and perhaps hereafter may be entitled to have executed. But plaintiff is entitled to an injunction against defendant's representing that he has a license."

The decree subsequently entered provides for an injunction as stated. The agreement was not decided to be fraudulent; on the contrary it was held valid as an agreement for a license; it was not set aside and the complainant has not appealed.

The agreement was not decided to be fraudulent; on the contrary it was held valid as an agreement for a license; it was not set aside and the complainant has not appealed.

We have, therefore, a bill praying for a decree declaring fraudulent and void a written agreement and for an injunction based upon and naturally following a finding that the agreement is fraudulent and void. We have also a decree holding the agreement valid, but awarding an injunction precisely as if the agreement were declared void. The sole question in this court is, can such a decree be maintained? We are of the opinion that it cannot be.

The suit entered the Circuit Court as an action to cancel a written instrument on the ground of fraud; it emerged therefrom as an action to restrain unfair competition in trade. Such a transformation in the character of the action cannot be permitted. Having found the agreement valid the only course open to the Circuit Court was to dismiss the bill; it could not retain the action for the purpose of construing the instrument, declaring the defendant's interpretation thereof erroneous and enjoining him from making that interpretation public.

Test it in another way: Suppose that the bill, after reciting that the parties had made an agreement for a formal license and that the defendant was untruthfully representing that he was actually licensed,

had prayed for an injunction restraining him from making such representations; could such a bill be maintained? It is thought not. Equity does not undertake to regulate the conduct of men along such narrow and essentially ethical lines. It does not undertake to prevent the expression of opinions. It may, in rare instances, restrain a false statement of fact, but not the mere expression of an opinion if it have any basis at all on which to rest. Able lawyers differ as to the proper construction of the agreement in question and a layman may be pardoned for thinking he has a license when he is confirmed in that opinion by counsel learned in the law. In any event, the distinction between what the defendant may lawfully say and what he may not say is too shadowy and attenuated to warrant the interference of a court of equity. Although he may not say that he has a formal license signed by the complainant he may say, with perfect propriety, that he has a written agreement for a formal license signed by the complainant. The court cannot undertake to regulate the affairs of trade in such minute details.

If a bill containing the assumed averments cannot be maintained it is manifest, a fortiori, that a bill to cancel a license agreement on the ground of fraud cannot be maintained for such a purpose. The suit is distinctly an action of fraud. The complainant based his right to recovery upon the theory that the agreement of March 27, 1897, was void. He cannot now obtain the same relief upon the theory that it is valid. The two theories are inconsistent.

An examination of the testimony has convinced us that this deplorable controversy might have been avoided if the parties had treated each other with greater consideration and forbearance and, in this respect, both parties are to blame. The complainant, as early as the spring of 1897, regarded the defendant with suspicion and distrust and acted accordingly. It was, therefore, difficult to arrange the very slight differences which existed between them. On the other hand the defendant might have brought about a reconciliation had he desired to do so. This hostile condition continued until the injury to both was irremediable, but we cannot think that the defendant is solely responsible for this result.

It follows that the decree must be reversed with costs and the cause remanded to the Circuit Court with instructions to dismiss the bill without costs.

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#### THE EUROPEAN.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1903.)

No. 1,173.

#### 1. SHIPPING—WHO ARE PASSENGERS—SEAMEN RETURNED UNDER CONTRACT.

Citizens of the United States, who shipped as horsemen on an English ship to care for horses and mules during a voyage from New Orleans to South Africa under a contract that they should be returned free to an American port, subjected themselves to the English law, and during the time of their service were to be considered and treated as British subjects; but their term of service ended at the end of the voyage in South Africa, the passage home being a part of their compensation, and on the voyage



home they were passengers, and their rights as such were governed by the laws of the United States.

2. SAME—CARRIAGE OF PASSENGERS—LIABILITY FOR FURNISHING IMPROPER FOOD. Act Aug. 2, 1882, 22 Stat. 186 [U. S. Comp. St. 1901, p. 2931]. to regulate the carriage of passengers by sea from a foreign port to a port of the United States, provides in section 4 that if any such passengers shall at any time during the voyage be put on short allowance for food and water, except in cases of necessity, the master shall pay each passenger \$3 for each and every day of such short allowance. *Held*, that the furnishing to passengers, without necessity, of bad or improper food, which was unfit to eat, was equivalent to putting them on short allowance, and entitled them to recover as damages an amount equal to that fixed by the statute.

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

This cause was commenced by filing a libel as follows :

"The libel of Armand Marx, Jerry Stoddard, Adolph Gaitskill, Wellman Bond, Robert Bond, Roy Snodgrass, John Smith, G. Hyde, A. R. Emerick, George Nobles, Sidney Thibodou, M. Hagan, J. W. Wilson, James Scott, all citizens of the United States of America, against the British steamship *European*, in a cause of damages civil and maritime, alleges as follows:

"First. That on or about May 29, 1901, they embarked as passengers on board said *S. S. European*, at Durban, South Africa, to be transported as passengers on said *S. S. European* from Durban to New Orleans, their passage money having been paid to the master of the *European* by Capt. Bennett, of the *S. S. Rippingham Grange*, for libelants, in the sum of fifty-five dollars for each libelant.

"Second. That as passengers libelants were informed they would receive and expected to receive decent and proper sleeping quarters and proper food and treatment, but that in truth and in fact they were compelled to sleep in the hold, where horses and mules had formerly been kept—this *S. S. European* having just discharged a cargo of horses and mules; that their food consisted of hash made of rotten salt meat, soup made of rotten salt meat, oatmeal filled with rat excrement and dirt, putrid and rancid oleomargarine, sour bread, chicory without sugar, except at rare intervals, also tea; that food of this character was given libelants during the entire voyage from Durban to New Orleans, which lasted from May 29th to June 29th, or a period of one month, with the exception of two or three days before the vessel reached New Orleans.

"Third. That there was plenty of good wholesome food aboard said *S. S. European*, which could have been furnished libelants, but it was not; that good potatoes were furnished libelants for the first day or two out, and then ceased; that three times during the voyage were libelants furnished with fresh meat for dinner; that time and again was the captain's attention called to the condition of the food furnished libelants, but he told them they would have to eat that or none; that libelant Marx, acting for all, exhibited some of the rotten meat to the captain that libelants had to eat, but the captain said they had to eat it; that previous to that libelant Marx had waited on the captain, and complained to the captain about the food, and the captain informed him it would be remedied, but it never was.

"Fourth. That libelants suffered mentally and physically by being compelled to eat this character of food; that they have been weakened and debilitated; and that damages in the sum of \$500 should be awarded each and every one of libelants by virtue of the foregoing allegations.

"Fifth. That all and singular the premises are true and correct, and within the admiralty jurisdiction of the United States and of this honorable court.

"Wherefore libelants pray that process in due form of law according to the course of this honorable court in cases of admiralty and maritime jurisdiction may issue against the said *S. S. European*, her tackle, apparel, and

furniture, and that all persons claiming any right, title, or interest in the said S. S. European may be cited to appear and to answer upon oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree in favor of libelants' demands in the sum of five hundred dollars for each libelant, and that the said S. S. European may be condemned and sold to satisfy same, together with costs; and libelants pray for general and equitable relief."

The answer of claimants alleges as follows:

"First. That the first article of said libel is not true, but the truth is as follows: That the steamship European is not a passenger ship, but a freighter, and on or about May 29, 1901, she was lying in the port of Durban, South Africa, where she had just discharged a cargo of horses and mules, which she had brought from New Orleans, and that the ship was fitted up entirely for the transportation of this live stock; that there was lying in the said port the steamship Ripplingham Grange, with the libelants and a large number of other so-called muleteers or horsemen aboard, she being under contract to return them to some port in the United States or Canada; that the master of said vessel applied to the master of the European, and requested that he consent that the libelants and other muleteers on the Ripplingham Grange should be transported back to New Orleans, on which voyage the European was about to proceed; that the master of the European made known to the master of the Ripplingham Grange the exact condition of his steamer, and that the same was well known to the libelants when they came on board of his said vessel.

"Second. That the allegations in the second article contained are not true, but the truth is as follows: That libelants well knew when they came on board of the European exactly what were the conditions of the vessel, what were the quarters in which they would have to sleep, and that they chose in the vessel their own sleeping quarters, and that the quarters occupied by them were as good as it was possible to afford them under the circumstances of the case; that the food furnished to them was the best that was on board of the vessel; that the entire stores of the ship had been taken aboard at Liverpool, on the preceding voyage from Liverpool to New Orleans, and before being allowed to clear the entire stores were deposited on the dock, and were inspected by the inspectors of the board of trade, which, under the English law is the authority charged with such inspections; that they were found good, sound, and sufficient in every respect, and the ship was provisioned under this inspection.

"Third. That the allegations of the third article are true in part and false in part. That true it is that there was plenty of good, wholesome food aboard the steamship European, but it is untrue that same was not furnished to libelants; that the best food in the ship was furnished to them; that it was all edible; that fresh meat was furnished as long as the live stock lasted, and that at Barbadoes additional live stock was taken on board; and respondent specially avers that everything possible was done to furnish good food to the libelants, and that in no respect was the ship at fault.

"Fourth. That the allegations of the fourth article are untrue, and that libelants neither suffered mentally nor physically from the food given them, and they were not weakened thereby, and that no damages whatsoever accrued to them.

"Fifth. That the fifth article of the libel is untrue.

"Sixth. Respondent avers that the said libelants were idle, ill-conditioned, and refused to do work that was offered to them; were captious, and disposed to find fault, grumble, and make trouble; that there was really no cause for complaint outside of the hardships necessarily incident to long subtropical voyages such as that from Durban to New Orleans; that they were furnished with quarters as good as could have been furnished under the circumstances, and quarters of which they knew when they came aboard of the vessel; that the food bought was sound and plentiful, and that the fare furnished them was as good as could have been furnished by a freight vessel on a voyage of that character, all of the circumstances being consid-

ered; and that the complaints of libelants are not such as should appeal to this honorable court.

"Seventh. That all and singular the matters set up in this answer are true."

Much testimony was taken tending to show that the food furnished the libelants on board the steamship *European* in the voyage from Durban, South Africa, to the port of New Orleans, was bad and improper at times, and for some days, during the voyage. The master of the steamship *European* testified—and his testimony is uncontradicted—of the circumstances and arrangements under which the libelants were taken on board the steamship *European* for the voyage from Durban, South Africa, to the port of New Orleans, as follows:

"Q. Now, will you state the circumstances, captain, under which these Ripplingham Grange men came on board your ship? A. The captain of the Ripplingham Grange met me going on shore in the dock at Durban, and asked me if— He told me he was ordered to Sidney with his ship, and his muleteers had to be sent home, and would I take them back to New Orleans; and I said, 'No,' I would have nothing to do with them. I had enough trouble with my own, and I had heard about the trouble that other ships had. So that evening his agent came to me himself, also the American consul, and put it to me as a personal matter that I should relieve him of the responsibility of these men, getting them back to New Orleans, saying that if I would take them back they would pay anything we liked to offer to get them back to New Orleans. Q. Who said that? A. The American consul said that, with the captain of the steamer Ripplingham Grange, as it was a great hardship on these men being left, and probably being returned on a tramp steamer going to Saint Lucia. As the captain was a personal friend of mine, I was prevailed upon, very much against my will, to consent to take them back; but I made an express stipulation with him that he should inform these muleteers that we were taking them back as muleteers pure and simple, and that they must bring their beds and fittings with them; that I had nothing on board, and could not obtain them there. He also offered to put some provisions on board, and for me to buy them there; but on my going up from the house with the steward later to see what we had on board, we found we had ample for the voyage back to New Orleans, so I purchased in Durban only things such as fruit and small canned goods, and I had to wait about six hours to get these men on board. They were not allowed to land in Durban. They couldn't go on shore. The immigration officer would not allow them to land. And so we had to take them direct from the Ripplingham Grange to our steamer. Now, when I was on board of the tug, Captain Bennett made a request of me that I would give these men employment with my own muleteers on the return passage, which we did to a great extent, as much as we wanted them. Q. Then the American consul and Captain Bennett of the Ripplingham Grange had the understanding with you that they were to notify these men that they would return as muleteers? A. Yes, sir; pure and simple."

It is also established by testimony that passage money to the amount of £11—say \$55—was paid to the *European* for the passage of each libelant. The shipping papers with the steamship Ripplingham Grange show that the libelants shipped on board the Ripplingham Grange for a voyage as muleteers or horsemen from the port of New Orleans to some port in South Africa, with a stipulation that they should have return passage to New Orleans, the port of shipment. On submission the District Court found that the libelants were entitled to recover, giving the following reasons for judgment:

"It is perfectly well settled that the libelants, who are citizens of the United States, subjected themselves to the English law by enlisting on a British vessel. They were to be considered as British subjects for the time of the enlistment. See *In re Ross*, 140 U. S. 470-472, 11 Sup. Ct. 897, 35 L. Ed. 581; *The Marie* (D. C.) 49 Fed. 286; *The Welhaven* (D. C.) 55 Fed. 80. On their way back from South Africa, the libelants were passengers, \$55 having been paid to the ship as passage money for each of the libelants. In determining what food, accommodation, and treatment the libelants were entitled to as passengers on their homeward trip, their entire contract should be considered. They were to go from New Orleans to South Africa as hostlers or muleteers, and then they were to be returned to New Orleans. The court is clear that under this contract the libelants had no right to expect better food, accommodation, and treatment on the return voyage than they were entitled to on the outward voyage. But they were entitled, of course, to proper, wholesome, and sufficient food. The court, after carefully considering the voluminous and conflicting evidence in the case, is satisfied that the libelants are entitled to a recovery because of bad and improper food. If the cause of action had arisen on the outward trip, it is clear that the matter would have been governed by the English law, which, in the absence of proof of special damages, allows seamen but one shilling per day for bad food. While this provision of the English law was not operative on the return voyage, when the libelants were passengers, yet that provision, in a case like this, where no special damages have been shown, might well be considered in fixing the amount of the damages. It seems to the court, under all the circumstances of this case, that an allowance to each libelant of \$15 is full compensation."

And thereupon rendered a decree for the libelants, 14 in number, awarding each the sum of \$15; a total of \$210.

From this decree the libelants have appealed, claiming that under the proof they were entitled to the damages originally claimed in the libel.

J. A. Woodville, for appellants.

H. C. Cage and Saml. L. Gilmore, for appellee.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). After a careful examination and full consideration of the evidence, we agree with the learned district judge in holding that the libelants, citizens of the United States, by shipping as horsemen on an English vessel, subjected themselves to the English law, and that for and during the time of the shipment they were to be considered and treated as British subjects. But we are unable to apply this further than for the shipment which was a voyage from the port of New Orleans to South Africa. As we view the case, the voyage ended in South Africa, and the passage home which was contracted for was a part of the compensation. The voyage ended, the libelants were free; and, while they were brought home under contract, they were brought not as enlisted men, shipped seamen, but as passengers. This is a fair construction of the shipping articles, and a proper view to be taken under the circumstances.

We are also of opinion that the libelants on their return home were not only passengers, but were passengers within the meaning of and entitled to the protection of the act of Congress to regulate the carriage of passengers by sea, approved August 2, 1882, 22 Stat. 186 [U. S. Comp. St. 1901, p. 2931], which was enacted for the pur-

pose of protecting emigrant passengers and all passengers other than cabin passengers taken on board at any port or place of a foreign country to be brought to any port or place in the United States.

We agree with the District Court in the finding that under the circumstances and the special arrangements shown to have been made under which the libelants were taken on board the *European* they were not entitled to complain of the quarters and accommodations furnished, because the evidence clearly shows that the same quarters and accommodations, to all intents and purposes, were furnished the libelants that were furnished the horsemen regularly on board the steamer *European*; in fact, the evidence shows that the quarters were the best that could have been furnished under the circumstances, and were all that the master agreed to furnish prior to their going on board; and we find that from the actual quarters furnished the libelants on board the *European* suffered very little, if any, hardship or damage.

The finding of the District Court that bad and improper food was furnished is sustained by the weight of the evidence, so that practically the only question arising on this appeal is whether the libelants recovered sufficient in the lower court to pay the damage or damages resulting from bad and improper food furnished on the voyage. The judge *quo*, in fixing these damages, considered that, if the cause of action had arisen on the outward trip, the matter would have been covered by the English law, which, in the absence of special damages, allows seamen one shilling per day for bad food; and he says that, while this provision of the English law was not operative on the return voyage, when the libelants were passengers, yet that such provision in a case like this, where no special damages have been shown, might well be considered in fixing the amount of damages. In other words, in fixing the amount of damages, the learned judge considered the English law in cases somewhat like, but seems to have overlooked, the American law, which we think more particularly bears upon the subject. Section 4 of the passenger act of 1882, 22 Stat. 188 [U. S. Comp. St. 1901, p. 2935], provides with regard to passengers—the category in which we are bound to place the libelants—as follows:

“Sec. 4.—An allowance of good, wholesome and proper food, with a reasonable quantity of fresh provisions, which food shall be equal in value to one and a half navy rations of the United States, and of fresh water, not less than four quarts per day, shall be furnished each of said passengers. Three meals shall be served daily, at regular and stated hours, of which hours sufficient notice shall be given. If any such passengers shall at any time during the voyage be put on short allowance for food and water, the master of the vessel shall pay to each passenger three dollars for each and every day the passenger may have been put on short allowance, except in case of accidents, where the captain is obliged to put the passengers on short allowance.”

We have always recognized in this court that in appeals in admiralty we would not disturb the amount of damages allowed by the District Court where it is a matter of discretion, and to increase or diminish would, in effect, be a mere substitution of our judgment; but that where the District Court has proceeded upon a wrong rule, or, in allowing damages, has overlooked some important element.

proper to be considered, we are at liberty to review and determine the amount of damages which, under our views of the case, ought to be allowed. The judge a quo, in fixing the amount of damages to be allowed, considered the English law, and thereon seems largely to have based his judgment. He makes no reference to the law of the United States, quoted above, which we think should be considered, if not control, in assessing damages for bad and improper food furnished to passengers who come within the purview of said law. The evidence shows that there was sufficient and proper food on board the ship, and no sufficient reason is given why bad and improper food was served, nor any reason given why the libelants should have been put upon a short allowance. There is evidence strongly tending to show that some of the bad and improper food furnished was disgustingly bad, too bad for any but starving persons to eat; and there is also evidence tending to show that the libelants suffered from starvation, nausea, diarrhoea, weakness, and loss of flesh. In fact, the proof with regard to the quality of food served is such that, if the court is to allow any damage at all therefor, it would seem that it ought to allow up to the statutory provision of our law in cases where passengers are unnecessarily put upon short allowance. While furnishing bad and improper food to a passenger is not technically the same as putting the passenger on a short allowance of food, we think it is substantially equivalent.

As noticed above, the provision for putting a passenger on a short allowance of food under the passenger act of 1882 is \$3 per day. We gather from the evidence that the libelants were not furnished bad and improper food on the whole voyage, nor on every day of the whole voyage; that there were days on which it is admitted by all of the libelants that proper and sufficient food of the kind was furnished. While this is the case, as shown from the evidence, we think it is properly inferable from all of it that at least on 15 days of the voyage bad and improper food was furnished. Our conclusion, therefore, is that in assessing the damages in this case the libelants should be allowed \$3 per day for 15 days, which makes the sum of \$45 to each libellant.

For these reasons the decree of the District Court is amended by increasing the sum to be recovered by the libelants from \$15 each to \$45 each, from a total of \$210 to a total of \$630, and, as thus amended, the decree appealed from be affirmed; and it is so ordered. The costs of appeal to be paid by the appellee.

## TURNBULL v. NEW ORLEANS &amp; C. R. CO.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1903.)

No. 1,186.

## 1. DEATH BY WRONGFUL ACT — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE.

In an action for death by wrongful act, an instruction that the defense of contributory negligence will not avail if defendant, by the exercise of reasonable care, could have avoided the accident, correctly states the law, and is not objectionable as being too broad or misleading.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana, at New Orleans.

E. Howard McCaleb, for plaintiff in error.

Henry P. Dart and Benj. W. Kernan, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The plaintiff in error has assigned many alleged errors in the action of the Circuit Court on the trial of this case. We will notice only one of them. It is stated in these words:

"The court erred in refusing to charge the jury, as requested by plaintiff, as follows: 'In an action like this for damages against a railroad company by the surviving parent for the injury, suffering, and loss of his son, run over and killed by a car of the defendant company, the defense of contributory negligence will not avail if, by reasonable care on the part of those in charge of the electric car, the accident could have been avoided.' And the reasons assigned by the court for refusing said charge are contrary to the jurisprudence of the federal courts."

The reasons just referred to are shown in the record to be as follows:

"The trial judge states that his reason for refusing said charge was that the same was too broad and misleading. The trial judge stated the true rule to the jury in the general charge, as follows: 'Therefore I say to you that in this case, if you find that the railroad company was at fault—that the fault of the railroad company caused the injury—that, however much the child was negligent, yet, if you find that the motoneer discovered the danger of the child in time to save the child, and did not do so, why the child could recover, notwithstanding the child's own contributory negligence. And I charge you further that if you find in this case that the conduct of the motoneer or the railroad company evinced such a reckless disregard of the life and safety of the child as to amount to a willful injury, then the child could recover, regardless of its own contributory negligence.' The instruction asked for is evidently based upon the case of *Davies v. Mann*, 10 Mees. & W. 546, which, as misunderstood by some, has been the cause of much trouble and confusion in cases for personal injuries. *Beach on Contributory Negligence*, 27, 28, 10, 11, 55, and 201. It is plain that the instruction asked for is a nullification of the doctrine of contributory negligence. The Supreme Court of Louisiana has so said. *Cowden v. Railway Co.*, 106 La. 238, 30 South. 747. The doctrine of *Davies v. Mann*, as incorrectly stated by some courts, has never been the law of the federal courts. On this point a number of cases could be cited. Mr. Thompson, in his recent excellent work on *Negligence*, shows that an instruction such as the one in hand leaves the jury without a guiding rule. All the authorities agree that a plaintiff cannot recover for

¶ 1. See *Negligence*, vol. 37, Cent. Dig. § 115.

personal injuries, if, by due care, he could have avoided the injury. Therefore an instruction to that effect should clearly be given to the jury. If thereupon the jury are told that the plaintiff can recover, notwithstanding his contributory negligence, if the defendant, by due care, could have avoided injuring him, it is clear that the instructions are conflicting, and the jury are left in hopeless confusion. Of course, when no question of contributory negligence on the part of the plaintiff is involved, it is proper and right to charge that the defendant is liable, even if he did not discover the danger, provided he could have avoided the injury by exercising due care. In such a case there is negligence only on one side. But whenever the plaintiff contributes to his own injury by his negligence he cannot escape the effect of his negligence by showing that the defendant could, by the exercise of due care, avoid doing the injury. It is simply a case of two persons at fault. If the doctrine of contributory negligence is to be maintained, it is clear that the instruction asked for was properly refused."

The son of the plaintiff, for whose injury, suffering, and loss damages are claimed, was an infant eight years of age. The language of the requested charge assumes that it was applicable to the evidence on the point to which the request was directed, and the language of the charge given by the judge, set out in his reasons for refusing the request, must be taken as conceding that the evidence in the case called for a proper charge on the point. It appears from this action of the circuit court, and from its action on numerous other requests for charges submitted by the plaintiff and refused, or given only in part, or given as modified, that the mind of the very learned and careful trial judge had become settled in the conviction that the only cases in which a person who has been injured partly through his own negligence and the negligence of another can recover are those where, although the party injured was negligent, the party who did the injury saw the danger in time to have avoided it, and could have avoided it, and did not do it. In the recent excellent work on Negligence of Mr. Thompson, to which the trial judge refers, that distinguished text-writer says, in substance, that the old rule on the subject of contributory negligence was that no recovery could be had where, by exercising ordinary care, the party injured could have avoided the consequences of defendant's negligence. He says that this was a harsh rule, but that it had the merit of certainty. It could seldom be misapplied by the court, or misunderstood by the jury; but it soon received at the hands of the courts a qualification so called, viz., that, although the plaintiff was guilty of the want of ordinary care contributing to the injury, yet this will not prevent him from recovering damages of the defendant, if the defendant might, nevertheless, have avoided the injury by the exercise of ordinary care on his part. Commenting on the old rule and this qualification, so called (as he describes it), he says these doctrines remain little more than metaphysical abstractions, tending to confuse the courts and juries, and to defeat the ends of justice, unless there can be extracted from them a definite practical rule or rules. He says that he is convinced, after further study of the adjudications of both the English and American courts, that the whole subject of contributory negligence remains in a state of great confusion and uncertainty; that the doctrinal formulas already laid down (in the preceding sections of his work) are reiterated in many judicial opinions without their import being under-



stood by the judges who make use of them, and that even those judges who, by study, seem to have acquired definite theoretical views of the import of these expressions, are unable to agree upon any definite rules with respect to their application; that nothing will better convince one of this than the diversity of opinion among the English judges and law lords in the case of *Radley v. London & Northwestern Railway Company*, 1 App. Cas. 754, wherein these judges and lords all appear to have agreed that the doctrine of *Davies v. Mann* was the settled law of England, but their opinions were diverse as to the application of the rule.

In further discussing the qualification of the old rule, Mr. Thompson says that when the defendant is driving an instrument of danger, such as a railway train, or is doing something of such a nature that, unless extreme caution is used, it is likely to lead to mischief, the law so far conforms to the dictates of humanity and enforces the plain obligation or moral duty as to require the defendant to keep a constant lookout, and to exercise an unremitting diligence, which is no more than requiring him to exercise a degree of care in proportion to the danger to others, to the end that they may not be injured; and this duty especially arises in favor of children, the aged and infirm, and in general in favor of those who, by reason of physical or mental decrepitude, are incapable of caring for themselves. The subtitle of the section in which the language just referred to is used is in these words: "Or When He Ought to Have Discovered Plaintiff's Negligence." Section 239.

In the case of *Inland & Seaboard Coasting Company v. Tolson*, 139 U. S. 558, 11 Sup. Ct. 655, 35 L. Ed. 270, the Circuit Court had instructed the jury as follows:

"There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."

Of this instruction Mr. Justice Gray, as the organ of the court, said:

"The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial."

He cites numerous cases, naming first *Radley v. London & Northwestern Railway*, 1 App. Cas. 754.

In *Grand Trunk Railway Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, Mr. Justice Lamar refers to the generally accepted definitions of contributory negligence as laid down by the courts and by text-writers, and, without going into a discussion of them, or even attempting to collate them, states:

"That the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained

if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546): that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

The requested charge which we are discussing is almost identical in its language with the first headnote to the opinion in the case of *Thomas McGuire et al. v. The V. S. & P. R. R. Co.*, 46 La. Ann. 1543, 16 South. 457. In that case the qualification of the old rule is most strenuously applied. It is likewise given controlling application in the subsequent case of *Lampkin v. McCormick*, 105 La. 418, 29 South. 952, 83 Am. St. Rep. 245. It is most elaborately discussed and approved and supported in a still more recent case decided by the Supreme Court of Louisiana. *McLanahan Tudor v. The V. S. & Pacific R. R. Co.*, 34 South. —.

After a careful examination of a number of recent decisions of the courts of highest authority and of the most approved text-writers, we conclude that the requested charge was not too broad, and was not misleading, and that the excerpt from the trial judge's general charge does not fully state the true rule, but omits to instruct the jury that, if the motoneer ought to have discovered the danger of the child in time to save it, he could recover, notwithstanding his own contributory negligence. It is always true, and cannot be too strongly impressed on the minds of trial judges, that instructions to juries should avoid abstractions, and get as close as may be to the particular issues and evidence in the case on trial. Those issues and that evidence are always more clearly in the view of the trial judge than they can be brought by any record to the attention of a court of errors, and therefore we refrain from propounding a charge which, in our view, would have stated the true rule to the jury on the trial of this case. For the reasons that we have suggested, rather than elaborated, we conclude that the assignment of error which we are discussing was well taken, and requires us to reverse the judgment of the Circuit Court.

It is therefore ordered that the judgment of the Circuit Court be and is hereby reversed, and this case is remanded to that court, with instructions to award the plaintiff therein a new trial.

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LIVINGSTONE v. HEINEMAN.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1903.)

No. 1,118.

1. **BANKRUPTCY—CLASSIFICATION OF CREDITORS—CLAIM OF SURETY FOR REIMBURSEMENT.**

There are two general classes of creditors of a bankrupt, within the meaning of Bankr. Act 1898, § 60a (Act July 1, 1898, c. 541; 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), first those who have priority and are to be paid in full, and second unsecured creditors who are entitled to equal dividends after the claims entitled to preference have been paid. The

claim of a surety for reimbursement for money paid in discharge of his obligations as surety belongs in the second class.

2. SAME—SURETIES—RIGHTS BY SUBROGATION.

A surety for a bankrupt who has discharged the debt, either before or after the bankruptcy by Bankr. Act 1898, § 571 (Act July 1, 1898, c. 541; 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), is subrogated "to the rights of the creditor," and is affected by any preference received by the creditor before payment, which inhere in the claim.

3. SAME—SURRENDER OF PREFERENCES.

A bank held two series of notes against the same principal maker—one signed by a single surety, and the other by the same and other sureties. The principal was adjudged a bankrupt, but had previously, while insolvent, and within four months, made payments to the bank on both series of notes. The notes of the first series were taken up by the surety, some before and some after the bankruptcy. *Held*, that he could not prove a claim therefor in bankruptcy without surrendering the preferences received by the bank on both series of notes.

4. SAME—APPEAL—DENIAL OF MOTION TO EXPUNGE CLAIM.

A trustee may appeal from an order denying his motion to expunge a claim allowed, unless further preferences were surrendered, and directing a return of a preference previously surrendered by the creditor.

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

Joseph New was adjudged a voluntary bankrupt on his petition filed August 8, 1901. Within four months of the filing of the petition he was indebted to the Mahoning National Bank of Youngstown, Ohio, on two series of promissory notes, in the aggregate sum of \$9,000. The following is a list of the notes of the first series: (1) Note for \$1,200, dated January 14, 1901, payable in four months; (2) note for \$1,000, dated February 1, 1901, payable on demand; (3) note for \$1,500, dated February 27, 1901, payable in four months; (4) note for \$1,200; (5) note for \$2,500, dated July 19, 1901, payable in four months; (6) note for \$800, dated July 5, 1901, payable in four months. In July the note for \$1,200 (being the fourth note above mentioned) was taken up by the bankrupt by the payment of \$600 and the making of a new note for \$600. The notes of the second series, six in number, for \$133.33 $\frac{1}{3}$  each, were all dated May 20, 1900, and payable in one, two, three, four, five, and six months, respectively. Heineman, the appellee, was surety on all the notes of the first series, including the \$600 note substituted in part for the \$1,200 note above mentioned, and Heineman and Isaac New and Joseph Newgass were joint sureties on the notes of the second series. In addition to the payment of the \$600 on the \$1,200 note, the bankrupt, within the four-months period, paid and took up two notes of the second series; the amount of the payment being \$266.66%. It is conceded that the payments were not guilty, but innocent, preferences. The bank elected to look to the sureties for the payment of the balance due on these notes, and failed to prove any claim against the estate of the bankrupt; nor did the sureties on the notes of the second series prove any claim thereon against the estate of the bankrupt, in the name of the Mahoning National Bank or otherwise, because the preference payment thereon of \$266.66 was so large that they could not afford to surrender it. Prior to the adjudication, Heineman paid the first two notes of the first series, the amount of the payment being \$2,200, and after the adjudication paid the other four; the total of the two payments being \$7,600, which, with the preferential payment of \$600 made by the bankrupt, paid the notes of the first series in full. Heineman surrendered the preferential payment of \$600, and proved claims, in his own name for the amount of each of said notes, separately, alleging in his affidavits that his claims on the first two were for money loaned the bankrupt; and on the other four, for money paid to the bank as surety thereon. His claim on the first note, for \$1,200,

¶ 4. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

was allowed August 20, 1901, and a dividend of 10 per cent. was paid thereon October 5, 1901. The other claims were allowed January 23, 1902. On February 5, 1902, the trustee moved the referee to rehear and expunge all these claims, which the referee refused to do. Afterwards Heineman asked leave to withdraw the surrender of the \$600, upon the ground that his claims should have been allowed without requiring the surrender thereof, which was refused by the referee. Afterwards, on the 12th day of February, 1902, the trustee, Livingstone, filed in the District Court a petition to review the action of the referee in allowing the claims of Heineman, upon the ground that the allowance was contrary to law. Afterwards Heineman filed in the District Court a petition to review the proceedings of the referee in requiring the surrender of the \$600 as a condition of the allowance of his claims, and in refusing leave to withdraw the \$600. These petitions for review came on for hearing before the judge, and it was contended by the trustee that the claims of Heineman should have been allowed only upon the surrender of the preferential payments upon both series of notes, to wit, the \$600 payment on the first series, and the \$266.66 payment on the second series; but the judge held that Heineman's claims were not affected by the preferential payments, because they were not proved or allowed in the name of the Mahoning National Bank for the purposes of subrogation, under section 571 (Act July 1, 1898, c. 541; 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) of the bankrupt act, but were proved and allowed in the name of Heineman, for moneys paid by him for the use of the bankrupt, at his request and upon his promise to repay the same—the request and promise arising by implication out of the contract of suretyship—and ordered that the \$600 be returned to Heineman, and that his claim for \$7,600 be allowed.

J. B. Wilson, for appellants.

Arrel, McVey & Robinson, for appellee.

Before SEVERENS, Circuit Judge, and THOMPSON and WANTY, District Judges.

THOMPSON, District Judge, after stating the case as above, delivered the opinion of the court.

The co-sureties of Heineman on the second series of notes do not make any claim against the estate of the bankrupt, and they have no relation to the controversy here which we are called upon to consider. The controversy is between Heineman and the trustee of the bankrupt. Some time within four months preceding the filing of the petition in bankruptcy the bank was the owner and legal holder of the two series of notes, which, in so far as the bank was concerned, and for the purposes of the administration of the bankrupt's estate, constituted but a single claim for \$9,000, no part of which could have been allowed, in favor of the bank, without the restoration to the bankrupt's estate of the two preferential payments. The disability of the bank in this respect inheres in the claim, and operates against the holder into whose hands it may come, whether by assignment or subrogation. Such holder succeeds "to the rights of the creditor," but "the rights of the creditor," under the bankrupt law, entitle him to participate in the distribution of the bankrupt's estate when, and only when, he surrenders and restores to the estate the preferential payments. The equal distribution of the bankrupt's estate among his creditors, contemplated by the bankrupt law, will not admit of one creditor receiving a greater percentage of his debt than any other creditor of the same class, and there are two general classes—first, those who have priority and are to be paid in full; and, second, gen-

eral or unsecured creditors, among whom the balance remaining after paying the creditors of the first class, is to be distributed equally, in proportion to the amount of their respective claims. The claim of a surety against the principal debtor for reimbursement of moneys paid in discharge of his obligation as surety belongs to the second class; and the surety, to obtain his distributive share of the bankrupt's estate, must proceed in the manner pointed out by the bankrupt law; that is, if the creditor fails to prove the claim, he must prove it in the name of the creditor, and he will then be permitted to participate in the distribution to the extent that he has discharged the obligation. A surety, when he assumes the relation, becomes contingently the creditor of the debtor, and the debtor of the creditor. If the debtor fails to pay the debt when it matures, the liability of the surety to the creditor becomes fixed, and he may be compelled to pay the debt; and when he pays it he succeeds to the rights of the creditor, and the liability of his principal to reimburse him becomes fixed. Here Heineman paid all the notes of the first series, but succeeded to the rights of the bank cum onere, and can only participate in the distribution of the bankrupt's estate when he restores to the estate the two preferential payments. He paid two of the notes before the filing of the petition in bankruptcy, thereby fixing the liability of the bankrupt to reimburse him, but this payment did not create a new and independent claim, free from the disability arising out of the preferential payments; nor will the fact that he was co-surety with others on the second series of notes require or permit that series to be treated by him as a separate claim, unaffected by the \$600 payment. He was surety on all the notes of both series, and the effect of the two preferential payments was to reduce his liability to the bank to the extent of \$866.66, by depleting the estate to the same extent. These payments reduced the claim of the bank to a balance of \$8,133.33; and if it be assumed that this amount was paid by Heineman, and there be added to it the \$600 surrendered by him to the referee, his total outlay will be \$8,733.33, but if he be paid a dividend of 10 per cent. on \$8,200, which will be the amount for which his claim on the first series of notes should be allowed, if the referee's view be sustained, his outlay will be reduced to \$7,913.33, being \$186.66 less than it would have been had he surrendered both payments and received a dividend on the full claim of \$9,000. In other words, if the surety be permitted to treat each series of notes as a separate claim, and withhold the smaller claim, and refuse to surrender the proportionally large preference payment thereon, the original claim of the bank in the hands of the surety will receive a greater percentage in the distribution of the bankrupt's estate than other claims of the same class.

The questions presented in this case have been ably and exhaustively considered by the Circuit Courts of Appeals of the Seventh and Eighth Circuits, from opposing standpoints, and they have reached opposing conclusions. The views and conclusions of the court for the Seventh Circuit will be found in *Doyle v. Milwaukee National Bank*, 116 Fed. 295, and of the other court in *Swarts v. Fourth National Bank*, 117 Fed. 1, and *Swarts v. Siegel*, Id. 13. In view of

these cases, it would be a work of supererogation to discuss these questions further here. We agree with the conclusions reached by our Brethren of the Eighth Circuit.

The right of the court to entertain the appeal is questioned by the appellee, but we have no doubt of the right and the duty of the court to do so.

The order is reversed, with costs, and with directions to allow Heineman's claim for \$9,000, provided he first restores to the estate the amount of both the preferential payments, and to disallow the claims proven by him if he refuses to restore the same.

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**BEALE v. CONNECTICUT FIRE INS. CO. OF HARTFORD, CONN.**

(Circuit Court of Appeals, Eighth Circuit. February 16, 1903.)

No. 1,588.

**1. INSURANCE COMPANIES—SUIT BY ASSIGNEE—INVALIDITY OF ASSIGNMENT UNDER MISSOURI STATUTE.**

Under the statutes of Missouri (Rev. St. 1899, § 8099 et seq.), which place mutual insurance companies organized under Act March 21, 1895, under the supervision of the State Superintendent of Insurance, who is expressly authorized to institute proceedings for their dissolution, and the decisions of the courts of the state that companies so placed cannot make a valid general assignment of their property in case of insolvency, an assignee of such a company has no title which will support a suit in a federal court to recover assets claimed to have been wrongfully diverted by its officers.

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

B. J. Woodson (J. B. Shackelford, W. B. Norris, W. P. Hall, R. E. Culver, and Ben Phillip, on the brief), for plaintiff in error.

Vinton Pike, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case passed off below on demurrer to a bill of complaint, which was sustained, and the bill was thereupon dismissed. The action was commenced by Samuel W. Beale, as assignee of the St. Joseph Town Mutual Fire Insurance Company, plaintiff in error, hereafter called the "St. Joseph Company," against the Connecticut Fire Insurance Company of Hartford, Conn., defendant in error, hereafter termed the "Hartford Company." The complaint charged, in substance, that the St. Joseph Company was incorporated under an act of the General Assembly of the state of Missouri approved March 21, 1895 (Laws Mo. 1895, p. 200), which provided for the organization of such companies upon the mutual assessment plan; that on January 26, 1899, the company levied an assessment upon all of the premium notes then held by it for the full amount remaining unpaid thereon, and realized the sum of \$23,000, and on the payment of the assessment canceled and surrendered to the makers thereof the premium notes upon which the assessment

had been made; that no part of the sum so realized was applied to the liquidation of losses which had at that time been sustained by the company under policies theretofore issued, the amount of which losses, as it was alleged, amounted at the time to \$21,500; that on the same day, to wit, January 26, 1899, in violation of their duty, the directors of said St. Joseph Company, in violation of its charter and by-laws, entered into an agreement with the Hartford Company to the effect that the latter company should assume the obligations of the St. Joseph Company upon its unexpired policies under which no losses had been sustained, the holders whereof should pay the assessment on that day levied; that in consideration of such obligation the Hartford Company should be paid out of the moneys realized from the assessment a sum equal to 60 per cent. of the premium then unearned upon all of said policies of insurance so assumed by it; and that in pursuance of such agreement the Hartford Company pretended to assume the obligations of the St. Joseph Company upon its said contracts of insurance, and its board of directors paid and turned over to said Hartford Company \$23,000 in cash of the assets of said St. Joseph Company, being the amount realized from the assessment of its said premium notes, which, when paid by the makers, the board of directors had caused to be canceled and returned.

It was further alleged that this transaction left the St. Joseph Company without any assets to pay its existing losses and liabilities, and unable to continue the business for which it was incorporated so that immediately after said sum of \$23,000 was so paid and received by the Hartford Company the St. Joseph Company was compelled to make a deed of general assignment of all of its effects to Samuel W. Beale, as assignee, which assignment was executed on or about June 3, 1899. It was further alleged that the premium notes upon which the assessment aforesaid was levied constituted a trust fund for the payment of the debts and liabilities of the St. Joseph Company; that it was the only fund held by it out of which its debts and liabilities could be paid, as they accrued, by assessments made thereon by the board of directors; that of the entire amount of premium notes so held by the St. Joseph Company at the time of the assessment aforesaid only \$23,000 thereof was collectible, the remainder being uncollectible; and that on January 23, 1899, the St. Joseph Company, by a resolution of its board of directors on that day passed, had determined to discontinue the business of insurance, and from that time forward did discontinue its business, and was only engaged in collecting assessments on its premium notes and in winding up its affairs.

In view of the premises, the plaintiff below prayed for a judgment against the Hartford Company in the sum of \$23,000.

It is undeniable that the bill of complaint shows by proper averments that the premium notes held by the St. Joseph Company constituted a trust fund, in that by the terms of these notes and by the by-laws of the company they were only payable or assessable as and when the board of directors of the company deemed it necessary to assess them to meet such losses as the company had sustained,

and such necessary expenses, in transacting its business, as might be incurred. The fund evidenced by these premium notes being one which could be resorted to by the board of directors only to meet losses and expenses when they accrued, the notes and the money realized therefrom by assessments constituted a trust fund; and, if this fund was diverted to other and improper uses, it may doubtless be recovered by any one who can show a title to it from any one else who may have appropriated it with knowledge of the diversion. It is insisted in behalf of the defendant in error that Beale, claiming merely under the assignment from the St. Joseph Company, and having no other right, shows no title to the fund, for the reason that the St. Joseph Company had no power, under the laws of the state of Missouri, to make a general assignment. If this position, which is the first that deserves attention, is well taken, all other questions in the case become immaterial.

The rule has been long established in the state of Missouri by local decisions, which are binding upon this court, that insurance companies which have been placed by local laws under the surveillance of the Superintendent of Insurance cannot make a valid assignment in case of their insolvency; and that such assignments, if attempted, are void, the policy of the law as respects such companies being to have them wound up, and their affairs liquidated through the agency of an organized insurance department, which has been vested with authority to institute the necessary proceedings for that purpose. *Relfe v. Commercial Insurance Co.*, 5 Mo. App. 173; *Williams v. Commercial Insurance Co.*, 75 Mo. 388. Following these decisions, the St. Louis Court of Appeals has recently held in *McCoy v. Fire Insurance Co.*, 87 Mo. App. 73, 77, that the very assignment involved in this case was invalid, and conveyed no title to the assignee. With reference thereto the court said:

"The provisions of the Revised Statutes of 1899 for winding up these companies by proceedings instituted by the Superintendent of Insurance bring them within the rule declared in *Relfe v. Commercial Insurance Company*, 5 Mo. App. 173, and *Williams v. Commercial Insurance Company*, 75 Mo. 388. Those cases decided that an insurance company organized under the laws of this state cannot make a general assignment, and that an attempt on their part to do so is void ab initio. Such corporations are under the direct supervision of an officer of the state, appointed for that very purpose. The conditions on which they may do business, the manner in which they are to be conducted, and an effective method of winding them up and distributing their assets, are all provided for by appropriate statutes framed to protect the interests of the public. Rev. St. 1899, § 8099 et seq. These regulations are incompatible with the right on the part of the company to transfer their assets to a general assignee."

Counsel for the plaintiff in error relies, however, upon another decision of the St. Louis Court of Appeals of an earlier date (*Woerheide v. Johnston*, 81 Mo. App. 193), wherein it was held that building and loan associations are competent, like other business corporations, to make a general assignment. The argument is, in brief, that, as building and loan associations are organized under a statute somewhat similar to that under which town mutual fire insurance companies are organized, the rules of law applicable to the liquidation of the affairs of companies of the latter class should be the same



as those applicable to the former class, and that they should be conceded the power to make a general assignment. The obvious answer to this suggestion is that the courts of the state, since the decision in *Woerheide v. Johnston*, have taken a contrary view, holding, as above shown in the case of *McCoy v. Fire Insurance Company*, 87 Mo. App. 73, that the power to make an assignment does not pertain to insurance companies. Moreover, it is noticeable that since the decision in *Woerheide v. Johnston* the Legislature of the state has taken the matter in hand, and by an act approved March 26, 1901 (Laws Mo. 1901, p. 95), has deprived building and loan associations of the power to make a general assignment when their affairs become involved, placing proceedings for liquidation in the hands of an officer termed a supervisor. It is further noticeable that by an act approved on May 6, 1899 (Laws Mo. 1899, p. 254), which was enacted before the assignment in favor of Beale was executed, the act of March 21, 1895, under which the St. Joseph Company was originally organized, was amended in material respects, and its affairs, as well as the affairs of all other companies of its class, were placed under the supervision of the superintendent of insurance, who is expressly authorized to inaugurate proceedings for the liquidation of their affairs.

In view of all these considerations, we conclude that at the time the assignment to Beale was executed the St. Joseph Company had no power to execute the assignment; that it conveyed no title to the fund in controversy; and that the judgment below, sustaining a demurrer to the bill, was right for that reason. It is accordingly affirmed.

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CENTRAL COAL & COKE CO. v. GEORGE S. GOOD & CO.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1903.)

No. 1,692.

**1. CONTRACTS—SUBSEQUENT ACQUIESCENCE OF BOTH PARTIES NOT ESSENTIAL TO LIABILITY OF EITHER.**

Either party to a contract may perform his part of it, and charge the other party with liability thereunder, without the consent or acquiescence of the latter. But a subsequent agreement or acquiescence of both parties is requisite to cancel the agreement or to relieve either party from its obligations.

**2. CONTRACT OF SALE—ACCEPTANCE OF PROPERTY AS ANOTHER'S—PAYMENT OF THIRD PARTY—LIABILITY FOR PRICE.**

The fact that one who has knowingly received and used the property of his contractor or vendor delivered under the agreement has notified the contractor when he received it that he refused to accept it as his property, and that he accepted it as another's, and the further fact that he has paid the third party for it, do not relieve the vendee from liability to the vendor for the purchase price or value of the latter's property which the vendee has received.

**3. PRINCIPAL AND AGENT—NOTICE TO AGENT—EFFECT ON PRINCIPAL.**

Where an agent acts for himself in his own interest, and adversely to his principal in a given negotiation or transaction, neither notice

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¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 1146.

to nor the knowledge of the agent can be lawfully imputed to the principal.

4. CONTRACT BETWEEN THIRD PARTIES—PAROL EVIDENCE—ADMISSIBILITY.

The rule that parol evidence is inadmissible to contradict or vary the terms of a written contract is inapplicable in a case in which the agreement assailed is between strangers to the parties to the suit, because the former cannot, by their ignorance, carelessness, or fraud, estop the litigants from proving the truth.

(Syllabus by the Court.)

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

The Central Coal & Coke Company, a corporation, brought an action in the United States Court of the Indian Territory for the Central District against Good & Co., another corporation, to recover the sum of \$9,024.42 and interest for lumber and piling which it had furnished to the defendant. It alleged in its complaint that on December 15, 1894, it agreed with the defendant to furnish it lumber and piling; that it had complied with its contract, and there had become due to it thereunder \$9,024.42. And for a second cause of action it alleged that between May 19, 1895, and October 1, 1895, it had delivered to the defendant piling which was of the value of \$6,268.48, for which the defendant refused to pay. Good & Co. answered that every allegation in the complaint was false; that it admitted that it owed the plaintiff \$1,201.04; and that it ought not to be required to pay to the plaintiff any more, because it had paid to M. W. Osborn, under a contract made between the defendant and Osborn on December 7, 1894, the very sum of money which the plaintiff demanded. There was a trial, verdict and judgment for the amount admitted by the defendant, an appeal from this judgment to the Court of Appeals of the Indian Territory, and an affirmance of that judgment. The writ of error to this court challenges the proceedings which have resulted in the affirmance of this judgment.

Upon the trial of the action before the jury the following facts were established without dispute: On December 15, 1894, Good & Co., which was a general contractor for the construction of the Choctaw, Oklahoma & Gulf Railway, made a written contract with the coal and coke company whereby the latter contracted, among other things, "to furnish all materials" necessary to complete the roadbed upon that portion of the railway between South McAlester, in the Indian Territory, and Oklahoma City, in Oklahoma territory; and Good & Co. promised to pay certain prices for these materials, among which were these: "For all piles delivered f. o. b. South McAlester, Indian Territory, 12½ cents per lineal foot; for all piles delivered f. o. b. Oklahoma City, Oklahoma territory, 16 cents per lineal foot." Eight days prior to the making of this contract, and on December 7, 1894, Good & Co. had made a written agreement with M. W. Osborn whereby the latter contracted to "furnish all the materials" requisite and necessary to complete the roadbed between South McAlester and Oklahoma City, and Good & Co. promised to pay him therefor certain prices, among which were these: "For piling furnished, delivered, and driven in bridges, 21 cents per lineal foot; for piling hauled from end of track and driven in bridges, 18 cents per lineal foot." The South Canadian river made a natural division of the work of construction into two parts—one between South McAlester and the river, and the other between the river and Oklahoma City. The controversy in this case relates solely to the piles furnished west of the South Canadian river. The coal and coke company was not aware during the spring and summer of 1895 of the contract between Osborn and Good & Co., and it furnished Good & Co., and that corporation used in the construction of the railroad west of the South Canadian river, piling which amounted at the contract price to more than \$6,000, for which, in the judgment below, the plaintiff has recovered nothing. On January 20, 1895, the coal and coke company made an agreement with Osborn that he should furnish for it, and deliver to Good & Co., the piling required west of the South Canadian river for 13½ cents per lineal foot. Osborn complied with this contract, and the coal and coke company paid

him for the piling pursuant to its agreement. At or near the inception of the delivery of this piling Good & Co. was notified that it was the property of the plaintiff, and was delivered under its contract pursuant to an agreement which it had made with Osborn that he should furnish and deliver the piling for the coke company. During the entire course of the delivery both Osborn and the coke company repeatedly informed Good & Co., and insisted that this piling was the property of the coke company; that it was delivered under its contract; and that it was paying Osborn for procuring and furnishing the piling pursuant to its contract with him. While Good & Co. protested to Osborn against accepting the piling as the property of the coke company, and informed him that it accepted it as his property under the contract of Good & Co. with him, neither the coke company nor Osborn assented to this view of their property rights, and Good & Co. put the piles into the railroad. Speaking of his transactions with Osborn, the superintendent of Good & Co., testified: "Q. He notified you as early as May that the timber he was furnishing was the plaintiff's timber, and that he was furnishing it under contract with them? A. Yes, sir. Q. Plaintiff also notified you to that effect, didn't they? A. Yes, sir; May 20th. Q. So you had notice both from Osborn, who was getting it out and delivering it, and from the plaintiff, that it was not Osborn's piling, but it was the piling that belonged to the plaintiff? A. Yes, sir. Q. With that knowledge you received it from Osborn? A. Yes, sir. Q. And used it in your road? A. Yes, sir. Q. And did not pay plaintiff for it? A. No, sir; we paid Osborn. Q. Did plaintiff consent to your paying Osborn for it? A. Don't know that they did. Q. Don't know that they didn't? A. I don't suppose they did consent to it, or anything about it, perhaps." During the entire transaction Osborn insisted that he was not entitled to, and would not receive, payment for the piling, but that under his contract he was entitled to 18 cents per lineal foot for hauling it from the end of the track and driving it in bridges. The alleged errors of which the plaintiff complains assail the rulings of the court upon the introduction of evidence and its charge to the jury.

W. C. Perry, Ira D. Oglesby, Sam H. West, and J. H. Gordon, for plaintiff in error.

C. B. Stuart and Yancey Lewis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

May one who has knowingly accepted and applied to his own use property of his contractor, furnished by the latter under the agreement between them, escape payment of the contract price or value of the property delivered by proof that when he accepted and used it he notified his contractor that he refused to receive it as his property, and accepted it as the property of another, and that he paid the third party therefor? Good & Co., the defendant below, made a written agreement with the plaintiff, the Central Coal & Coke Company, to pay it for the piling the latter furnished under its contract. The coal and coke company furnished the piling which is the subject of this controversy under its agreement with Good & Co. by employing and paying Osborn to prepare and deliver the piles to the defendants for the price of 13½ cents per lineal foot. Good & Co. knew, before it paid Osborn for these piles, that they were the property of the plaintiff, that the latter had employed and paid Osborn to prepare and deliver them for it, and that both the plaintiff and Osborn had tendered and delivered the piling as the property of the plaintiff, and

not as the property of Osborn, in fulfillment of the contract between the plaintiff and the defendant, and that both the plaintiff and Osborn had repeatedly and continually insisted that these piles were the plaintiff's property, and were so delivered for it. Under these circumstances the plaintiff seeks to recover the contract price, or the value of its piles, and the defendant objects to paying for them because the fact was, although this fact was unknown to the plaintiff when it furnished the piles, that Good & Co. had made a contract with Osborn before it made the agreement with the plaintiff by which Osborn had undertaken to furnish the very piling which the plaintiff furnished by means of its contract with Osborn, and the defendant protested and insisted that it refused to accept the piles under its contract with the plaintiff as its property, and that it took them under its contract with Osborn as his property.

The court was requested to charge the jury, under this state of facts, that no payment for the piles to Osborn would affect the plaintiff's right to recover. It refused to grant this request, and instructed the jury (1) that such a payment was a good defense to the plaintiff's cause of action, unless they found that the defendant not only knew of, but acquiesced in, the furnishing and delivery of the piles by Osborn as the plaintiff's property; and (2) that, if the defendant refused to accept the piling as plaintiff's, but accepted it as Osborn's property, and so notified Osborn, and if Osborn was acting as the agent of the plaintiff, and if, after this notice to Osborn, the plaintiff continued to furnish piling, it could not recover the purchase price or value thereof. These instructions appear to have been given under a strange misapprehension of the legal relations of the parties to this action and of their rights between themselves, which probably resulted from a confusion of their relations with each other with their relations to Osborn. But this is an action between the coal and coke company and Good & Co. Osborn is not a party to it, and the rights of the parties to it against and their respective liabilities to him are not here for our determination. The coal and coke company contracted to furnish the piling in controversy to Good & Co., and it has done so. The only question here is whether or not the fact that Good & Co. refused to accept these piles as the plaintiff's, and received them as Osborn's, relieved it from the obligation of its contract with the coal and coke company, and from paying the plaintiff for its property. The question does not seem to be doubtful or difficult. Simple illustrations make it plain. A. agrees to sell his horse to B. for a stipulated price. A. subsequently delivers his horse. B. notifies him that he refuses to accept him as A.'s horse, but that he receives him as C.'s. B. pays C. for the horse. Has B. relieved himself from his liability to pay A. for his horse? D. contracts with E. to furnish him with a thousand cords of wood for an agreed price. D. furnishes the wood. E. takes and uses it, but notifies D., as it is delivered, that he refuses to accept it as his property, but that he takes it as the property of F. Does such a notice transfer the ownership of the wood from D. to F., or release E. from his agreement to pay D. for it? And if E., knowing that the wood was D.'s, paid F. for it, can that

in any way affect his obligation under his contract to pay D. for it? These questions bear their own answers.

When these piles were delivered, the coal and coke company had agreed to furnish them to Good & Co., and the latter had agreed to pay the coke company for them. Through Osborn, its subcontractor to provide them, the coke company tendered and delivered them to Good & Co. as its property in performance of its contract. The defendant was obligated by its contract with the coke company to take and to pay for them. There were two parties to this agreement, and the consent of both these parties was indispensable to its abrogation; but either of them had the right to insist upon its performance. Here was the fatal error of the courts below. They assumed that after the contract was made the acquiescence of both parties in its performance was essential to the liability of either thereunder, when the true rule was that both parties had finally acquiesced in its performance when they signed their contract, and either party had the right to perform it on its part and to insist upon its performance by the other party, while the acquiescence or agreement of both parties was indispensable to its abrogation or to the relief of either from its performance or its liability to perform. Either party to a contract may perform his part of it, and charge the other party with liability thereunder, without the farther consent or acquiescence of the other; but the subsequent agreement or acquiescence of both the parties is requisite to cancel the contract, or to relieve either party from its obligations.

Doubtless Good & Co. might have escaped liability to the coke company for the contract price or value of the piling the latter furnished by refusing to receive it, and by leaving it in the possession of the coke company or of its subcontractor, Osborn. But it would still have been liable for damages for its refusal to perform its contract—for its refusal to accept the piles. When it received and used the piles tendered by the plaintiff in performance of its agreement, its obligation to pay for them became absolute. Its protestation that it refused to receive them as the plaintiff's property, its assertion that it took them as Osborn's, and its payments to Osborn neither transferred the title to the piles from the plaintiff to Osborn nor affected the defendant's liability to pay to the plaintiff for its property either according to the terms of the contract, or according to its true value. The fact that one who has knowingly received and used the property of his contractor delivered under the agreement notified the latter when he received the property that he refused to receive it as the contractor's property, and that he accepted it as the property of another; and the further fact that he paid the third party for it will not relieve him from liability to the contractor for the purchase price or value of his property which he has received.

The charge of the court that, if Osborn was acting as the agent of the plaintiff, if the defendant refused to accept the piling as plaintiff's, but accepted it as Osborn's, and so notified him, and if thereafter Osborn continued to furnish the piling for the plaintiff, the latter could not recover in this suit, was erroneous, not only for the reason which has already been considered, but also because there was no evidence in the record that Osborn ever had or claimed any

authority, either actual or apparent, to appropriate to himself, or to transfer from his contractor to himself, the property of the plaintiff. The record shows that the only relation between the plaintiff and Osborn was that of a subcontractor to his contractor, and that the defendant was aware of the attitude in which these parties stood to each other while the piling was in process of delivery. The theory of this charge of the court is that, if one informs a subcontractor who is furnishing materials for his contractor, and who is being paid therefor by the latter, that he will not accept these materials as the property of the contractor, but will take them as the property of the subcontractor, and will pay him for them, that information is notice of that fact to the contractor, and estops him from recovering the price or value of the materials which he has furnished through his subcontractor. But it is not within the apparent or the actual scope of the authority of a subcontractor to transfer or to consent to the conveyance of either the property or the claim for the price or value of the property which the contractor employs and pays him to furnish from the latter to himself, so that notice of such a transaction to the subcontractor is no notice to the contractor. And, even if such an authority existed, the personal interest of the subcontractor in such an affair would be so adverse to that of his principal that notice to the former would not charge the latter. Where an agent acts for himself in his own interest and against the interest of his principal, without the latter's consent, in a given negotiation or transaction, neither the notice nor the knowledge of the agent can be lawfully imputed to the principal. *Pine Mountain Iron & Coal Co. v. Bailey*, 94 Fed. 258, 261, 36 C. C. A. 229, 232; *Surety Co. v. Pauly*, 170 U. S. 133, 156, 18 Sup. Ct. 563, 42 L. Ed. 987; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; *Waite v. City of Santa Cruz (C. C.)* 89 Fed. 619, 630; *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33, 37; *Winchester v. Railroad Co.*, 4 Md. 231, 241; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co. (C. C.)* 20 Fed. 699, 702; *Thomson-Houston Electric Co. v. Capital Electric Co. (C. C.)* 56 Fed. 849, 853; *Bank v. Cunningham*, 24 Pick. 270, 276, 35 Am. Dec. 322; *Mechem*, Ag. § 723.

There was another error in the trial of this case. *Good & Co.* made two contracts, one with Osborn and one with the plaintiff, which upon their faces require both Osborn and the plaintiff to furnish the piles in controversy, the piles required for the construction of the railroad between the South Canadian river and Oklahoma City. But the contract with Osborn provided in one of its clauses that the accepted tender of the contractor, the specifications for the doing of the work, and the several parts of the contract should be taken and construed together, and Osborn testified that his bids upon which the contract was based were for furnishing and driving the piling required for the construction between South McAlester and the South Canadian river and for hauling and driving the piles needed for the same purpose between the South Canadian river and Oklahoma City, but that he never made any bid for furnishing the piling west of the river. Notwithstanding this provision of the contract and this evidence, the court refused to permit this witness to testify that the pro-

vision of the agreement for furnishing piling in his contract related only to the piling east of the river, and charged the jury that the legal effect of this contract was that Osborn undertook to furnish all the piling west of the river, regardless of his testimony or his understanding. Now, the proffered testimony of Osborn had a strong tendency to prove—if, when taken in connection with the evidence relating to the bids, it did not establish—the proposition that the real intention of the parties to this contract was to make an agreement for the furnishing of the piles east of the river, and to make none for providing them west of it. Nor was this evidence obnoxious to the objection which was urged against it that it tended to contradict or vary the terms of the written contract, because the bids which did not provide for the furnishing of the piling west of the river were as much a part of the written agreement as any other part of it, and because this was not a contract between the parties to this litigation. The rule that parol evidence is inadmissible to contradict or vary the terms of a written contract is inapplicable to a case in which the agreement assailed is between strangers to the parties to the suit, because the former cannot by their ignorance, carelessness, or fraud estop the litigants from proving the truth. 1 Greenl. Ev. § 279; *Cunningham v. Milner*, 56 Ala. 522; *Talbot v. Wilkins*, 31 Ark. 411; *Hussman v. Wilks*, 50 Cal. 250; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239; *Brown v. Thurber*, 77 N. Y. 613, 58 How. Prac. 95; *Bell v. Woodman*, 60 Me. 465; *Tobey v. Leonard*, 2 Cliff. 40, Fed. Cas. No. 14,067; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

The judgments below are reversed, and the case is remanded to the United States Court for the Central District of the Indian Territory, with directions to grant a new trial.

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FLORIDA CENT. & P. R. CO. v. SULLIVAN.

(Circuit Court of Appeals, Fifth Circuit. March 3, 1903.)

No. 1,177.

1. DEATH BY WRONGFUL ACT—FOREIGN ADMINISTRATOR—RIGHT TO SUE.

Under Rev. St. Fla. §§ 2342, 2343, authorizing actions for death by wrongful act, and providing that such an action may be brought by the widow, surviving husband, minor child, person dependent for support, or executor or administrator, an administratrix appointed in Alabama of a deceased resident of that state may sue in Florida for negligence causing the death of her intestate, though the statutes of the two states relative to the distribution of damages in such cases are dissimilar, the Florida statute governing distribution in Alabama.

2. SAME—RAILROADS—PASSENGER—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for the death of a passenger, caused by the engine striking cattle on the track and being forced through the car in which deceased was riding, which car was the one provided exclusively for colored passengers, though deceased, a white person, remained in this car in violation of the rules of the company and the directions of the conductor, *held*, that deceased was not, as a

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¶ 1. What law governs action for wrongful death, see note to *Burrell v. Fleming*, 47 C. C. A. 606.

matter of law, guilty of contributory negligence in riding in the car reserved for colored passengers.

**8. SAME—RECOVERY BY ADMINISTRATOR.**

Under Rev. St. Fla. §§ 2342, 2343, authorizing suits for wrongful death by administrator, and providing that in every such action the jury shall give such damages as the parties entitled to sue may have sustained, in an action by an administrator the jury should determine from the testimony as to the age, character, and health of deceased, and the natural expectancy of life, and estimate the amount of the net earnings and accumulations he would reasonably have acquired during such expectancy, and find the cash value of such amount at the time of the trial, and find their verdict for such sum.

Pardee, Circuit Judge, dissenting.

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

This was an action by Helen A. Sullivan, as the administratrix of the estate of John T. Sullivan, deceased, against the Florida Central & Peninsular Railroad Company. The plaintiff was a citizen of Dallas county, Ala., of which state and county John T. Sullivan, deceased, was a citizen up to the time of his death. The action was brought in the United States Circuit Court for the Southern District of Florida. The plaintiff in her pleading showed that the deceased, on the 14th day of December, 1898, was a passenger on the railroad of the defendant, and while being carried as such passenger, by reason of the negligence of the defendant and of its servants, he received injuries that resulted in his death. The proceedings presented the usual features, and resulted in a judgment in favor of the plaintiff. The case is brought here by the defendant on writ of error.

J. C. Cooper, for plaintiff in error.

A. W. Cockrell, A. W. Cockrell, Jr., R. S. Cockrell, and Wm. W. Quarles, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case, delivered the opinion of the court.

In this case many errors are assigned, but it would be unprofitable to notice them in detail. They present substantially only three questions: (1) Can the administratrix, appointed in Alabama, maintain this suit in the state of Florida? (2) Does the matter offered by the defendant in support of its plea of contributory negligence tend to establish contributory negligence on the part of the deceased? (3) Is the case one in which the administrator can recover damages?

As to the first of these questions: The administratrix was appointed by proper proceedings in the proper court in the state of Alabama, and at the institution of her action she filed in the Circuit Court a properly authenticated copy of the letters of administration granted to her by the probate court in the matter of the deceased's estate. In the case of Sullivan v. Honacker, 6 Fla. 374, the Supreme Court of Florida, in discussing the law of that state, said:

"Our statute was intended to place foreign executors and administrators, mentioned in it, with respect to the institution and maintenance of suits in our courts, upon the same footing as executors or administrators who had obtained their letters testamentary or of administration in this state, whenever they should produce such letters duly obtained and properly authenticated."

It is, however, insisted by the plaintiff in error that the statutes of Florida which fix the liability of the defendant for such injuries as are



alleged to have been done the deceased, and which provide who may sue to recover the same, taken in connection with the provision for the distribution of the proceeds when recovered, compared and contrasted with the statutes in Alabama fixing similar rights, providing for the recovery of damages for such injuries, and for the distribution thereof, show such a dissimilarity and substantial conflict as to exclude this administratrix from prosecuting this action.

The law upon which the action is based is embraced in sections 2342 and 2343 of the Revised Statutes of Florida. It is unnecessary to quote the sections in full, or to give even the substance of section 2342, further than to say that it fixes the liability of persons committing such injuries. The other section provides that the action may be brought by the widow or surviving husband, as the case may be, and, where there is neither widow nor husband surviving, then by the minor child or children, and where there is no widow nor husband, nor minor child or children, then by any person or persons dependent on such person killed for support, and, where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. In the case of *Florida Central and Peninsular Railway Company v. Foxworth*, reported in 41 Fla. 1-77, 25 South. 338, 79 Am. St. Rep. 149, in discussing this statute, the Supreme Court of Florida used this language (on page 70, 41 Fla., page 347, 25 South., 79 Am. St. Rep. 149):

"Our statute, unlike the English one, by giving a right of action to the administrator of the deceased, imposes the liability whether there be a family to compensate or not. Its effect was to abrogate the common-law rule, for which, if any reason ever existed, the world has long since outgrown it, denying damages for human life, and to affix a penalty, by an award of pecuniary damages, for a careless or wrongful act resulting in another's death. In authorizing suits to enforce this liability, our act gives the right to those who are supposed to suffer most by the death of the deceased, but on no account does the action fail for want of a person to sue, as with Lord Campbell's act."

As to the objection grounded on the different disposition of the fund by the laws of Florida and the laws of Alabama, it is enough to say that the law of Florida which gives the right, and gives direction to the proceeds of such a recovery, is the law of the case both as to the recovery and to the disposition of the proceeds. But it would be a reproach to the laws of Alabama to say that, when the money recovered in such an action as this came into the hands of the administratrix, the courts of that state could not compel its distribution as the law of Florida applicable thereto directs. *Dennick v. Railroad Co.*, 103 U. S. 11-21, 26 L. Ed. 439; *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 18 L. Ed. 105, 42 L. Ed. 537.

In reference to the second question: The bill of exception shows that:

"The plaintiff introduced evidence tending to show that on the date of the accident, the deceased, John T. Sullivan, was an enlisted soldier in the United States Army, a member of Battery D, Fifth Artillery, and was going from

St. Augustine, Fla., through Jacksonville, to New Orleans, La., and that he got upon the train of the defendant at Jacksonville, on the morning of the accident, with 23 other soldiers, members of the company, all of whom were traveling upon one ticket to the party, and held by an officer in charge, and that, at the time the deceased and the rest of the party of soldiers got upon the train at Jacksonville, there were not seats enough in the regular passenger coach, to wit, the second car in the rear of the baggage car, for the entire party to obtain seats. That the train was composed of engine, baggage car, colored passenger coach, white passenger coach, Pullman car, and a special or private car; and that at the time of the accident the deceased, John T. Sullivan, and another soldier, known as Henry Lowenberg, were sitting in the car known as the 'colored car,' a car provided for colored persons; and that the train was running on a downgrade about 45 or 50 miles an hour, and struck some cattle on the track, and that the engine was forced into the car on which Sullivan was riding, and the people on the left of the car were crushed under the boiler, causing the death of Sullivan.

"The defendant introduced evidence that some years before, and at the time of the alleged accident, the defendant had issued a rule or regulation providing for separate cars on its train for white passengers and colored passengers, requiring white passengers while traveling on its trains to take seats in and remain in the car for white passengers, and colored passengers to take seats in and remain in the car for colored passengers, and not to allow white passengers to take seats in and remain in the cars for colored passengers, or colored passengers to take seats in or remain in the car for white passengers, while riding on the trains of the defendant, and that these separate cars were provided exclusively for seating white and colored persons, respectively, in making up trains of the defendant; and that upon the train upon which the deceased, John T. Sullivan, was a passenger at the time of the accident, there was a car provided exclusively for colored passengers, and a car provided exclusively for white passengers; and that John T. Sullivan was a white person; and that when the train left Jacksonville the deceased was sitting in the car provided for white persons, and afterwards went into the car in the train provided for colored persons, with two or three soldiers of the company (and that John T. Sullivan and the two or three soldiers with him were boisterous, talked loud, drinking, and disturbing passengers), and the defendant's conductor and other employes of the defendant upon the train several times directed John T. Sullivan, on the date of the accident, before the same, and on one occasion immediately before, to leave the said car provided for colored persons, in which John T. Sullivan was, and go into the car provided for white persons, and the conductor informed him that the rules and regulations of the defendant company required white persons to sit and be in the car provided for white persons, and not to travel in the car provided for colored persons in which Sullivan was sitting and traveling, but Sullivan refused to leave the car provided for colored persons, and would not and did not return to the car provided for white persons; and that at the time of the accident John T. Sullivan was still sitting and riding in the car so provided for colored persons, on the left-hand side of the same, about the middle of the car. That there was sufficient room in the car provided for white persons for John T. Sullivan to obtain a seat in the same; and that each time the conductor and other employes of the defendant company directed Sullivan to go into the car for white persons there was room in the car for Sullivan to obtain a seat in the car; and that the car provided for colored persons was immediately behind the baggage car in the train, and nearer to the engine than the car provided for white persons; and that this was the order in which the cars were usually placed in the defendant's train; and that the train on which Sullivan was riding consisted of an engine, immediately behind which was a baggage car, then a car for colored persons, then followed a car for white persons, then followed a Pullman car, and behind the Pullman car was a special car. That the accident was caused by the engine striking cattle on the track; that the engine was turned around, the baggage car was thrown from the track and damaged, but not destroyed, and the engine and boiler were forced back into the car provided for colored persons, and the front half on the left-hand side of the car was destroyed for one-half of the length

of the car; and that none of the persons sitting in the rear of the car, and none of the persons sitting in the car for white persons, were injured at all; but that the deceased, who was sitting on the left-hand side of the car provided for colored persons, about the middle of the car, was killed, and several colored persons on the left-hand side and on the front of the car provided for colored persons were killed or injured."

On this issue the Circuit Court, in the charge to the jury, used this language:

"The next important question for consideration is the plea of contributory negligence. This question should be submitted to the jury as a question of fact only when it appears, by a reasonable construction of the facts proven, considering them most favorably in behalf of the person presenting them, it might be found that the deceased was guilty of some conduct of which a reasonable, prudent man would not have been guilty. This is to be judged of by the acts of the deceased, and the prospect of danger or otherwise, at the time of such acts, and not by the result. In this case it is contended that the deceased was guilty of negligence in remaining in the car set aside for colored passengers; not that the car, on account of its being so set apart for that purpose, was any more exposed to danger, but because it was the forward car nearer the engine. But it is not contended that he was guilty of negligence in being in the forward car of a train, but on account of its being the forward car and at the same time the colored car.

"In all the cases cited, or which I have been able to find, in which passengers have been held to be guilty of negligence on account of the place or position in which they were riding, it has been because the place or position, per se, was one of danger—on the pilot, in the baggage car, or on the platform—where passengers were prohibited from riding on account of being exposed to greater danger, and not on account of their belonging to a different class.

"It is not considered necessary to pass upon the constitutionality or validity of the statute of the state, or the regulations of the corporation under which it is claimed the passenger was prohibited from occupying the car where he was, for the purpose for which it was enacted or established, but it was not so enacted or established for the protection of passengers from danger, and the defendant is estopped, by the law which requires equal accommodations for both classes, from claiming that the colored coach was a place of danger, and that a white person was, by taking a seat there, placing himself in a place of danger, and removing himself from the right of the protection of the carrier. It cannot be claimed that the colored coach was a place of danger of itself, nor can it be considered that the forward coach was a place of danger, nor that, when both of the peculiarities are combined, can it so be considered; and, in order to find that the deceased was guilty of contributory negligence, it would be necessary to so find, which, under the most favorable consideration of the testimony, the court considers should not be done. I therefore take the responsibility of relieving you from the consideration of the plea of contributory negligence, and instruct you that you exclude from your consideration all testimony relating to the deceased being in the colored coach, or relating to the law, rules, or regulations concerning the separation of the classes and designation of different cars."

We concur in the view of the learned judge of the Circuit Court, and approve his action in withdrawing this issue from the jury. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Northern Pacific R. R. Co. v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82; *Kresanowski v. Northern Pacific R. R. Co.* (C. C.) 18 Fed. 229.

As to the third question: We find this paragraph in the brief filed by counsel for the plaintiff in error:

"The statute in Florida authorizing the administrator to sue for death of his intestate does not designate any person as the beneficiary for whose benefit the recovery is had, and therefore such a recovery is a general asset

of the estate, and is applicable to the payment of debts and other administration purposes."

The language of the statute is:

"And in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed."

In the Foxworth Case, supra, the Supreme Court of Florida said:

"It is a difficult matter to lay down general rules by which to estimate damages in this class of cases. Those which occur to us as being applicable to this case (the action was by the widow), so far as we can judge from the evidence in the record, are as follows: In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the situation or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of general health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death; all these elements to be based upon the probable joint lives of herself and husband. She is also entitled to compensation for loss of what she might reasonably have expected to receive in the way of dower or legacies from her husband's estate in case her life's expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages."

In analogy to the foregoing, it would be easy to define the elements of recovery in an action by a minor child, or by one dependent upon the deceased for support, and it would seem to be not difficult to draw from the foregoing, as the trial judge did, instructions to the jury as to the elements of recovery in this case, where the suit was by the administrator for the recovery of a general asset of the estate, applicable to the payment of debts and other administration purposes.

Upon this subject the trial judge instructed the jury, substantially, that they were to determine, from their "own best, honest, and enlightened judgment" from the testimony before them of the age, character, and health of the deceased, the period of his natural expectancy of life at the time immediately preceding his death, and estimate the amount of the net earnings and accumulations he would reasonably have acquired during the period of such expectancy, and then find the cash value of this amount at the time of the trial, according to well-recognized rules, and, for this present cash value of the estimated reasonable net earnings and acquisitions of the deceased, find their verdict in favor of the plaintiff.

Our examination of the case has discovered no error in the action of the Circuit Court for which the judgment should be reversed, and it is therefore affirmed.

PARDEE, Circuit Judge (dissenting). I think the court erred in taking away from the jury the question of contributory negligence. Contrary to the rules of the company, and in violation of the directions and orders of the company's agents, the deceased, Sullivan, a white person, persisted in remaining in the car set apart for colored people, which, from its location in the train and in the nature of things, and as the result showed, was a place of greater danger than the place set apart by the rules of the company for Sullivan to occupy.

Conceding it was the duty of the company to provide a place in the train for colored people, of equal accommodations and equal safety with that provided for white persons, yet this was not a duty that the company owed to Sullivan. I do not care to elaborate.

The question should have been submitted to the jury under all the evidence adduced in the case, with proper instructions as to the rules of law concerning contributory negligence in personal injury cases.

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STOLL v. LOVING.

(Circuit Court of Appeals, Sixth Circuit. February 25, 1903.)

No. 1,126.

1. APPEAL—QUESTIONS REVIEWABLE ON SECOND APPEAL.

An appellate court will not, on a second writ of error, review questions decided on a former writ of error in the same cause.

2. TRIAL.—INSTRUCTION—FAILURE TO SUBMIT ISSUE.

Where, in an action to recover a broker's commission on a purchase of property by defendant under a verbal contract, defendant alleged that the services were rendered under a written contract, which plaintiff made with another to defendant's exclusion, and with which he had no connection, and there was evidence upon which such defense might have been sustained, it was error not to submit that issue clearly to the jury.

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

Thomas W. Bullitt and Wm. Marshall Bullitt, for plaintiff in error.  
John L. Dodd and David W. Baird, for defendant in error.

Before SEVERENS, Circuit Judge, and THOMPSON and WANTY, District Judges.

WANTY, District Judge. The record now before us is almost identical with the one on which the former judgment in this case was reversed. The facts, so far as necessary, are stated by Judge Day in the opinion of this court reported in 112 Fed. 885, 50 C. C. A. 576. The evidence on the new trial was substantially the same as on the former trial, the trial judge repeated his former charge to the jury with no material alteration, so far as respects the ground or question on which the former judgment was reversed. Under these circumstances we must inquire whether the Circuit Court followed the instructions of this court in the matter upon which the former judgment was reversed, as that decision is the law of the case, binding on this court as well as

on the trial court. This rule is stated by the Supreme Court in the case of *Roberts v. Cooper*, 20 How. 467-481, 15 L. Ed. 969:

"But we cannot be compelled, on a second writ of error in the same case, to review our own decision on the first. It has been settled by the decisions of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. See *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861; *Corning v. Troy Iron Company*, 15 How. 466, 74 L. Ed. 768; *Himely v. Rose*, 5 Cranch, 313, 3 L. Ed. 111; *The Ocean Insurance Company v. Canter*, 1 Pet. 511, 7 L. Ed. 242; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; and *Sibbald et al. v. United States*, 12 Pet. 488, 9 L. Ed. 1167."

See, also, *Matthews v. Columbia Nat. Bank*, 100 Fed. 397, 40 C. C. A. 444; *Haley v. Kilpatrick*, 44 C. C. A. 102, 104 Fed. 647; *Ouray County v. Geer*, 47 C. C. A. 450, 108 Fed. 478; *Standard Sewing Mach. Co. v. Leslie* (C. C. A.) 118 Fed. 559; *Mutual Life Ins. Co. v. Hill* (C. C. A.) 118 Fed. 711; *Olsen v. North Pacific Lumber Co.* (C. C. A.) 119 Fed. 77, and cases cited in those opinions.

Under the pleadings the jury were to determine whether the defendant had entered into a contract with the plaintiff to secure his services in obtaining stock of the Mattingly Company, whereby the defendant was to pay him a commission for the purchase of the stock; and whether, before the time for the purchase had expired, the plaintiff brought the parties together, and the defendant, taking advantage of the plaintiff's efforts, purchased a majority of the stock, and refused to pay the plaintiff for his services. These questions were submitted to the jury under the pleadings. The plaintiff, in the evidence, claimed that he had made a complete verbal bargain with the defendant for a commission of 5 per cent. for the purchase of the stock. This the defendant denied, and testified that he never made a bargain of any kind with the plaintiff for the purchase of the Mattingly Company stock, or any part of it, but that the plaintiff entered into a written agreement with one G. B. Shaw, to the exclusion of the defendant, in the following letter, which appeared in evidence:

"Dear Sir: Confirming our verbal agreement just made, I desire to say that you are authorized to negotiate with the holders of the entire capital stock of the J. G. Mattingly Company upon a basis averaging to the syndicate whom I represent, now taking options on distillery properties in Kentucky, \$130 per share—the capital stock being \$300,000. These figures are based upon your assurance that the distillery property is unencumbered; that the corporation owns at least 25,000 barrels of whisky in bond that is unencumbered, and besides has accrued storage and other available net cash assets to the amount of \$30,000, any shortage to be made up out of the commission to you. It is the purpose of the syndicate whom I represent to secure options on a number of distillery properties in Kentucky, all maturing July 1st, 1899. Whenever a certain proportion of these properties are secured by option, it is their present purpose to close the option and make the purchases; but it is not now known to me what proportion of properties

is necessary, nor do I guarantee that when the proportion is acquired, the options will be closed and the purchase made. But I will agree that if you will secure the capital stock of the Mattingly Company, upon the basis aforesaid, or if through you we make a purchase of this stock, whether upon the basis aforesaid or otherwise, then we will pay to you as your commission for services to be rendered by you, five per cent. of \$390,000, viz., \$19,500. But it is distinctly understood that the commission to be paid you as aforesaid will be due you only in the event the purchase is made of the stock above stated; and by way of suggestion as to the manner to proceed in bringing about a sale, I will say that it will be best for you to put yourself in a position where you can own or control—either yourself or through some friend—the entire capital stock; and when you are thus in shape, you should make a proposition to the syndicate so represented by me, through its agent, the American Trust and Savings Bank of Chicago, under which you propose to sell to said company the said capital stock at the total price of \$409,500, which proposition will then be accepted by them, and I will recommend the acceptance of it, and use all reasonable efforts to carry it through. Or, failing in the above, if you will obtain an option under conditions of our option contract on the distillery plant for one hundred and seventy-five thousand dollars and under that option the purchase is made by the syndicate we represent, then, and in that event, but not otherwise, we will pay you a commission of ten thousand dollars. This proposition to be open for thirty days from date.

[Signed] G. B. Shaw.

“Correct: H. V. Loving.”

The defendant testified that he had no interest in this written agreement with Shaw, and knew nothing of it until the day on which the purchase was made. Thus the vital issue before the jury was whether the contract, under which Loving performed the services for which he sought to recover, was made by him with Stoll or with Shaw. This court held on the former hearing that there was testimony which would authorize the jury to find that the plaintiff accepted this contract in writing from Shaw to the exclusion of Stoll, and, if he did, that he could not recover against Stoll; and, because this question had not been submitted to the jury under proper instructions, the judgment was reversed. The court, on the new trial, after stating that the issue was whether there was an agreement between the plaintiff and defendant, in charging the jury in respect to the letter of January 26, 1899, above set out, said:

“The court tells you that that letter is not a contract between the plaintiff and defendant, and should not be regarded, though I charge you that, even if there was a contract with Mr. Shaw, that fact would not necessarily affect the rights of the plaintiff as against the defendant, Stoll. The subject-matter of agreements for negotiating the sale of property admits of the employment of as many agents as the party pleases.”

This statement was probably intended to affirm that an agent may be employed to do a service for as many principals as may see fit to employ him. At the conclusion of the charge counsel excepted to so much of it as “in effect declares that the question is whether there was a contract between Stoll and Loving,” and “also to that part of the charge which declares that the written contract with Mr. Shaw does not have the effect of abrogating the principal contract.” To this the court replied, “What the court said on that subject will be excepted to.” Exceptions were stated on two other points, whereupon the court said, “Let exceptions be entered to what the court said on all those subjects.” From what appears in the bill of exceptions, it is clear that the

counsel intended by the exceptions above stated to challenge the instructions of the court with respect to the issue as to who was party to the contract with Loving, and that the court must have so understood it. There was nothing else in the charge to which the exceptions would be pertinent. Counsel for the defendant also, to emphasize their position, submitted a request for a special charge to the jury that, if the plaintiff accepted a contract in writing from Shaw alone, and if Stoll was not bound to fulfill the contract, the jury should find for him. This same special charge was requested at the former trial, and, because the contention embodied in it was not submitted to the jury under proper instructions, the former judgment was reversed. It was not contended by Loving, and is not now contended, that there was more than one contract for the services performed by him. If the contract was with Shaw, the plaintiff was not entitled to recover, but the instruction allowed the jury to find that Loving might have had a contract with Shaw for the services rendered, and also a contract with Stoll for the same services. While it may be conceded that the legal proposition stated by the court is in the abstract sound, it was inapplicable to the controversy, and misleading. Stoll's contention that Loving had made a contract with Shaw to the exclusion of Stoll, and that the work for the payment of which suit was brought was done under that contract, was not submitted to the jury, and it cannot be known from the verdict whether the jury passed on that question, which this court, in its former opinion, pointed out was essential to the proper determination of the controversy. That decision should have been considered as controlling by the trial court, and the failure to submit this question makes it necessary to reverse the judgment and grant a new trial.

The other assignments of error relied upon in the brief for plaintiff in error have been considered, but we think none of them are maintainable.

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ORIENT INS CO. v. LEONARD.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 874.

**1. FORMER APPEAL—DECISION—LAW OF THE CASE.**

Where, on a prior appeal to the Circuit Court of Appeals, it was held that a loss by fire ensuing and connected with an explosion outside plaintiff's building, by which a hole was made in the wall of the building, through which the fire entered and destroyed the property insured, was within the provisions of the policy, such decision was the law of the case, and a motion to direct a verdict for defendant on a subsequent trial, after plaintiff's introduction of evidence to prove such facts, was properly denied.

**2. INSURANCE POLICY—CAUSE OF LOSS—EVIDENCE—INSTRUCTIONS.**

Where, in an action on a policy excluding losses resulting from explosion unless fire ensued, and from the falling of the building, defendant claimed that the falling of the wall of the building was due to defects or overloading, while plaintiff claimed that it was the result of an explosion in a neighboring building, and was immediately followed by fire, and the evidence on such theories was sharply conflicting, an instruction that if the building, or some part thereof, fell by reason of some con-



cuSSION occurring from without, or from fire outside or inside the building, and plaintiff had proved his contentions that, through such explosion or fire, fire was communicated to plaintiff's building, and his stock was destroyed, plaintiff was entitled to recover, but that, if the building fell by reason of its own defects or by overloading, or both, plaintiff could not recover for the fire loss, sufficiently presented the issues of both parties to the jury.

**3. SAME—EVIDENCE.**

Where, in an action on a policy, plaintiff contended that the fire was occasioned by an explosion of mill dust in an adjoining mill, evidence as to the condition of the mill at and before the alleged explosion, the amount of mill dust collected, and the omission of known appliances to prevent the escape of such dust, was admissible.

**4. SAME—EXPERT EVIDENCE—COMPARISONS.**

Where, in an action on a policy, it was claimed that fire was occasioned by an explosion of mill dust, and experts testified as to the explosiveness of such dust, such experts were entitled to testify to a comparison of the explosiveness of mill dust with gunpowder, and their experiences regarding the same, though they were unable to give dates of such experiences.

**5. SAME—HYPOTHETICAL QUESTIONS.**

A hypothetical question asked an expert witness is not objectionable on the ground that the facts included therein were not conceded to be true, or established by the evidence.

**6. SAME—DAMAGES—INSTRUCTIONS.**

Where, in an action on a policy exempting insurer from loss by the falling of a building, or from loss caused by explosion unless fire ensued, a part of the property insured was damaged by the falling of the building, an instruction that, if the property was destroyed or damaged by fire to an amount exceeding all the insurance plaintiff had thereon at the time of the loss, plaintiff was entitled to recover from defendant the face of the policy, with interest, was not objectionable as relieving the jury from determining whether the damage by fire exceeded the whole amount of the insurance.

**7. SAME.**

Where a part of the property insured was damaged by the falling of the building, for which the insurer was not liable, but the loss by fire within the policy materially exceeded the entire insurance on the property, the failure of the court to charge that, if the jury found the damage by fire to be less than the total insurance, their verdict should be for such proportion of the loss by fire alone as defendant's policy bore to the total insurance, was without prejudice.

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

From a judgment in favor of Mr. Leonard for the full amount of a fire insurance policy issued to him by the Orient Company, entered as the result of a second trial, this writ is prosecuted.

Mr. Leonard, as lessee, occupied a six-story brick warehouse on Lake street, in Chicago. In it he had a stock of seeds, the insured property. Next west of the warehouse was a frame blacksmith shop, 20 feet wide. Next was the New England Mill, the front of which on Lake street was a two-story frame, joined to a four-story brick structure in the rear.

The policy provided indemnity for "all direct loss or damage by fire," except (so far as concerns this case) in two instances: (1) "The company shall not be liable for loss caused directly or indirectly by invasion, \* \* \* or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind." (2) "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

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† 4. See Evidence, vol. 20, Cent. Dig. §§ 2371, 2373.

Mr. Leonard's theory was that an explosion of mill dust in the frame part of the New England Mill broke down the front part of the west wall of his building, and that a fire, immediately ensuing upon and connected with the explosion, entered through the opening, and consumed his property. At the first trial he introduced evidence sufficient to go to the jury if his theory was good in law. But the court directed a verdict for the company on the ground that when the wall fell not by fire, but by explosion, the insurance was at an end. That ruling was held to be error. Leonard v. Orient Ins. Co., 48 C. C. A. 369, 109 Fed. 286, 54 L. R. A. 706.

On the present writ the company assigns that the court erred in refusing to take the case from the jury, in giving and refusing instructions, and in admitting evidence.

Other facts are stated in the opinion.

D. J. Schuyler, for plaintiff in error.

Myron H. Beach, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, having made this statement, delivered the opinion of the court.

A consideration of what was decided on the former writ will greatly simplify the solution of the principal questions now presented. Mr. Leonard's own case showed that an explosion, and not a fire, caused the fall. It was, therefore, necessary to decide whether, when the ensuing fire reached Mr. Leonard's property, the insurance had not already ceased by virtue of the second condition quoted in the statement. In determining this, the court had regard, also, for the first condition, namely, that the company would not be liable for loss caused directly or indirectly by explosions of any kind, and for the exception to that condition, namely, that the company would be liable for damage by fire ensuing upon an explosion. The court found that the wording of the second condition was "unqualified and universal, admitting of neither interpretation nor construction," but that an application of it to the case in hand would utterly destroy the liability "carefully and precisely defined" in the exception to the first condition. The court thought such a result was not intended, and therefore held the second condition inapplicable. "In this way," the court concluded, "the two clauses may well stand together, neither interfering with the legitimate office of the other."

Now, when Mr. Leonard, on the second trial, again produced evidence that an explosion in the neighboring mill made a hole in the wall, through which the fire ensuing upon and connected with the explosion entered, and destroyed his stock, the court was not at liberty to follow its own or counsel's view of the law in ruling on the company's motion for a directed verdict in its favor. The law of the case, determined by the former decision, required the denial of the motion, and the submission of the evidence to the jury. And, since its motion for a new trial was overruled, it is futile for the company to undertake to demonstrate on this writ that the preponderance of the evidence proved that the wall fell by reason of inherent defects of construction, or overloading, or both.

The material and sharply marked conflict in the evidence occurred with respect to the cause of the wall's tumbling, for on this depended

the applicability of the "falling clause" of the policy. After stating the respective contentions of the parties, the court continued his charge as follows:

"If you find from the evidence that the plaintiff has established his case by a preponderance of all the evidence, that plaintiff's building or some part thereof fell by reason of some concussion occurring outside his building (for I recall no evidence tending to show an explosion or concussion inside said building), or from fire either outside or inside said building, and that plaintiff has otherwise so proved his contentions, and that, through such explosion or fire, fire in plaintiff's building ensued or was communicated thereto from without, and his said stock was destroyed or damaged, then plaintiff is entitled to recover herein for such loss as hereinafter stated. If, however, you find that plaintiff's building, or some material part thereof, fell by reason of its own defects, or overloading, or both, plaintiff cannot recover for ensuing fire loss, under the terms of the policy sued on."

Under the former decision this charge correctly construed the policy, and applied its terms to the conflicting evidence. It is needless to set out the company's various requests for instructions in regard to the conditions in the policy; for, so far as they ran counter to the former decision, they were properly refused, and those that were correct merely duplicated the charge given. The company is very earnest in its insistence that, on account of the great volume and high character of the testimony in support of its theory that the wall fell from defects or overloading, the court should have elaborated and dwelt more largely upon the meaning of the "falling clause," and its bearing upon the evidence. The company's defense was not a confession and avoidance of Mr. Leonard's case; it was simply a denial that the wall fell as the result of the explosion claimed by the plaintiff. And, no matter how vehement and strongly supported the denial, the court was not required to do more than place the conditions of liability before the jury clearly and directly once. Repetitions of the same idea in varying phraseology would only tend to confuse the jury, leading them possibly to believe that distinctions were intended which they failed to grasp, where none existed.

Witnesses were permitted, over the company's objection, to testify in regard to the condition of the mill at and before the alleged explosion, the amount of mill dust collected, the omission of known appliances to prevent the escape of mill dust, etc. All this was material within the approved definition that "a fact is material which renders probable the existence or nonexistence of a fact in issue."

The explosiveness of mill dust was explained by experts, and some experiences were stated. Objections to a comparison with gunpowder and to a failure to give dates of experiences are manifestly untenable.

Hypothetical questions were objected to on the ground that facts were included which were not conceded to be true, nor established by the evidence. A hypothetical question may call for an opinion based on facts assumed. If the facts are not eventually proven, the weight of the answer is destroyed, but error cannot successfully be predicated on the court's permitting the question to be put.

Finally, an instruction in regard to the amount of recovery is

criticised. The court told the jury that if they found "that the property of the plaintiff, described in the policy of insurance, contained in plaintiff's said building, was destroyed or damaged by fire to an amount exceeding all the insurance plaintiff had upon it at the time of the loss, if any, then plaintiff is entitled to recover herein from the defendant the sum of five thousand dollars (the face of the policy), with interest at the rate of five per cent. per annum from February 1, 1900." This instruction did not relieve the jury from determining for themselves whether the damage by fire exceeded the whole amount of insurance. It expressly submitted that question to them. Under the evidence the only possible source of damage other than fire was the fall of part of the building. The only legitimate inference from the instruction was that, if the jury found the damage by fire to be less than the total insurance, their verdict should be for such proportion of the loss by fire as the company's policy bore to the total insurance. Probably it would have been better if the court had made an explicit statement of this to the jury. But any possible error in failing to do so was rendered harmless by the state of the evidence. We do not find in the record any evidence on the part of the company in reference to the amount of loss by fire and the amount resulting from the partial fall of the building. The total insurance was \$76,500. The value of the insured stock was \$130,000. From the evidence on behalf of Mr. Leonard the utmost the jury would have been justified in finding was that one-fourth of the stock was disturbed by the fall, and that this portion was damaged to half its value. The loss thus shown to be attributable to the explosion might be trebled, and the fire loss would still materially exceed the whole insurance.

The judgment is affirmed.

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OWEN et al. v. BROWN.

(Circuit Court of Appeals, Eighth Circuit. February 9, 1903.)

No. 1,793.

**1. ACT OF BANKRUPTCY — 'PREFERENCE THROUGH LEGAL PROCEEDING' — ENFORCEMENT OF JUDGMENT LIEN.**

Neither the third subdivision of section 3a. nor any other provision of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), contemplates that valid judgment liens on real property acquired before the passage of the act, or more than four months before the filing of the petition in bankruptcy, shall be vacated, or that the due enforcement of such liens by execution shall constitute an illegal preference or an act of bankruptcy.

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

Henry T. Rogers, Lucius M. Cuthbert, Daniel B. Ellis, and Pierpont Fuller, for appellants.

James H. Brown, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. On the 14th day of April, 1902, the appellants filed their petition in the District Court of the United States for the district of Colorado to have the appellee adjudged a bankrupt. The petition was based on the act of bankruptcy defined in the third subdivision of section 3a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), and alleged, in substance, that the appellee, Brown, was insolvent, and that within four months next preceding the filing of the petition he had committed an act of bankruptcy by suffering and permitting, while so insolvent, Thomas R. McKee, one of his creditors, to obtain a preference through legal proceedings, and did not, within five days of the date of the sale of his property thereunder, vacate and discharge such preference. The petition then sets out that the alleged preference was obtained in this wise: That on the 14th day of November, 1895, judgment was entered in the Circuit Court of the United States for the district of Colorado in favor of the First National Bank of Fort Madison, Iowa, against the defendant, Brown, for \$5,260.65; that an execution was issued on this judgment on the 12th day of November, 1901, which was levied upon certain real estate belonging to the defendant, Brown, described in the petition, which, after being duly advertised for sale, was sold by the marshal on the 23d day of December, 1901, to Thomas R. McKee, assignee of the judgment, for the amount thereof, with interest and costs, and that by this proceeding McKee, the assignee of the judgment, obtained a preference by legal proceedings and a greater percentage of his debt against Brown than any other of his creditors, and that Brown, having suffered and permitted this preference thus obtained, and not having, at least five days before sale or final disposition of the property affected by such preference, vacated and discharged such preference, was thereby guilty of an act of bankruptcy. The defendant Brown demurred to the petition, which was sustained, and petitioners appealed to this court.

The contention of the appellants is that the judgment creditor obtained a preference and the act of bankruptcy was committed when the defendant's real estate was sold on execution, without regard to the date of the judgment on which the execution was issued, and regardless of the fact that the judgment was a lien on the real estate of the defendant sold on the execution from the date of its rendition. This contention finds no support in the bankrupt act or on principle. Section 3a of the bankrupt act provides (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]):

"Acts of bankruptcy by a person shall consist of his having \* \* \* (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

Section 3b provides:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act."

The "preference through legal proceedings" mentioned in subdivision 3 is a preference obtained by such means within four months next preceding the filing of the petition in bankruptcy.

Neither the third subdivision of section 3a, nor any other provision of the bankrupt act, contemplates that valid judgment liens on real property acquired before the passage of the act, or more than four months before the filing of the petition in bankruptcy, shall be vacated; or that the due enforcement of such liens by execution shall constitute an illegal preference, which would be exactly tantamount to vacating or annulling the lien itself. The judgment against the defendant upon which his real estate was sold was rendered before the passage of the bankrupt act, and was a lien on the defendant's real estate from the date of its rendition, or whenever thereafter the judgment debtor acquired the property. Sess. Laws Colo. 1891, p. 247; Act of August 1, 1888, c. 729, 25 U. S. Stat. 357 [U. S. Comp. St. 1901, p. 701]; *Dartmouth Savings Bank v. Bates* (C. C.) 44 Fed. 546. The bankrupt act did not vacate or discharge this lien or take away the right of the judgment creditor to avail himself thereof by selling on execution the real estate upon which his judgment was a lien. The date of the sale is immaterial; whenever it took place it had relation back to the date the lien of the judgment attached. The judgment creditor's right to have this real estate sold on execution and the proceeds of the sale applied to the payment of his judgment was acquired when the lien of the judgment attached to the real estate, and not when the execution sale took place. As the judgment creditor did not, within four months of the filing of the petition in bankruptcy, obtain "a preference through legal proceedings" there was no "such preference" for the defendant to vacate or discharge, and the third subdivision of section 3a does not, therefore, apply to this case. The preference was obtained when the lien attached, and not when it was enforced. When the creditor obtains no preference within four months the debtor suffers or permits none for which he can be adjudged a bankrupt. Under the construction of the act contended for by the appellants it would be useless for a creditor to take a mortgage or obtain a judgment lien on the property of his debtor in any case; for years after he obtained his lien, and whenever by appropriate judicial proceedings he enforced the same to procure satisfaction of his debt, he would be met by the proposition that by the "legal proceedings" he had resorted to to enforce his lien he had thereby obtained "a preference through legal proceedings"; and the judgment debtor, for suffering or permitting such preference, would be adjudged a bankrupt, and the proceeds of the creditor's security would inure to the equal benefit of all the debtor's creditors. The bankrupt act does not work any such fell destruction of securities.

The recent decisions of the Supreme Court of the United States in the case of *Metcalf Bros. & Co. v. Barker* (October term, 1902), 23 Sup. Ct. 67, 47 L. Ed. —, and *Pickens v. Roy* (October term, 1902) 23 Sup. Ct. 78, 47 L. Ed. —, must be held to conclude this question. Though other provisions of the bankrupt act were under consideration in those cases, the reasoning of the court is equally

applicable to the provision of the act under consideration in this case. In the first of these cases the court, construing section 67f of the act, said:

"In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial."

The reasoning of the Supreme Court in the case cited and the citations it contains make it unnecessary to cite other cases.

The decree of the District Court is affirmed.

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MARSHALL FIELD & CO. v. WOLF & BRO. DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. February 2, 1903.)

No. 1,769.

1. BANKRUPTCY—COMPOSITION—ACCEPTANCE—APPEAL—PARTIES.

On appeal by a creditor of a bankrupt from an order approving a composition under which a majority of the creditors have received the amounts to which they were entitled, the assenting creditors are necessary parties.

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

W. B. Thompson (John W. Blackwood and John E. Williams, on the brief), for appellant.

George B. Rose (U. M. Rose and W. E. Hemingway, on the brief), for appellee.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Wolf & Bro. Dry Goods Company, a corporation, having been adjudged a bankrupt on the petition of its creditors, offered to its creditors a composition of 30 cents on the dollar, which was accepted by a large majority in number and value of its creditors, and, after considering objections to the composition filed by the appellant in this case, and hearing evidence on the issues, the bankrupt court approved the composition, and thereupon, and before this appeal was taken, there was paid to the several creditors accepting the composition the amount due them, respectively, and the estate of the bankrupt was returned to and disposed of by it. Neither the trustee nor the assenting creditors are made parties to the appeal, but only the bankrupt, and there is a motion to dismiss the appeal on this ground, which must be sustained. The creditors assenting to the composition, and who have received the amount due them thereunder, have a direct interest in maintaining the order appealed from, and should have been served with citation and made ap-

pellees in this appeal. *Dodson v. Fletcher*, 24 C. C. A. 69, 78 Fed. 214; *Farmers' Loan & Trust Co. v. McClure*, 24 C. C. A. 64, 78 Fed. 210; *Dodson v. Fletcher*, 24 C. C. A. 466, 79 Fed. 129; *American Loan & Trust Co. v. Clark*, 27 C. C. A. 522, 83 Fed. 230; *Boyd v. Stuttgart R. R.*, 28 C. C. A. 262, 84 Fed. 9; *Grand Island R. R. v. Sweeney*, 37 C. C. A. 127, 95 Fed. 396; *Same v. Same*, 43 C. C. A. 255, 103 Fed. 342.

If their number made it impracticable to make them all parties to the appeal, at least a sufficient number to insure an effective representation of the assenting creditors should have been made parties. The great body of the creditors having accepted the composition and received their money before this appeal was taken, the consequences of reversing the order of the court approving the composition would be very serious to them. They would have to repay the money they have received, and incur the risk of receiving a less sum from the trustee. It is very plain that the bankrupt does not represent the assenting creditors, and that their interests are such as to require that they should be made parties to the appeal.

For failing to make the assenting creditors, who had received the money due them under the composition, parties to the appeal, the case must be dismissed. We may add that we have examined the record very carefully, and perceive no error on the merits.

The appeal from the District Court is dismissed.

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#### MENGE v. WARRINER.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1903.)

No. 1,175.

1. **APPEAL—FINALITY OF JUDGMENT—RULE GOVERNING IN FEDERAL COURTS.**  
The question of the finality of a judgment or decree for the purpose of review by writ of error or appeal in the federal courts is not affected by the procedure in the state courts, but is governed by the rules established by federal legislation, and by decisions of the federal courts.
2. **SAME—JUDGMENT OF DISMISSAL AS TO ONE DEFENDANT.**  
In the federal courts an appeal or writ of error will not lie, in general, unless there has been a final disposition of the case as to all parties. A judgment of dismissal as to one of several defendants sought to be jointly charged is not final, so as to permit an appeal or writ of error while the action is still pending as to the other defendants.

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

Frank E. Rainold, for plaintiff in error.

Henry P. Dart and Benj. W. Kernan, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

¶ 1. See *Courts*, vol. 13, Cent. Dig. § 937.

¶ 2. What decrees are final, see note to *Brush Electric Co. v. Electric Imp. Co. of San José*, 2 C. C. A. 379.



SHELBY, Circuit Judge. This action was brought by Charles Menge, a citizen of Louisiana, against Elder, Dempster & Co., a corporation under the laws of Great Britain, and Matthew Warriner, a subject of Great Britain, residing in New Orleans. It is a suit to recover damages for personal injuries alleged to have been received by the plaintiff. It is alleged in the petition that both defendants are liable in solido to the plaintiff, and the prayer is for judgment against both defendants for \$25,000. The defendants separately filed exceptions to the petition, averring that the petition showed no cause of action against them. The exceptions were tried, and the court, on April 7, 1902, "ordered that the exceptions of Matthew Warriner be sustained, and that the suit as to him be dismissed, but that the exceptions of Elder, Dempster & Co. be overruled"; and time was allowed for answer. On April 16, 1902, the defendant Elder, Dempster & Co., filed an answer, denying the allegations of the petition. On May 27, 1902, the case was, by order of the court, continued till November 19, 1902. On June 4, 1902, the plaintiff, Charles Menge, applied to the Circuit Court for a writ of error, which was allowed on that day.

It will be seen from the foregoing statement that the action was brought against two defendants; that the demurrer of one of them was sustained and the action dismissed as to him; that the other defendant answered; and while the case was pending for trial on the issues joined by one defendant, the plaintiff sued out a writ of error to review, in this court, the judgment dismissing the suit as to the other defendant.

By section 6 of the judiciary act of March 3, 1891 [U. S. Comp. St. 1901, p. 549] this court has jurisdiction if there has been a "final decision" in the Circuit Court. 26 Stat. 828. The question of the finality of a judgment or decree for purposes of review by writ of error or appeal in the federal courts is not affected by the procedure in the state courts, but must be governed by the rules established by federal legislation and by the decisions of the federal courts. The Cha-teaugay Company, Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 997; Andes v. Slauson, 130 U. S. 435, 9 Sup. Ct. 573, 32 L. Ed. 989.

In *United States v. Girault*, 11 How. 21, 13 L. Ed. 587, a judgment was had in the United States Circuit Court in favor of some of the defendants, but the case left undecided as to one defendant. The plaintiff sought to review the judgment by writ of error. The Supreme Court dismissed the case for want of jurisdiction, holding that the judgment was not final. In *Hohorst v. Packet Company*, 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443, a bill in equity was filed against several defendants. It was dismissed as to one defendant, but, so far as the record disclosed, was left pending against the others. It was held by the Supreme Court, the chief justice delivering the opinion, that the decree of dismissal was not final, so as to support an appeal.

It may be stated as a general rule that an appeal or writ of error will not lie unless there has been a final disposition of the case as to all parties; and that a judgment of dismissal as to one of several

defendants sought to be jointly charged is not final, so as to permit an appeal or writ of error. 1 Freeman on Judgments (4th Ed.) §§ 27, 34; 2 Cyc. 588, 589. There are, of course, exceptions to the rule, which tend to illustrate its meaning, but which we need not discuss. Standley v. Roberts, 8 C. C. A. 305, 59 Fed. 837; Hill v. Chicago, etc., R. R., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331; Withenbury v. U. S., 5 Wall. 819, 18 L. Ed. 613.

It is not the purpose of a writ of error to bring up the case piecemeal. It is not so used as to leave the case partly in one court and partly in another. It does "not authorize the court below to send up the case unless all the matters between all the parties to the record have been finally disposed of. The case is not to be sent up in fragments, by a succession of writs of error." U. S. v. Girault, 11 How. 21, 32, 13 L. Ed. 587.

The suit is still pending and undetermined in the court below. The judgment of dismissal as to one defendant is not a final judgment within the meaning of the law allowing the writ of error. When the case is finally disposed of, it can be reviewed as to all questions properly reserved. The writ must be dismissed for want of jurisdiction.

Dismissed.

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**CONSUMERS' COTTON OIL CO. v. NICHOL**

(Circuit Court of Appeals, Eighth Circuit. February 2, 1903.)

No. 1,733.

**1. APPEAL—PARTIES—FAILURE TO JOIN OR SEVER.**

Where one of two defendants, against both of whom a decree for damages has been entered by a court of admiralty, does not join in an appeal therefrom, and he is not served with summons and notice of severance before the time for appeal has expired, he cannot thereafter be brought in, or by his voluntary appearance confer jurisdiction on the appellate court.

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

W. S. McCain and Farrar L. McCain, for appellant.

Morris M. Cohn, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. In this case a decree in admiralty was rendered to the effect that Wolf Nichol, as administrator, should recover from the Consumers' Cotton Oil Company and M. S. Brinkley \$1,934.40, together with all costs of the proceeding; that upon the payment of \$900 by the Consumers' Cotton Oil Company or its surety, and the costs of the proceeding, that company should be discharged from all liability under the decree; that, upon the failure to pay that sum and the costs, execution should issue against it; and that execution might go against M. S. Brinkley for any sum which

remained due and unpaid after the cotton oil company had exercised its option to pay or to refuse to pay the \$900. This decree was rendered at some unknown date which does not appear in the record. An appeal from this decree was taken on February 7, 1902, by the Consumers' Cotton Oil Company and A. D. Allen, its surety, but M. S. Brinkley did not join in the appeal, nor was he served with a summons and notice of severance or like notification. On November 17, 1902, Brinkley appeared in this court and waived the service of citation. Brinkley was interested in the decree, was one of the judgment debtors, and the determination of the question presented by the Consumers' Cotton Oil Company determines the amount for which he will ultimately be liable under the decree. The case, therefore, could not be properly considered or heard in this court unless Brinkley was a party to the proceeding or had failed or refused to join therein after notice to do so. At the end of the six months from the entry of the decree, no appeal had been taken which would allow this court to review this record, because Brinkley had not then become, or failed or refused after notice to become, a party to the proceeding in this court. It was not competent for Brinkley to take an appeal subsequent to that date, or for the parties to this suit, or Brinkley, to perfect the appeal by bringing in a new party. *Dodson v. Fletcher*, 78 Fed. 214, 24 C. C. A. 466; *Grand Island & W. C. R. Co. v. Sweeney*, 95 Fed. 396, 37 C. C. A. 127. Upon the authority of these cases the appeal must be dismissed. It is so ordered.

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BOYNTON et al. v. HAGGART et al.

ROZELL et al. v. BOYNTON et al.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1903.)

Nos. 1,679, 1,770.

1. REGISTRY STATUTES—ESTOPPEL FROM DENYING RECORD TITLE.

Registry statutes are legislative extensions of the doctrine of estoppel. Their purpose and effect are to estop the holder of the actual title, evidenced by an unrecorded deed or decree, from denying that the title which appears of record is the real title.

2. SAME—AVAILABLE TO ONE HOLDING UNDER DEED OF WHAT THE GRANTOR OWNS.

An innocent purchaser for value of the lands owned by his grantor in a certain state, without more definite description, may avail himself of a registry statute to estop the holders of the real title under a prior unrecorded decree or deed from asserting it against his claim to all the lands which his grantor appeared by the records to own when he made his purchase.

3. RECORDING ACT OF ARKANSAS—CONSTRUCTION.

One of the statutes of Arkansas provides that, if a decree affecting the title to real estate is not registered in the recorder's office of the proper county within one year of its rendition, it shall be void as to all subsequent purchasers without notice. *Held*, the title of an innocent purchaser of land from the defendant in a decree that appeared by the record to be the owner thereof more than a year after the decree was rendered, and before it was recorded, is superior to the title of those in whose favor the decree was rendered, notwithstanding the fact that the

deed to the purchaser contained no detailed description of the land, but conveyed the right, title, and interest of the grantor in all the lands it owned in certain counties in the state of Arkansas.

**4. REGISTRY STATUTES—NOTICE TO PURCHASER UNDER WARRANTY DEED.**

A subsequent purchaser of lands conveyed to him by a warranty deed is not charged with notice under the registry statutes of unrecorded conveyances or decrees by the fact that some prior deed in the chain of title is a quitclaim deed or conveys only the lands which the grantor therein owned, or those which some bankrupt owned at the time of his adjudication, or those of which some apparent owner died seised. But the purchaser may safely rely upon the presumption that the record title is the real title.

**5. SAME—FACT THAT DEED TO PURCHASER IS FROM HIS AGENT IMMATERIAL.**

The fact that the purchaser takes his deed from his agent in the purchase, who obtained his title by a prior quitclaim deed from the vendor of the lands he owned in a certain county or state, does not deprive the purchaser of the benefit of this rule.

**6. SAME—DEED WHOSE PARTIES ARE NOT IN CHAIN OF TITLE—NOTICE.**

The record of a deed neither the grantors nor grantees of which appear in the recorded chain of title is no notice to a subsequent purchaser of any right or interest of any of the parties to such a deed in the land it describes.

**7. SWAMP-LAND GRANT TO ARKANSAS—GOVERNOR AND AUDITOR SPECIAL TRIBUNAL TO DETERMINE CLAIMS TO.**

The Auditor and Governor of the state of Arkansas constitute a quasi judicial tribunal empowered to hear and determine who are entitled to the swamp lands granted to that state by the act of Congress of September 28, 1850 (9 Stat. 519), and to execute their judgments by issuing patents or deeds of the state to the parties that they find entitled to them.

**8. SAME—PATENT CONCLUSIVE EXCEPT AGAINST DIRECT-ATTACK.**

The patent of the state to such lands is impervious to collateral attack, and conclusive evidence of title, except in a direct proceeding in equity to avoid it for fraud or gross mistake.

**9. ESTOPPEL BY DEED.**

An estoppel by the subsequent judgment of a competent tribunal prevails over a prior estoppel by the covenants of a deed.

**10. LACHES—LIMITATION AT LAW.**

Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed for the commencement of the analogous action at law.

When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by the answer, that circumstances exist which require the application of the doctrine of laches.

When the suit in equity is brought after the analogous statutory time, the burden is on the complainant to plead in his bill and to establish by proof the existence of unusual facts and circumstances which make it inequitable to apply the doctrine of laches to his case.

**11. SAME—FACTS.**

The cause of action in equity to avoid a patent accrued 32 years before the interveners sought relief. The analogous limitation at law was five years. The interveners neither pleaded nor proved any excuse for the delay, and an innocent purchaser had bought the land in reliance upon the patent.

*Held*, the interveners were estopped from securing relief in equity by their laches.

(Syllabus by the Court.)

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

Charles T. Coleman (W. J. Driver and John M. Rose, on the brief), for appellants Lucetta B. Boynton and others.

S. S. Semmes and Allen Hughes, for appellants L. D. Rozell and others.

N. W. Norton, for appellees James Haggart and others.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. These appeals present controversies between three sets of claimants to the title to certain timber lands in the state of Arkansas. Lucetta B. Boynton and her associates, the complainants below, are the devisees under the will of C. O. Boynton, deceased, who brought this suit against James Haggart and William McMasters, hereafter called the "defendants," to quiet in himself the title to about 20,000 acres of land which he bought of the Citizens' Bank of Louisiana in the year 1883. L. D. Rozell and his associates, the heirs of A. B. Rozell, deceased, intervened in this suit, and claimed the title to a portion of these lands. There was a hearing and a decree for the defendants, which the complainants and the interveners challenge by separate appeals.

The principal question which the appeal of the complainants presents is whether or not an innocent purchaser under a deed of all the right, title, and interest in the lands owned by his grantor in a certain state, without a more definite description, may successfully hold the lands which his grantor appeared by the registry to own when he made this deed as against a claimant under a prior unrecorded conveyance of the same lands by the same grantor. The question arises in this way: From 1873 until October 26, 1883, the records of the counties in which these lands were situated disclosed a complete chain of title to them from D. C. Cross, the grantee of the state of Arkansas, to the Citizens' Bank of Louisiana. On May 3, 1880, however, a decree had been rendered in one of the courts of the state of Arkansas in a suit between the executor, the executrix, and the devisees of the will of Jephtha Fowlkes, complainants, and the Citizens' Bank of Louisiana, defendant, to the effect that the heirs of Jephtha Fowlkes were the owners of this land, and that the bank had no title or interest in it. One of the statutes of the state of Arkansas required those in whose favor such a decree was rendered to register it in the recorder's office of the county in which the lands it affected were situated within one year after its rendition, and provided that, "if such decree be not recorded within such time, it shall be void as to all subsequent purchasers without notice." Gould's Digest of the Laws of Arkansas, p. 637, § 35. This decree was not recorded until November 4, 1884. Meanwhile, and in the year 1883, W. L. Culbertson, the agent and associate of C. O. Boynton, without any notice of this decree, purchased the lands in controversy in this suit from the Citizens' Bank of Louisiana, paid that bank \$13,000 therefor, and took and recorded a quitclaim deed from it to himself of "all and singular its right, title, interest, and claim of whatever nature, legal and equitable, in and to all the lands, lots, and parcels of land and any and all interests in the same belonging to and owned by

said Citizens' Bank of Louisiana, in the state of Arkansas, at the date of this conveyance (except its lands and interests in Chicot county in said state); the said lands and interests herein conveyed being situated and lying within the counties of Clay, Crittenden, Craighead, Cross, Greene, Mississippi, Poinsett, and Woodruff, in the said state of Arkansas; and this conveyance to operate and be as absolute full and complete as if the said lands and interests aforesaid were herein specifically described." Before making this purchase, Culbertson procured a list of these lands, and an abstract of the recorded title to them, from which it appeared that the bank had a perfect record title to them, subject only to a tax title, which Culbertson bought at the same time that he purchased the lands from the bank. He secured his deed from the bank on September 26, 1883, and recorded it on October 26, 1883. C. O. Boynton, his principal, furnished the money to make this purchase, and on October 23, 1883, Culbertson conveyed the lands in controversy in this suit to Boynton by means of a warranty deed which describes them by government subdivisions, and this deed was recorded on October 29, 1883. Culbertson appears to have been interested with Boynton in the purchase of the lands, but what his interest was does not appear. The title of the complainants rests upon the purchase from the bank and the conveyance to Boynton while he was ignorant of the existence of the decree. The defendants have succeeded to the title of the heirs of Fowlkes under their decree against the bank of May 3, 1880, and the question is whether that title or that of the devisees of Boynton should prevail.

Counsel for the defendants argue that the deed from the bank to Culbertson conveyed only the lands which the bank owned at the date of the deed, and that, as the title to the lands here in question had been divested from the bank before the deed to Culbertson was made by the decree of May 3, 1880, and as the bank did not in fact own any right, title, or interest in the lands when it made this deed, the deed conveyed nothing, and the purchasers took nothing thereby. In support of this contention they cite *Brown v. Jackson*, 3 Wheat. 449, 4 L. Ed. 432. That was the first of a long line of decisions rendered by the Supreme Court in which it held that the grantee in a quitclaim deed could not become a bona fide purchaser under the registry statutes because the prior deed had conveyed all that the grantor had, and the form of the quitclaim deed was notice of that fact to its grantee. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Mav v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618; *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396. Counsel for the interveners cite the cases of *Adams v. Cuddy*, 13 Pick. 460, 25 Am. Dec. 330; *Jamaica Corporation v. Chandler*, 9 Allen, 159, 169; *Chaffin v. Chaffin*, 4 Gray, 280; *Fitzgerald v. Libby*, 142 Mass. 235, 7 N. E. 917; and *Eaton v. Trowbridge*, 38 Mich. 454, in support of the position of the defendants. But these decisions fail to give any adequate effect or force to the estoppel of the registry

statutes, and are in accord with the early holdings of the Supreme Court regarding the effect of a quitclaim deed. The riper experience and more thoughtful consideration of later years have exploded the fallacy upon which the earlier decisions of the Supreme Court rested, and have led that court to adopt the rule which has now become firmly established both upon reason and authority that the innocent purchaser under a quitclaim deed may acquire the title under the registry statutes as against the holder of a prior unrecorded deed from the same grantor notwithstanding the fact that the latter had no title, and had nothing to convey when he executed his second deed. *Moelle v. Sherwood*, 148 U. S. 21, 29, 30, 13 Sup. Ct. 426, 37 L. Ed. 350; *United States v. California, etc., Land Co.*, 148 U. S. 31, 47, 48, 13 Sup. Ct. 458, 37 L. Ed. 354; *Prentice v. Duluth Forwarding Co.*, 58 Fed. 437, 447, 7 C. C. A. 293, 303; *Memphis Land & Timber Co. v. Ford*, 58 Fed. 452, 7 C. C. A. 304.

No reason is perceived why the case at bar should not be governed by this just and salutary rule. Registry statutes are legislative extensions of the doctrine of estoppel. They forbid those who have, and yet withhold from the record, their muniments of title, from asserting the title those muniments disclose against others who have innocently purchased the land from him who appears by the record to be the owner while the holders of the real title silently conceal it. They rest upon and enforce the equitable proposition that he who knowingly conceals his ownership when he ought to disclose it shall not assert it to the detriment of his neighbor who has acted in reliance upon his silence. When Culbertson purchased these lands, the record disclosed a perfect title to them in the bank. That record was evidence of title both in the courts of the land and in the ordinary commercial transactions of men. *Gould's Digest*, p. 268, § 26. The agent of the vendor, the bank, furnished to the purchaser a list of these lands, and offered to sell them to him for his principal. Culbertson took the list, procured an abstract of the record title to the lands it described, and bought them in reliance upon the representation which the record and the silence and inaction of the grantors of the defendants exhibited. The defendants, or those under whom they claim, in violation of the statute, which required them to record the decree of May 3, 1880, which had divested the title of the bank, silently withheld it from the record, and thereby induced, or at least permitted, Culbertson and Boynton to buy from one who had no actual title. May they now be allowed to avail themselves of that decree, to deprive these vendees of the land, and to entail upon them the loss of their purchase money? The question is answered by the salutary statute of Arkansas. It declares that, if such a decree is not recorded within one year after its rendition, "it shall be void as to all subsequent purchasers without notice." The evidence is satisfactory—nay, it is conclusive—that Culbertson and Boynton were subsequent purchasers of these lands without notice of this decree, and they fall far within both the reason and the terms of the statute whose protection they invoke.

It is true, as counsel insist, that, in the absence of the estoppel of the registry statutes, a conveyance of what one owns carries nothing

which he does not own, and that under that rule the deed to Culbertson conveyed nothing, because the bank had nothing when it was made. But the question here is not what the bank owned when that deed was made. It is not what the bank could convey. It is what the bank appeared to own by the authorized records of the counties in which these lands were situated. The statute and the negligence of the defendants, or of their grantors, estop them from proving, or from successfully claiming, that the title to these lands was other than that which they permitted it to appear to be upon these records when Culbertson and Boynton bought. The contention that the grantor had nothing when this deed was made, and hence that the purchasers acquired nothing by it, proves too much. It applies with equal cogency to the purchaser under every deed subsequent to a prior unrecorded conveyance, and its adoption would annul every statute of registration, for it may be said with equal truth of every such subsequent conveyance that the grantor has nothing when he makes it, and therefore the subsequent purchaser can take nothing. The argument is fallacious, because it utterly ignores the purpose, the policy, and the effect of the statutes of registration. It is the purpose and the legal effect of these statutes to make the title that appears of record—the record title—superior in the hands of an innocent purchaser for value to the real title that is withheld from registration. Hence, while one who has parted with his title to land by an unrecorded deed or decree has no title or interest remaining in himself, yet his deed to an innocent purchaser for value, by virtue of the registry statutes, avoids the effect of the prior unrecorded deed or decree, and vests the title to the land in the subsequent purchaser to the same extent as it would have done if the title of record had been the real title. The holders of unrecorded instruments are estopped by the statute and their negligence from denying that the record title is the real title. *Memphis Land & Timber Co. v. Ford*, 58 Fed. 452, 455, 456, 7 C. C. A. 304, 307, 308. The defendants cannot be heard to say, as against Culbertson, Boynton, and their successors in interest, that the Citizens' Bank of Louisiana was not the owner of the lands which it appeared by the records of the counties to be the owner of when Culbertson and Boynton made their purchase.

There is another reason why the title of the complainants must prevail. Boynton was not only an innocent purchaser of these lands, but he secured them in October, 1883, by means of a warranty deed from Culbertson, which properly described and conveyed them to him by government subdivisions. If Culbertson could not have claimed the benefit of the estoppel of the registry statute because the deed to him did not specifically describe the lands, Boynton was under no such disability. Even in those courts in which the rule once prevailed that one who takes under a quitclaim deed cannot be a bona fide purchaser, that rule was sometimes limited to the grantee in such a deed. It did not apply to those who succeeded to the title of such a grantee by deeds of bargain and sale or by warranty deeds, and this was a reasonable limitation. *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661; *United States v. California, etc., Land Co.*, 148



U. S. 31, 47, 13 Sup. Ct. 458, 37 L. Ed. 354. The form of the deed to Culbertson, his grantor, did not charge Boynton with notice of the unrecorded decree against the bank, or of any other defect in its title, even if it could have charged Culbertson. A subsequent purchaser of lands properly described in a warranty deed to himself is not charged with notice of unrecorded conveyances or decrees by the fact that some prior deed in the chain of title is a quitclaim deed, or conveys only the lands which the grantor then owned, or of which some apparent owner died seised; or which some bankrupt owned at the time of his adjudication, but he may safely rely upon the presumption that the record title is the real title. *Memphis Land & Timber Co. v. Ford*, 58 Fed. 452, 455, 456, 7 C. C. A. 304, 307, 308; *United States v. California, etc., Land Co.*, 148 U. S. 31, 46, 47, 13 Sup. Ct. 458, 37 L. Ed. 354; *Kennedy v. Northup*, 15 Ill. 148, 157; *Bowen v. Prout*, 52 Ill. 354, 357; *Youngblood v. Vastine*, 46 Mo. 239, 242, 2 Am. Rep. 509; *Powers v. McFerran*, 2 Serg. & R. 44, 47; *Earle v. Fiske*, 103 Mass. 491, 494.

The suggestion of counsel for the defendants that this rule is inapplicable in the case at bar because Culbertson was the agent of Boynton, and the form of the deed from the bank to him, which evidenced the real transaction, ought to control, and to charge Boynton with notice, has not been overlooked. But this contention ought not to prevail, because the rule which counsel seek to apply to this purchaser was, when it prevailed, arbitrary, technical, and unjust, and it ought not to be extended beyond its exact limits where it is applied at all. In *United States v. California, etc., Land Co.*, 148 U. S. 31, 46, 47, 13 Sup. Ct. 458, 37 L. Ed. 354, the deed from the vendor to its agent was a quitclaim deed, while the deed from the agent of the vendor to the vendee was a warranty deed, and the Supreme Court held that the fact that the agent of the vendor was a mere conduit to transfer the title would not deprive the purchasers of the benefit of the limitation of the rule that they were not chargeable with notice of unrecorded conveyances by a quitclaim deed to their grantor. If the rule were to be applied, this limitation, in our opinion, would not be inapplicable in this case, and an innocent purchaser for value, who holds under a warranty deed from his agent which properly describes the land, ought not to be charged with notice of unrecorded conveyances or decrees by the fact that the deed to his agent was a quitclaim deed, or by the fact that that deed by its terms conveyed only the lands which the grantor owned in a certain state or county.

The rules and principles to which reference has now been made practically dispose of the issue between the complainants and the defendants. The record of the deed from the heirs of Fowlkes to Allen in the year 1882, which appears in the defendants' chain of title, constituted no notice to Boynton of any title or interest in either of the parties to that deed, because the decree had not then been recorded, and neither the grantors nor the grantee in that deed appeared from the record to have any interest in the title to the lands. The record of a deed neither the grantors nor the grantees of which appear in the recorded chain of title is no notice to any subsequent purchaser of any right or interest of any of the parties to such a deed in the land

it describes. *Huber v. Bossart*, 70 Iowa, 718, 722, 29 N. W. 608; *Tarbell v. West*, 86 N. Y. 280; *De Yampert v. Brown*, 28 Ark. 166; *Traphagen v. Irwin*, 18 Neb. 195, 24 N. W. 684.

The title, independent of the heirs of Fowlkes, which the defendants claim to some of the lands in controversy through the deed from D. C. Cross to the Iron Mountain & Helena Railroad Company, dated June 7, 1871, fails, because these lands were then subject to the lien of the judgment of the bank against Cross, which was subsequently enforced by the marshal's sale to the bank under the execution upon that judgment. The result is that Boynton was a subsequent purchaser, without notice, of the lands in controversy in this suit, more than a year after the decree against the bank was rendered, and before it was recorded. That decree was void as to him, and the title of his devisees must prevail over the claim which the defendants derived from the heirs of Fowlkes.

We turn to the claim of the interveners. It will be borne in mind that the complainants' chain of title is a patent or deed from the state of Arkansas to D. C. Cross, made in 1866; a marshal's deed to the bank on April 12, 1873, made in execution of a judgment against Cross rendered and docketed in 1868; a deed from the bank to Culbertson, dated September 26, 1883, and recorded October 26, 1883; and a deed from Culbertson to Boynton, dated October 23, 1883, and recorded on October 29, 1883. The interveners are the heirs of A. B. Rozell, and they claim a portion of the lands conveyed to Boynton upon this state of facts: These lands were a part of the swamp-land grant of September 28, 1850 (9 Stat. 519), to the state of Arkansas. They were entered by George W. Underhill in the office of the proper official of the state of Arkansas in 1852. On February 14, 1855, Jephtha Fowlkes conveyed the lands which the interveners claim by a warranty deed to A. B. Rozell. That deed was properly recorded in February, 1855, and the claim of the interveners is based upon it. The statutes of the state of Arkansas provided that upon the presentation of certificates of entry of swamp lands to the land agent of the state he should issue patent certificates to the land to the last assignee of the certificates of entry; that the Governor of the state should issue deeds upon such patent certificates; and that full title in fee should vest in the assignee to whom such deeds were issued as effectually as if he had been the original purchaser or locator of the land. *Gould's Digest*, p. 730, § 37. On June 7, 1855, about four months after Fowlkes' deed to Rozell, the agent of the state of Arkansas issued to Jephtha Fowlkes a patent certificate to these lands. The statute of Arkansas farther provided (1) that it was the duty of the Auditor of the state, upon receiving proof deemed sufficient by him of the loss of any certificate, to issue a duplicate certificate reciting the fact that this duplicate was given by him in lieu of a certificate proved to be lost; (2) that such duplicate should be deemed, taken, and considered for all and every purpose whatever as in lieu and cancellation of the original certificate; and (3) that the Governor of the state was authorized to issue upon such a duplicate certificate a patent to the holder thereof for the lands therein described. *Id.*, p. 731, §§ 42, 44. On December 1, 1866, the Auditor of the state of

Arkansas issued under these statutes to D. C. Cross a duplicate certificate of these lands, which recited that it was issued in lieu of the certificate which Jephtha Fowlkes had obtained on the 7th day of June, 1855, which had been assigned to D. C. Cross, and had subsequently been lost by him. Thereupon the Governor of the state issued to D. C. Cross upon this certificate a patent or deed of these lands from the state of Arkansas to D. C. Cross.

Now, the claim of the interveners is that the interest which Jephtha Fowlkes acquired by the assignment of Underhill's entry and the issue of the patent certificate to him on June 7, 1855, passed to their intestate, A. B. Rozell, instantly upon its acquisition by Fowlkes by virtue of the covenants in his warranty deed of February 14, 1855, so that their title under that deed is superior to the title of the complainants. At the threshold of the discussion of this contention it is conceded that under this warranty deed as against Fowlkes and those claiming under him with notice of its existence whatever title or interest Fowlkes acquired in these lands passed to Rozell, the grantee therein, by virtue of the covenants of warranty. But it does not follow from this concession that the title of the heirs of Rozell is superior either in law or in equity to the title of the complainants. The only basis for their claim to these lands which the interveners pleaded or suggested in their petition was that by the decree of May 3, 1880, the title of the bank had been divested, and restored to the heirs of Fowlkes, and that under that decree and the warranty deed to their intestate they had succeeded to that title. But the heirs of Rozell are estopped from deriving any benefit from that decree for the same reason that the defendants are, because Boynton was a subsequent innocent purchaser for value more than a year after the decree was rendered and before it was recorded, so that it was void as to him. To the contention that the record of the deed from Jephtha Fowlkes to A. B. Rozell charged Boynton with notice of the title or interest of the interveners or their intestate the answer is that neither the grantor nor the grantee in that deed appeared in the recorded chain of title, and for that reason it constituted no constructive notice to a subsequent innocent purchaser.

This brief reference to the pleaded claim of the interveners completely disposes of the only question which they made by their petition, or which, so far as the record discloses, they presented to the court below at the hearing, and we might well close the discussion of their pretensions here. In this court, however, their counsel insist that their title may be sustained in preference to that of the complainants, independent of the decree of May 3, 1880, because the title of Fowlkes passed to their intestate before Fowlkes sought to assign it to Cross, so that neither Cross nor any one claiming under him ever dequired any title to the property; and a few moments will be devoted to a statement of the reasons why, in our opinion, this position cannot be sustained. If Jephtha Fowlkes had acquired the legal title to this land, instead of the equitable title, and if Boynton had received either actual or constructive notice of the warranty deed to Rozell before he purchased, their proposition would be unanswerable. But Fowlkes never had the legal title. That title was in the United States,

or in the state of Arkansas, until that state conveyed it to Cross. Fowlkes never had, and Rozell never acquired by the deed to him, more than the equitable title—the right, subject to the decision of the Auditor, the Governor, and the courts, to acquire the legal title by a patent from the state or by a decree of a court, if the Auditor, the Governor, or the court should be of the opinion that they, or either of them, were entitled to such a title. Now, the Legislature of Arkansas lawfully constituted the Auditor and the Governor of that state a quasi judicial tribunal to hear and determine the question who was entitled to the legal title to this land—to the patent or deed of it from the state. Neither Rozell nor his heirs ever applied or asked for this patent or deed before this suit was instituted in the year 1899. In 1866—11 years after Rozell obtained his warranty deed and whatever interest he acquired from Fowlkes—Cross applied to the Auditor and the Governor, the proper tribunal, for the legal title and the patent of the state to this land, and that tribunal decided that he was the assignee of Fowlkes, that he had lost his certificate, and that he was entitled to a duplicate certificate, and to the legal title and the patent of the land from the state, and they issued the patent to him. The heirs of Rozell now claim for the first time in this suit—more than 32 years after the issue of this patent, and more than 12 years after Boynton has brought and paid for these lands in reliance upon that patent—that the duplicate certificate and the patent were obtained by the fraud and misrepresentation of Cross, were wrongfully issued by the Auditor and the Governor of the state, and that they are ineffectual to convey any title to Cross or to his grantees, because they were privies in estate with Fowlkes, and bound by his covenants of warranty to Rozell. But the Auditor and the Governor constituted a quasi judicial tribunal, under the statutes of the state of Arkansas, vested with the power and charged with the duty to hear and determine the question who was entitled to the legal title to these lands, and to execute its judgment by the issue of a patent conveying it. The Auditor and Governor heard and determined this question. They decided that Cross was entitled to the title and the patent, and they issued it to Cross. That patent conveyed the legal title. Like the decisions of other judicial tribunals, the judgment of the Auditor and Governor upon this matter, which was committed to their jurisdiction, was impervious to collateral attack, and it estopped every one claiming the land from asserting any title to it derived from the state of Arkansas until by direct proceeding in equity the effect of this patent was avoided. *King v. McAndrews*, 111 Fed. 860, 864, 873, 50 C. C. A. 29, 32, 41; *Minter v. Crommelin*, 18 How. 87, 89, 15 L. Ed. 279; *U. S. v. Schurz*, 102 U. S. 378, 401, 25 L. Ed. 167; *Moore v. Robbins*, 96 U. S. 530, 533, 24 L. Ed. 848; *French v. Fyan*, 93 U. S. 169, 172, 23 L. Ed. 812; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Refining Co. v. Kemp*, 104 U. S. 636, 645-647, 26 L. Ed. 875; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389, 27 L. Ed. 226; *Lee v. Johnson*, 116 U. S. 48, 49, 6 Sup. Ct. 249, 29 L. Ed. 570; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380, 34 L. Ed. 1053; *Knight v. Association*,

142 U. S. 161, 212, 12 Sup. Ct. 258, 35 L. Ed. 974; Noble v. Railroad Co., 147 U. S. 174, 13 Sup. Ct. 271, 37 L. Ed. 123; Barden v. Railroad Co., 154 U. S. 288, 327, 14 Sup. Ct. 1030, 38 L. Ed. 992. This judgment of the Auditor and Governor is a complete answer to the asserted estoppel of the covenants of warranty in the deed of Rozell. The estoppel by that deed is met by the estoppel of the judgment of the special tribunal authorized to adjudicate the question whether or not Cross was the owner of the title, and the latter estoppel prevails. An estoppel by the subsequent judgment of a competent tribunal prevails over a prior estoppel by deed.

Notwithstanding the presumptive validity of this patent and its imperviousness to collateral attack, Rozell and his heirs were not remediless, if, as their counsel now claim, the patent was issued upon a misapprehension of the facts, which was induced by fraud or mistake. They might have pleaded the facts which constituted this fraud or induced this mistake in a court of equity, and such a court, if they proved their averments, would have avoided the patent, or decreed that the owner of the title under it held it in trust for, and should convey it to, Rozell or his heirs. King v. McAndrews, 111 Fed. 860, 864, 865, 50 C. C. A. 29, 33, and cases there cited. It is only upon this ground that this court or the court below has any jurisdiction to grant any relief to the interveners in this suit under the established rules and principles of the law to which we have adverted, and there are two conclusive reasons why they are entitled to no relief upon this ground. The first is that they have not pleaded or proved the facts constituting the fraud or inducing the mistake which they now claim caused the issue of the patent to Cross. Indeed, they have not even pleaded that there was any such fraud or mistake. This seems to be an afterthought, presented in argument in this court, and it cannot prevail, because the decision of a question of fact by a special tribunal authorized to hear and determine it is conclusive even in a direct proceeding to avoid a patent based upon it, unless it is first made to appear clearly by pleading and proof that its action was induced by a gross mistake or by fraudulent practices. There is no general appeal from the decision of the Auditor and Governor of Arkansas determining who is entitled to patents from the state to swamp lands to the state or to the federal courts. U. S. v. Northern Pacific Railroad Co., 95 Fed. 864, 870, 37 C. C. A. 290, 295, 296; James v. Germania Iron Co., 107 Fed. 597, 617, 46 C. C. A. 476, 497.

The second reason why the interveners are entitled to no relief against this patent is that they are estopped from securing it by their own laches. When, in 1866, this conveyance by the state of Arkansas to Cross was made, a cause of action to set it aside and to secure a decree that the title under it was held by Cross in trust for, and that it should be conveyed to, Rozell, immediately accrued to the latter. He lived until 1884, and one of his heirs—one of the interveners, his son L. D. Rozell—was aware that his father had a claim to this land before the latter died. Yet no suit was brought or action taken to enforce this claim until this petition in intervention was filed in 1899. The statutes of the state of Ar-

kansas provide that suits of this nature must be commenced within five years after the cause of action accrued. Sandels & Hill's Digest, §§ 4832, 4822. While courts of equity are not bound by, they ordinarily act or refuse to act in analogy to, the statutes of limitations relating to actions at law of like character. When a suit is brought after the time fixed by the analogous statute, the burden is on the complainant to plead and prove that it would be inequitable to apply it to his case, and when a suit is brought within the statutory time for the analogous action at law, the burden is on the defendant to show either from the face of the bill or by his answer that extraordinary circumstances exist, which require the immediate application of the doctrine of laches. *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21. The action at law analogous to the petition to avoid this patent to Cross was barred under the statutes of Arkansas in 1871. The fact that many of the heirs of Rozell were not until 1899 aware that either they or their intestate ever had any claim to or interest in this land, which appears in the record, furnishes no excuse for the fatal delay in bringing this suit, because the time for its commencement began to run 17 years before A. B. Rozell died, it expired 12 years before he died, and his son L. D. Rozell, one of the interveners, was aware of his claim before the decease of his father. The record contains neither pleading nor proof of any facts or circumstances which make it inequitable to apply the doctrine of laches to the case of the interveners by analogy with the corresponding statute of limitations at law according to the ordinary rule of practice, while the facts that these interveners and their intestate allowed the patent to Cross to stand unchallenged for 32 years, and permitted the devisee of the complainants to purchase and pay \$13,000 for the lands it described in reliance upon its validity, and without notice of any claim of any defect in it, make it unconscionable and unjust to depart from the ordinary rule. *Wagner v. Baird*, 7 How. 234, 12 L. Ed. 681; *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Rugan v. Sabin*, 53 Fed. 415, 420, 3 C. C. A. 578, 582.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with instructions to enter a decree quieting the title to the lands in controversy in the complainants against both the defendants and the interveners, and making equitable provisions for the payment by the complainants to the defendants Haggart and McMasters of the taxes, which, according to the stipulation contained in the record, they, and those under whom they claim, have paid upon these lands, together with the interest thereon, and for the payment of the costs by the proper parties in accordance with the views expressed and the decree indicated in this opinion. Let the appellants recover costs in No. 1,679, and the appellees, the devisees of C. O. Boynton, in No. 1,770, in this court.

## LAY et al. v. INDIANAPOLIS BRUSH &amp; BROOM MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 12, 1903.)

No. 894.

## 1. PATENTS—INVENTION—BROOMS.

In making a sheet metal broom case to hold the brush together at the upper end where it fastens to the handle, there was no patentable invention involved in making it flaring, to conform to the shape of the broom, instead of straight up and down, nor in making it of a single piece of metal with the ends fastened together at one side of the broom, instead of in two pieces fastened together at either side.

## 2. SAME—ABANDONMENT OF APPLICATION—SECOND APPLICATION FOR SAME INVENTION.

The failure of an applicant for a patent to take further action for nearly three years after his application was finally rejected, and notice thereof received, operated as an abandonment under Rev. St. § 4894 [U. S. Comp. St. 1901, p. 3384], unless the application was reinstated for unavoidable delay; and a new application thereafter filed cannot be treated as a continuation of the old proceedings, for the purpose of avoiding the effect of prior use.

## 3. SAME—UNAVOIDABLE DELAY IN PROSECUTION—NEGLIGENCE OF ATTORNEY.

The negligence of an attorney which works the abandonment of an application for a patent under the statute does not constitute unavoidable delay which will avoid the effect of such abandonment as to the applicant.

## 4. SAME—INVENTION—BROOMS.

The Lay patent, No. 652,542, for a broom case, is void for lack of invention, and for prior sale and use of the article.

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

C. C. Linthicum, for appellant.

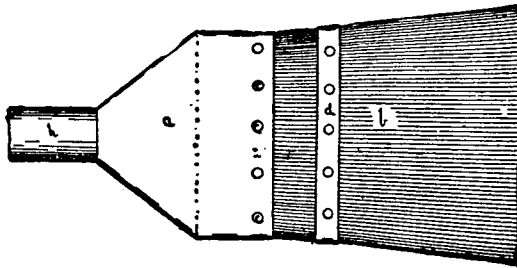
V. H. Lockwood, for appellee.

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

BUNN, District Judge. This is an appeal by complainants below from a decree dismissing a bill brought for infringement of patent No. 652,542, for an improvement in broom cases, granted Samuel C. Lay, June 26, 1900. The defenses are: (1) Prior sale or use two years before filing the application for the patent. (2) Prior sale or use two years before filing a prior application for a patent on the same invention. (3) Want of novelty. The bill was dismissed in the Circuit Court, after hearing, on the ground of prior sale and use for nearly five years before filing the application for the patent in suit, with a strong intimation that the patent was void for want of novelty amounting to invention. We think the decree sound on both of these grounds.

A prior patent, No. 208,685, was obtained by Joseph Lay in 1878 for an improvement in brooms, and another, No. 272,890, in 1883, and the complainants had been engaged in the manufacture of brooms at the city of Ridgeville, Ind., for 24 years or more prior to the hearing in this case.

The 1883 patent was for a sheet-metal cap formed of two thin sheets having their edges interlocked at the two narrower sides or edges, like this:



These complainants first manufactured brooms with this metal cap or case to inclose the upper end of the brush where the handle is inserted. This was in 1881, before the second patent was issued. This case was clinched on both edges by an interlocking of the metal case, and nails were driven through the interlocking parts. For the first inch or so at the bottom the case is straight, and does not follow the slope of the broom. The upper part of the case slopes or flares upwardly toward the handle. This is complainants' broom No. 1. The testimony shows that it was a good, strong broom for heavy sweeping, but cost too much, was most too good for the market, and the profits were too light. Besides this, the material had to be cut too short in making the connection with the handle, so that the case did not secure a firm grip on the material.

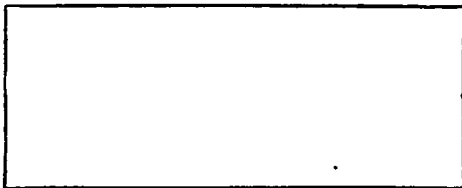
Some time afterwards, but early in the manufacture, complainants made another case, which is marked as their No. 2 broom, shaped like this:



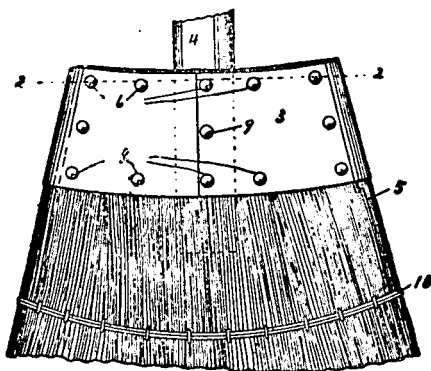
In this broom the case flares all the way from the bottom to the top of the metal case, following the natural slope of the brush. This case is fastened by interlocking on the two edges the same as in No. 1, except that the clasp is wider, and is nailed in a similar manner. The complainants say they began the manufacture of this broom in 1890. The purpose of the change was: (1) To answer the objection of too great cost, and give the public a cheaper broom; and (2) to secure the handle and brush together with a wider fastening or clasp. But the difficulty with this broom was the tendency to become loose at the interlocking edges. There were also other objections, as that the insertion of the nails to hold the material together had a tendency to unlock the edges and spread them apart. To remedy



these defects, complainants made another form of case, which is No. 3, about  $2\frac{3}{4}$  inches long, with straight edges, like this:



Why they went to a straight up and down case for a sloping broom, after using a flaring case so many years, is not very apparent. Afterwards they adopted the flaring case, such as is described in their last patent of 1900, tapering with the taper of the broom, like this:



This style of flaring case to fit a flaring broom is the one which would naturally suggest itself to a noninventive and nonmechanical man, because it fits the natural shape of a brush broom, which all the witnesses agree is flaring, that is, wider at the lower end where the sweeping is done, and continuing to a narrower compass at the handle. What invention there would be in adopting such an obvious style of case, it is difficult to see. It would seem to be about as sensible to place a straight iron case on a flaring broom as to put a straight iron hoop on a flaring wooden barrel or pail. It would not require invention to fit the case to the slope of the broom, and this is just what the complainants did by their Nos. 4, 5, and 6 cases, which are substantially alike. In all these cases the interlocking and nailing is on one side instead of two, a change which would not seem to require invention, or even mechanical skill, to perform. But this is the substance of the complainants' 1900 patent: (1) the employment of a flaring metal case to fit a flaring broom, and (2) the nailing on one side instead of two. To further show the preposterousness of claiming invention for a flaring case in 1900, it is only necessary to observe that they had themselves used a flaring case of a little different form from the time they first began business. Indeed, the straight

iron jacket of 1890 is the only case they have ever used that was not flaring. All the other five cases on exhibit are flaring, either in whole or in part. All are wholly flaring except No. 1, and that is flaring for about one-half its length. So that, in view of the state of the art when the patent in suit was applied for, it seems clear that the patent shows no novelty amounting to invention. And this is just what the Patent Office at Washington decided upon full presentation of the complainants' claim in 1897.

2. In 1897, the complainants, through their attorney, Chester C. Shepherd, of Columbus, Ohio, made application for a patent on this No. 4 flaring metal case. The application was filed on March 5, 1897, serial number 626,069, and, when reached in its order by the examiner, was rejected on the ground of want of invention, in view of the state of the art. Mr. Shepherd then renewed the application and made an argument, and he thinks probably an amendment, to the case, which resulted in a second rejection. After receiving two or three rejections, he gave a power of attorney to W. S. Boyd, a patent solicitor in Washington, who also tried to get the patent. Mr. Boyd had the case, in conjunction with Mr. Shepherd, for a year or two, during which time Mr. Shepherd would call on Mr. Boyd at Washington, who always reported to him that, although he had made numerous efforts to secure an allowance of the patent, he had failed. The final rejection was on June 26, 1897, as appears by the following entry in the Department of the Interior:

"Department of the Interior.

"United States Patent Office,

"Washington, D. C., June 26, 1897.

"Mailed

"Samuel C. Lay, Care C. C. Shepherd, Columbus, Ohio. Brooms, No. 626,069. Filed Mch. 5, 1897.

"The claim presents nothing patentable over the references of record, and is rejected.

"Applicant may for the purpose of appeal consider this rejection final.

"H.

C. G. Gould, Examiner.

"Serial No. 626069 Paper No. 3.

"Final Rej:

"Dated June 26, 1897."

Nothing further was done toward obtaining a patent until some three years had elapsed. On January 6, 1900, the complainants discharged Mr. Shepherd, and gave a power of attorney to Higdon & Longan, of St. Louis, and R. P. Haines, of Washington, D. C. On February 21, 1900, the attorneys at St. Louis sent to complainants an affidavit to sign and swear to, and return to them as a preliminary foundation for obtaining the patent. The oath is signed by Samuel C. Lay, and is as follows:

"Oath.

"State of Indiana, County of Randolph, City of Ridgeville—ss.

"Samuel C. Lay, the above named petitioner, being duly sworn, deposes and says that he is a citizen of the United States and resident of Ridgeville, Ind., and that he verily believes himself to be the original, first, and sole inventor of the improvement in brooms described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used before his invention or discovery thereof; or patented or de-

scribed in any printed publication in the United States of America or any foreign country before his invention or discovery thereof, or more than two years prior to this application, and that no application for foreign patent has been filed by him or his legal representatives or assigns in any foreign country, except as follows:

"Sworn to and subscribed before me, this 21st day of Feb. 1900.	Samuel C. Lay.
"[Notarial Seal.]	S. R. Allen, Notary Public.
"Com. Ex. April 7" 1901.	
"Serial No. 7,368 Paper No ½	U. S. Patent Office
"Application	Mar. 5, 1900
"Filed Mch. 5, 1900.	Chief Clerk
"S. C. Lay."	

In order to obtain a patent it was necessary for the complainants to make oath that the proposed invention had not been in public use or on sale in the United States for more than two years prior to the application. This oath Mr. Samuel C. Lay took and subscribed, and upon this oath, after some amendments and correspondence, the patent was issued on June 26, 1900, just three years after the final rejection of the former application, June 26, 1897.

It is clearly shown by the testimony, and is now admitted by the complainants, that this material statement in the oath taken by Mr. Lay is not true. It is in evidence, and fully admitted by complainants, that the improvement had been in public use and on sale by them from 1895 to 1900, for a period of nearly five years, when this oath was taken and filed. To obviate this rather awkward situation, complainants' counsel contends, but without much tenable ground for it, that Mr. Lay did not intend to swear that his invention had not been in public use or on sale for more than two years prior to "this" application—that is to say, the application he was then making in 1900—but prior to "his" application, referring to the application he had made three years previous, in 1897, the final rejection of which was filed on June 26, 1897. We can see no good ground for this claim in the record. The attorneys knew what they were doing when they drew this affidavit. They knew that an application made in 1900 could not be treated as an amendment or continuation of an application which had been presented three years previously and finally passed upon by the department. No action was ever taken by the Patent Office, and no request for any action, on the first application since its final rejection on June 26, 1897, and it must therefore be regarded as abandoned under all the authorities, and by the plain and emphatic language of the statute. Section 4894, Rev. St. 1878 [U. S. Comp. St. 1901, p. 3384], provides:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof or on failure of the applicant to prosecute the same within two years after action therein, of which notice shall be given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

The language of this statute is plain, and requires no aid from construction. The Patent Commissioners have always held that the second application cannot be considered a continuation of an abandoned application. *Ex parte Livingston*, 20 O. G. 1746; *Hien v. Pungs*, 68 O. G. 657; *Ex parte Beggs*, 50 O. G. 1130; *Carty v.*

Kellogg, 73 O. G. 285. These decisions of the Commissioners accord with the decisions of the courts and the elementary writers upon patent law. *Lindsay v. Stein* (C. C.) 10 Fed. 912; *Weir v. Morden* (C. C.) 21 Fed. 243; *Kittle v. Hall* (C. C.) 29 Fed. 508; *Walker on Patents* (3d Ed.) § 147; *Robinson on Patents*, § 580.

Under this statute and the doctrine of the authorities cited, it is evident that the application of March 5, 1897, must be regarded as abandoned, and that of March 5, 1900, held to be the one on which the patent was granted, and so, under the complainants' own testimony, would be invalid because the invention, whatever its merits might otherwise be, had been in public use and on sale in the United States for nearly five years before the application on which it was granted was filed.

A not very plausible attempt has been made to bring this case within the exception named in the statute, of unavoidable delay, and so redeem it from its apparent hopeless and inavoidable estate, based upon the assertion that the Washington associate, Mr. Boyd, was guilty of negligence in the prosecution of the claim for a patent. The principal attorney, Mr. Shepherd, was a witness for complainants on the hearing, and his testimony shows him to have been diligent in his endeavor to obtain the patent. The Patent Office decided against the claim, but its decision was sound, and Mr. Shepherd could not get it changed, although he made proper effort to do so. The difficulty lay in the want of merit in the claim.

The other assumption is that, if the complainants failed in their application through the negligence of their attorney, the delay would be unavoidable, which is wholly unwarranted in the law. It is of the very nature of negligence that it should not be unavoidable, otherwise it would not be actionable. The negligence of the attorney would be the negligence of the principal. The purpose of the statute was to put an end to such pleas, and there would be no limit to a renewal of these applications if every application, however remote, could be considered under the plea of negligence of attorneys, by whom their business is generally conducted.

3. We think, also, that, according to the great weight of evidence, the invention disclosed by the patent in suit had been in public use and on sale for more than two years before the application of March 5, 1897, was made. According to complainants' testimony, they began the manufacture in the summer of 1895, which would be a little less than two full years before the application of March 5, 1897, was filed. But by the defendants' testimony these same broom cases had been manufactured and sold, both at Ridgeville by the complainants, and at Chattanooga by the Crescent Manufacturing Company, of which Frank R. Lay was a member, from 1890 continuously, and the broom put upon the market. The evidence on this question is conflicting, but we think the weight is with the defendants. On this very question of time, the complainant Samuel C. Lay having admittedly testified in his affidavit to obtain the patent that the invention had not been in public use or on sale for more than two years previous to the time of making the application on March 5, 1900, and it now being conceded that it had been on sale for nearly

five years, the court has not any reason to be prepossessed in favor of the complainants' testimony upon the same subject on the hearing; but, giving the due weight to evidence upon each side, the clear preponderance is with the defendants that this improvement had been in public use and on sale from 1892, or before, down to the hearing. There are Joseph Lay, Samuel C. Lay, partners and complainants, Ernest Hossler, their engineer, who says he did not see the flaring case before 1895, and Wm. H. Clouse, foreman, testifying for complainants. For the defendants there are 11 witnesses, a large majority of them unconnected with the case, testifying that this form of case was manufactured and on sale from 1888 and 1889. Seven of these witnesses had worked in complainants' shops. Sylvester Thompson, an apparently disinterested witness, says he nailed brooms for Lay & Co. exactly like complainants' broom, in 1888, and that these brooms were put on the market and sold by the company, and he gives his reasons why he remembers the date. Frank R. Lay, not interested with defendants, and a brother of Samuel C. Lay, testifies that he was salesman for the complainant company in 1887, 1888, 1889, and 1890, and sold these manufactured products to the trade generally; that they began the manufacture and sale of these brooms, made according to the patent in suit, in 1889. The cases were made of one strip of iron locked together; that the practicability of such construction was demonstrated by making some without a taper, like No. 3, but not to any great extent; that the broom they made then was the same as the No. 6 case; and that they made many of them in 1889, and have been making them with the same case ever since. Sylvester Addington worked for complainants in 1893 and 1894 and they were making the same broom in 1893. Wm. A. Studebaker says he worked for the Crescent Manufacturing Company in 1891 and 1892, and that they made and sold this same broom. M. W. Landwich during these years bought the same broom of complainants in November, 1894, and this same broom is brought into court as an exhibit for defendants. J. A. Heston, a disinterested witness, says he made caps for Lay & Co. from 1890 to 1893 like complainants' Exhibits Nos. 5 and 6, and made also a few like Nos. 1 and 4. M. B. Stratton, a defendant, says he worked for Lay & Co. from 1887 to 1900; that from 1888 to 1892 they made and sold and shipped brooms made with the No. 6 cap; that in 1892 he went to Chattanooga, and worked for the Crescent Manufacturing Company, of which Frank R. Lay had the management, and that they made and put upon the market the same kind of broom that was made by complainants with No. 6 cap or case; that he did the shipping for the company at Chattanooga; that they made eight or ten dozen a day, and sold and shipped them; that he returned to work for Joseph Lay & Co. in 1893, and that at that time they were making and selling the same broom, and continued to do so in 1894, and until June, 1900; and that he knows of his own personal knowledge that Lay & Co. had been continuously manufacturing and selling the same broom from 1888 to 1900. Other witnesses are to the like effect. The catalogue of Lay & Co. issued in 1891 shows the same broom that their subsequent catalogues, issued after 1895, show.

Aside from the positive testimony of witnesses, the probabilities of the question go far to support the defendants' contention. It seems highly improbable and quite unaccountable, with the known and manifest imperfection in form of the No. 3 case, which is a straight iron jacket made to put upon a tapering or flaring broom, and which crushed the material so hard at the bottom as to break it, that they should continue its use for so long a time, say from 1888 up to 1895, especially after they had before used a flaring case which would more nearly adjust itself to the shape of the broom. Samuel C. Lay shows the advantage of the tapering broom very concisely in these words:

"It is a gradual flare of the material from the bottom of the broom to the top. There are no angles in the material at any point, but all lies straight in about the position it should be when finished."

Very well. But why go on for several years putting a straight iron case on a broom intended from the first to be flaring? Mr. Joseph Lay's cross-examination on this point is interesting, but not very convincing testimony in his favor:

"X. Q. 336. You have described certain defects and drawbacks in making brooms with a No. 3 case, and in the brooms after they were made. Why was it that you continued to make such difficult and defective brooms for ten years without flaring the No. 3 case? A. Well, we hadn't found out before. X. Q. 337. You had been using flaring cases and making brooms with flaring cases like No. 2. Why do you say you hadn't found it out? A. There is a wide difference between No. 2 and Nos. 3, 4, 5, and 6. The No. 2 was not fit for heavy brooms, or for any other kind to any great extent, it being made of two pieces and locked on the edge, making a short lock; no way of securing properly except by riveting the seams, which made it too expensive for practical use. X. Q. 338. Well, you had found out the advantages of flaring cases in using the No. 2 cases, had you not? A. Yes. X. Q. 339. Being aware of such advantages, why was it that you, as you have testified, proceeded to make brooms with a case that didn't flare, and which made the broom harder to make and not so good after they were made? A. Just like all other inventions, it takes time to develop a good thing, and as soon as we found out how to make a flaring case that would answer a better purpose than the No. 2 we commenced making them, which was in 1895. X. Q. 340. Did it take you ten years to adopt the flaring idea in connection with the No. 3 case, when that idea was familiar to you in connection with the No. 2 case? Do you mean to say that it would take anybody more than three or four days of making brooms with the straight No. 3 case to discover the difficulties and defects, and then flare it, when he was at the time perfectly familiar with the use of flaring cases? A. It would depend something on the one operating, and the time they had to study over it. Brooms had been made for a hundred years prior to this without anybody discovering the flaring case prior to this, and finding it better than the other means of manufacturing it."

These answers are probably as good as could have been given under the circumstances, but do not furnish a satisfactory explanation for continuing the straight iron jacket so many years instead of using a case more in keeping with the proper form of the broom.

The decree of the Circuit Court is affirmed.

## DANCEL et al. v. UNITED SHOE MACHINERY CO.

(Circuit Court, S. D. New York. January 16, 1903.)

**1. PATENTS—ASSIGNMENT—ACTION AGAINST SUBSEQUENT ASSIGNEE—COMPLAINT.**

Where a complaint alleged an assignment of a patent by intestate to defendant's assignor in consideration of such assignor's agreement to pay intestate in each year, while the patent should remain in force, a certain annuity, and that defendant had succeeded to all the property of its assignor, including the patent, and had assumed all its obligations, which it fulfilled during intestate's life, but had since refused, but failed to allege any contract between intestate and defendant, it did not state a cause of action at law.

**2. SAME—BILL IN EQUITY.**

Such allegations were sufficient to entitle plaintiff to a decree in equity for the payment by defendant of the amount due.

**3. SAME—BILL IN EQUITY—DEMURRER—STATUTES—CONSTRUCTION.**

Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], providing that no declaration, etc., in civil causes in any court of the United States shall be quashed for any defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof, and such court shall amend every such defect and want of form other than those which the party demurring so expresses, is not confined to civil cases at law, but extends to and includes suits in equity.

**4. SAME.**

Under such section, where a complaint in an action removed from a state court was demurred to for want of facts, it could not be dismissed, because, when treated as a bill in equity, it did not contain the address, statement of citizenship, or proper prayer for relief, or because it was erroneously placed on the law docket; such objections being matters of form only.

On Demurrer.

J. Philip Berg, for plaintiffs.

Edward H. Childs, for defendant.

WHEELER, District Judge. This suit was brought in the state court, where proceedings at law and in equity are blended, and was removed by the defendant into this court, and entered upon the law docket. The ground of demurrer set down is "that said complaint does not state facts sufficient to constitute a cause of action."

The complaint well sets forth an assignment of letters patent No. 459,036 by the plaintiffs' intestate to the Goodyear Shoe Machinery Company, in consideration of which that company agreed to pay him in each year while the patent should remain in force \$5,000 as an annuity; that the defendant has succeeded to all the property of that company, including this patent, and assumed all its obligations, including these payments, which it fulfilled during the life of the intestate, and has refused since; "wherefore plaintiffs demand judgment against the defendant in the sum of \$8,749.94," with interest. These facts do not constitute a good cause of action at law, for there was no contract between the intestate and the defendant for a breach of which damages could be recovered. They do show, however, that upon the relations assumed by the defendant to the property and obligations involved the plaintiffs are entitled in equity to a decree for

the payment by the defendant to them of the amount due. They are not set forth in the nine orderly parts of a regular English bill according to the practice adopted by the Supreme Court, but only in a plain statement demanding judgment. But the Supreme Court, while requiring, by rule 20, an address to the judges and a statement of the names, abode, and citizenship of the parties, has granted liberty to omit the confederacy clause, the charging part, and the jurisdiction clause; has, by rule 21, allowed the option of stating and avoiding supposed defenses or excuses in the narrative part, and required a prayer of special relief asked and of general relief. All this complaint lacks of a good bill according to these rules is the address, statement of citizenship, and proper prayer for relief. The statement of citizenship is necessary in original bills where jurisdiction depends upon that. In removed cases it should appear, when required, in the petition for removal. This is the same both at law and in equity. The address and prayer are merely formal. The law provides (Rev. St. § 954 [U. S. Comp. St. 1901, p. 696]) that:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer the party demurring specially sets down, together with his demurrer as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses."

This is in the chapter relating to procedure in all classes of cases, and is not confined to civil cases at law, but extends to all civil cases, and includes equity cases, which are as well civil cases as law cases are; and it requires an adjudication upon this demurrer according to law and right, without reference to these defects. There is nothing left in the way of overruling the demurrer except that the case is on the law docket, from which it has been placed on a day calendar of equity cases and issues at law, among which it has been heard. This is one court of the same judges, whether dealing with law or equity cases. When this cause was removed to this court it was placed by the clerk, by the direction of the defendant's counsel, or of his own motion, on the law docket. This was immaterial, except as to future trial. The cause is in this court, and the question now is whether the complaint states a cause of action of which this court has cognizance. If on the wrong docket, it should be put on the right one. The position of the case on the law docket is a defect or want of form not set down with the demurrer, which the statute quoted directs the court to amend. It can be corrected by placing the case on the equity docket. The demurrer is in form a demurrer at law; but that is also a matter of form, likewise to be disregarded. It has answered all the purposes of a demurrer in equity; and to it the defendant is entitled to have rule 34, as to assignment for answer over, applied. This is not contrary to *Goodyear Shoe Machinery Co. v. Dancel* (decided by the Circuit Court of Appeals of this Circuit December 15th) 119 Fed. 692. That was a writ of error to review a judgment at law between these same parties, and the ques-



tion was whether there was error in that judgment, and not whether the case might have been transferred to the equity side of the court before trial.

The plaintiffs, when the cause was removed, might have proceeded to recast their bill according to the forms and requirements of equity cases in this court, which would seem to have been according to the more usual and better practice, and have brought the cause on to the equity side of the court, to be proceeded with there; but the defendant has not taken any advantage of the failure to take that course. It has only raised the question of the plaintiff's right to any relief.

Let the cause be transferred to the equity calendar, the demurrer be overruled, and the defendant is assigned to answer over by February 9th.

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THE KOMUK.

THE CLARENCE.

(District Court, S. D. New York. February 2, 1903.)

**1. COLLISION—STEAM VESSEL AND BARGE IN TOW—WANT OF LOOKOUT AND FAILURE TO OBSERVE TOWING LIGHTS.**

A steam lighter which was navigating New York Bay in the night without a lookout, and which attempted to pass close under the stern of a tug, although the latter carried lights indicating a tow astern, and in so doing came into collision with a barge in tow of the tug, held in fault for such collision.

**2. SAME—CONTRIBUTORY FAULT—ABSENCE OF LIGHTS ON TOW REQUIRED BY PILOT RULES.**

When a barge injured in a collision in the night in New York Bay while in tow of a tug was not carrying the lights on the bow and stern required by rule 11 of the pilot rules, the burden rests upon her and the tug to prove that such violation of the rule did not contribute to the collision.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libelant.

Wilcox & Green, for the Clarence.

Hyland & Zabriskie, for the Komuk.

ADAMS, District Judge. On the 15th of November, 1901, about 5 o'clock P. M., a collision happened in the vicinity of Robbins Reef, Upper New York Bay, between the steam-lighter Clarence and the canal boat E. W. Griggs, which was in tow of the steam-tug Komuk on a hawser. The owner of the Griggs brought an action against both of the steam vessels for his damages.

The Griggs was taken in tow shortly before the collision at Stapleton, Staten Island, to be delivered at Pier 6, East River. The Clarence left Pier 11, North River, shortly before 5 o'clock bound for Bayonne, through the Kills. The Komuk claims that as she was approaching the bell buoy, near Robbins Reef, the Clarence was well off on the Komuk's starboard bow, showing her red and green lights, and that shortly afterwards the red light was shut out, leaving the green light only visible, indicating a change of course on the Clarence's part

to the eastward, which, if continued, would have enabled the vessels to pass starboard to starboard, at a considerable distance apart. The Clarence claims, that when about a quarter of a mile to the eastward of Robbins Reef Light, the Komuk was on the Clarence's port bow about a half a mile away, to the southeast, showing her red light, so that if the courses continued they would have passed port to port, and that she shortly afterwards changed so as to open her green light. These claims are irreconcilable. The weight of the testimony is in favor of the Komuk's contention and I find that the Clarence approached the tow from the east and ran into the Griggs, on the starboard side, when the latter was a little north of the bell buoy, the Clarence having apparently changed her course to the westward to go under the Komuk's stern and reach her destination, without regard to the tow. The Clarence had no lookout and apparently did not see the Griggs until in the jaws of the collision, though the Komuk's lights indicated that she had a tow on a hawser. When the Clarence did see the tow, she attempted to arrest her headway by reversing but her efforts were unavailing. I find that the collision was mainly caused by her want of lookout, and in attempting to go closely under the Komuk's stern, without regard to her tow.

It is urged that the Komuk is in fault because she did not blow any signals until the vessels were in close proximity. It is true that she failed to give signals but she was observed by the Clarence when more than a mile away, so that it appears the lack of signals did not in any way contribute to the collision with the barge, even if the situation demanded them.

A more serious charge against the Komuk and the Griggs is, that the latter did not display lights according to Rule 11 of the Pilot Rules, which provides:

"Barges and canal boats, when being towed by steam vessels on the waters of the Hudson River and its tributaries from Troy to Sandy Hook, the East River, and Long Island Sound (and the waters entering thereon, and to the Atlantic Ocean), to and including Narragansett Bay, R. I., and tributaries and Lake Champlain, shall carry lights as follows:

"Barges and canal boats being towed astern of steam vessels, when towing simply or what is known as tandem towing, shall each carry a white light on the bow and a white light on the stern."

The Griggs concededly did not comply with this rule but only exhibited one light, which was placed on her cabin. It is urged in her behalf that the neglect did not in any way contribute to the collision and the testimony of the master of the Clarence that he saw the light is relied upon to establish the contention. In considering the question of the Clarence's fault, I have entirely disregarded the testimony of this witness as being utterly unreliable and certainly can not accept it as establishing this claim. It appears that he was not on deck until immediately prior to the collision and that the navigation during his absence was in charge of an unlicensed man, who was steering the Clarence and failed to see the canal boat at all. In the absence of proper lights, it was incumbent upon the Komuk and the Griggs to show that the neglect to comply with the rule did not contribute to the collision. This they have failed to do, and they must bear a part of the loss. They will be considered as one vessel and contribute to-

gether one-half. The remaining half will be borne by the Clarence. The Lyndhurst (D. C.) 92 Fed. 681; The Nettie L. Tice (D. C.) 110 Fed. 461.

Decree against the Clarence for one-half of the damages and against the Komuk for one-quarter, with an order of reference.

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UNITED STATES v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court, D. Massachusetts. February 12, 1903.)

No. 1,162.

1. TRUST—CONSTRUCTION OF INSTRUMENT CREATING—DISTRIBUTION OF FUND. A railroad company having acquired the property of another company, which was subject to three mortgages and liens, executed an instrument of trust by which it created a sinking fund in the hands of a trustee "for the protection, benefit, and further security" of the three liens, naming them in the order of their priority. The instrument then provided that the fund should be applied to the payment of such debts "according to the principles of equity, to the end that all of said lien or mortgage creditors \* \* \* may be entitled thereto in due order." *Held*, that such provision required the application of the fund to the several liens in order of priority which the beneficiaries occupied in the original security.

In Equity. Suit to determine rights in trust fund.

P. C. Knox, U. S. Atty. Gen., and John C. Cowin, U. S. Special Counsel.

Elmer P. Howe, for American Loan & Trust Co.

W. R. Kelly, for Union Pac. Ry. Co.

Winslow S. Pierce and Lawrence Greer, for Union Pac. R. Co.

COLT, Circuit Judge. This bill is brought by the United States against the American Loan & Trust Company, trustee, the Union Pacific Railway Company, and the Union Pacific Railroad Company, for the purpose of determining the rights to a trust fund.

On July 1, 1886, the Union Pacific Railway Company, as successor to the Kansas Pacific Railway Company, executed a certain trust indenture to the American Loan & Trust Company, and there now remains in the hands of the trust company for distribution the sum of \$589,291.80, with accumulations from December 14, 1900. The only claimants to the fund are the United States and the Union Pacific Railroad Company; and the only question in controversy is whether, under the trust indenture, the United States has a prior claim to the whole fund, or whether it should be distributed ratably and without preference between both the claimants.

At the time the indenture was created there existed certain mortgages and liens on the property of the Kansas Pacific Railway Company. These included the first mortgage, the United States subsidy lien, and the consolidated mortgage. The first mortgage was a prior lien on the railroad, extending west from Kansas City 393<sup>15</sup>/<sub>16</sub> miles. The United States subsidy lien was a second lien, and the consolidated mortgage a third lien, on the same property. The consolidated

mortgage also covered other property belonging to the railroad company.

The purpose of the trust indenture was the creation of a sinking fund for the protection and further security of these mortgage and lien creditors of the Kansas Pacific Railway Company. The first mortgage bonds having been paid in full under foreclosure proceedings, the only remaining beneficiaries under the trust are the United States and the Union Pacific Railroad Company, the owner of the consolidated mortgage bonds.

The Union Pacific Railway Company was under no legal or moral obligation to create this trust. It was an entirely voluntary act on its part. The property conveyed to the trustee under the indenture was not embraced in any lien or mortgage. It was, in effect, property added to the existing security of the trust beneficiaries. The donor was at liberty to direct the distribution of this fund in any manner it deemed best. It might have recognized that the consolidated mortgage creditors had a superior equity, and had made them the sole beneficiary, or it might have directed that the three beneficiaries named should share equally in the fund.

The question for our determination, however, is not what might equitably have been done under the circumstances, but what the donor saw fit to do. If the intention of the creator of the trust is made clear by the terms of the instrument, it must be carried out. The court has no power to change or modify the trusts irrevocably impressed upon the fund.

The purpose of the indenture and the trusts imposed upon the trustee are set forth in article 6, and there is nothing to be found in the other parts of the indenture which in any way qualifies or renders doubtful the provisions of this article. It is several times referred to in the instrument as fully setting forth the purposes of the trust. The article reads as follows:

"Art. 6. The sinking fund hereby created and its accumulations are for the protection, benefit and further security of the first mortgage bonds of the Kansas Pacific Railway Company, having priority over the lien of the United States for subsidy bonds issued to the Kansas Pacific Railway Company; and for the benefit, protection and further security of the United States in respect of said subsidy bonds and interest thereon; and also for the benefit, protection and further security of the said consolidated mortgage bonds, secured by the said mortgage of May first, 1879, and shall be applied to the payment and satisfaction of the foregoing debts and obligations of the said Kansas Pacific Railway Company according to the principles of equity, to the end that all of said lien or mortgage creditors of the Kansas Pacific Railway Company, including the United States, may be entitled thereto in due order."

By the terms of this article, the fund is created for the protection and further security (1) of the first mortgage bonds of the Kansas Pacific Railway Company having priority over the subsidy bonds; (2) for the protection and further security of the United States in respect of the subsidy bonds; (3) for the protection and further security of the consolidated mortgage bonds. It will be observed that this is the order of the existing liens on the railroad property. Then follows the provision that the fund shall be applied to the payment of the foregoing obligations, "according to the principles of equity,

to the end that all of said lien or mortgage creditors \* \* \* may be entitled thereto in due order."

According to the natural reading of this article, it appears to have been the intention of the donor that the status of the beneficiaries in the original security should be preserved in the distribution of this further security fund; in other words, that this fund should be subject to the same terms and controlled by the same principles of equity as were applicable to the prior existing security to which it was supplementary. If the last 2 lines of the article had been omitted, and it had stopped with the words "according to the principles of equity," it might be claimed, perhaps, that the donor intended equality of distribution; but, with the addition of the words, "to the end that all of said lien or mortgage creditors \* \* \* may be entitled thereto in due order," such an interpretation is unwarranted, if we are to give effect to the language used. When the donor declares that the fund is to be applied according to the principles of equity, to the end, or to the effect, that the beneficiaries shall be entitled thereto in due order, the only reasonable construction of this provision is that the fund is to be distributed in the order of right which the beneficiaries occupied in the original security, and in the order in which they are named in the indenture. Any other interpretation leads to discord and confusion. If equality of payment were intended, the words "entitled thereto in due order" must be eliminated. These words have no place in the instrument unless the beneficiaries named are to be preferred in the order in which they were preferred in the prior existing security.

In my opinion, the United States is entitled, as a preferred creditor, to this entire fund, by reason of the status of the beneficiaries in the original security, by reason of the manner in which they are named in the trust indenture, and by reason of the terms in which it is directed the trust fund shall be applied.

The Union Pacific Railroad Company bases its superior equitable claim to a share in this fund largely upon the circumstance that the security of the consolidated mortgage bondholders was being constantly depleted by the sale of lands covered by the mortgage, for the purpose of paying interest on the bonds. The answer to this contention is that article 4 of the consolidated mortgage provided that the interest on the bonds should be met in this way. Every purchaser of a consolidated mortgage bond presumably knew of this provision.

But whatever force there may be in the argument urged in behalf of the special equity of the consolidated mortgage bondholders, it cannot avail, because it seems to me that the language of article 6 clearly shows that it was the intention of the donor to direct the application of this trust fund, first, to the payment of the first mortgage bonds; second, to the payment of the subsidy bonds; and, third, to the payment of the consolidated mortgage bonds.

A decree may be prepared directing the payment to the United States of the fund of \$589,291.80, and the accumulations thereon, now in the hands of the American Loan & Trust Company, trustee, after deducting therefrom its proper expenses and disbursements. All questions as to the costs and expenses in these proceedings are reserved until the settlement of the decree.

## In re CONNELL &amp; SONS.

(District Court, M. D. Pennsylvania. February 28, 1903.)

No. 152.

## 1. INVOLUNTARY BANKRUPTCY—ATTORNEY'S FEES—LIABILITY OF ESTATE.

An involuntary bankrupt's estate is liable to the bankrupt's attorney only for the reasonable value of the services actually required, irrespective of the services rendered.

## 2. SAME—CHARACTER OF SERVICES—CLERICAL WORK.

An attorney for an involuntary bankrupt was not entitled to payment from the estate for services in going over and posting the bankrupt's books and writing up extra copies of the schedules, such services being clerical, and not of a professional character.

In Bankruptcy. On certificate from C. A. Van Wormer, referee.

Ralph Levy, for bankrupts.

A. V. Bower, for referee.

ARCHBALD, District Judge. The bankrupts ask for the allowance of an attorney's fee of \$150 to be paid as a preferred claim under section 64b of the Bankruptcy Act [U. S. Comp. St. 1901, p. 3447] for professional services rendered them in the performance of the duties required of them by the act. The referee allowed them \$75, and the question is whether that was adequate. This is an involuntary case, and the services rendered were in connection with the preparation of the bankrupts' schedules. There is no doubt, according to the evidence, that a large amount of time was spent in gathering together the necessary information to correctly make up the schedules, and, judged by this, the fee claimed is not an unreasonable one. But it is not so much what was done by the attorney as what was really required. The bankrupts are responsible individually to the extent that they employed him, regardless of the character of what he was called upon to do; but not so the estate. This is a preferred claim, and is to be kept down to what it was intended by the act to represent, and that is simply the necessary professional assistance required by the bankrupts to meet the demands of the act upon them. In the present instance the time spent seems to have been mainly taken up in going over the books of the firm and straightening them out by posting and otherwise. A part of this may be regarded as necessary, but a part certainly was not. It was the work of a bookkeeper or an accountant, rather than a lawyer, to post the books and reduce them to the condition where the information they contained would be available, and for this no claim can be made. Neither can there be for the writing up of the extra copies of the schedules after the first one had been made out. This was mere clerical work, which any one could do who wrote a fair hand, and is not to be charged against the estate at professional rates. It hardly seems, therefore, as though more could have been really earned if the assistance rendered was confined to that which falls within the terms of the act, than what was allowed by the referee, but, that no possible injustice may be done, I will raise the amount to \$100, beyond which, however, I do not feel that I can go.

Let an attorney fee of \$100 be allowed.

## THE WARFIELD.

(District Court, E. D. New York. January 24, 1903.)

## 1. MARITIME LIEN—VESSEL IN DRY DOCK.

Neither a dry dock, fitted into piers, to which it is held by cleats, so that it has only a vertical motion, nor a steamer therein for repairs, is a vessel in navigable waters, so as to give a maritime lien for a tort thereon.

Edward V. Slausen and John W. Ingram, for libelant.  
Convers & Kirlin, for claimant.

THOMAS, District Judge. The libelant, whose employer was under contract to make repairs on the steamship Warfield, on a dry dock, fell through a hatch. For the injury thus received this action is brought. The dry dock, consisting of five sections connected by stringers, was fitted into piers, to which it was held by cleats, so that it had only a vertical motion. If the cleats were removed, the dry dock could be drawn out of position, and would float. This action in rem is based upon an alleged maritime lien upon the ship. But a tort committed on a ship on land does not give such lien. Hence the action must be sustained, if at all, on the theory, (1) that the dry dock was a vessel in navigable waters, or (2) that the ship was in navigable waters. The first alternative is negated by *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501. Thus, the final question is, was the ship in navigable waters? In her position on the dry dock, she was not only out of commission and withdrawn from navigation, but also incapable of navigation. The ship could not be navigated on the dry dock, nor could the combined ship and dry dock be navigated in the water. Hence if the ship be eliminated from consideration, the injury on the dry dock was not on a vessel in navigable waters; or, if the ship be considered, she was not on navigable waters nor capable of navigation; or, if the combined ship and dry dock be considered, the whole was not a ship, nor capable of navigation. The piers pertained to the land, and the dry dock was adjusted to, and intended to be an attachment of, the piers. The fact that it rested on the water, rather than the water's bed, and rose and fell with the tide, did not make it a vessel, nor a part of the water. Its nature pertained not to water, but to land. To land it was attached, and of land it was intended to be a part. The pertinent decisions have been so often discussed by this and other courts that there is no occasion for reconsidering them. This precise question is thought not to have arisen, but the solution depends upon very obvious and fundamental rules relating to the admiralty jurisdiction.

The libel is dismissed, solely for want of jurisdiction.

## In re ROSENTHAL &amp; LEHMAN.

(District Court, E. D. Missouri, E. D. November 29, 1902.)

**1. BANKRUPTCY—ATTORNEY FOR BANKRUPT—FEES—ALLOWANCE.**

Under Bankr. Act, § 64b [U. S. Comp. St. 1901, p. 3447], providing that one reasonable attorney's fee for professional services rendered to the bankrupt in involuntary cases, as the court may allow, shall have priority, and be paid in full from the bankrupt's estate, the court may allow an attorney for the bankrupt in an involuntary proceeding for services actually rendered in good faith for the real purpose of impartially administering the estate.

**2. SAME—NECESSITY—GOOD FAITH—PROOF.**

Where, in a proceeding for the allowance of attorney's fees to involuntary bankrupts for representing them at their examination before the referee, and for being present and acting as counsel for them through such examination, there was no proof that the employment of counsel was reasonably necessary, and that the services were actually rendered in good faith to promote the purposes of the bankruptcy act, the claim should be disallowed.

In Bankruptcy.

Sale & Sale, for trustee.

Solomon S. Swarts, for bankrupts.

ADAMS, District Judge. This record certified to me by the referee raises the question whether a fee should be allowed to attorneys of bankrupts for attending them on the occasion of their examination before the referee. Section 64b of the bankruptcy act of 1898 [U. S. Comp. St. 1901, p. 3447] is as follows:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed and to the bankrupt in voluntary cases, as the court may allow. \* \* \*

This is an involuntary case, and therefore one reasonable attorney's fee, such as the court may allow for professional services actually rendered to the bankrupt while performing the duties prescribed by the act, should be included in and paid out of the estate as a part of the cost of administration.

By the provisions of section 7 of the act [U. S. Comp. St. 1901, p. 3425] it is made the duty of the bankrupt in all cases to attend the first meeting of creditors, if directed by the court so to do; and when there, and at such other times as the court may order, "to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate." The same section imposes other duties upon the bankrupt, some of which (like preparing schedules of property and list of cred-



itors) from their nature justify and require the aid of professional counsel; while others (like complying with specific orders of court, or informing the trustee of any attempt known to him of creditors or other persons to evade the provisions of the act), from their essential nature, do not require, and would not justify, the employment of professional counsel to aid the bankrupt in their performance. And there are still other duties of the bankrupt (like attending the hearing upon his application for discharge from his debts) which may or may not require the aid of professional counsel in their performance.

From these observations, as well as from the language employed in section 64b [U. S. Comp. St. 1901, p. 3447], it seems clear that Congress did not intend by the provisions of the last-mentioned section to lay down a fixed rule authorizing a bankrupt to employ, at the expense of the estate, counsel to attend him in the performance of every duty prescribed by the act. Only such a reasonable attorney's fee as the court may allow in each individual case, and only such professional aid as the nature, exigency, and difficulty of the duty to be performed in each individual case reasonably require, seem to have been within the contemplation of Congress, as shown by a consideration of all the provisions of both sections in question.

The test laid down in some cases, and which was applied by the referee in this case, is that legal services in aid of the administration of the estate should be paid for out of the funds of the estate, while those for the personal benefit or protection of the bankrupt should not be so paid. This may or may not be a correct test, but the difficulty arises in determining what services are purely personal, as distinguished from those which are incidental to the administration of the estate under the bankruptcy act. The act of 1898 [U. S. Comp. St. 1901, p. 3418], like its predecessors, has, broadly speaking, two fundamental purposes—one to relieve an honest debtor from the incubus of overwhelming debt, and restore him to the activities of business life; another is to make a just and equitable distribution of the bankrupt's estate among his creditors. The true administration of an estate in bankruptcy is concerned as much with securing a discharge to the debtor as with the distribution of his assets, and to that end it is frequently essential for the bankrupt to make a full showing with relation to his property and business methods. He is ordered to appear before the referee for an examination touching "the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate." The scope of this examination may, and frequently does, involve inquiries relative to the existence and whereabouts of property, and also relative to matters about which the bankrupt has made oath, and other matters which, by section 14b [U. S. Comp. St. 1901, p. 3427], preclude discharge. Obviously, the personal benefit and protection of the bankrupt at such an examination is involved, and so, also, the accomplishment of one of the main purposes of the act—to secure the discharge of an honest debtor—is involved. Thus it appears that what is for the

personal benefit and protection of the bankrupt may also be of commanding importance in the just and impartial administration of the bankruptcy law.

It goes without saying that, if the services of counsel are secured, or, when secured, are employed for the purpose of screening the bankrupt from the consequences of his own wrongful conduct, or for the purpose of suppressing the truth, or otherwise thwarting the operation of the act, no compensation can reasonably be allowed by the court to be paid out of the assets of the estate. The test, in my opinion, is whether the employment is necessarily made, and the services necessarily rendered in good faith for the real purpose of so administering the act in a given case as to accomplish the purposes of its enactment. If the employment is reasonably necessary to aid either in the discovery of assets, or securing the bankrupt's discharge, or protecting the bankrupt from unjust charges or imputations of wrong, such as would subject him to the penalties of the act, a reasonable allowance should be made therefor. If, on the other hand, there is no reasonable necessity for the employment for either of the foregoing purposes, or if the employment is not in good faith to protect an innocent debtor in the assertion of his right under the act, then no allowance should be made therefor. And when an allowance is made it should be remembered that the policy of the law, as disclosed in the compensation fixed for referees, clerks, and trustees, is in the direction of great economy.

\* Attention is called in argument to the abuse that may be practiced under a construction of the act like that now given it. It is claimed that any bankrupt may employ counsel to attend him upon his examination or in the discharge of any other duty prescribed by the act, but such employment does not in and of itself secure compensation out of the estate. Several additional facts must be found before such compensation is allowed. As already indicated, it must appear to the court that employment of counsel in a given case is reasonably necessary, and it must also appear that the services were secured and actually rendered in good faith to promote the purposes of the act. As already indicated, it is believed that a careful and attentive consideration of the circumstances attending the employment of counsel and rendering of services by them in each individual case will enable the court to reach a just conclusion, and do so in such way and manner as not to encourage the employment of useless and unworthy services.

Applying the principles already announced to the case now before the court, the conclusion reached by the referee must be sustained, because the certificate of facts recites merely that the claimants were employed by the bankrupts to represent them at their examination before the referee, and that they were present and acted as counsel for the bankrupts throughout the examination. The mere fact of employment and attendance upon the bankrupts does not conclude the inquiry.

For the reason that it does not appear that the services of claimants in this case were necessary, or rendered in good faith to promote the purposes of the bankruptcy act, the conclusion of the referee must be sustained, and the claim disallowed.

## THE GADSBY.

## THE FRANK A. PALMER.

(District Court, E. D. New York. November 25, 1902.)

**1. COLLISION—STEAMER AND SCHOONER MEETING IN FOG—FAILURE TO KEEP PROPER LOOKOUT.**

A steamer and a schooner came into collision 120 miles southeast of Sandy Hook Lightship, in a dense fog, on meeting and nearly parallel courses. The testimony from each vessel showed that she was going at moderate speed, was properly manned, and that fog signals were regularly sounded; but neither vessel heard the signals from the other until immediately before they came in sight of each other, when 400 feet apart, and when it was too late to avoid the collision. *Held*, upon such evidence, that (1) each vessel duly sounded fog signals; (2) each vessel was running at proper speed; (3) neither vessel kept a proper lookout; that such fault on the part of the schooner did not contribute to the collision, because it would have been her duty to keep her course under the circumstances, if she had heard the signals, but that the steamer must be held solely liable as the burdened vessel, and because she might by the exercise of due care have avoided the collision.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for Clark and the Frank A. Palmer.  
Convers & Kirlin, for Robinson and the Gadsby.

THOMAS, District Judge. The four-masted schooner Palmer, unladen, sailing west, and the steamer Gadsby, laden, sailing east by south, in a fog that had existed for an hour and a half, collided at a point about 120 miles or 130 miles southeast from Sandy Hook Lightship. Each vessel had a full crew, whose members, with a single exception, have testified.

The evidence of the Gadsby is to the following effect: The steamer was, and had been for about an hour and a half, running at half speed, not to exceed four knots per hour, duly sounding fog signals, with an attentive lookout at her stem, the chief officer and a wheelsman on the upper bridge, the captain on the upper bridge until 6:20 a. m., then on the lower bridge, and several seamen busied on the deck, no one of whom heard fog signals from the Palmer, when the chief officer heard a screeching sound like that of a steam whistle, whereupon he signaled to stop, the time being 6:33 a. m.; blew a long blast on the whistle. The captain ran up to the upper bridge, arriving there 10 seconds later, learned of a whistle on the port bow, and signaled to reverse the engines, which was done. The Palmer, going, as variously estimated, at from 8 to 12 knots an hour, in a fresh breeze, listed to port, carrying all her 13 sails, came in sight 400 feet away, which was the limit of vision, bearing one and a half or two points on the Gadsby's port bow; whereupon the Gadsby's engines were put half speed ahead, the wheel ordered hard apart, one course whistle sounded; but it appearing that the schooner did not go to starboard, and that a collision was inevitable, the Gadsby's wheel was put hard astarboard, to throw her stern out and ease the contact. The steamer's port side abaft the smokestack struck the bow of the schooner, whereby the engineer's house of the steamer was carried

away by the port anchor of the schooner, which was imbedded in it, the life-boats crushed, and other damage done to the steamer's sides and decks. The Gadsby slid past the schooner, and thereafter went about, and, searching for the Palmer, found her within a half an hour after the collision, and towed her to within a few miles of Sandy Hook.

The evidence of the Palmer is to the following effect: The schooner was on the starboard tack, with a light breeze from the northeast, on a course from west to west one-half north, with only her four lower sails and four head sails set, running about four miles per hour, with an attentive watch forward, who was and had been from a little before 6 o'clock industriously sounding fog signals from the fog horn. Another seaman was at the wheel, the mate was on the quarter deck forward of the wheelsman, and another seaman was in the waist. When the steamer's whistle was heard ahead, but was not located, the mate ran forward, and ordered three short blasts of the fog horn to be sounded, which was done. The Gadsby came in sight less than a point on the port bow, and about 400 feet away, running at the rate of nine knots per hour. A course signal of one whistle was heard. The mate ordered the wheel hard down, which was attempted, but before the course of the schooner could be changed perceptibly the Gadsby was upon her, listing her over to port, and carrying away the jibboom guys, breaking the port cathead, parting the port anchor chain, breaking the bow planking below the lower chain plates, and driving her forward house to starboard.

Thus it appears that each vessel, in regard to lookout, attentiveness, speed, and sounding fog signals, by her own evidence fulfilled her duty, and did not fulfill it in any of these particulars by the evidence of the opposite vessel. From this evidence it is concluded: (1) Each vessel duly sounded fog signals; (2) each vessel was running at proper speed; (3) neither vessel kept a proper lookout.

Although each vessel should have heard the fog signals of the other, at an earlier time, yet Dolan, the lookout on the steamer, did not hear, nor did any person upon her hear, any sound from the schooner, except her chief officer, who heard, as he claims, something similar to a steam whistle.

Thus, a steamer, sailing under favorable conditions of weather, had in the existing watch, the lookout, chief officer, the boatswain, the wheelsman, the steward, a spare man on deck, the master himself, and yet there was no discovery of the schooner's fog signals until the vessels were so near that collision was inevitable. On the other hand, Johnson, the lookout on the schooner, had the dual duty of an outlook and to turn the crank of the fog horn. He was blowing his horn and looking down, and the first that he saw of the steamer was when her amidships were abreast of the schooner's port bow. Shortly before he had heard a whistle a little off the port bow. He seemed to be in doubt as to the nature of the whistle, although he regarded it as the usual whistle blown in foggy and clear weather. At that time the mate came forward. Johnson told him that there was a steamer right ahead. The mate said that he had heard the whistle. Johnson, by the mate's order, blew twice after that, but the

steamer was "on top of us" when he saw her. This indicates an inattention on the part of the lookout that may or may not have arisen from his preoccupation in sounding the horn or his proximity to it. The mate in charge of the vessel, and other persons on the deck, heard no more than did the lookout. So that the case shows that although each vessel blew proper fog signals none of them were duly heard by the opposite vessel.

From the evidence it is necessary to find either that the fog signals were not blown, or that the persons on deck of the several vessels were inattentive. With the ample evidence that the signals were blown, it is difficult to arrive at a conclusion that such was not the case, and, in the absence of conditions of wind that would account for the failure to hear, it must be concluded that such failure arose from a lack of that strict attention which the foggy weather demanded.

The next inquiry is whether the negligent inattention was the proximate cause of the accident on the part of either or both vessels. The vessels were approaching very nearly head on, but were probably so placed as to see each other slightly on the port bow. Had the Palmer heard the Gadsby's fog whistles, what should she have done? The schooner's primary duty was to keep her course whether or not she heard the signals. If she heard, should she have gone to either side or luffed? If she had made any of these maneuvers, and the steamer had collided with her, her particular maneuver would have been urged as a fault against her. But what is more important is that, with the steamer practically dead ahead of the schooner, the latter could not know what course to pursue, other than to hold her course, as she could not know the steamer's location and probable maneuver. Had the steamer been broad on either side of her, or so far to either side as to establish the relative location of the vessels, it could be urged with better reason that the schooner should have heard, and have taken action accordingly. But, as the vessels were related to each other, the schooner ought to have heard, but ought not to have taken action, at least until she had a course signal from the steamer, or saw her coming upon her. The law commands the action of sailing vessels, and establishes a rule that to the largest degree insures that certainty which is essential to safe navigation. The sailing vessel departs from the injunction to keep her course, at high peril both on the sea and in the court, and in the case at bar she did just what she should have done had she duly heard the opposing whistles. With the Gadsby the result is different. Had she been duly attentive and heard the schooner's fog horn, she could have pursued two courses, or one of two courses. She could have stopped the steamer and availed herself of an opportunity to hear and locate the schooner's fog signals, and thereupon maneuver respecting them, and given and obeyed earlier course signals. If the schooner came in sight with the steamer at rest, the injury would have been such as would arise from the momentum of one rather than two moving vessels, and the space that separated the vessels, upon their sighting each other, would be traversed by one vessel alone, thereby allowing greater time for the vessels to avoid each

other. But, above all, it was the duty of the steamer to hear and keep out of the way, if she could do it by exercising due care; she had no right to keep her course; and, if there was a probable advantage in her being in motion rather than at rest, she could, after having located the sailing vessel by stopping or otherwise, have chosen her course, and possibly, perhaps probably, avoided the sailing vessel, according to her duty.

From these considerations it is concluded that the inattention of the schooner was not, and of the steamer was, the proximate cause of the collision. Therefore the libelant Clark should have a decree for his damages, and the libel filed by Robinson should be dismissed.

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**CLYDESDALE SHIPOWNERS' CO. v. WILLIAM W. BRAUER**  
S. S. CO. et al.

(District Court, S. D. New York. February 19, 1903.)

**1. SHIPPING—BREACH OF CHARTER PARTY—RIGHT OF CHARTERER TO RESCIND FOR MISREPRESENTATION OF VESSEL'S SPEED.**

Libelant made a general charter of a steamer to respondent for three years. During the negotiations libelant stated that the vessel's average speed was 11 knots an hour, but such representation was entirely outside of the charter, and was made in relation to the employment of the steamer in the carriage of cattle in the transatlantic trade, for which purpose it was understood she was to be used. Respondent subchartered the steamer for a voyage to the western coast of South America, which occupied six months, and thereafter returned her to libelant, on the ground that she failed to make the speed represented. *Held*, that the representation was material, and if found to be untrue on a fair trial of the steamer, as by a voyage across the Atlantic, such as was contemplated, entitled respondent to rescind the charter, but that the fact that she did not maintain the speed on the long voyage in different waters, and during a part of the time with inferior coal, was not proof of the falsity of the representation, and that, furthermore, libelant was entitled, in case of rescission, to be restored as far as possible to the position it occupied when the contract was made, and respondent was not justified in sending the vessel on a long voyage, and after the lapse of several months asserting a cause of rescission which, if it existed, should have been discovered within a few days.

In Admiralty. Suit for breach of charter.

Convers & Kirlin, for libelant.

Warren, Warren & O'Beirne, for respondents.

ADAMS, District Judge. A libel was filed in this action to recover the damages incident to a failure on the Brauer Steamship Company's part to perform a charter party of the libellant's steamship Aboukir, made between the libellant and the steamship company, with William W. Brauer as surety, on the 12th day of March, 1901, for a period of thirty-six months, at the rate of £1300 per month from the date of her delivery, which took place at New York on the 13th day of May, 1901. The steamship then went into the Brauer Company's service and was sub-chartered by it to W. R. Grace & Co. for a round trip to the West Coast of South America and back. This trip occupied until the 19th day of November, 1901. The charterer

then returned the steamship to the owner on the grounds that it falsely and fraudulently represented to the Brauer Company, for the purpose of effecting the charter, that the steamship had a speed of eleven knots per hour on a consumption of twenty-five tons of coal per day and was in all respects fitted for the Brauer Company's trade, in carrying live cattle and general merchandise, whereas in fact she could only make less than nine knots per hour on consumption of over thirty tons of coal per day and by reason of her slow speed she was unfit for such trade.

No speed was guaranteed in any way by the owner and the defense would only be made out upon a fair preponderance of evidence establishing the claimed fraud.

The respondent desired to charter an eleven knot steamer, which it made known to the owner through a broker in New York, where the negotiations took place, who cabled it to the owner's agent in Glasgow, who communicated it to the owner. An answering cable from the agent in Glasgow was sent to the broker in New York, which, among other things, contained a statement that the vessel's average speed was eleven knots an hour, which it was computed by the agent would save the charterer from £100 to £250 per month over vessels of less speed. This was exhibited by the broker to the Brauer Company. I hold that the representation was material and if it was untrue, the charterer was entitled to rescind the contract, provided it exercised due diligence in asserting the right.

I find, however, no evidence to establish the claim that it was untrue. Although the charter was for general employment of the steamship, there was no such representation therein or with reference thereto. The representation was entirely outside of the charter and related to the employment of the steamer in the carriage of cattle in the transatlantic trade, involving trips occupying ten or eleven days in the cool waters of the North Atlantic, with Welsh or good American coal. The only test that was made of the steamship was under the Grace charter mentioned, in performing which she was called upon to meet quite a different condition with respect to the temperature of the water, causing a slower rate of speed, and to use a much inferior quality of coal for a part of the time, also affecting the speed. The voyage made consumed several months and it afforded but few opportunities of keeping the steam generating powers of the vessel in order as compared with the short voyages in contemplation.

Moreover, I do not think that the charterer was justified in sending the vessel off on a long trip, not contemplated when the representation was made, and, at the expiration of several months consumed in that way, in asserting a cause of rescission, which was limited to the short period incident to a voyage across the Atlantic. Assuming that the representation was untrue, the owner, especially in view of the fact that it had good reason to believe it to be true, was entitled to be restored in case of rescission, as far as possible, to the position it occupied when the contract was made. Carver on Carriage by Sea (3d Ed.) § 133; Pollock on Contracts (7th Ed.) p. 583. The Brauer Company was entitled to such an opportunity of ascertaining the truth, as would result from a voyage to Europe, or was

equivalent thereto, in conformity with the understanding of the parties that the vessel was to be so used, but not to delay rescinding for several months, while an entirely different voyage was made, with an opportunity to take advantage of any change in the market that might be for its benefit and to the detriment of the owner. In fact, there was a change in the market for vessels, which lowered the hiring value of this steamship very considerably during the several months which elapsed between her delivery and the attempted rescinding and caused a loss to the owner which it would be inequitable to permit the respondent to impose upon it. Upon the whole case, I find no merit in the defense.

Decree for libellant, with an order of reference. Decree to be settled upon one day's notice.

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#### THE DESPATCH.

(District Court, E. D. New York. December 24, 1902.)

1. COLLISION—VESSEL BACKING FROM PIER—NEGLIGENCE.

When a lighter was backing to get out from her pier, her engine failed to start forward in obedience to the lever, and she backed into another vessel lying at an adjoining pier. Repairs were being made on the piers, and there was more or less driftwood in the water, and it was claimed that her propeller was fouled by a log. The steward stood at the stern, but was not keeping any lookout for obstructions. *Held*, that she was in fault for failing to exercise greater care in backing, in view of the known danger of fouling, under the circumstances.

In Admiralty. Suit for collision.

Gifford, Stearns & Hobbs (Jesse Stearns, of counsel), for libellant.  
Robinson, Biddle & Ward (Charles M. Hough, of counsel), for claimant.

THOMAS, District Judge. The steam lighter Joanna was lying at the end of the South Central Pier, in the Atlantic Basin, with her bow out. The lighter Despatch, 101 feet over all, was lying at the North Central Pier, with her bow in and her stern about 50 feet from the end of the pier. The Despatch backed under one bell, with the intention of carrying her bow past the end of the pier, and then starboarding to go out of the basin. When the stern of the Despatch was about 150 feet from the Joanna, the engineer gave one bell to stop and one bell to go ahead. The engineer changed his reverse lever forward, and let on the steam, but the vessel did not go ahead, and continued her sternway; whereupon the captain from the pilot house looked out, and asked the engineer what was the matter, to which the engineer replied, according to the captain's statement, that she had picked up a log. The Despatch continued to go back until her stern struck the Joanna's starboard side at about a right angle. At the instant of contact, according to the libellant's evidence, the propeller became free, and the Despatch went forward, and after an interval came back and lay alongside the Joanna, while the captain of the Despatch went aboard the Joanna, and



there, or on the deck, had a conversation with the captain of the Joanna, in which he told him that he had collided with the Joanna, and had done her some harm, and that he would report it. The evidence shows that they were repairing one of the piers, and that there was considerable driftwood in the basin.

Burke, the engineer of the Despatch, stated that at the moment he got the bell to stop and go forward his engine stopped, and that although he reversed and gave steam she would not go ahead; that he called to the captain that he could not go ahead, and told the fireman to use a bar for the purpose of prying over one of the cog-wheels which turned the crank; that the fireman pried on such cog-wheel in such a way as to turn the wheel from left to right. He stated that when he was backing the wheel was turning from right to left. Matthews, the fireman, testified that he was in the fireroom; that he heard only the bells to back; that finally the engineer called out to him, "Pry her out; there is something the matter with her." He stated on cross-examination that the captain said, "Pry her off," and nothing more. Upon being questioned by the court he testified that the engineer said, "Pry her off; there is something the matter;" that he himself knew that there was something the matter; that just as she struck the propeller became free. The engineer testified that the propeller was fouled, but finally stated that he could not say whether it was fouled, or whether the engine was on its center, and that the bar would be used in either case. The fireman stated that he had many times pried off vessels that were on the center, but that he had seldom been called to do it in the case of the Despatch. Patterson, the deck hand, testified that he heard a bell to stop and go ahead, and that when she did not go ahead he went to the stern, and found the steward there with a fender; that she struck just as he got back, and that just as she struck the engine did go ahead; that he saw the captain put his head out of the window, and heard him ask what was the matter, and that the engineer said that she would not work, that she was on the center; and he added, on cross-examination, that the engineer said that there was something in the wheel; that he did not see anything in the wheel. Shanley, the steward, said that he let go the lines and stayed aft; that he looked to see that there was nothing coming in or out of the basin; that there was a good deal of driftwood; that he did not hear bells to stop or go ahead; that he loitered around the stern; that he saw the Despatch approaching the Joanna, and that he picked up a rope fender when the vessels were from 15 to 20 feet apart; that the Despatch was going very slowly; that he did not notice driftwood in the immediate neighborhood of the propeller; that as soon as the Despatch struck he could see her quickwater; that he did not see anything come from the propeller of the Despatch; that he did not notice the Despatch stop, and did not give any warning.

The fact seems to be that the Despatch backed in such a way as to carry her stern far eastward of the line of the North Central Pier, and that when the captain gave the signal to go ahead she did not go ahead, although the engineer properly disposed his engine therefor, but that at the moment of contact she did begin to go ahead.

If the claimant's contention be accepted that the propeller was fouled, she became disabled by reason of the driftwood, of which there was full knowledge. Therefore the Despatch should have used greater care in backing, in which motion the propeller is more apt to be fouled. The steward who was astern should have been on the sharp lookout, but his own evidence shows that he was loitering rather than looking out, and it is concluded that proper care was not used in backing the boat and looking out lest driftwood should foul the propeller.

The libelant should have a decree.

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#### THE EARL OF DUNMORE.

(District Court, E. D. New York. January 22, 1903.)

**1. SHIPPING—LIABILITY OF SHIP FOR INJURY OF STEVEDORE—FAILURE TO GIVE WARNING OF DEFECTS.**

Where it was known by the officers of a ship that a hatch covering was so constructed, or was in such condition, that if the hatch was opened in the usual way it would fall, the failure to give warning of the danger to stevedores engaged in loading the vessel was negligence, which rendered the ship liable to an employé of the stevedores for an injury resulting from the falling of the hatch with him into the hold while he was removing the cover in the customary way.

In Admiralty. Action for injury of stevedore.

James G. Cropsey, for libelant.

Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. The ship was receiving cargo at her dock in the East River, and had been so engaged for two or three days before the accident occurred. During such time the cargo, so far as concerns hatch No. 3, had been received through the after portion thereof, and the libelant had been connected with this work. On the morning of the accident, the necessities of the work required that the forepart of the hatch should be uncovered, and while the libelant was standing on the port side thereof, removing the hatch cover adjoining the crosspiece, all of the forward part of the hatch fell into the hold, carrying the libelant, and it is for the serious injury then received that the present action is brought.

The hatch was constructed as follows: A piece of iron rested athwartships on the coaming. On each side of this was a separate central fore and after piece, made of wood. One end of each piece rested in the coaming, and the other end fitted against a crosspiece with intended sufficient play to permit its removal. The libelant produced evidence that the crosspiece was bent, and several witnesses testify that on the night of the accident, when an attempt was made to put the forward fore and after in place, it was not sufficiently long to reach from the coaming to the crosspiece, lacking from an inch to two inches, and that before it could be brought into support, it was necessary to insert the aft fore and after, so as to press the cross-

piece forward, and some of the witnesses stated that wedges were also placed at the ends of the forward fore and after to keep it from sliding. In other words, the libelant's claim in this regard is that if the forward fore and after were pushed into the slot in the coaming, as far as it would go, the other end would not reach to the crosspiece, and that if it were pushed into the crosspiece as far as it would go, the forward end would not reach to the coaming. The evidence of the claimant is to the effect that the crosspiece was perfectly straight, that the fore and after was sufficiently long, allowing only enough play to permit it to be raised easily out of position. Claimant's evidence further is to the effect that on the morning of the accident the ship carpenter told one of libelant's fellow servants, connected with the stevedore's work, not to remove the forward part of the hatch unless the aft fore and after was in place. The libelant was not present at the time, and several people who were there state that nothing of the kind occurred. The very fact that the carpenter states that he gave this warning indicates that he knew that it was unsafe to remove the forward part of the hatch unless the aft fore and after was in place, and the ship's officer also knew this fact. Why was it necessary that it should be in place? The claimant's contention, based upon the evidence of the carpenter and the ship's officer, is that, while the crosspiece was true, yet that if an attempt were made to remove the fore hatch covers the pressure would fall upon the crosspiece and cause it to bend, unless the aft fore and after were in place to hold it true. Adopting, then, the proposition most favorable to the claimant, as the probable explanation of the accident, the structure was such that in the removal of the forward part of the hatch, in such manner and with such force as stevedores would be likely to use, there was danger that the crosspiece would recede from its true position, and allow the forward fore and after to fall. The claimant urges that the carpenter gave notice of this; but if such condition existed, and if warning was necessary, it should have been brought to the notice of the contracting stevedore, or their proper representative, and the evidence shows that it was not made known so that even the foreman in charge of the libelant's gang knew of it. In fact, such foreman denies that any such statement concerning it was made in his presence. The claimant further urges that the libelant should have known without warning that the removal of the forward part of the hatch would result in the crosspiece yielding, and that it was gross negligence on his part to make the attempt. But there is no sufficient evidence that hatches are usually so constructed as to bring about this result. On the other hand, the hatch frame should be, and usually is, constructed so that such injurious pressure is not possible. The contention that a ship may furnish a stevedore a hatch so constructed that it will fall unless uncovered in a certain order is not approved. The order claimed in this action may be reversed by the claimant next to appear in a similar action. Although the libelant was in the employ of the stevedore, yet the ship owed the stevedore and his men the duty of giving proper warning that the hatch would fall unless dismantled

in the particular manner now pointed out. As the construction was such that the opening in the usual way would result in the hatch falling, and as no such warning was given, and the stevedore was not bound to anticipate the danger, the claimant was negligent, and for the injury which resulted the libelant should recover the sum of \$3,000.

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DUKE v. MORNING JOURNAL ASS'N.

(Circuit Court, S. D. New York. February 3, 1903.)

1. LIBEL—PUNITIVE DAMAGES.

Defendant published a highly sensational article, occupying several columns of its newspaper, prefaced by startling headlines, charging plaintiff with conspiracy to defraud insurance companies by securing policies for the benefit of the conspirators on the lives of aged and decrepit persons, and, when desirable, to hasten the death of insured, and stated that such conspirators were beneficiaries in 100 policies, of which 60 had been canceled by the insurance companies; that 30 of the persons insured had died of disease, 12 by poison, and that the lives of 15 others had been attempted. In its answer defendant alleged that such conspiracy existed in part, and that plaintiff and the other conspirators falsely claimed to be creditors of the individuals insured, etc., and attempted, but failed, to establish such defense. *Held*, that plaintiff was entitled to recover exemplary damages.

2. SAME—EXCESSIVENESS.

A verdict in favor of plaintiff for \$36,000 was excessive, and should be reduced to \$20,000.

Abram J. Rose, for plaintiff.

Benj. F. Ernstein, for defendant.

WALLACE, Circuit Judge. The motion for a new trial upon the ground that the verdict was excessive has led to a careful reconsideration of the case as it was presented to the jury. The reasons for the conclusion which has been reached may be briefly stated.

It is exceedingly difficult to fix the boundary line between a just award and an excessive one in a case like this. The libelous article published by the defendant was extensively circulated in the state where the plaintiff resided, as well as in other states where he was known, and excited comment and discussion. It was a highly sensational article, occupying two or three columns of the defendant's newspaper, prefaced by startling headlines. In substance it represented that for several years certain prominent business men of Kemper county, Miss., had engaged in an extensive conspiracy to defraud insurance companies, the scheme being to procure policies for the benefit of the conspirators upon the lives of aged and decrepit persons, and, when desirable, to hasten the death of the insured. It gave an estimate of the extent of the operations of the conspirators. This was, in effect, that they were beneficiaries in 100 policies; that 60 of the policies had been canceled by the insurance companies; that 30 of the insured had died of disease; that 12 had died of poison; and that the lives of 15 others had been attempted. It stated that the plaintiff was one of the conspirators; that another, Dr. Lib-

scombe, had been convicted of poisoning one of the insured; that another, Guy Jack, had been indicted and was awaiting trial for the same offense; and that another, Rosenbaum, had been indicted for attempting to poison another of the insured. The defendant, by its answer, alleged facts in partial justification of the publication and in mitigation of damages. It did not allege that the publication was true throughout, but it did allege, in substance, that for many years a conspiracy had existed in Kemper county, the plaintiff being one of the conspirators, to defraud insurance companies. It then proceeded to set out various fraudulent insurances obtained by the several alleged conspirators, the circumstances attending the deaths of some of the insured, and the criminal proceedings against Libscombe, Guy Jack, and Rosenbaum. It alleged that the plaintiff and the other conspirators claimed to be creditors of the individuals insured, when in fact they were not; and that the insurance companies became suspicious because of the deaths of some of the insured, and instituted investigations, and as a result revoked and canceled various policies in which the conspirators were interested. Upon the trial the defendant sought to establish the defense thus set up in its answer, and produced Guy Jack as one of its principal witnesses. The trial occupied three days, and the jury rendered a verdict for the plaintiff of \$36,000.

The case was one where the jury was abundantly justified in awarding punitive damages as well as compensatory damages. The circumstances attending the publication of the article authorized them to find that it had been published recklessly, without any attempt to investigate its truth, and with the object of producing a sensational article which would appeal to the credulous and to the tastes of those who enjoy reading narratives of fraud and crime. The plaintiff was a man of respectable business and social standing in his state, and had a wide acquaintance. To what extent his reputation actually suffered by the article is of course largely a matter of conjecture. While it would seem that discriminating readers would regard it as a tissue of exaggeration interwoven with an attenuated thread of fact, many, and perhaps the majority, probably would not analyze it intelligently, and may have inferred that the plaintiff was guilty of the crimes imputed to him. If the jury had awarded compensatory damages only, it cannot be safely said that \$10,000 would have been extravagant. Nor can it be safely said, if they had awarded \$10,000 by way of exemplary damages, that amount would have been extravagant. What would have been a reasonable award for either element of damages is a question upon which fair-minded and intelligent men would differ widely.

In actions like this, in which damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, the court ought not to interfere with a verdict for excessiveness unless it is so unreasonable as to indicate that they were influenced by passion, prejudice, partiality, or corruption. The jurors in this case were men of exceptional intelligence, and no doubt is entertained that the verdict was the result of their conscientious convictions.

Nevertheless, it was so large as to induce the belief that their feelings, either of sympathy for the plaintiff or of indignation towards the defendant, carried them too far. The evidence justified them in concluding that the charges in the libel were groundless, and that the publication was a wanton and cruel wrong to the plaintiff. It also probably led them to believe that the defense was not interposed in good faith, but was interposed, not in the expectation of substantiating the averments of the answer, but to besmirch the plaintiff's character by associating him with the frauds of the disreputable witness produced by the defendant, and thus reduce a recovery to a trifling sum. A dispassionate consideration of the evidence leaves the impression that the jury could hardly have failed to become incensed by the character of the defense. In short, the defendant undertook to play with fire, and got, not merely scorched, but burned. Although the defendant justly brought upon itself the severe condemnation of the jury, the conclusion is reached that they visited the offender with too heavy a hand, and that they exceeded the boundaries of a just discretion.

A new trial will be granted unless the plaintiff stipulates to reduce the recovery to \$20,000.

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HILLS & CO., Limited, v. AUSTRICH.

(Circuit Court, S. D. New York. March 7, 1903.)

1. COPYRIGHTS—PICTURES—"PRINTS."

Rev. St. § 4956 [U. S. Comp. St. 1901, p. 3407], authorizes the copyright of any "book, chart, \* \* \* cut, print, \* \* \* or design, for a work of the fine arts, provided that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited, shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States." *Held*, that pictures printed in successive colors from metal plates, from which part of the metal has been cut so as to leave portions thereof in relief, were entitled to copyright as "prints," within the general enumeration of the section, and were not within the proviso because not "printed from drawings on stone."

2. SAME—COPYRIGHT NOTICE.

A copyright notice reciting, "Copyright, 1902, Published by Hills & Co., Ltd., London, England," was sufficient.

Benno Loewy, for the motion.  
Morris Cukor, opposed.

LACOMBE, Circuit Judge. Section 4956 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3407] provides for copyright of "book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, \* \* \* photograph, \* \* \* painting, drawing, statue, statuary, model or design for a work of the fine arts:

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¶ 1. Matter subject to copyright, see note to Amberg File & Index Co. v. Shea Smith & Co., 27 C. C. A. 248.

\* \* \* provided, that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited \* \* \* shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom." It is apparent from the context that Congress used the word "chromo" with its dictionary meaning, viz., an abbreviation of "chromo-lithograph," and that it understood the word "lithograph" to cover a print "made from a drawing or drawings on stones."

The four pictures which are the subject of the complaint have certainly been "printed" from something. They were not painted or photographed or drawn upon the paper which now bears them. They are, therefore, within the enumeration "prints." The testimony of the persons who made them, accompanied by the original plates, with impressions therefrom taken in different stages of completion, overwhelmingly establishes just how they are made. Without now deciding whether the completed picture is an "engraving" within the meaning of that word, as used in the statute, there can be no doubt it has been printed in successive colors from metal plates, from which plates part of the metal has been cut out so as to leave portions thereof in relief. They are "prints" within the general enumeration of the section, and are not within the proviso, because they have not been "printed from drawings on stone."

It is objected that the copyright notice is defective, because there is testimony tending to show that on some of the copies sold by complainant the phrase used was: "Copyright, 1902, Published by Hills & Co., Ltd., London, England." Reliance is placed on *Osgood v. U. S. Aloe Inst. Co.* (C. C.) 83 Fed. 470. The fundamental difficulty with the alleged statutory notice in that case, however, was that one half of it was printed on one page and the other half on the next one. The notice in this case is sufficient, within the ruling of the Court of Appeals in *Bolles v. Outing Company*, 23 C. C. A. 594, 77 Fed. 966.

Motion for preliminary injunction is granted.

## In re BALENSI.

(Circuit Court, S. D. New York. January 10, 1903.)

**I. EXTRADITION—EMBEZZLEMENT—TREATIES.**

Where defendant subscribed for one share of the stock of a French corporation, and agreed with the other subscribers to devote his entire time to the management of the corporation's affairs, and in consideration of his services receive 40 per cent. of the profits, he was a person "hired or salaried" by the corporation, within French extradition treaty, authorizing extradition for embezzlement by any person or persons, hired or salaried, to the detriment of their employers, etc.

This is an application to review the decision of the United States Commissioner holding the petitioner subject to extradition under the treaty between the United States and the republic of France.

David E. Anthony, for petitioner.  
Coudert Bros., opposed.

LACOMBE, Circuit Judge. The treaty describes the offense for which it is sought to extradite the petitioner as follows: "Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment." The testimony tends to show that he appropriated to his own use moneys deposited with a corporation, to wit, the Société Francaise de Banque et de Change, and stock delivered to it to be sold, to a very large amount. The corporation was formed pursuant to the provisions of the French law for the purpose of carrying on a banking business and also the business of stockbrokers. The capital stock was \$50,000, divided into shares of the par value of \$100 each, the liability of the members being limited to the amount of their subscription. The petitioner subscribed to one share of the stock, and the other subscribers agreed that he should devote his entire time and attention to the management of its affairs, and that in consideration of the services to be rendered by him he should receive 40 per cent. of the profits. His position may fairly be described as that of a person hired or salaried by the corporation of which he was a stockholder, the amount of his salary varying with the profits; and therefore his alleged offense is within the definition of the treaty. Provisions with regard to the extradition of aliens are no longer conducted with the extreme technicality which once prevailed. Matter of Neely (C. C.) 103 Fed. 631; Grin v. Shine, 23 Sup. Ct. 99, 47 L. Ed. —.

The writ is dismissed.



## HUSET v. J. I. CASE THRESHING MACH. CO.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1903.)

No. 1,790.

**1. NEGLIGENCE—LIABILITY OF MANUFACTURER, VENDOR, OR CONTRACTOR TO THIRD PARTIES—GENERAL RULE.**

It is the general rule that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles.

**2. SAME—EXCEPTION TO RULE—POISONS, FOODS, ARTICLES AFFECTING LIFE AND HEALTH.**

An act of negligence of a manufacturer or vendor which is imminently dangerous to human life or health, and which occurs in the preparation or sale of articles, like foods and poisons, whose primary use is to preserve, destroy, or affect life and health, is actionable by parties who have no contractual relations with the manufacturer or vendor.

**3. SAME—INVITATION TO USE.**

An owner who impliedly invites third parties to use defective machines or instruments manufactured or furnished by him is liable to them for injuries resulting from his negligence in the manufacture or care of them.

**4. SAME—MANUFACTURER'S OR VENDOR'S KNOWLEDGE OF DANGEROUS CHARACTER WHEN DELIVERED.**

A manufacturer or vendor, who, without giving notice of its character or qualities, supplies or delivers to another a machine or article which, at the time of delivery, he knows to be imminently dangerous to the life or limbs of any one who may use it for the purpose for which it is intended, is liable to any one who sustains injury from its dangerous condition, whether he has any contractual relations with him or not.

(Syllabus by the Court.)

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

This writ of error was sued out to reverse a judgment sustaining a demurrer to the amended complaint of O. S. Huset, the plaintiff below and the plaintiff in error here, in an action for personal injury, which he brought against the J. I. Case Threshing Machine Company, a corporation. These are the facts which the complaint discloses: The threshing machine company was a corporation engaged in the manufacture and sale of threshing rigs, which consisted of an engine, a separator, a band-cutter, and self-feeder. The band-cutter and self-feeder consisted of a series of fast revolving knives covered with a sheet-iron covering and a frame designed to fit into the front of the separator in which the cylinder was located. The cylinder was made of iron and steel about 48 inches in length and 20 inches in diameter, set with rows of steel teeth and spikes projecting about two inches, and so placed as to pass between similar teeth in a concave frame in front of and under the cylinder. When the machine was in operation, this cylinder revolved at a very high rate of speed with great force, and threshed the grain. The self-feeder and band-cutter was designed to be fastened to the separator, and its sheet-iron covering fitted onto the front of the separator just above and over the front part of the cylinder so as to cover the cylinder completely. The object and design of the defendant in placing this covering over the cylinder was that it should be used by any person who might operate the machine to walk upon it passing from the top of the main part of the thresher to the self-feeder. This sheet-iron covering was made without any support, and was so pliable and easily bent that it was incapable of sustaining the least weight, and would necessarily bend and collapse when subjected to the weight of any man who might walk or step upon it. It was necessary for the opera-

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¶ 4. See Negligence, vol. 37, Cent. Dig. § 25.

tor to walk over the covering of the cylinder in operating the machine. This machine, covered in this way, was imminently and necessarily dangerous to the life and limbs of those who operated it, and it was well known to be thus dangerous by the defendant when it shipped the same and supplied it to the purchaser, J. H. Pifer; but this dangerous condition was of such a nature as not to be readily discovered by persons engaged in operating the machine or working thereon, but was concealed, and thereby rendered more dangerous still. On August 25, 1901, the defendant sold this threshing outfit to J. H. Pifer, who started to operate it on the next day, and employed the plaintiff, O. S. Huset, as a laborer to assist him in running it. It became the duty of the plaintiff to walk upon the top of the machine over the cylinder while it was in operation in order to superintend the pitching of bundles into the self-feeder, to prevent its clogging, and to oil the bearings of the parts of the cylinder and band-cutter. When he walked upon the covering of the cylinder, this covering sank so as to come in contact with the cylinder, and the plaintiff's right foot was caught thereby, and his foot and leg were drawn into it and crushed to a point above the knee joint, so that it was necessary to amputate the leg above the knee. The demurrer to this complaint rests upon the ground that the defendant owed no duty to the plaintiff, who was a stranger to the transaction between the defendant, the manufacturer and vendor of the threshing machine, and the vendee, Pifer. The court sustained the demurrer, and dismissed the action.

Halvor Steenerson (Charles Loring, on the brief), for plaintiff in error.

W. E. Black (Alfred L. Cary and Horace A. J. Upham, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?

The argument of this question has traversed the whole field in which the liability of contractors, manufacturers, and vendors to strangers to their contracts for negligence in the construction or sale of their articles has been contested. The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of every one to so act himself and to so use his property as to do no unnecessary damage to his neighbors, leads us fairly through the maze. With this fundamental principle in mind, if we contemplate the familiar rules that every one is liable for the natural and probable effects of his acts; that negligence is a breach of a duty; that an injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the probable effect of such an act is not actionable, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted from an act of negligence except from the interposition

of an independent cause (Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Elliott, 55 Fed. 9:9, 5 C. C. A. 347, 20 L. R. A. 582)—nearly all the decisions upon this subject range themselves along symmetrical lines, and establish rational rules of the law of negligence consistent with the basic principles upon which it rests.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise, and vice versa. It is a rational and fair deduction from the rules to which brief reference has been made that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale. (But when a contractor builds a house or a bridge, or a manufacturer constructs a car or a carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction.) So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and, as Wharton says, “insulates” the negligence of the manufacturer from the injury to the third person. Wharton on Law of Negligence (2d Ed.) § 134. For the reason that in the cases of the character which have been mentioned the natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold, and, perhaps more than all this, for the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted and has become established by repeated decisions of the courts of England and of this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical. The general rule is that

a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles, *Winterbottom v. Wright*, 10 M. & W. 109; *Longmeid v. Holliday*, 6 Exch. 764, 765; *Blakemore v. Ry. Co.*, 8 El. & Bl. 1035; *Collis v. Selden*, L. R. 3 C. P. 495, 497; *Bank v. Ward*, 100 U. S. 195, 204, 25 L. Ed. 621; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567; *Goodlander v. Standard Oil Co.*, 63 Fed. 400, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; *Loop v. Litchfield*, 42 N. Y. 351, 359, 1 Am. Rep. 513; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 623; *Curtain v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 615, 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 481; *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; *Burke v. De Castro*, 11 Hun, 354; *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. Supp. 821; *Barrett v. Mfg. Co.*, 31 N. Y. Super. Ct. 545; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *McCaffrey v. Mfg. Co. (R. I.)* 50 Atl. 651, 55 L. R. A. 822; *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Davidson v. Nichols*, 11 Allen, 514; *J. I. Case Plow Works v. Niles & Scott Co. (Wis.)* 63 N. W. 1013.

In these cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the following articles, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the courts held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts of construction, sale, or furnishing: A stagecoach, *Winterbottom v. Wright*, 10 M. & W. 109; a leaky lamp, *Longmeid v. Holliday*, 6 Exch. 764, 765; a defective chain furnished one to lead stone, *Blakemore v. Ry. Co.*, 8 El. & Bl. 1035; an improperly hung chandelier, *Collis v. Selden*, L. R. 3 C. P. 495, 497; an attorney's certificate of title, *Bank v. Ward*, 100 U. S. 195, 204, 25 L. Ed. 621; a defective valve in an oil car, *Goodlander v. Standard Oil Co.*, 63 Fed. 401, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; a porch on a hotel, *Curtain v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; a defective side saddle, *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567; a defective rim in a balance wheel, *Loop v. Litchfield*, 42 N. Y. 351, 359, 1 Am. Rep. 513; a defective boiler, *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine, *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 615, 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 481; a defective wall which fell on a pedestrian, *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; a defective rope on a derrick, *Burke v. Refining Co.*, 11 Hun, 354; a defective shelf for a workman to stand upon in placing ice in a box, *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. Supp. 821; a defective hoisting rope of an elevator, *Barrett v. Mfg. Co.*, 31 N. Y. Super. Ct. 545; a runaway horse, *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; a defective hook holding a heavy weight in a drop press, *McCaffrey v. Mfg. Co. (R. I.)* 50 Atl. 651, 55 L. R. A. 822; a defective bridge, *Marvin Safe Co. v.*

Ward, 46 N. J. Law, 19; shelves in a dry goods store, whose fall injured a customer, *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employés, *McGuire v. McGee* (Pa.) 13 Atl. 551; defective wheels, *J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

In the leading case of *Winterbottom v. Wright* this rule is placed upon the ground of public policy, upon the ground that there would be no end of litigation if contractors and manufacturers were to be held liable to third persons for every act of negligence in the construction of the articles or machines they make after the parties to whom they have sold them have received and accepted them. In that case the defendant had made a contract with the Postmaster General to provide and keep in repair the stagecoach used to convey the mail from Hartford to Holyhead. The coach broke down, overturned, and injured the driver, who sued the contractor for the injury resulting from his negligence. Lord Abinger, C. B., said:

"There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

Baron Alderson said:

"I am of the same opinion. The contract in this case was made with the Postmaster General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty."

The views expressed by the judges in this case have prevailed in England and in the United States, with the exception of two decisions which are in conflict with the leading case and with all the decisions to which reference has been made. Those cases are *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, in which Smith, a painter, employed Stevenson, a contractor, to build a scaffold 90 feet in height, for the express purpose of enabling the painter's workmen to stand upon it to paint the interior of the dome of a building, and the Court of Appeals of New York held that Stevenson was liable to a workman of Smith, the painter, who was injured by a fall, caused by the negligence of Stevenson in the construction of the scaffold upon which he was working; and *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, in which a painter purchased of a manufacturer a stepladder, and one of the painter's employés, who was injured by the breaking of a step caused by the negligence of the manufacturer, was permitted to recover of the latter for the injuries he had sustained. The decision in *Devlin v. Smith* may, perhaps, be sustained on the ground that the workmen of Smith were the real parties in interest in the contract, since Stevenson was employed and expressly agreed to construct the scaffold for their use. But the case of *Schubert v. J. R. Clark Co.* is in direct conflict with the side saddle case, *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567;

the porch case, *Curtain v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; the defective cylinder case, *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 481; the defective hook case, *McCaffrey v. Mfg. Co. (R. I.)* 50 Atl. 651, 55 L. R. A. 822; and with the general rule upon which all these cases stand.

It is, perhaps, more remarkable that the current of decisions throughout all the courts of England and the United States should be so uniform and conclusive in support of this rule, and that there should, in the multitude of opinions, be but one or two in conflict with it, than it is that such sporadic cases should be found. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English speaking nations.

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule,

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. *Dixon v. Bell*, 5 Maule & Sel. 198; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 493, 502; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Peters v. Johnson (W. Va.)* 41 S. E. 190, 191, 57 L. R. A. 428. The leading case upon this subject is *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. A dealer in drugs sold to a druggist a jar of belladonna, a deadly poison, and labeled it "Extract of Dandelion." The druggist filled a prescription of extract of dandelion, prepared by a physician for his patient. The patient took the prescription thus filled, and recovered of the wholesale dealer for the injuries she sustained. In *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, a recovery was had by a third party for the sale of laudanum as rhubarb; in *Bishop v. Weber*, for the furnishing of poisonous food for wholesome food; in *Peters v. Johnston*, for the sale of saltpetre for epsom salts; and in *Dixon v. Bell*, for placing a loaded gun in the hands of a child. In all these cases of sale the natural and probable result of the act of negligence—nay, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after the purchasers had disposed of the articles, should consume them. Hence these cases stand upon two well-established principles of law: (1) That every one is bound to avoid acts or omissions imminently dangerous to the lives of others, and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective ap-

pliance upon the owner's premises may form the basis of an action against the owner. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & Record Co.* (Wis.) 60 N. W. 418, 420, 26 L. R. A. 524; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Roddy v. Railway Co.*, 104 Mo. 234, 241, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333. In *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387, the owner of a building employed *Osborn & Martin* to construct a cornice, and agreed with them to furnish a scaffold upon which their men could perform the work. He furnished the scaffold, and one of the employés of the contractors was injured by the negligence of the owner in constructing the scaffold. The court held that the act of the owner was an implied invitation to the employés of *Osborn & Martin* to use the scaffold, and imposed upon him a liability for negligence in its erection. The other cases cited to this exception are of a similar character.

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337; *Wellington v. Oil Co.*, 104 Mass. 64, 67; *Lewis v. Terry* (Cal.) 43 Pac. 398. In *Langridge v. Levy*, 2 M. & W. 519, a dealer sold a gun to the father for the use of the son, and represented that it was a safe gun, and made by one *Nock*. It was not made by *Nock*, was a defective gun, and when the son discharged it, it exploded and injured him. The son was permitted to recover, because the defendant had knowingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and had knowingly made a false warranty that this might be safely done, and the plaintiff, on the faith of that warranty, and believing it to be true, had used the gun, and sustained the damages. The court said in conclusion:

"We therefore think that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

This case was affirmed in 4 M. & W. 337, on the ground that the sale of the gun to the father for the use of the son with the knowledge that it was not as represented was a fraud, which entitled the son to recover the damages he had sustained.

In *Wellington v. Oil Co.*, the defendants knowingly sold to one *Chase*, a retail dealer, to be sold by him to his customers as oil, naphtha, a dangerous and explosive liquid. *Chase* sold the naphtha as oil, the plaintiff used it in a lamp for illuminating purposes, it ignited and exploded, and he recovered of the wholesale dealer. Judge *Gray*, later Mr. Justice *Gray* of the Supreme Court, said:

"It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for an injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault. Thus a person who delivers a carboy,

which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier, to whom it is delivered by the first in the ordinary course of business, to be carried to its destination. *Farrant v. Earnes*, 11 C. B. (N. S.) 553. So a chemist who sells a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair. *George v. Skivington*, Law Rep. 5 Ex. 1."

In *Lewis v. Terry* (Cal.) 43 Pac. 398, a dealer, knowing a folding bed to be defective and unsafe, sold it to a Mr. Apperson without informing him of the fact. His wife suffered a broken arm and other severe injuries from the negligence of the dealer in the sale of the bed, and recovered of him the damages she sustained.

The Supreme Court of Missouri, in *Heizer v. Kingsland & Douglass Mfg. Co.*, in which they held that the manufacturer was not liable to a third person for negligence in the construction of the cylinder of a threshing machine, which burst and injured him, said:

"Had the defendant sold this machine to Ellis, knowing that the cylinder was defective, and for that reason dangerous, without informing him of the defect, then the defendant would be liable even to third persons not themselves in fault. *Shearman & Redfield on Negligence* (4th Ed.) § 117."

Turning now to the case in hand, it is no longer difficult to dispose of it. The allegations of the complaint are that the defendant prepared a covering for the cylinder of the threshing machine, which was customarily and necessarily used by those who operated it to walk upon, and which was so incapable of sustaining the least weight that it would bend and collapse whenever any one stepped upon it; that it concealed this defective and dangerous condition of the threshing rig so that it could not be readily discovered by persons engaged in operating or working upon it; that it knew that the machine was in this imminently dangerous condition when it shipped and supplied it to the employer of the plaintiff; and that the plaintiff has sustained serious injury through this defect in its construction. The case falls fairly within the third exception. (It portrays a negligence imminently dangerous to the lives and limbs of those who should use the machine, a machine imminently dangerous to the lives and limbs of all who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff.) It falls directly within the rule stated by Mr. Justice Gray that when one delivers an article, which he knows to be dangerous to another person, without notice of its nature and qualities, he is liable for an injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or to any other who is not himself in fault. The natural, probable, and inevitable result of the negligence portrayed by this complaint in delivering this machine when it was known to be in a condition so imminently dangerous to the lives and limbs of those who should undertake to use it for the purpose for which it was constructed was



the death, or loss of one or more of the limbs, of some of the operators. It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom.

The judgment of the Circuit Court must be reversed, and the cause must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

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FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al. (AMERICAN TRADING CO., Intervener).

(Circuit Court of Appeals, Second Circuit. January 15, 1903.)

No. 30.

**1. RAILROAD RECEIVERS—POWERS—CONTRACT FOR TRANSPORTATION OVER CONNECTING LINES.**

Receivers, authorized by order of court to continue the business of a railroad company, are clothed with substantially the same powers with respect to such business, and are subject to substantially the same liabilities as such receivers, as those applicable to the company; and in the exercise of such powers they may contract for transportation beyond the line of their road and assume liability for the entire distance over connecting lines.

**2. SAME—GENERAL FREIGHT AGENT—POWER TO BIND RECEIVERS.**

The general Eastern freight agent of a Western railroad being operated by receivers, having his office in New York, has apparent power, by virtue of his position, to contract for the through carriage of goods over his line of road and a connecting steamship line across the Pacific, and a contract so made by him, when clear in its terms, will bind the receivers, when the shipper has no notice of any limitation on his authority, and no knowledge that the steamship line is not owned by the railroad company and operated by the receivers.

**3. CARRIERS—CONTRACT OF AFFREIGHTMENT—EFFECT OF BILL OF LADING.**

The mere receipt of a bill of lading does not alter or affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.

**4. SAME.**

The fact that a shipper, after receiving a bill of lading, negotiates the same, is not a ratification or adoption of its terms, as between him and the carrier, which will operate to annul a prior valid contract under which the goods were shipped, and under which rights have vested and obligations have accrued.

**5. SAME—THROUGH SHIPMENT—LIABILITY FOR DELAY IN FORWARDING.**

A railroad company, whose road was being operated by receivers, had a contract with a connecting steamship company, by which a close traffic arrangement was established between them for through shipments to Japan, the steamship company being required to supply ships to meet the demands of the joint business. The receivers, through their general

freight agent in New York, made a contract for a through shipment of lead from there to Japan, to be sent by a ship leaving Tacoma on a certain date. After the shipper had contracted for the sale and delivery of the lead, in reliance on such agreement the freight agent attempted to annul the same, on the ground that the lead might be contraband of war, but, being notified that the receivers would be held liable for damages, they authorized him to reinstate the agreement, and the lead was shipped thereunder to Tacoma, and loaded on the vessel. On the day for sailing the deputy collector refused to clear the ship, on the ground that the lead was contraband of war. The ruling was reversed the following day, and before the vessel sailed, but in the meantime the lead had been unloaded and was left. It was shipped on a later vessel, but the purchaser then refused to accept it, and it was sold at a loss. *Held*, that it was incumbent on the receivers at least to use all reasonable means to prevent the delay from a risk which they had foreseen and assumed, and that, in the absence of proof that they made any effort to see that the vessel was cleared, they were liable for the resulting damages.

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

For opinion below, see 112 Fed. 829.

F. B. Jennings, for appellant.

Edw. B. Hill, for appellees.

Before WALLACE, LACOMBE and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. This is an appeal from the decree of the United States Circuit Court for the Southern District of New York, dismissing the petition of the American Trading Company for the recovery of its claim against the receivers of the Northern Pacific Railroad Company. The decree under which the property of said corporation was sold provided that such sale should be subject to all obligations or liabilities contracted or incurred by said receivers, and that such claims might be enforced by such a petition in this court.

The case was tried to the court without a jury upon an agreed statement of facts, from which, inter alia, it appeared that at the time of the transactions in question the receivers of the Northern Pacific Railroad Company were carrying on the business of said road under authority of court; that the road in their possession extended from Duluth, Minn., to Tacoma, Wash.; that under contracts with various carriers they issued through bills of lading to and from points outside of their line, and that among such carriers was the Northern Pacific Steamship Company, an English company operating a line of steamers between Tacoma and points in Japan, including Yokohama; that the freight business of said railroad company over its railroad and outside connections in the eastern part of the United States was in charge of one George R. Fitch, the general Eastern agent of the receivers, at their office in the city of New York; that his only authority to act as agent of said steamship company was under a contract between the railroad company and the steamship company, but that he had been instructed by said receivers to solicit freight and to issue such bills of lading as the one herein involved, providing for through transportation by said railroad com-

pany and steamship company, and that he had no express general authority to make such contracts except as provided in said bills of lading, and no express authority to make the contract herein unless by virtue of certain telegrams to be hereinafter set forth; and that the petitioner herein did not know that the steamship company was a separate and independent company.

The material part of the agreed statement as to the transaction in question is as follows:

"(5) In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and via the Northern Pacific steamer Tacoma, sailing from Tacoma October 30, 1894."

The petitioner thereupon accepted Fitch's proposition, purchased said lead in bond, and closed said proposed agreement for the sale of said lead. Fitch subsequently wrote the petitioner, confirming contract for shipment, "to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given by me, to be forwarded from Tacoma, Washington, via Northern Pacific steamer sailing from thence October 30th," which the petitioner accepted in a letter repeating the aforesaid terms, and it arranged for shipment in accordance with Fitch's request to "see that same are rushed through without delay to connect with our steamer at Tacoma." On September 24, 1894, Fitch informed the trading company that he declined to ship, upon the ground that it might be contraband of war, and thereupon, upon the same day, the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract. Thereupon Fitch notified the general freight agent of the receivers, and received the following telegram in reply:

"September 25, 1894.

"G. R. Fitch, 319 Broadway, New York.

"Your wire this date to Mr. Hannaford: Dodwell, Carhill & Co., have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

0-900

J. B. Baird. WDB."

Dodwell, Carhill & Co. represented the said steamship company.

Thereupon the refusal was withdrawn, and the shipment was made under said contract, the lead being in course of transportation on the afternoon of September 27th, and reached Tacoma in time for shipment as agreed on the steamer sailing October 30th. On September 28, 1894, petitioner gave Fitch its check for the freight, and Fitch subsequently delivered a bill of lading in the usual printed form, but upon which were stamped the words, "Subject to delay," to a clerk of the petitioner, who received it without any stated objection to its terms, and it was not read or examined by him or by any officer of the company, and was immediately hypothecated for moneys

borrowed thereon. Said check was payable to the order of the Northern Pacific Railroad, was indorsed by Fitch, as general Eastern agent, and the proceeds were remitted to said receivers, and were divided and distributed under said contract with the steamship company. On September 29th, Fitch sent a copy of said bill of lading to the agent of said steamship with the following letter:

"September 29, 1894.

"Dodwell, Carhill & Co., Tacoma, Wash.

"Gentlemen:-

"I hand you herewith my B L 1507 covering shipment of pig lead for export to Amer. Trading Co., Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing October 30th. Will you kindly see that this connection is made, without fail.

"Yours truly,

[Sgd.] Geo. R. Fitch,  
"G. E. A."

At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company, and was loaded upon the Tacoma, the vessel of the steamship company which was to sail on October 30th; but about 4 o'clock of the afternoon of that day the deputy collector of the port refused to clear the vessel while the lead was on board, on the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions. On the following day the deputy collector at Tacoma received a telegram from the collector at Port Townsend, advising that the shipment be permitted. In the meantime the master of the vessel had unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st, when he sailed without it. The petitioner was not notified of the delay in the transshipment of the lead until November 5, 1894. The lead went forward on a later vessel, but in consequence of the delay the purchaser refused to receive the shipment, and in consequence the petitioner was obliged to sell it in the open market, and thereby suffered a loss of \$26,704.02.

The petitioner contends that the original contract for through transportation was within the scope of Fitch's authority as general eastern agent of the receivers under the order of court; that it was adopted and ratified by the receivers; and that the failure to perform was due to their negligence, and was not excused by the refusal of the deputy collector to clear the ship. Counsel for the receivers contend that there was no agreement that the receivers should assume responsibility except over their line of railway; that the receivers had no power to make such a contract; that if Fitch made any such contract it was for the steamship company, and not for the receivers; that he had no authority to make any contract on behalf of the receivers for the carriage of goods beyond Tacoma; that the original agreement was merged in the bill of lading; that failure to perform was excused by impossibility of performance.

The receivers, under the order of court, were authorized to continue the business of the railroad system of said company; that is, to conduct the business of a common carrier. And receivers, acting within the scope of their authority, are clothed with substantially the same powers, and are subject to substantially the same liabilities,

as such receivers as those applicable to the corporation. *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. Ed. 726; *Beers v. Wabash, St. L. & P. Ry. Co. (C. C.)* 34 Fed. 244, 247; *Elliott on Railroads*, §§ 567, 576, and cases cited; *Hutchinson on Carriers*, § 67; *Beach on Receivers*, § 371; *Central Trust Co. v. N. Y. C. & H. R. R. Co.*, 110 N. Y. 250, 257, 18 N. E. 92, 1 L. R. A. 260; *Little, Recr., v. Dusenberry, Adm.*, 46 N. J. Law, 614, 50 Am. Rep. 445; *Wall v. Platt*, 169 Mass. 398, 400, 48 N. E. 270. A carrier may contract for transportation beyond its own route and assume liability for the entire distance over connecting lines to the same extent as over its own line. *R. R. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *R. R. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. No reason is apparent why receivers have not the same power, and the authorities so far as cited are to that effect. *Kansas Pacific Ry. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744; *Elliott on Railroads*, supra.

Under the order of court authorizing them to conduct the business of common carriers, it was their right to so manage the property as would in their judgment secure the best results, consistently with the proper discharge of their duties. Under this authority they could and did issue through bills of lading beyond their route, and by the steamers of the steamship company.

In *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, the court says:

"Any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions of loose language, but only from clear and satisfactory evidence."

If Fitch had the authority to make the agreement undertaken by him, its terms are sufficiently clear and certain to meet this rule. Fitch was the general eastern freight agent of the receivers. It has been held that it is within the power of a general freight agent to contract for the carrying of goods beyond the limit of the carrier's line (*White v. M. P. R. Co.*, 19 Mo. App. 400; *Grover & Baker Sewing-Machine Co. v. Mo. Pacific R. R. Co.*, 70 Mo. 672, 35 Am. Rep. 444), and to stipulate for forwarding goods by a certain vessel and for carrying within a specified time (*Goddard v. Mallory*, 52 Barb. 87, 95; *Goodrich v. Thompson*, 44 N. Y. 324; *Strohn v. Detroit, etc., R. R.*, 23 Wis. 126, 99 Am. Dec. 114).

It is elemental that, as to third parties dealing with such a general agent, thus representing a corporation in the management of its business, and acting within the scope of his apparent authority, the principal is bound to the same extent as though it had directly conducted the business itself. *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Pechner v. Phoenix Insurance Co.*, 65 N. Y. 195. And so far as appeared from said course of dealing and from said bills, and so far as this petitioner knew or had reason to know, said steamers were owned and operated by said receivers. In any event the receivers, having first expressly authorized Fitch to accept a certain rate for this shipment to Yokohama, and having afterwards attempted to cancel said quotation, upon notice of the petitioner's refusal to ship, and of their claim under a written contract

already given, without further inquiry as to the terms of said contract, except as to the number of pounds and route, authorized Fitch to accept the lead already contracted, and suggested to Fitch, but did not instruct him, that the receipt for lead should be subject to delay. That the receivers knew that the contract provided for shipment per steamship Tacoma on October 30th may, perhaps, be inferred from their telegram to Fitch on September 25th, asking for such information. Thus having all the knowledge of the facts which they desired, they authorized the shipment, and under said authority the "shipment was made under the contract," in bond. It sufficiently appears that the contract was made by Fitch on behalf of, and was ratified by, the receivers, and that it provided for shipping the goods by steamer sailing October 30th.

But counsel for the receivers claims that said written contract was merged in the bill of lading. That the mere receipt of a bill of lading does not affect or alter a prior contract under which goods have been actually shipped and are in course of transit without actual consent to such a change is well settled. *Missouri Pacific Railway Co. v. Beeson*, 30 Kan. 298, 2 Pac. 496; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12 N. E. 583; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 21 L. Ed. 297; *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 418. In *Bostwick v. B. & O., etc.*, 45 N. Y. 712, goods were shipped under the same conditions as herein shown, namely, a through freight contract by an agent beyond the route of the defendant railroad, and with a later receipt of bills of lading. A loss having occurred, defendant claimed exemption under the conditions of bills of lading. But the court said: "The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this." Before the issuance of the bill of lading the petitioner, relying upon said prior contract, had made its engagement to deliver at Yokohama at a fixed date, had bought the lead, paid the through freight, and had surrendered possession and control of it. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by government locks and "customs seals." Receivers could not oblige it to consent to a change in the contract.

But counsel for the receivers contends that the subsequent negotiation by petitioner of said bill conclusively shows that the petitioner adopted it and assented to all of its terms. In support of this proposition he cites *Rubens v. Ludgate Hill Steamship Company (Sup.)* 20 N. Y. Supp. 481, and *The Henry B. Hyde (D. C.)* 82 Fed. 681. But in neither of said cases was there any agreement with the shipper prior to the receipt of the bill of lading. In *The Henry B. Hyde* the court expressly says that it is the acceptance of the bill of lading "at the time of the delivery of the goods for shipment" which binds the shipper. The decisive answer to this contention of counsel for receivers is that such acquiescence in or adoption of said bill of lading by petitioner only affects the rights and obligations toward the parties with whom said bill was negotiated. As to them the petitioner is estopped to deny the conditions of the bill, upon the familiar principle that one who has thus negotiated such an instrument thereby ratifies

its terms and conditions. But we know of no rule by which such ratification can be extended to or taken advantage of by a carrier, in order to annul a prior valid contract under which rights have vested and obligations have accrued. This can only be done by the consent of both parties. As to the carrier the transaction is *res inter alios acta*.

Counsel for the receivers contend, and the court below held, that, the shipment having become impossible temporarily through the act of the deputy collector, the receivers were not bound to provide for a clearance of the vessel, and that, therefore, they are not liable for the delay. We cannot assent to this proposition, in view of the situation of the parties as shown by the submission on facts. The traffic agreement between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company shows that said steamship company was expressly organized in order to establish a close alliance with said Northern Pacific Railroad Company to control freight traffic between the United States and Japan; that the steamship company was bound to supply steamships according to the exigencies of Northern Pacific traffic; and that the steamship company and railroad company were to conjointly arrange for the receipt of goods at Tacoma and assumption of liability thereon. Before this contract was made, Fitch had expressed some doubt as to whether, in view of the existing war between China and Japan, such shipment would be permitted. After the contract was made he had attempted to withdraw therefrom, but upon being notified that petitioner would hold the receivers liable for resulting damages, they secured from the steamship company a contract to accept the lead, and authorized him to carry out the contract. In these circumstances it was incumbent upon the receivers at least to show that they used all reasonable means to guard against damage resulting from delay by reason of the very risks foreseen and assumed by them. There is nothing in the stipulated facts to show that they took any precautions or exercised any care in advance, other than Fitch's letter of September 29th to the agent of the steamship company, or that, when the contemplated exigency arose, they made any effort to meet it. They assumed the obligation with knowledge of the risks incident to its discharge and the damages likely to result from delay; they reaffirmed it with knowledge that if they did not choose to assume said risks the petitioner would ship by another route and charge the difference in rates; they failed to guard against the happening of said risks, and it does not appear that, after the actual interference with the shipment from Tacoma, they made any attempt to prevent the unloading of the lead for the brief time necessary to obtain instructions from the collector, or to arrange to have it reloaded in case of a favorable report, or to secure any delay in the sailing of the vessel, and they negligently failed to notify the petitioner of the delay for six days thereafter.

The fact stated in the agreed submission, that "neither Fitch nor the receivers knew until September 24th that any contract for the sale of lead in Japan had been concluded by the trading company," does not affect the measure of damages, because they arranged for said shipment after their knowledge that such a contract had been made,

and their agent was informed, before any contract for shipment was made, that such shipment was contemplated in order to fulfill a proposed agreement, which would require its delivery in Japan at a fixed time. In these circumstances the measure of damages is the difference between the contract price and actual market value of the goods at the time of delivery. *New York, Lake Erie & Western Railroad Company v. Estill and v. Leonard*, 147 U. S. 591, 616, 13 Sup. Ct. 444, 37 L. Ed. 292; *Messmore v. New York Shot & Lead Company*, 40 N. Y. 422; *Booth v. Spuyten Duyvil Rolling Mill Company*, 60 N. Y. 489.

Let an order be entered reversing the decree and directing the payment to the intervener of \$26,704.02, with interest thereon from the 4th day of January, 1895, and costs.

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**LINCOLN v. ORTHWEIN et al.**

(Circuit Court of Appeals, Fifth Circuit. March 3, 1903.)

No. 1,182.

**1. PARTNERSHIP—DISSOLUTION—DEATH OF PARTNER.**

A partner may provide by his will that the partnership shall continue after his death, and, if assented to by the other partners, such provision becomes effective, and the partnership is not dissolved by his death, nor are contracts previously made, and depending on the continuance of the partnership, terminated thereby.

**2. SAME—CONTINUANCE AFTER DEATH OF PARTNER—EFFECT ON OUTSTANDING CONTRACT FOR SERVICES.**

Plaintiff entered into a written contract with a partnership for the stevedoring of all the vessels owned or controlled by the partnership at the port of New Orleans for 12 months beginning October 1st at prices therein fixed, the work to be done in a first-class manner. After the contract had been entered upon, one of the partners died, but left a will directing his executors (who were his sons and copartners) to continue the partnership until July 1st following his death, which they did. Both parties to the contract continued to recognize and perform the same until about June 1st, when it was terminated by the surviving partners. *Held*, that the contract was not terminated by the death of the deceased partner, and that plaintiff could maintain an action for its breach by its termination before July 1st.

**3. CONTRACT—ACTION FOR BREACH—ISSUES FOR JURY.**

In an action for the breach of such contract the only defenses alleged in the answer were that plaintiff did not perform the contract on his part in accordance with its terms and a denial of any damage to him resulting from its termination. *Held*, that under the pleadings the question whether the defendants were justified in terminating the contract, depended upon the determination of the issue as to performance by plaintiff, which was one of fact for the jury.

**4. SAME—DAMAGES—EVIDENCE.**

Defendants, who, by wrongfully terminating a contract by which plaintiff was to have the stevedoring of certain ships during a stated time at fixed prices, have rendered it difficult or impossible for him to prove his exact damages, cannot, for that reason, defeat his recovery for breach of the contract, but he is entitled to approximate his damages by the best evidence obtainable.

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¶ 1. See *Partnership*, vol. 38, Cent. Dig. § 554.



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

July 19, 1899, plaintiff filed his petition in the civil district court for the parish of Orleans. Therein he represented that on September 30, 1898, he entered into a written contract with Chas. F. Orthwein & Sons to have and to perform all the stevedore work, loading and discharging vessels at the port of Orleans consigned to and chartered by them, in all cases where that work was controlled by them, and especially of certain lines of vessels named in the contract; that the contract was to begin on October 1, 1898, and continue for 12 months; that the work was to be done in first-class manner, under petitioner's personal supervision, and with as quick dispatch as could be by any other stevedore in port, the cargoes to be stored, dunnaged, and separated to the satisfaction of the defendants, captains of steamers, and surveyors. After reciting the scale of prices for which the work was to be done, the petition further shows: That up to May 26, 1898, the plaintiff performed all the work and duties required of him under the contract in thorough first-class manner, and in all respects conformed to and complied with the terms thereof; but that on or about that date, and "without lawful cause, and wrongfully, and in disregard and violation of said contract," the defendants peremptorily refused to permit him to perform his work and duties thereunder, although a large number of the vessels mentioned in the contract arrived and were afterwards loaded by other stevedores employed by the defendants, but which vessels he was entitled and had the right to stevedore and load under the contract. The petition further represents that by the conduct of defendants, as recited, he was deprived of and prevented from earning under said contract and damaged and injured up to the time of filing his suit in the sum of \$3,232.09, "actual profits he would have earned" if he had not been prevented, as stated, by the unlawful conduct of defendants. He annexes to his petition an Exhibit X, which is a list of vessels arriving to the defendants at the port of New Orleans between the date (May 26th) of the breach of the contract and that of filing the suit, and then discharged or loaded or stevedored, and all of which work he was entitled to perform under the contract; which exhibit shows, also, the tonnage of the several vessels, and the profits he would have made under the contract. The petition also shows that the senior member of the firm, Charles F. Orthwein, died. The other members reorganized on July 1, 1899, under the style of Charles F. Orthwein's Sons, and in fact and law assumed all the obligations and liabilities of the old firm in, to, and under the said contract. There was prayer for the citation of Charles F. Orthwein & Sons in liquidation, and William J. Orthwein and Charles C. Orthwein, the surviving members of the firm, and of William J. Orthwein, executor of Charles F. Orthwein, deceased member of the firm, and of Charles F. Orthwein's Sons, and William J. Orthwein and Charles C. Orthwein, the members of the commercial firm, and for judgment against the several defendants cited in *solido* for \$3,232.09.

The contract sued on is in the form of a "bid" by plaintiff to Charles F. Orthwein & Sons, and is accepted and signed for them by Wm. P. Ross, manager, steamship department. The first paragraph reads: "I hereby make the following bid for all the stevedore work, loading and discharging vessels at this port consigned to or chartered by you, where you control said work, to wit: The Head Line, Forendo Gulf Baltic Line, Creole Line, Hamburg-American Packet Line, Phelps' Texas Transport Line, Orthwein's Gulf Ports Line, and such other lines as you may acquire and on which you have the authority to provide the stevedore under this tender. This contract commencing from the first day of October next, and to continue for twelve months thereafter." Second paragraph: "The work to be done in a first-class manner, under the personal supervision of the undersigned, and to be done with as quick dispatch as can be carried out by any other stevedore of the port. The cargoes to be stowed, dunnaged, and separated to the satisfaction of yourselves, captains of steamers, and surveyors."

On the petition of William J. Orthwein, the cause was removed from the civil district court to the United States Circuit Court. The answer was filed in the name of William J. Orthwein individually, as one of the members of the

late firm of Chas. F. Orthwein & Sons, and as one of the liquidators of that firm, and as one of the executors of the estate of Charles F. Orthwein, deceased. The answer pleads, first, the general issue. It admits the making of the contract sued on, and the termination thereof "by the said Charles F. Orthwein & Sons on the 26th day of May, 1899." It specially denies that plaintiff "performed all the work and duties required of him under said contract up to the date of the termination thereof in thorough, first-class manner, and in all respects conformed to and complied with the terms of said contract, as alleged in plaintiff's petition; and defendant avers that the plaintiff did not perform the work required of him under said contract in first-class manner; nor did plaintiff give his personal supervision to all the work and duties required of him under said contract; nor were the cargoes stowed by plaintiff under said contract stowed, dunnaged, and separated to the satisfaction of said Chas. F. Orthwein & Sons, captains of steamers, and surveyors, and the said Chas. F. Orthwein & Sons rightfully terminated the said contract; and respondent specially denies that the said Chas. F. Orthwein & Sons in any way disregarded or violated said contract, and avers that the said Chas. F. Orthwein & Sons in every way kept and performed the obligations and undertakings in said contract imposed on them, and faithfully carried out the same, but that the plaintiff, without lawful cause and wrongfully disregarded and violated the terms and conditions of said contract, and failed and neglected to do the work of stowing the cargoes in the vessels in first-class manner, and to give personal supervision to the work under said contract, and to stow, dunnage, and separate the cargoes to the satisfaction of the said Chas. F. Orthwein & Sons, the captains of the steamers, and the surveyors. The answer also denies the right of plaintiff to act as stevedore in respect to any vessel after the termination of the contract. It also denies plaintiff's right to damages, and denies that, even if the contract had not been terminated, he would have earned the profits alleged.

The case came on for trial March 7, 1901. A jury was impaneled to hear the same, and, after hearing the pleadings, evidence, and testimony in part on that day, it was ordered that the cause and trial be continued until next day. On the next day the trial was resumed, and the hearing proceeded for that day, and was then continued until March 13th, when the hearing was again resumed, and at the close of that day was continued to the next day. Like resumptions of the hearings and the like continuances thereof were had on March 15th, 18th, 19th, 20th, 21st, 22d, 23d, 25th, 29th, and on April 4th, 5th, 6th, 8th, and 10th. A hundred witnesses or more were examined, and much written evidence admitted, and argument of counsel heard from time to time, and argument appears to have been heard continuously at each of the sittings of the court from April 6th to and on April 10th, on which day, after having heard counsel for both parties sufficiently, the court directed the jury to find a verdict in favor of the defendants. This direction the jury at once obeyed, and thereupon it was ordered that the verdict be recorded, which was done accordingly, and judgment given thereon.

The plaintiff duly moved for a new trial. The court set this motion down to be heard on the 20th day of April, 1901. On that day the motion came on to be heard, was argued by counsel for the parties respectively, and submitted to the court, when "the court took time to consider." On June 11, 1901, the court ordered that the rule for new trial herein filed by the plaintiff be continued over to the next term of the court. On January 22, 1902, the court ordered that this motion be fixed for trial on Saturday, February 1, 1902. On which day the case came on to be heard, and the motion was argued by counsel, and submitted to the court. "The court took time to consider." On April 14, 1902, the court granted the motion. The verdict and judgment which had been rendered were set aside, and the cause was set for trial on Tuesday, April 15, 1902. The transcript does not show that any action was taken on April 15th, but on April 18th an order was entered to let an amended and supplemental petition be filed. This new pleading reiterates the allegations contained in former pleadings, and further alleges that during the existence of the contract sued on, to wit, about the 28th day of December, 1898, Chas. F. Orthwein, one of the members of the firm of Chas. F. Orthwein & Sons, departed this life in the state of Missouri, testate; that his will

had been duly admitted to probate in that state, a duly authenticated copy of which and of the probate was attached to this pleading. This will shows that the testator gave to his executors authority and power to leave the whole of his shares or interest in the copartnership of Chas. F. Orthwein & Sons in the business of the copartnership until the 1st day of July following their taking charge of his estate, to wit, until the 1st day of July, 1899; the interest during the period of its continuance in the firm to share in the profits and losses as during the testator's life. The new pleading avers that the executors and the surviving members of the partnership consented to and agreed to the continuance of the partnership as provided for in the will, and the partnership did continue in fact until the 1st day of July, 1899, subject to all the contracts and obligations entered into by the partnership existing at the time of the decease of the testator, and subject to the obligations herein sued on, and liable for all damages accruing to petitioner as set forth in his previous pleading. It prayed process of citation and judgment against all of the defendants. Service of this petition was accepted, and citation waived by W. J. Orthwein individually and as one of the members of the late firm of Chas. F. Orthwein & Sons, and as one of the liquidators of said firm, and as one of the executors of the estate of Chas. F. Orthwein. On the same day Wm. J. Orthwein, in the capacities just above noted, filed a general denial to all and singular the allegations of this petition, except as to the existence of the will. On the same day (April 18th) a jury was impaneled, and substantially the same evidence, with the addition of the will and proof of its probate, was put before the court in bulk, without the delay and labor of going through another trial in detail (the testimony of the witnesses on the former trial having been reduced to writing), and the court again directed a verdict for the defendant.

Chas. S. Rice, for plaintiff in error.

J. Ward Gurley, 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 first and the second of the errors assigned are substantially one, to the effect that the court erred in directing the jury to find a verdict for the defendants. The other was not argued, and will not be considered. The contract which is the basis of this action provides that one of the parties thereto shall furnish to the other designated employment, and that the other shall furnish designated services at stipulated prices therefor; the mutual transactions contemplated by it to begin on the 1st of October, 1898, and to continue for a period of 12 months thereafter. In the nature of the subject of the contract and of the terms thereof, if the plaintiff, who was the sole contracting party on his part, had died within the 12 months next after the 1st of October, 1898, such death would have terminated the contract. The party of the other part thereto being a trading partnership consisting of three individual members, the death of one of the members might or might not terminate the contract, because such death might or might not actually dissolve the partnership. While it is true, as a general rule, that the death of one of the partners dissolves the partnership by operation of law, it is competent for partners to provide against that contingency by their previous agreement, and a partner may, by his will, provide that the partnership shall continue notwithstanding his death, and if this is consented to by the surviving partners it becomes obligatory, just as though if the

testator, being a sole trader, had provided for the continuance of his trade by the executor after his death. *Burwell v. Mandeville's Executor*, 2 How. 560-576, 11 L. Ed. 378. The will of Chas. F. Orthwein appointed his two sons, Wm. J. Orthwein and Charles C. Orthwein (who were the other members of the firm of Chas. F. Orthwein & Sons), independent executors of his will, without bond, and with the fullest powers, and provided that:

"To facilitate the advantageous winding up of our partnership affairs, I give my executors authority and power to leave the whole of my shares or interest in the partnership of Chas. F. Orthwein & Sons in said business until the first day of July following their taking charge of my estate. My said interest during said period of its continuance in said firm to share in the profits and losses of the business as theretofore."

This will is dated December 22, 1898, and was duly probated January 3, 1899.

On the part of the partnership the contract was signed: "Chas. F. Orthwein & Sons. Wm. H. Ross, Manager Steamship Department." Mr. Ross testified on the trial that he attended to the making of the contract on behalf of Orthwein & Sons; that he was in consultation with Wm. J. Orthwein, and no one else; that, though it bore date September 30th, it was not signed on behalf of the partnership until he had consulted the various lines of steamers. He could not fix with certainty the date when it was signed, but thought it was about Christmas, or the 1st of January after its date. He testifies that Wm. J. Orthwein was in New Orleans, where the office of the manager of the steamship business of Chas. F. Orthwein & Sons was located, in February after the death of Mr. Chas. F. Orthwein. It is not disputed that the work went on under the contract in question continuously from the date of the death (in December) of Chas. F. Orthwein until the 26th day of May following. There is proof tending to show that both of the surviving partners accepted as executors named in the will of their deceased father, who had been the senior partner, and that they did, according to the terms of the will, continue the business until the 1st of July, 1899. "Wm. J. Orthwein, as one of the members of the late firm of Chas. F. Orthwein & Sons, and as one of the liquidators of said late firm, and as one of the executors of the estate of Chas. F. Orthwein, deceased," in answer to the plaintiff's suit, denies all and singular the allegations thereof, "except in so far as may be hereinafter specially admitted." The answer then "admits the making of the certain contract between the said late firm of Chas. F. Orthwein & Sons and the plaintiff, of which a copy is attached to and filed with the original petition herein, and respondent admits the termination of said contract by the said Chas. F. Orthwein & Sons on the 26th day of May, 1899." This termination of the contract by Chas. F. Orthwein & Sons took place after the expiration of five months from the date of the death of Chas. F. Orthwein, and within five weeks of the date when it would have been terminated by the termination of the partnership under the terms of the testator's will. The answer does not claim that the contract with the plaintiff was terminated by or on account of the death of Chas. F. Orthwein, but it denies that the plaintiff

had performed all of the work and duty required of him under the contract up to the 26th day of May; and avers that he did not perform the work required of him under the same in a first-class manner, and did not give his personal supervision to the work and duties required of him thereunder. Nor were the cargoes stowed by him stowed, dunnaged, and separated to the satisfaction of Chas. F. Orthwein & Sons, captains of steamers, and surveyors, and that Chas. F. Orthwein & Sons rightfully terminated the contract. The contract provided that the work to be done by the plaintiff should be done in a first-class manner, under the personal supervision of the plaintiff, and with as quick dispatch as could be carried out by any other stevedore of the port of New Orleans; the cargoes to be stowed, dunnaged, and separated to the satisfaction of Chas. F. Orthwein & Sons, captains of steamers, and surveyors. It was conceded on the hearing before us by the able counsel who represented the defendants in error, that the provision that the cargoes "should be stowed, dunnaged, and separated to the satisfaction of Chas. F. Orthwein & Sons, captains of steamers, and surveyors," meant in such a manner that the parties named ought, as reasonable men, to be satisfied therewith. This concession was required, not only by sound reason, but by recognized authority. *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. Whether work done on the part of the plaintiff under the contract had been done in a first-class manner, under his personal supervision, and with the required dispatch, and the cargoes stowed, dunnaged, and separated in such a manner as should have satisfied the other party, captains of steamers and surveyors, presented issues of fact to be found by the jury. On these issues there was substantial conflict in the great volume of the proof offered and admitted on the trial. Whether, therefore, Chas. F. Orthwein & Sons did rightfully terminate the contract on May 26, 1899, must depend on the findings of the jury on the issues of fact just stated. They had submitted their offers to the various stevedores in the port of New Orleans. The plaintiff had made the detailed bid set out in the contract, based on the continuance of the relations for a period of 12 months, which period of continuance had, in the nature of such things, affected the price favorably to the defendant partnership. This the partnership had accepted and received the benefit of, not only up to the death of the deceased partner, but for five months thereafter. And the survivors and executors of the will of the deceased, having so acted after the death of their testator, could not capriciously terminate the contract before the 1st day of July, the limit imposed by the will, any more than the partnership could have done so before the expiration of the 12 months had the death not occurred. If the jury find from the proof that the contract was rightfully terminated on May 26th, then they need not inquire further, as in that case the plaintiff would have no right to recover. If, on the other hand, the jury find that it was not rightfully terminated, they should be charged to inquire further, and determine from the whole proof whether the plaintiff has been damaged by the wrongful termination, limiting the inquiry to the 1st of July, 1899, and find the extent of that damage, if any is shown to have resulted.

The answer of the respondent specially denies that the plaintiff has been deprived of and prevented from earning the sums of money averred in his petition, and specially denies that the profits to plaintiff on work properly performed under the contract, if it had not been terminated, would have equaled the rate and figures stated by the plaintiff; and avers that the rate and amount of profits which the plaintiff claims he would have made for work under the contract, if it had not been terminated, are grossly exaggerated and overstated. This also presents an issue of fact, which, however difficult it may be for the jury to determine from such proof as the subject permits, is one which should be submitted to them. The defendant insists that the plaintiff cannot know, and hence cannot prove, that he would have made any profit on the stevedore work, loading and discharging the vessels consigned to or chartered by the respondents, and loaded or discharged at the port of New Orleans, after the 26th of May, and prior to the 1st of July. Here it should be borne in mind that the difficulty of making direct proof springs, like the plaintiff's right to recover the damages, out of the wrongful act of the respondents, who should not be suffered to reap advantage from their own wrong by requiring that kind of proof which their wrongful action has rendered it impossible or difficult for the plaintiff to obtain, while it is fully and easily at their command. On this issue the plaintiff testified:

"I took the net registered tonnage from the time I commenced the contract until it was broken. That amounted to so many tons—I cannot remember—and my profits for that length of time was so much. I figured out that I made so much on the registered tonnage of these ships, and from that time on until the contract should have run out I kept a record of the vessels that came here consigned to them that I should have had, and I figured them on the same basis, as I say, of that amount on the same vessel." Being asked, "What does the document now exhibited to you represent?" he answered: "This paper first shows the list of the vessels I loaded up to that time, the 26th of May, when this contract was terminated, and in that list it shows the profits I made at that time on that number of vessels. It shows the name and tonnage of each vessel."

He then presented also another list, which he said represented the vessels that he should have had up to the time his contract ran out, figured on the same basis. In reference to this method of showing net profits actually made during the eight months that the contract was recognized and running, and the estimation on this basis of the profits that reasonably would have accrued on the work that should have been furnished the plaintiff and done by him on and after the 26th of May until the 1st of July, the witness Wm. P. Ross, who, as "manager of the steamship business" for the respondents, had made the contract, being asked, "What do you say as to the fairness of the calculations made by Mr. Lincoln?" said, "I do not know of any other method that would be as fair, because it deals with so many kinds of cargoes, and it all resolves itself into so many tons after all, whether it is the net register or actual cargoes does not matter."

It is clear to us that these issues of fact should have been submitted to the jury, and that the Circuit Court erred in withdrawing the case from the jury by directing a verdict for the defendants. Therefore the judgment is reversed, and the cause remanded to the Circuit Court, with direction to that court to award the plaintiff a new trial.

## THE YARKAND.

(Circuit Court of Appeals, Fifth Circuit. March 3, 1903.)

No. 1,200.

## 1. SHIPPING—AUTHORITY OF MASTER TO SELL SHIP—NECESSITY.

The authority of a master to sell his ship is restricted within the narrowest limits, and will only be implied in case of actual and extreme necessity, and where he acts in the utmost good faith. It is his duty to advise the owners of an offer, and submit it to their decision, whenever it is practicable and feasible, notwithstanding the fact that he has previously notified them of the ship's peril, and has received no instructions; and only when the peril is so immediate and threatening that the necessary delay is not warranted will a sale by him be sustained.

## 2. SAME—VALIDITY OF SALE.

The Russian ship Yarkand stranded in the night on the coast of the Gulf of Mexico between Pensacola and Mobile Bay. The second day thereafter the master notified the owners by cable, and also the Russian vice consul at Pensacola. The latter, who was also agent for the insurers, at the master's request selected a competent board of survey, who visited and examined the vessel with him four days after she stranded. She was lying broadside on the beach, bedded in the sand, heavily listed, bilged, and with the water covering her 600 tons of ballast, and on a level with the sea outside, ebbing and flowing with the tide. Her crew had left her, and were camped on the shore for safety. The weather was rough and threatening. The board of survey reported that the peril of the ship was to her full extent, and so great as to demand immediate action; that, in their opinion, she could not be salvaged within a reasonable expense, and they recommended her sale if possible, fixing her value as she lay at \$1,500. The master and vice consul concurred in their opinion, and, two days later, not having heard from the owners, the master sold her for \$1,600, and gave a bill of sale. The insurers, to whom she had been abandoned by the owners, at once, on notice of her peril, brought action to recover her from the purchaser, who had floated and repaired her. *Held*, that under the circumstances the master had authority to make the sale, and that the purchaser acquired a valid title, there being no question of the master's good faith.

Appeal from the District Court of the United States for the Southern District of Alabama.

In Admiralty. Action by insurer to recover possession of a ship sold by the master while lying stranded.

For opinion below, see 117 Fed. 336.

In January, 1901, in the District Court of the United States for the Southern District of Alabama, the Marine Insurance Association of Finland, for itself and for other insurance companies, filed its libel against the Russian ship Yarkand, her tackle, apparel, furniture, and stores, and against all persons intervening for their interests therein. The libellant claimed that it, with the Second Marine Assurance Association of Finland and the Russian Company were the owners of the ship Yarkand, her tackle, etc., because of her abandonment to them by her owners; that the master had sold her to W. H. Northup without authority, and in fraud of the rights of libellant and all others interested in her; that he was in possession of the ship, claiming under a bill of sale given by the master. The ship, her tackle, etc., being seized to answer the libel, Northup, in conformity with a decree permitting it, gave bond for her appraised value to abide the final decree of the trial court or on appeal, and took possession of her.

In April, 1901, the Second Marine Assurance Association of Finland and the Russian Company came in as interveners or claimants, and adopted the alle-

gations made by the libellant. These latter companies will hereafter be spoken of as libellants.

The claimant, W. H. Northup, filed his answer, denying the lack of authority in the master to sell, and averring his authority under the existing circumstances, and alleging the good faith of the transaction. The case was tried before the district judge, and resulted in a decree sustaining the title of claimant, W. H. Northup, acquired by purchase from the master, and dismissing the libel. The libellants prosecuted this appeal from such decree.

On the night of December 29, 1900, the Russian ship Yarkand encountered stormy weather, and went aground off the beach about 18 miles easterly from Sand Island Light, near the entrance to Mobile Bay. At the time the ship was insured with libellants for a total of 100,000 Finnish marks. Her value afloat before the stranding was estimated by witnesses at from \$15,000 to \$30,000. On Monday evening, December 31st, the master of the ship, J. A. Saarni, advised the owners by cable of her stranding, and they, on January 3, 1901, abandoned her to the insurers, who, by formal letter of January 4th, accepted the abandonment. At this time D. C. Eitzen was agent of the Marine Insurance Association of Finland, and also Russian vice consul at the port of Pensacola. On December 31st the master had Eitzen advised by telegraph of the stranding of the Yarkand. Eitzen employed a tug at Pensacola, and repaired to the ship at once, arriving about 9 o'clock at night. He found the ship deserted, and the crew camped on the beach opposite. The reason for the crew leaving the ship is given in the testimony of the master Saarni, who was a witness for the libellants, as follows: "Q. Captain, why did you all leave the vessel, and go on shore? A. Well, that afternoon, or that night [December 30th], when we went on shore, it was very rough weather, and she was washing over, and the rigging was so much shaken and knocking we were afraid it would come down every moment. We couldn't stand on deck. Was knocked down many times by standing on deck, and the ship was hitting so much on the ground— Q. Pounding? A. Yes, sir; so long as she was empty, without water in her— Q. You were afraid she would go to pieces, and you would get drowned? A. The men came to me—came first to the mate—and said that they would not risk to be there that night on board, and the mate started to talk to me about the same, and I would not want the men to stay on board. I said to them, 'You can take some bedclothes, and something what you can, for to keep you warm, and go ashore, if you like.'" The master requested Eitzen to return to Pensacola, and appoint a board of survey to make an inspection and survey of the ship at the earliest possible day. On January 1, 1901, Eitzen appointed as surveyors Sewell C. Cobb, surveyor for the American Bureau of Shipping, Capt. Jacob Kryger, surveyor for the National Board of Underwriters, and Robert H. Langford, ship carpenter and master builder. On that day they could not make the survey, as the weather was rough, and the sea so heavy as to prevent their boarding the Yarkand with safety. On January 2d they boarded the ship, and made a survey, which resulted in a report to Eitzen in part as follows: "We found the vessel (Yarkand) nine miles west of Perdido Inlet, apparently bilged in five feet of water, tide ebbing and flowing in her. Vessel has on board 600 tons of ballast, sand and rock, and we value her as she lies for \$1,500.00. We do not think she can be floated within a reasonable expense, and therefore recommend that she be sold, and, if cannot be sold as she lies for \$1,500.00, then we recommend that the master strip the vessel at once, in order to dispose of all material to the best advantage under the direction of the underwriter's agent, D. C. Eitzen." The master of the Yarkand went to Pensacola on the 2d day of January in company with the board of surveyors, and on the 4th of January, late in the afternoon, he executed a bill of sale for the ship to W. H. Northup for the sum of \$1,600.

Judge Toulmin, before whom the case was tried, filed a full and exhaustive opinion, in which he reviews the contentions of the parties and the evidence. We quote from him at length, as follows:

"The ship was subsequently gotten off the beach, and towed to Pensacola, and converted into a barge. Her value was variously estimated by the witnesses, some of whom had seen her after the survey and before she was gotten off the beach. They differed widely in their opinions of her value,



both as she was lying on the beach and if she were afloat and in repair. On January 5th, the day after the sale, another survey was had, by appointment of the Russian vice consul, at the port of Mobile. The surveyors, in their report, described the situation of the ship, expressed the opinion that she could be salvaged at an expense that would justify the effort to save her, and recommended that the effort be made. It is contended on the part of the libelants that the master had no authority to sell the ship; that there was no necessity for it; that the master was unwilling to make such sale, but was urged by said Eitzen and others to immediately sell her at private sale; and that, yielding to their importunities, he accordingly executed the bill of sale. It is further contended that the consideration was grossly inadequate, and that the sale was fraudulent and void. It is contended by the claimant that, while the master had no express authority to sell the ship, he acted under his implied authority as master, and was justified in doing so by the circumstances of the case.

"Two of the three surveyors appointed by the Russian vice consul, Eitzen, testified in the case with intelligence and clearness and in detail as to the situation of the vessel, and why they considered her in great peril and of little value as she lay on the beach. They were shown to have had large experience in such matters, and to have been entirely disinterested. It appeared that the third surveyor had died since the survey, but he, too, was shown to be thoroughly competent and experienced, and as having fully concurred in the views expressed by his colleagues. The testimony of the two surveyors who were witnesses in the case was, in substance, that the ship was lying almost broadside on the beach, and bedded about nine feet in the sand, and heavily listed off and towards the shore, with water in her up to tide-water mark, and with five feet of water at the stern. The sea was breaking against her side. The crew had left her, and were camped on the shore. She was bilged, and water ebbing and flowing in her, the water being the same height in the vessel as on the outside. The ship was at the time lying still, but the water in her was washing even with and the same as the water on the outside of her. Her position was a very hazardous one, and, in their opinion, her peril was to her full extent; that she was too badly bilged ever to be gotten off, and they believed she could never be gotten off. There were fish of considerable size swimming in the water in the vessel, which indicated that there was quite a large hole in her bottom. They could not examine the vessel below the water line. She had about 600 tons of ballast in her, and the water covered the ballast. There was every indication of a gale of wind, and they then believed the vessel was in danger of capsizing and being pounded to pieces.

"The master of the ship testified on the part of the libelants, and, among other things, said: That his ship went aground on December 29, 1900, at night, and on December 31st he sent a cable to the owners of the ship and a telegram to the Russian vice consul, Eitzen, telling them the condition of the ship, and that the same was full of water. That there was water in her hold as high as there was on the outside of her. He saw that the deck was a little bent amidship upward, and the pitch from the seams broken. He could not see that she was started anywhere else. That the crew left the ship, and camped on the shore. He further stated: That the ship was sold on January 4th, some time about 6 o'clock in the evening. That he understood it was to Saunders & Co. That he got this understanding from Eitzen, who made the trade for the sale. He did not talk with anybody else about the sale of the ship except Eitzen. A few hours before the sale Eitzen told him he could get the full sum at which the ship was valued by the surveyors, and he thought it a good bargain. That he signed the bill of sale about 6 o'clock, January 4th. Did not know W. H. Northup, and does not know whether he was present when the bill of sale was signed. There were several persons present, but he did not know who they were. That Eitzen told him he was representing the underwriters, and had authority from them to sell the ship. That Eitzen said 'in such cases as that, nothing else could be done except to sell the ship, and that he got the power from them, or something of that kind.' That what witness understood Eitzen to mean was that in such a case there was nothing else could be done except to sell the ship. Witness

received a part of the purchase money, and left the balance with R. A. Hyer, the ship's agent, to pay her bills. He requested Eitzen to bring the surveyors aboard to examine the vessel, and Eitzen came with them. Witness received no directions from the owners of the ship, and no answer at all to his cable. He further stated that he was trying to do the best he could for the underwriters and for the owners, and he believed at the time he signed the bill of sale that he was doing the best for all concerned; that he agreed in opinion with the surveyors that the ship was in danger of being lost, and that he would not have signed the bill of sale if he had not had that opinion.

"W. H. Northup testified for claimant: That he was the purchaser of the ship; that he and the master negotiated the trade for her. That they had several interviews on the subject before the trade was finally consummated in Eitzen's office. They met there by previous agreement. That Eitzen was present in his office at the time, but took no special part in the transaction. Eitzen had some conversation with the master there, but did not make the trade with witness, or have any negotiations with him about it further than to ask him on the same day, and before he had seen the master on the subject, if he could not do something towards helping the master out in the sale of the ship. Eitzen's testimony on this point was substantially the same as that of witness Northup. He further stated that about noon on the day of the sale R. A. Hyer said to him that Northup or Saunders would give \$1,600 for the ship. That he told Hyer the master must be seen about it, and he would bring them together; that later on that day Northup and the master did meet at his office, and that they dealt directly together; that witness said to the master that he thought he made a good bargain, and that it was the best thing that could be done, in which the master fully agreed. Witness stated that he saw the ship on the beach at least twice between the time she stranded and the day of the sale, and that his opinion, as a seafaring man of considerable experience, was at the time that she could not be saved, and would become a total loss; that he had no interest in the purchase of the ship.

"B. C. Tunison testified that he was an attorney at law, and prepared the bill of sale at the request of the purchaser, and he was present at the signing of it by the master, and was a witness to his signature. He stated that the master expressed to him satisfaction at having closed the trade, and reiterated several times after the sale that the ship was in imminent danger, and he believed her bottom was out, and that she could not be gotten off. He said 'he had the \$1,600 and the purchaser the ship with the bottom out.' There was evidence that tended to show that one Saunders was interested with Northup in the purchase of the ship.

"Communication with the owners was practicable, if not very easy. It could be had by cable, and it appears that on December 31, 1900, the second day after the accident, the master gave notice by cable of the stranding of the ship. The proof was that an answer by cable could be had, and ordinarily was had, in from 16 to 24 hours, at the outside, between Pensacola, Fla., whence the master's telegram was sent, and Abo, Finland, the residence of the owners, to which it was sent. The proof further was that the master received no directions, in fact no answer of any sort, from the owners."

The Yarkand (D. C.) 117 Fed. 336.

It also appears from the evidence that pieces of clay ballast were washed ashore.

Jno. C. Avery, W. H. McIntosh, and Jos. C. Rich, for appellants.  
Gregory L. Smith and Harry T. Smith, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

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

The appellants complain that the trial court erred in holding as matter of law on the facts found that there existed such a necessity

as justified the master in selling the ship without first communicating with and securing the authority of the owners. They do not challenge the correctness of the facts found by the district judge, but by the phrasing of the assignment of errors and in their argument and briefs they tacitly admit the sufficiency of the evidence to support his findings. We have read the record carefully, and have concluded that, though the testimony as to the condition and peril of the ship is conflicting, yet it sustains the findings of the district judge, and, consequently, they will not be disturbed. *The Albany* (C. C.) 48 Fed. 565; *The Alijandro*, 6 C. C. A. 54, 56 Fed. 622.

The principles involved in the disposition of this case are few, and well settled. Both sides to the controversy cite the same authorities in support of their respective contentions, so that it is manifest the difficulty lies in the application of recognized principles to the facts. It is settled law that a master has no general authority, *virtute officii*, to sell his vessel. *The Catherine*, 15 Jur. 1 Eng. Law & Eq. 679; *Gates v. Thompson*, 57 Me. 422, 99 Am. Dec. 782; 20 A. & E. of Law, Second Ed. 210. It is as well settled that a master has implied authority to sell his vessel in case of actual necessity; but there must be an extreme necessity, and the master must have acted in good faith, to render the sale made by him valid. *The Amelie*, 6 Wall. 26, 18 L. Ed. 806; *The Brig Sarah Ann*, 2 Sumn. 206, Fed. Cas. No. 12,342; *Id.*, 13 Pet. 400, 10 L. Ed. 213. Mr. Justice Davis, in *The Amelie*, cited *supra*, says:

"The sale of a ship becomes a necessity, within the meaning of the commercial law, when nothing better can be done for the owner, or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in the ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts and juries to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed."

The good faith of the master in selling the ship is not questioned. It is manifest from his conduct that he had an honest purpose to serve those at interest, and that he was exercising his best discretion. But this is not sufficient. The claimant must also show that the sale of the ship was an actual and pressing necessity; that her condition was truly perilous, menacing the owners with a total loss, or subjecting them to such burden of expense in any attempt to deliver her as not to justify the undertaking. The ship was stranded on the beach, and exposed to the wind and waves of the Gulf of Mexico. She was lying almost broadside, and had 600 tons of ballast in her hold. She was heavily listed off and towards the shore, and was bilged, but by reason of the ballast and water in her it could not be ascertained how badly. The water covered the ballast

at the same height or level within the ship as in the Gulf, and the tide ebbed and flowed in her. Large fish were swimming in the hold, and pieces of clay ballast had washed ashore. The weather on the Gulf was rough and threatening. Competent and disinterested surveyors, after making such an examination as conditions would permit, concluded that the peril of the ship was "to her full extent," and so great as to demand immediate action on the part of the master in disposing of her. With the plainly perilous condition of the ship before him, and his own judgment re-enforced by the recommendation of the board of surveyors, the master was justified in making a sale, in event it was not practicable or feasible for him to consult the owners in order that they might determine and direct the course to be pursued.

Mr. Justice Davis, in *The Amelie*, cited *supra*, further says:

"If the master can, within a reasonable time, consult the owners, he is required to do it, because they should have an opportunity to decide whether, in their judgment, a sale is made necessary."

In *Hall v. Franklin Insurance Company*, 9 Pick. 466, Judge Putnam says:

"The master acts for the owners or insurers because they cannot have an opportunity to act for themselves. If the property could be kept safely until they could be consulted, and have an opportunity in a reasonable time to exercise their own judgment in regard to the sale, the necessity to act for them would cease."

The master cabled the owners of the stranding of the ship and her peril on December 31, 1900. The sale was not made until the afternoon of January 4, 1901. The intervening time was occupied by the master in securing a board of surveyors to pass upon the condition of his vessel, in receiving its report, and finding a purchaser. The owners did not communicate with him upon receipt of his cable, but straightway abandoned the ship to the insurers. The insurers had not advised or given him any directions up to the hour of sale. The learned district judge expresses the rule he considers applicable to these facts as follows:

"If notice to the owners was not easy and practicable, or, if given, and the master had failed to ascertain their wishes within a reasonable time, then he was authorized to act upon the necessity and emergency of the occasion as they then appeared to him from all the lights before him."

We do not consider that the failure of the owners or insurers to communicate their wishes within a reasonable time would enlarge the authority of the master in the premises. Such a rule, in our opinion, would alter the manifest and wise tendency of the law to restrict his authority to sell to the narrowest limits. Where it is feasible, the owners should always have the right to say what disposition shall be made of their property, and their rights should be safeguarded by all possible and reasonable rules. If it had been practicable and feasible for the master to communicate the offer made him for the purchase of the ship to the owners, it would have been his duty to do so, even though he had advised them of the ship's stranding and peril, and had received no instructions from them as to what to do. He could only be justified in a failure to

communicate the offer because at the time it was made the peril of his ship was so great and so impending and immediate in character as not to warrant the necessary delay. The facts of this case relating to the perilous condition of the ship, in our opinion, bring it within the rule enunciated, and so we conclude that the master was justified in making the sale without first communicating with the owners.

The part taken by the vice consul, Eitzen, in the transactions ending in the sale of the ship, is severely criticised by the appellants, and it is charged that the master did not exercise his own discretion and judgment in making the sale, but was unduly influenced thereto by Eitzen. The vice consul was active in effecting the sale, but a careful and impartial review of the testimony of the master discloses that he was impressed with the necessity of the sale by reason of the ship's condition and imminent peril, and that he acted primarily upon his own judgment and the recommendations of the board of surveyors. Eitzen gave his opinion as to the advisability of the sale, but it would have been strange had he not done so. However, it is the master's good faith that is material to this inquiry, and, his good faith not being questioned, it is unnecessary to further analyze or discuss the conduct of Eitzen.

That the ship was subsequently floated is urged by counsel for the appellants as being a fact material in reaching a correct conclusion, especially in view of the number of witnesses who testified the ship was in no immediate peril. The justification of the master is to be found in the condition and circumstances which confronted him at the time of the sale. The witnesses testified after the event, and, while they may not have been consciously influenced by the fact that the ship withstood its peril, yet their convictions were no doubt heightened and strengthened thereby. Each day the ship lived through its peril would naturally inspire added confidence of its ultimate rescue. The subsequent floating of the ship demonstrates the master and his advisers indulged an erroneous judgment, but elements over which man has no control, and that he cannot forecast, so enter into an order the ultimate event that it would be unjust to raise up a presumption of incompetence against honest and experienced men because of such erroneous judgment, and the law does not do it. *The Brig Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213; *The Amelie*, 6 Wall. 18, 18 L. Ed. 806.

The decree of the District Court is affirmed.

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BLODGETT et al. v. LANYON ZINC CO.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1903.)

No. 1,749.

1. FOREIGN CORPORATION—CONTRACTS—RIGHT TO HOLD REAL ESTATE.

In the absence of prohibitive legislation, a corporation may contract, acquire, hold, and convey real estate as fully in another state as in the state of its incorporation.

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† 1. See Corporations, vol. 12, Cent. Dig. § 2581.

2. SAME—FAILURE TO COMPLY WITH STATUTE—VALIDITY.

In the absence of an express provision of statute to the contrary, the innocent acts and contracts of a foreign corporation, which has failed to comply with the statutes permitting it to do business in the state where the contracts are made and the acts done, are valid and enforceable, because it is not the intent of the authors of such laws to strike down contracts or acts in performance of them that are not evil in themselves.

3. SAME—PROHIBITION TO MAINTAIN ACTIONS IN STATE COURTS—RIGHT TO SUE IN FEDERAL COURTS.

The prohibition by a state of the maintenance of actions in its courts by a foreign corporation does not prohibit or limit the right of that corporation to maintain such actions in the national courts, nor does it forbid the corporation from defending actions in the state courts.

4. LEASE—CONSTRUCTION—PAYMENTS.

In a lease for 10 years, with a stipulation that in case no well was sunk within 2 years it should become void unless the lessee should elect from year to year to continue it by paying \$40 each year, it is not essential that the \$40 should be paid before the commencement of the year, but the payment may be made at any time during the year.

5. ESTOPPEL—PERFORMANCE OF CONTRACT—FORFEITURE FOR DELAY.

The grantor of an option, who prevents its exercise within the time specified in his grant, may not take advantage of the failure of its timely exercise, but must give a reasonable time therefor after the obstruction he interposed is removed.

(Syllabus by the Court.)

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

John F. Thompson and Stephen H. Allen (William H. Thompson and Otis C. Allen, on the brief), for appellants.

Charles E. Benton and Altes H. Campbell (John F. Goshorn and J. B. F. Cates, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill exhibited by Mary Blodgett, Mary K. Hackney, Lewis E. Hackney, and James Q. Blodgett to avoid a lease made by Mary K. Blodgett, the owner of the life estate in the 160 acres described therein, upon two grounds: (1) That the Lanyon Zinc Company, a corporation and the owner of the lease under properly executed conveyances from the lessee and its grantees, has no corporate existence, nor power to do business, nor right to hold real estate, in the state of Kansas, because it has failed to comply with the laws of that state regulating foreign corporations and the method by which they may be permitted to do business in Kansas; and (2) that the zinc company has failed to make its election to continue the lease in force from April 10, 1899, to April 10, 1900, by paying to the complainant Mary Blodgett, or depositing to her credit in the Bank of Allen County, the sum of \$40, as stipulated by the terms of the lease.

The proof at the hearing failed to sustain the first reason assigned in the bill for the granting of the relief which the complainant sought. The proof was that the Lanyon Zinc Company was a corporation of the state of New Jersey; that on March 3, 1899, it purchased and obtained from the holder thereof a proper assignment of the lease

in question; that in April, 1899, it applied to the charter board of the state of Kansas to engage in business in that state; that on April 10, 1899, it paid into the office of the Secretary of State its charter and application fees; and that on January 18, 1900, the charter board of the state of Kansas issued to it a charter to do business within that state pursuant to the provisions of Sess. Laws 1898, p. 27, c. 10 (Gen. St. Kan. 1901, §§ 1259-1264). Conceding that the zinc company had not, at the time it acquired the lease, complied with the act of 1898, upon which counsel for the appellants base their objections, so that it was entitled to do business in the state of Kansas, its title to the leasehold estate was not impaired by that fact. In the absence of prohibitive legislation, a corporation of one state is authorized to receive and hold real estate in another state, and to make and execute contracts relative to both real and personal property. The presumption is that the right to contract concerning, to take, and to convey title to, real and personal property, is free. Now there is nothing in the act of 1898, nor in any of the legislation of the state of Kansas which has been called to our attention, which prohibits a corporation of another state from acquiring, holding, and conveying real and personal property in that state in the absence of a compliance with the provisions authorizing it to do business therein. The result is that the proof in this case establishes the fact that the Lanyon Zinc Company had a corporate existence and the right to hold real estate in the state of Kansas at the time it received the assignment of the lease, and at the time this action was commenced, and the first claim for the destruction of its leasehold estate is without foundation.

There is another reason assigned by counsel for the complainants for their alleged right to the relief they seek, so similar to that which has just been considered that it will be convenient to discuss it here. The lease was dated April 10, 1894. By its terms Mary Blodgett granted to the Troy Oil Company, a remote assignor of the Lanyon Zinc Company, the exclusive right for 10 years from the date of the lease to enter, and operate for oil and gas, upon a certain tract of land in Allen county, Kan., and it provided that, "in case no oil or gas well is sunk on these premises within two years from this date, this lease shall become absolutely null and void, unless the second party shall elect from year to year to continue this lease by paying or depositing to the credit of the first party each year forty dollars at Bank of Allen County, Kan., until a well is complete on these premises." The zinc company deposited the \$40 at the Bank of Allen County, Kan., for Mary Blodgett for the year from April 10, 1899, to April 10, 1900, on December 23, 1899. Counsel for the complainants insist that this deposit was invalid and ineffective to continue the lease in force, because, at the time it was made, the zinc company had not acquired permission to engage in business as a foreign corporation in the state of Kansas under the act of 1898, and had failed to comply with various provisions of that statute. It will be borne in mind that, while this corporation had not received its charter to do business within that state, it had applied for it, had paid the charter and application fees into the office of the Secretary

of State, where they were held awaiting the decision of the charter board, and that it ultimately received its charter on January 18, 1900. It is also worthy of notice that there is no provision of the statutes of Kansas prohibiting a foreign corporation from doing business in that state, or declaring that any act or contract of a foreign corporation that fails to comply with the requirements to enable it to obtain permission to do business from the charter board shall avoid any of its acts or contracts. Conceding that the Lanyon Zinc Company had not complied with the corporation laws of Kansas so as to entitle it to permission from the charter board to do business in that state, no reason occurs to us why this fact should be held by the courts to avoid its contracts or the effect of its acts in performance of its agreements, in the absence of the denunciation of any such penalty for the failure to comply with its statutes by the Legislature of the state which made them. On the other hand, there are two established and familiar rules of law which prohibit the complainants from availing themselves of the failure of their lessee to comply with the statutes authorizing it to do business in the state for the purpose of escaping from the performance of their obligations under their contract. One is that the laws relative to the admission of foreign corporations to do business in the state of Kansas were not enacted for the purpose of destroying contracts or prohibiting their performance. It was not the intent or purpose of the Legislature by these laws to regulate the agreements of foreign corporations with the citizens of the state of Kansas, or to supervise or prohibit the performance of their contracts. The object of these statutes was to subject foreign corporations doing business in the state to the jurisdiction of its courts, and to the inspection and supervision of its officers, not to the end that the citizens of the state might avoid their contracts and perpetrate injustice, but to the end that justice might be administered to both the corporations and the citizens. Hence it is that the private citizen is not the party empowered to enforce these corporation laws, nor is the nullification of his contracts or of acts done in performance thereof the true remedy for their violation. The state alone is authorized to enforce them, and the ouster and dissolution of the corporation, or an injunction against its proceedings at the suit of the state, is the only remedy available. *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 82 Fed. 124, 134, 27 C. C. A. 73, 83; *Bank v. Matthews*, 98 U. S. 621, 629, 25 L. Ed. 188; *Fritts v. Palmer*, 132 U. S. 282, 292, 10 Sup. Ct. 93, 33 L. Ed. 317; *Bank v. Townsend*, 139 U. S. 67, 76, 11 Sup. Ct. 496, 35 L. Ed. 107; *Thompson v. Bank*, 146 U. S. 240, 251, 13 Sup. Ct. 66, 36 L. Ed. 956.

The second rule is that where a contract or an act in performance of it is not *malum in se*, and its invalidity is not declared as a penalty for a violation of a statute, the courts may not declare it, and thus affix a penalty not prescribed by the lawmaking power. *Fritts v. Palmer*, 132 U. S. 282, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 426, 48 C. C. A. 482; 487; *Speer v. Board of County Commissioners*, 88 Fed. 749, 758, 32 C. C. A. 101, 110; *Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592; *Gold-Mining Co. v. Rocky Mountain Nat. Bank*,



96 U. S. 640, 24 L. Ed. 648; *O'Hare v. Bank*, 77 Pa. 96; *Pangborn v. Westlake*, 36 Iowa, 546.

There was no wrong in itself, there was no moral turpitude in the purchase of the assignment of this lease, or the payment of the rent due upon it, by the Lanyon Zinc Company. If there was anything wrong in either of these acts, that act became so, not because it was evil in itself, but because it was not done in compliance with the terms of the statutes of Kansas requiring foreign corporations to file their charters, to comply with the requirements which those statutes contain, and to obtain permission to do business in that state from the board appointed to consider and determine that matter. There was no provision in these statutes which inflicted the penalty of the invalidity of contracts made, or business done, without a compliance with them, nor was there any express prohibition of the conduct of such business before the laws were complied with. As there was nothing morally wrong in the acts of the appellee, as it was not the primary purpose of the statutes under consideration to invalidate such acts or contracts, and as the statutes contain neither express provision nor clear intimation that this was the intent of the legislators, it is not the province of the courts to do so. While the authorities upon this question are variant and conflicting in the state courts, the federal courts have steadily adhered to the rule, which is sustained by the better reason and the more persuasive opinions in the courts of the states, that, in the absence of an express provision of statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with the statutes permitting it to do business in the state where the contracts are made and the acts are done are, nevertheless, valid and enforceable, because it is not the intent of the authors of such laws to strike down such agreements and acts when they are not evil in themselves. *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Washburn Mill Co. v. Bartlett* (N. D.) 54 N. W. 544, 546, 547; *Wright v. Lee* (S. D.) 51 N. W. 706; *Fortier v. Bank*, 112 U. S. 439, 5 Sup. Ct. 234, 28 L. Ed. 764; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 152 Mass. 428, 28 N. E. 300, 9 L. R. A. 339; *Merrick v. Reynolds Engine & Governor Co.*, 101 Mass. 381, 384; *Enterprise Brew. Co. v. Grimes* (Mass.) 53 N. E. 855, 856; *National Cash-Register Co. v. Wilson* (N. D.) 81 N. W. 285; *Neuchatel Asphalt Co. v. The Mayor*, 155 N. Y. 373, 376, 49 N. E. 1043; *Simplex Dairy Co. v. Cole* (C. C.) 86 Fed. 739, 741; 6 *Thompson on Corporations*, § 7957.

The statutes under consideration require foreign corporations seeking to do business in the state of Kansas to comply with the requirements there set forth. For a failure to comply with some of them, they prohibit the company from maintaining actions in the courts of the state of Kansas. But a prohibition of the commencement or of the maintenance of suits is not an inhibition of defending them, and the appellee is the defendant in the suit in hand. Moreover, the inhibition by a state of the maintenance of actions in its courts does not affect the right of a citizen or of a corporation to maintain them in the national courts. The jurisdiction of the federal courts was not con-

ferred, and it cannot be withdrawn or limited, by the legislation of the states. It was granted by the people through the Constitution and the acts of Congress, and an amendment of the Constitution, or an act of Congress, is requisite to destroy or diminish it. *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593; *Darragh v. H. Wetter Mfg. Co.*, 23 C. C. A. 609, 615, 616, 78 Fed. 7, 13, 14.

The offense of a failure to comply with the corporation laws of the state of Kansas was an offense against the state, and not against the complainants in this suit. For that offense the state had ample remedy. It could prevent the maintenance of actions by this corporation in its courts. It could maintain a proceeding to oust it from its power to do business, and could enjoin it from carrying on business, within the state. The statutes of the state forbid the commission of many offenses, and make many requirements of individuals and of corporations. It is, however, ordinarily no defense to an action for the enforcement of a contract that the plaintiff has been guilty of larceny, burglary, or of the violation of other statutes of the state in which the suit is brought, and it is not perceived how the fact that a corporation has failed to comply with the laws authorizing it to do business in a state should constitute any valid reason why those who are under the obligations of fair contracts with it should be released from performing their agreements.

The second ground upon which the bill to avoid this lease was founded is that the Lanyon Zinc Company did not pay the \$40 rental for the year from April 10, 1899, to April 10, 1900, until December 23, 1899. The lease grants the right of use of the land for 10 years, and then provides that if a well is not sunk on the premises within 2 years from the date of the lease it shall become void, "unless the second party shall elect from year to year to continue this lease by paying or depositing to the credit of the first party each year \$40 at the Bank of Allen County, Kan., until a well is complete on these premises." No well has been sunk. Counsel for the appellants insist that this lease became null and void on April 10, 1899, because the \$40 for the succeeding year was not paid on or before that day. They insist that this lease simply gave to the lessee the option to elect to continue it from year to year by paying the rental for the succeeding year before it commenced. But is this a fair construction of the agreement? It first grants the exclusive right for 10 years from April 10, 1894, and then provides that if a well is not sunk within 2 years from its date the lease shall become void, unless the lessee shall elect to continue it from year to year by paying \$40 each year. This is not a mere grant of an option. It is a grant of the right to the use of the premises for the term of 10 years, conditioned on the payment of \$40 per year after the expiration of the first 2 years. Nor is there any provision in this contract that this rental shall be paid on or before the commencement of the year to which it applies. An election from year to year, by paying \$40 each year, literally means an election by paying during each year, and there is nothing elsewhere in the contract inconsistent with the words and the ordinary meaning of this provision. The general rule is that time is not the essence of a contract, unless the parties have so made it by express stipulation,

or it is apparent from the entire agreement, their relations, and the character of the rights and remedies they were limiting, that it was their intention that time should be considered material. Nothing of that character is found in the relations of these parties or in the terms of this lease, and our conclusion is that the appellee was in time to pay its rent for the year ending April 9, 1900, at any time on or before that day.

Moreover, if we are in error in our construction of this agreement, the result could not be different. If the right to continue this lease one year from April 10, 1899, was a mere option, which the appellee must have exercised on or before that day by the payment of the \$40, in order to protect its right to the use of the property for the ensuing year, the appellants are in no position to take advantage of the fact that it did not make the payment. Some of them had instituted a suit in the district court of Allen county, Kan., against the Palmer Oil & Gas Company, under which the Lanyon Zinc Company held this lease, and had obtained a decree which enjoined the Palmer Company, and of course those claiming under it, from carrying out, or attempting to carry out, any of the provisions of the lease, and from exercising any right or interest in the land, or in the oil and gas beneath its surface. This injunction was granted on July 6, 1898, and it was not dissolved until November 21, 1899. One who thus prevents another from performing his part of a contract is thereby estopped from insisting that any rights were lost by such a failure to perform. *Elkhart Car-Works Co. v. Ellis (Ind.)* 15 N. E. 249, 250.

The truth is that there is no equity in this bill. Here is a contract free from fraud or mistake in its negotiation, execution, and performance. There is nothing in the failure of the Lanyon Zinc Company for a few months to persuade the charter board to issue permission to it to do business in the state of Kansas which perpetrated any wrong or inflicted any injustice upon the complainants. There is nothing in the fact that the appellee did not pay the \$40 required for the rent of the year ending April 9, 1900, until the 23d day of December, 1899, which appeals with much force to the conscience of a chancellor, when it is remembered that it was prohibited from exercising any rights under this lease, by an injunction procured by some of the appellants, until November 21, 1899. The equities of the appellants are not superior to those of the appellee, and the parties must be left to enforce their legal rights under the contract they deliberately made.

The decree below is affirmed.

THAYER, Circuit Judge. I concur in the order affirming the decree of the Circuit Court for the following reasons:

The action is one in equity to obtain a decree canceling a mining lease and declaring a forfeiture of the same for the reasons stated in the foregoing opinion. The general rule is that courts of equity will not lend their aid to enforce forfeitures, but will leave a complainant who is insisting upon a forfeiture to enforce his rights at law, where they can usually be enforced without difficulty if a forfeiture has been incurred. Courts of equity abhor forfeitures, and will frequently

grant relief against them, whereas they will rarely, if ever, lend their aid to enforce a forfeiture.

But, aside from the foregoing view, the assignment of the mining lease to the Lanyon Zinc Company, which the complainants seek to have declared null and void, was not void, although the last-mentioned company had not, at the time the assignment was executed, taken all of the steps necessary to qualify it to engage in business in the state of Kansas. The assignment, when executed, vested in the assignee of the lease all the right, title, and interest of the assignor, and these complainants are not in a position which entitles them to challenge the validity of the assignment. If it is vulnerable to attack on the part of any one, it can only be assailed by the state of Kansas, and the state has not seen fit to move in the matter, but has actually granted the assignee of the lease a license to transact business in that state. It is a general rule that when a corporation acquires property without adequate authority, the act being simply *ultra vires* and not a prohibited act, no one but the state which imposed a limitation on the powers of the grantee can challenge the grant. *Chambers v. City of St. Louis*, 29 Mo. 543, 576, 577; *St. Louis Drug Co. v. Robinson*, 81 Mo. 18, 26; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Grant v. Henry Clay Coal Co.*, 80 Pa. 208; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317. This rule of law is certainly applicable to the case in hand, and should preclude the complainants from questioning the validity of the assignment whereby the Lanyon Zinc Company acquired a title to the mining lease in question. It is really no concern of these complainants whether the assignment of the lease was valid or otherwise, since neither the state of Kansas nor the assignor has seen fit to challenge it.

For the reasons fully stated in the opinion in chief, I concur in the view that the rental for the year beginning April 10, 1899, and ending April 9, 1900, was paid in due season to preserve all of the rights of the Lanyon Zinc Company in and to the lease in question.

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## THE STRAITS OF DOVER.

### THE BLUEFIELDS.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1903.)

No. 447.

#### 1. COLLISION—STEAMSHIPS CROSSING—VIOLATION OF RULES.

The ocean steamships *Bluefields* and *Straits of Dover* both held in fault under the evidence for a collision in Chesapeake Bay in the night, while on crossing, but nearly parallel, courses, for violation of the inland navigation rules: The *Bluefields* primarily, because, seeing the red light of the Straits of Dover on her starboard bow, she was the burdened vessel, and required by articles 19, 22, and 23 of the act of Congress of June 7, 1897 [U. S. Comp. St. 1901, p. 2883], to keep out of the way, to avoid crossing ahead, and to slacken speed, or stop, or reverse, if necessary, and should have ported her helm, instead of which she continued her course and speed until across the bows of the *Straits of Dover*; the latter because she failed to keep her course and speed as required

by article 21, or to give danger signals in accordance with article 18, rule 3, when the Bluefields persisted in her course and danger of collision was apparent, but instead ported her helm, and stopped and reversed, and without giving the signal indicating such fact required by article 28; none of which violations of the rules could be said not to have contributed to the collision, or to have been an error in extremis.

Cross-Appeals from the District Court of the United States for the District of Maryland.

J. Parker Kirlin (Convers & Kirlin, George Whitelock, and Charles R. Hickok, on the briefs), for the Straits of Dover.

Francis S. Laws (John F. Lewis, William Colton, and Thomas R. Clendinen, on the briefs), for the Bluefields.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

WADDILL, District Judge. These are cross-appeals from the District Court of the United States for the District of Maryland in a cause of collision. The original libel was filed August 28, 1900, by the New York & Baltimore Transportation Line against the steamship Straits of Dover, and the libel of the Straits of Dover Steamship Company, Limited, against the steamship Bluefields was filed on the 31st of August, 1900. The collision occurred between the two steamships in Chesapeake Bay, about 3½ miles below Wolf Trap Lighthouse, on August 25, 1900, about 1:25 or 1:30 o'clock a. m., it being a clear night, with a smooth sea and tide ebb. The Straits of Dover was a large, ocean-going steamer, loaded with coal, drawing about 23 feet of water, and was proceeding down the Bay to the Capes; the Bluefields was a much smaller steamer, nearly light, coming up the Bay to Baltimore, the former proceeding about eight knots, and the latter about nine knots an hour. As the result of the collision, both vessels were considerably damaged. The damages to the Straits of Dover were ascertained to be \$5,789.20, and to the Bluefields \$8,732.35. The court below found both vessels to be in fault, decreed the damages to be divided between them, and adjudged that the owners of the Bluefields recover against the Straits of Dover a balance of \$1,401.07, with interest from the 25th of August, 1900. From this decree both parties appealed.

Numerous faults were assigned by the vessels against each other, respectively, in which each, in effect, averred that the collision was solely the fault of the other. The case of the Bluefields, as stated in its answer and cross-libel, is:

"At about 1:10 a. m. by the Bluefields' time, her lookout called out, 'A steamship on the starboard bow.' The Bluefields' course was north half east. The pilot saw the vessel on the starboard bow about the same time the lookout did, the green lights being plainly visible on each vessel. The vessels continued this course until the Straits of Dover came within half a mile of the Bluefields, when the Straits of Dover changed her course, exhibiting her port light, whereupon the Bluefields gave a single whistle, easily heard several miles. The mate ordered hard aport. There was no response from the Straits of Dover, and the Bluefields continued her course, and in about one minute repeated the single blast, when suddenly the Straits of Dover put her helm to starboard and struck the Bluefields, showing both her side lights. When the vessel struck, the Bluefields stopped her engines."

And of the Straits of Dover, as stated in her cross-libel and answer, is:

"At about 1:05, August 25, 1900, the Straits of Dover, with Bay pilot and chief mate on the bridge, etc., was going down the Chesapeake Bay about three miles below Wolf Trap Light, when a masthead light was reported seven or eight miles off, about a point and a half on the port bow. Shortly after the green light was observed, continuing with same bearing. The Straits of Dover kept her course and speed until there was a risk of collision, since the other vessel did not give way; then the Straits of Dover put her helm about halfway to port, and blew a blast, and engines rung to stand by. There was no answer, and as the Bluefields still kept on and did not give way, the engines of the Straits of Dover were stopped, and put full speed astern. The Bluefields appeared to be then under a starboard helm, and suddenly appeared to change to a port helm, and swept around, blowing one whistle just before she ran into the bow of the Straits of Dover."

A great mass of evidence was taken as to just how the collision came about; and it may be said, in passing, that the conflict is greater than usually exists, even in this class of cases. It is not deemed necessary to enter into a lengthy discussion of the same, further than to say, after mature consideration, no reason has been found for arriving at a different conclusion upon the facts than that reached by the learned judge of the District Court, who heard and saw the witnesses, and was in that way better enabled to determine the relative value of their several statements. In the judgment of the court below, the collision was attributable primarily to the Bluefields, whether treating the case as one of meeting or crossing, though the court considered it a crossing case. Article 18, rule 1, of Act of Congress, approved June 7, 1897 (30 Stat. 101 [U. S. Comp. St. 1901, p. 2881]), provides what shall be done when vessels are meeting end on, or nearly so, in such manner as to involve risk of collision; that is, that either vessel shall give to the other one short and distinct blast of the whistle, which the other shall answer promptly in like manner, and thereupon such vessels shall pass on the port side of each other. *The America*, 92 U. S. 432, 23 L. Ed. 724; *Marsden on Collisions* (4th Ed.) p. 458; *Hughes' Ad.*, 237-8-9. That the Bluefields did not comply with this requirement is apparent. The Straits of Dover exhibited her red light to the Bluefields at least a mile away, and, in the opinion of the lower court, when at a much further distance; and had the Bluefields ported, and continued so to do, there could have been no risk of collision, but instead, as found by the lower court to be a fact, the Bluefields continued her full speed, and kept her course until she ran across the bow of the Straits of Dover; and not until then, under a hard port helm, attempted to avoid collision by changing her course. The Bluefields earnestly insists that she ported earlier, and at the time that the red light of the Straits of Dover was exhibited to her; but that the Straits of Dover thereafter suddenly starboarded, shutting in her red and exhibiting her green light, and collided with her on her port bow. This contention is not borne out by the evidence. It does not appear that the Straits of Dover, after porting and exhibiting her red light, again starboarded as claimed. The Bluefields, as found by the lower court, in which finding of fact we concur, attempted, with the Straits of Dover on her starboard side, to cross her bow, which largely con-

tributed to bringing about the collision. Articles 19, 21, 22, 23, rule 3, arts. 18, 26, of the act of June 7, 1897, supra, prescribe the rules for the avoidance of collisions between steam vessels in the position in which these were.

"Art. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

"Art. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Art. 18, Rule 3. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify, the same by giving several short and rapid blasts, not less than four, of the steam whistle."

"Art. 28. When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts of the steam-whistle."

The obligation imposed to obey these rules is imperative, and those violating them, except under circumstances contemplated by the rules, must bear the consequences if damages ensue. It was the duty of the *Bluefields*, with the Straits of Dover on her starboard side, to have kept out of the way of the other steamer. *The Breakwater*, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139; *The Delaware*, 161 U. S. 459-466, 16 Sup. Ct. 516, 40 L. Ed. 771; *The Luckenbach*, 1 C. C. A. 489, 50 Fed. 129-134; *The Chittagong* [1901] App. Cas. 597. And likewise to avoid a collision with her by crossing ahead of her. *The Excelsior* (D. C.) 102 Fed. 652-655; *Marsden on Collisions* (4th Ed.) p. 483. And upon approaching her, if necessary, to slacken her speed, or stop or reverse. *The New York*, 175 U. S. 187-201, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751. Instead of taking these plain and simple precautions prescribed for the government of her conduct, the *Bluefields* pursued a course of her own, which resulted in the collision. The *Bluefields* should have avoided the risk of collision, and, for failure so to do, is clearly liable. The presence of danger, or anticipated danger, was enough to admonish her of the necessity of complying with the rules of navigation. *The Carroll*, 8 Wall. 302-305, 19 L. Ed. 392; *The New York*, 175 U. S. 187-207, 20 Sup. Ct. 67, 44 L. Ed. 126; *Steamship Co. v. Low*, 50 C. C. A. 473, 112 Fed. 161, 162, 172; *The Richmond* (D. C.) 114 Fed. 208.

Coming to the consideration of the question of the liability of the Straits of Dover, by reason of the faults alleged against her, we find that the District Court held her also liable for failure to give danger signals, upon the green lights of the *Bluefields* bearing upon her port bow for such length of time, immediately preceding the collision, as to make it apparent that the *Bluefields* was crossing her bow and that there was great danger of collision; and also because, when in such condition, she blew one whistle, stopped her engines, and in

about three minutes, without getting a reply from the Bluefields, or understanding her intentions, reversed full speed astern. We do not understand it is denied that, under the circumstances indicated, the Straits of Dover so acted. The Straits of Dover, in the position stated, was the favored vessel, and under article 21, *supra*, was required to keep her course and speed; and, upon failure to understand the course or intention of the Bluefields, should have immediately signified the same by giving several short and rapid blasts, not less than four, of her steam whistle (rule 3, art. 18); or, upon reversing her engines and putting the same full speed astern, she should have indicated the fact by three short blasts of her whistle (article 28), so as to warn the Bluefields of her movements. The Straits of Dover seems clearly to have erred in the three particulars stated. She should have kept her course and speed, unless in case of imminent danger, and the Bluefields had the right to assume that she would do so (*The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660; *The Delaware*, 161 U. S. 459-469, 16 Sup. Ct. 516, 40 L. Ed. 771; *The Albert Dumois*, 177 U. S. 240-250, 20 Sup. Ct. 595, 44 L. Ed. 751; *The Mary Powell*, 34 C. C. A. 421, 92 Fed. 408; *Hughes' Ad.* 245); and, in case of emergency justifying a departure therefrom, should have followed strictly the rules governing such maneuver, which she failed to do; and, upon reversing her engines, she should have also complied promptly with the rules governing such movement; otherwise she, herself, by unexpectedly moving backwards, might have cut off the only escape the Bluefields would have had, had she, too, discharged her duty in the emergency in which the two vessels were then placed, and by her failure to give danger signals utterly misled the Bluefields as to her movements. *The Dexter*, 23 Wall. 69, 23 L. Ed. 84; *Belden v. Chase*, 150 U. S. 674-699, 14 Sup. Ct. 264, 37 L. Ed. 1218, and cases there cited.

The learned counsel for the Straits of Dover insisted with much earnestness, and argued with great ability, to show that the Straits of Dover, conceding the faults to be as found against her, should nevertheless be held blameless, first, because it appeared that her negligence, if any, in no way contributed to the collision, and, if it did, it was an error in *extremis* for which liability should not attach; and that the Bluefields, having brought about the collision, and its faults being obvious and inexcusable, and enough within themselves to account for the catastrophe, all doubts regarding the management of the Bluefields should be resolved against her, and those of the Straits of Dover solved in her favor. The propositions of law involved in these several contentions may be conceded. It is undoubtedly true that all presumptions should be solved against the vessel primarily liable and clearly in fault, and doubts resolved in favor of the one secondarily responsible, as should errors in *extremis* be excused, and no liability attach to acts of negligence not contributing to bring about the cause of disaster; but it cannot be said in this case either that the failure of the Straits of Dover to follow the rules prescribed for its conduct, on the occasion in question, was an error in *extremis*, or that it did not in part bring about the disastrous results that followed. The navigators of the Straits of Dover



observed the green light of the Bluefields bearing on her port bow, in such manner as to make it apparent that the Bluefields was crossing the bow of the Straits of Dover, and was persisting in this course, and that there was great danger of collision, and in this condition the Straits of Dover neither continued her speed and course, nor gave to the Bluefields the danger signals required to be given, but, on the contrary, blew one whistle, stopped her engines, and in about three minutes reversed full speed astern; and it will not do now to rely upon the fact that, because their red light was exposed to the Bluefields, they had a right to suppose that she too would perform her duty under such circumstances, and port her wheel, exhibiting in proper time her red light, so as to pass red to red. The conduct of those navigating the Straits of Dover shows that at the time they did not so consider, but, on the contrary, instead of proceeding on their course and at their speed, which might have prevented the disaster, or relieved them from liability, in apprehension of the danger which they felt existed, they adopted the opposite course of stopping, and subsequently reversing her engines full speed astern, and utterly failed to comply with the requirements of the law in making either maneuver. It cannot be said that if the Straits of Dover, by reason of the persistency of the Bluefields in crossing her bow, had given danger signals, such timely warning to the Bluefields, showing that her movements were not understood, would not have averted disaster. The violation of the rules of navigation by the Straits of Dover in the three particulars mentioned, being clearly established, indeed admitted, she cannot under the circumstances of this case be held blameless. Nor can it be said that her conduct did not in part contribute to bring about the disaster that followed. Every consideration requires that these rules should be strictly observed by those for the government of whose conduct they were prescribed, and any departure therefrom should not be lightly overlooked or passed by. To do so would destroy the symmetry of the whole, and would place questions affecting the navigation of ships, now well settled and certain, in utter chaos and confusion. The taking of risks and chances in these matters should be discouraged.

Finding no error in the determination of facts or the adjudication of principles of law announced by the decision of the lower court, the same is affirmed; each party to pay their own costs. Affirmed.

## CLEVELAND LINSEED OIL CO. v. A. F. BUCHANAN &amp; SONS.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 41.

**1. SALE—IMPLIED WARRANTY OF FITNESS—PLEADING.**

Allegations in a complaint that "defendant contracted and agreed to deliver to the plaintiff \* \* \* one tank car of well-settled new process linseed oil \* \* \* for use in its business of manufacturing table and enameled oilcloth, and which defendant well knew was to be used in its said business and to manufacture table and enameled oilcloths," are sufficient to raise and support an implied warranty of fitness in a sale by a manufacturer for a particular purpose.

**2. SAME—MANUFACTURED ARTICLES.**

Plaintiff was engaged in the manufacture of oilcloths in which a special quality of linseed oil was required. Defendant was a manufacturer of oil, and its agent called on plaintiff, and represented that it was using a new process, by which a superior article of oil for plaintiff's use was produced. They tested a sample, which proved fit for plaintiff's use. Defendant's agent promised that if plaintiff would give an order he would see that the right kind of oil was furnished for its use, and thereafter plaintiff purchased large quantities, which were satisfactory in use. At one time plaintiff gave an order for two tank cars of the same oil as it had before. One car was received and emptied into plaintiff's tanks and used. It proved of inferior quality, not fit for such use, and a large loss resulted. *Held*, that there was an implied warranty by defendant that such oil was of the same quality as that previously furnished plaintiff, and fit for the purpose for which defendant knew it was to be used.

**3. SAME—ACTION FOR BREACH OF WARRANTY—MEASURE OF DAMAGES.**

In an action for breach of such warranty, in which it was found that plaintiff was not negligent in using the oil in reliance thereon, the measure of damages was the loss actually sustained by reason of such use, and to enable the jury to determine the amount evidence was admissible showing that goods sold by plaintiff were returned by customers because of defects due to the poor quality of the oil, or were unsalable, and that in other cases plaintiff was obliged to settle with customers and pay the differences in the value of the goods due to such defects.

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

H. G. Ward, for plaintiff in error.

Sidney H. Stewart, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. Writ of error by defendant in court below from a judgment of the United States Circuit Court for the Southern District of New York entered on a verdict for \$7,436.37 in favor of plaintiff.

At the time of the transaction involved herein the plaintiff corporation was engaged in the business of manufacturing table and enameled oilcloth. The defendant corporation was the manufacturer of what was known as "new process linseed oil." Its agent, Butterfield, called on the president of the plaintiff corporation at its factory with a sample of said oil, explained the details of the new process, and that it was especially adapted to the elimination of an objection-

able product known as "foots." Oil which does not contain foots is known as "well settled," and only such oil could be used by plaintiffs in their business. The presence of foots in linseed oil cannot be detected by the eye. The usual test applied is by heating in a test tube up to 560 degrees. Butterfield and plaintiff's president thus tested the sample, and it stood the test. Butterfield said that this oil would be satisfactory to manufacture tablecloth. Plaintiff then ordered 10 barrels for trial, which proved to be unsatisfactory, by reason of the presence of foots. Butterfield again came to the factory, and promised that, if defendant could get another order, he would see that the right kind of oil came to them, or that it should be perfectly satisfactory. Thereupon plaintiff gave an order for some 3,000 gallons, subjected the first car load to a laboratory test, found it well-settled oil, free from foots, and used it in manufacturing oilcloths, and continued such use of defendant's oil for some six or seven months. The last sale to plaintiff prior to the one involved herein was specified to be of 40,000 gallons of pure well-settled new process oil. While defendant was still making deliveries under said contract, defendant's agent called on plaintiff's treasurer, Andrew Buchanan, to make a further sale. Buchanan said he wanted oil such as had been delivered before. Defendant's agent accepted an order for two tank cars of the same oil as plaintiff had had before, and one tank car was emptied into plaintiff's tanks. It was not well settled, and its use in making oilcloths which were not merchantable was the original cause of the damages herein complained of. The other car was afterwards returned to defendant. In the view we have taken of this case it is unnecessary to consider the question whether, under the circumstances, plaintiff could or should have tested the oil in this tank car before using it. The oil was not open to inspection, and an inspection would not have shown the defect complained of. Said oil was used in the manufacture of 2,100 rolls of table oilcloths, the fair market value of which would have been \$1.65 per roll if the oil had been suitable. By reason of the defect in the oil the cloths were so damaged that plaintiff was obliged to sell them at public auction. The difference between the price thus obtained and the fair market value, with interest, was \$1,714.22. Part of the other oilcloth made with this oil was returned by customers; some of it was so bent that it could not be straightened, and it was burned; some was so stuck together that it could not be sold, even in an auction house. Plaintiff settled as well as it could with its customers by giving the lowest allowances possible in each case. Plaintiff proved the loss by showing the allowance paid in each case, or, in case of sales, by the difference between the market value and price received. The jury returned a verdict for the amount of damages thus proved. Defendant has excepted to the refusal of the court to direct a verdict for defendant, on the ground that no cause of action on a warranty was stated in the complaint.

The complaint alleged that "the defendant contracted and agreed to deliver to the plaintiff \* \* \* one tank car of well-settled new process linseed oil \* \* \* for use in its business of manufacturing table and enameled oilcloth, and which defendant well knew was to

be used in its said business, and to manufacture table and enameled oilcloths." These allegations are sufficient to raise and support an implied warranty of fitness in a sale by a manufacturer for a particular purpose.

Defendant has also excepted to the refusal of the court to charge that there was no warranty in the sale, and that the plaintiff, having accepted and used the oil, could not complain that it was not well settled. Counsel for defendant relies upon the distinction between conditions which are a part of the contract of sale and warranties which are collateral to said contract, and insists that the case at bar belongs to the former class, in which he asserts that the only remedy of a purchaser is in a refusal to receive, which is waived by acceptance and retention of the article purchased.

There is an apparently irreconcilable conflict of authority as to the distinction between warranties and conditions and as to the rights and obligations of the parties thereunder. Much of the confusion has arisen from the fact that what are generally considered in this country as warranties that the article shall be of the kind or species contracted for, were, prior to the passage of the sales of goods act in England, and are in some of the courts of this country, treated as conditions precedent. Benjamin on Sales (7th Ed.) pp. 589, 594, 677; Carleton v. Lombard, Ayres & Co., 149 N. Y. 147, 43 N. E. 422. Furthermore, the word "warranty" has been used in such a great variety of senses, and the decisions thereon have been so anomalous, that, as a distinguished jurist has said, "an attempt to arrive at a satisfactory conclusion about any principle supposed to be established by them would be hopeless, if not absurd." Chief Justice Gibson in *McFarland v. Newman*, 9 Watts, 55, 34 Am. Dec. 497.

The cases relied upon by counsel for defendant are forcible illustrations of this statement. In *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, defendants agreed to sell to plaintiff a crop of tobacco then growing, "well cured and boxed, and in good condition." A majority of the court held that a warranty could not be predicated upon said engagement, and that the rules of law by which the rights of parties in respect to warranties are regulated were inapplicable. In *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335, an executory agreement to sell "No. 1 extra foundry pig iron of the Coplay Iron Co. make" was held not to be a warranty, but a mere description of the article to be sold. On the other hand, the courts of the state of New York have held that in a sale of "blue vitriol sound and in good order" the trial court could have decided, as a question of law, that there was a warranty that it was sound and in good order (*Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595), and that a contract to sell "pipe iron which should be of a quality suitable and proper for use in the defendant's manufacturing business \* \* \* was an express agreement or warranty that it should be of that specified or designated quality." *Dounce v. Dow*, 57 N. Y. 16. The decision in *White v. Miller*, 71 N. Y. 118, 129, 27 Am. Rep. 13, is to the same effect. And the later New York decisions agree that, in case of breach of an express warranty as thus defined, the warranty survives the acceptance. *Brigg v. Hilton*, 99 N. Y. 517, 529, 3 N.

E. 51, 52 Am. Rep. 63; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 265, 23 N. E. 372, 373, 16 Am. St. Rep. 753. In the latter case Chief Judge Parker, approving the doctrine that a positive affirmation, relied on as such by the vendee, is an express warranty, quotes with approval from an opinion by Judge Learned as follows:

"There can be no difference between an executory contract to sell and deliver goods of such and such a quality and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter. 101 N. Y. 616, 3 N. E. 905."

The right of the vendee to recover damages in such cases after acceptance is sustained in other jurisdictions. Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Morse v. Moore, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. But even the case of Reed v. Randall, as limited by Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719, is only authority for the proposition that where there is no collateral or express warranty, but the representation as to the quality is part of the contract itself, "the remedy of the vendee to recover damages on the ground that the article furnished does not correspond with the contract does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect." Waeber v. Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712. The doctrine of Reed v. Randall has been denied in England. Freeman v. Baker, 5 Car. & P. 475, 483; Yeats v. Pim, 2 Marsh. 141. See Morse v. Moore, *supra*.

In the case at bar the defendant, being a manufacturer, promised the plaintiff that if it would give defendant an order it would see that the right kind of oil came to it for use in making oilcloths in its factory. Defendant duly furnished such oil for such use, which, upon being tested, was found free from foets, and, therefore, fit for such use. Thereafter defendant continued to furnish, and plaintiff continued to use, said oil; and when plaintiff gave its last order, defendant specially agreed that it should be like the oil that had been sent to plaintiff.

The same questions were considered by Judge Wallace in the case of Bagley v. Cleveland Rolling Mill Co. (C. C.) 21 Fed. 159. There the defendants, being manufacturers, undertook to furnish to plaintiffs a certain quality of steel for the facing of vise jaws. The defendant sent a sample, which was tested and proved unsatisfactory. Thereafter defendant sent other lots of steel, which were satisfactory, and later, in response to an order for "same quality as last," sent a lot which was a failure. This lot was returned, and the order was filled by a new shipment, which was used in making vises. After the vises had been sold it was found that the steel was too brittle for this purpose, and plaintiff notified defendant of the facts, returned a portion of the steel, and, later, brought suit and recovered damages. It will thus be seen that the legal relations of the parties were identical with those of the parties herein. The court denied a motion for a new trial, and held that there was an agreement on the part of defendant that the steel should be of the same quality as the lots previously sent; that there was a breach of said agreement; and that plaintiffs owed no duty to defendant to test the steel before using it. The

court in its opinion discussed, *inter alia*, some of the cases already referred to, and reached the following conclusions:

"Manifestly, there is no distinction in principle, as to the rights and remedies of a purchaser, between a cause of action arising out of a breach of contract by the vendor to deliver an article of a specified quality or description, or out of a breach of a representation which is collateral to the contract, or out of such a breach when the representation or warranty is implied instead of being express. In either case there is an agreement, in substance and purport, to the same effect; in either, a breach of it works the same injury to the vendee; and in either, the same presumption of fact arises from an acceptance of the article after the discovery of its defects. Whether the cause of action is for a breach of a contract or for the breach of a warranty is a mere matter of nomenclature (*Hastings v. Lovering*, 2 Pick. 214); and the breach of a promise implied by the law works the same consequences, imposes the same obligations, and creates the same rights, as the breach of an express promise."

We concur in these views. The general rules governing contracts between manufacturers and purchasers were fully considered in this circuit in the very recent case of *Dodge v. The Dickson Manufacturing Company*, 51 C. C. A. 175, 113 Fed. 218.

The principles directly applicable to the case at bar are thus stated by the Supreme Court of the United States in *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86:

"When the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purpose for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought it on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer and maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

The same rule is applied in such cases in the state of New York. *Carleton v. Lombard, Ayres & Company*, 149 N. Y. 137, 43 N. E. 422; *Bierman v. City Mills Company*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635. In the present case, however, the court below left to the jury the question whether plaintiff had exercised proper care in the examination and inspection of the oil before using it. The charge was, at least, as favorable to the defendant as it had a right to demand, and the exceptions thereto on the foregoing points are overruled.

The exceptions further challenge the correctness of the charge on the measure of damages. The court charged the jury, *inter alia*, as follows:

"If they exercised due diligence, that of prudent men in going on and using it and making it into oilcloth and sending it to customers—if they did all that could be expected of prudent men—then you will go further and give damages for what they lost in consequence of the oil being bad and being used in that way."

Later, counsel for defendant having asked the court to charge that the measure of defendant's liability was the "difference in the value of the oilcloth as manufactured with the oil delivered, and what the oilcloth would have been worth if the oil had been what was agreed," the following colloquy occurred between court and counsel:

"The Court: Is not that what is left to the jury now? Mr. Ward: I do not so understand. The Court: I understand it so. Mr. Ward: Your honor charges that? The Court: Yes; the jury understand that."

No further exception was taken after this statement. It must be assumed that counsel was satisfied with the charge as thus interpreted. The court had already repeatedly stated the general rule in apt language to be understood by the jury, that the defendant's liability, if any, was for the direct natural consequences resulting from the use of said oil as defendant understood it was to be used. In order, however, to avoid any misunderstanding, it further explained the legal effect of its charge in accordance with the request of counsel for defendant. This exception to the charge is overruled.

Counsel for defendant objected to the admission of the testimony of plaintiff's treasurer as to amounts paid to customers in settlement as aforesaid. The ground of the objections and the theory on which said evidence was admitted is shown by the following excerpt from the record:

"Mr. Ward: I object to a lump sum, and think the witness should be required, under your honor's ruling, to state the names of the customers. The Court: These figures are given with the idea that the fact is to be made out that they came from this bad oil. Mr. Ward: I understand; but my objection is that they cannot say they paid a lump sum. I have a right to know who the customers were, and what each received."

Subsequently the witness was recalled, and produced copies of letters showing the names and addresses of each customer, and the amount paid to each in settlement of his claim, and no objection was made or further exception taken to said testimony.

It is clear that the finding of the jury as to the amount of damages sustained was correct. The measure of damages in such cases is the loss actually sustained by the breach of the warranty. *Ferris v. Comstock*, 33 Conn. 513. It may be shown by evidence as to the difference between the actual value of the damaged goods as manufactured and the value of such goods if the article supplied for manufacture had conformed to the warranty. *Hook v. Stovall*, 26 Ga. 704. Evidence showing the return of the oilcloth on account of such defects, or that the goods were unsalable, or that plaintiff was otherwise subjected to loss by reason of the breach of said warranty, was clearly admissible in order to enable the jury to determine the actual damages. *Bierman v. City Mills Company*, supra.

The judgment is affirmed, with costs.

**ARND, County Treasurer, v. UNION PAC. R. CO.**

(Circuit Court of Appeals, Eighth Circuit. February 16, 1903.)

No. 1,755.

**1. TAXATION—RAILROAD BRIDGE—TAXATION FOR MUNICIPAL PURPOSES UNDER IOWA LAW.**

Under the established rule of decision in Iowa, that the taxation of property for municipal purposes which receives no benefit or protection directly or indirectly from the municipal government, and imposes no burdens upon the city, is a violation of the constitutional provision that private property shall not be taken for public use without just compensation, the eastern half of the Union Pacific Railroad Company's bridge across the Missouri river, which is used exclusively for railroad purposes, is not taxable for municipal purposes by the city of Council Bluffs, although within the corporate limits of such city; the eastern end of the bridge being over a mile from buildings, street improvements, water, or lights, and being furnished neither fire nor police protection by the city, and the land between the bridge and the settled portion of the city being used for agriculture, and not taxable for city purposes under the laws of the state.

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

This action was brought by William Arnd, treasurer of Pottawattamie county, Iowa, the plaintiff in error, against the Union Pacific Railroad Company, the defendant in error, to recover municipal taxes amounting to \$3,376.28, assessed in favor of the city of Council Bluffs, for its ordinary municipal purposes, on the eastern half of the defendant's railway bridge which spans the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Neb. The case was tried in the lower court on the following agreed statement of facts:

"It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the following facts are herein and hereby stipulated, found, and agreed upon by and between the parties hereto, subject always to objections thereto for incompetency, immateriality, and irrelevancy:

"(1) That the limits of the city of Council Bluffs, Iowa, extend on the west to the center line of the Missouri river, between the cities of Council Bluffs, in the state of Iowa, and Omaha, in the state of Nebraska, and that the bridge against which the taxes in this controversy were assessed crosses the Missouri river, and that one-half of said bridge is in the state of Iowa, and one-half thereof in the state of Nebraska.

"(2) That the east half of said bridge is within the city limits of the city of Council Bluffs, Iowa, and is the property of the defendant, and that said east half of said bridge is, and was for all of the several years sued on, assessed by the local city assessor of the city of Council Bluffs as real estate.

"(3) That the municipal taxes for said city of Council Bluffs, Iowa, on the east half of said bridge, have not been paid for several years sued on, and represented by the warrants of the county treasurer, hereto attached, marked 'Exhibit A,' and made a part of this stipulation.

"(4) That for said years the defendant has paid the county, state, and school taxes on the east half of said bridge.

"(5) That the amount of unpaid municipal taxes and penalties on said east half of said bridge to September 1, 1901, is \$13,713.97, as represented by the attached warrants of the county treasurer of Pottawattamie county, state of Iowa, hereinbefore referred to, which warrants are made a part of this stipulation.

"(6) That the levy and assessment of taxes on said east half of said bridge for said years for municipal purposes was the same as the rate levied and assessed against other property within the city limits of said city, except upon such property within said city limits, of which there is a large amount,



as has been for all of said years specially exempted from such municipal taxes by the action of the authorities of said city and of Pottawattamie county, for the reason that it receives no benefits from a municipal point of view; the same being used for agricultural or horticultural purposes.

"(7) That the Code of the State of Iowa, Annotated, 1897, and all statutes and acts amendatory thereof, shall be and are considered as evidence in this case, without any further reference or identification, and any statute, section, or act that either party to this controversy desires to refer to, in said Code or the amendments, may be considered as proven and as in evidence in this case.

"(8) That the eastern terminus of the defendant railroad is within the limits of the city of Council Bluffs, Pottawattamie county, Iowa, and that said defendant's tracks extend to its freight house, near the junction of Main street and Tenth avenue, and that another line extends to the intersection of Ninth street and Broadway in said city, and that said defendant company has valuable buildings, many miles of main and side tracks, and many acres of land, within the city limits of the city of Council Bluffs, Iowa, upon all of which said buildings, tracks, and lands, which are assessed by the executive council of the state of Iowa as a part of the railroad property of said defendant company, all state, county, school, and municipal taxes have been paid for all of said years, except the water fund and gas or street lighting fund taxes upon such of said property as lies wholly without the limits of the benefit of the same.

"(It is agreed that this controversy, and the stipulation and papers herein, shall not, in any wise, shape, manner, or form, affect the claim of the plaintiff or the defense of the company in respect to the taxes for the years involved in this controversy, for water fund and gas and street lighting fund.)

"(9) That the location of said buildings, lands, and tracks are substantially as represented on Allen's Suburban Map of Council Bluffs, Iowa, published by C. R. Allen in the year 1890, which map is hereto attached, marked 'Exhibit B,' and made a part of this stipulation, and is substantially correct, and may be considered as part of the evidence in this case.

"(10) That the map or blue print hereto attached, marked 'Exhibit C,' and made a part of this stipulation, is substantially correct, and may be considered as a part of the evidence in this case.

"(11) That the city of Council Bluffs, Iowa, maintains a regular police force, fire protection, paid firemen, and is furnished with gas, water, and electric lights, and that said water mains, gas mains, and electric light wires extend as far towards said bridge as the Union Pacific Transfer Depot, but no farther. It is, however, conceded that no regular police patrol of said bridge is maintained by said city, and that said bridge is patrolled by the defendant's own employes, and no fire protection is afforded to said east half of said bridge.

"(12) That said bridge is about a mile and one-half distant from the inhabited portions of the said city of Council Bluffs, eastwardly; that for a distance of a mile and one-half, in the state of Iowa, eastwardly from the eastern end of said bridge, there are no buildings, houses, or habitations; that for a distance of a mile northwardly from said eastern end of said bridge there are no habitations or buildings; that the lands under said eastern end of said bridge, and those included in an area extending for three-fourths of a mile to the north and a mile to the south of said bridge, and extending to the east one and one-half miles from the eastern end of said bridge, are used and occupied as farm lands, and solely for agricultural purposes; that the lands shown on the map as Union Pacific lands, C. R. Hannan, N. P. Dodge, and Nathan Merriam lands are, and have been for all of said years, exempted from municipal taxes.

"(13) That the portion of said lands referred to, as has been platted into city lots and blocks, and as shown by Allen's map, have never been, and are not now, used for city purposes, but are inclosed as farm lands, and used for agricultural purposes.

"(14) That the corporate authorities of the city of Council Bluffs have never laid down or improved the streets and alleys for a distance of three-fourths of a mile north from the eastern end of said bridge, and a mile and

one-half east from the eastern end of said bridge, and a mile and one-half south from the eastern end of said bridge, except Thirty-Fifth street and Ninth avenue, and that there never has been extended to said platted portions of said lands, as above referred to, the regular police protection, fire protection, and lighting usually incident to incorporated towns, and established for and enjoyed by the citizens and residents thereof.

"(15) That said bridge has been and is used solely and only for railroad purposes, and that the lands immediately east, north, and south, and extending to the distances hereinbefore stated, have been at all times, and are now, used for agricultural purposes.

"(16) That the defendant has at all times for which these taxes have been assessed, and for which suit is now brought, policed said bridge and protected it by its own servants, agents, and employés.

"(17) That the city of Council Bluffs is a city of over 25,000 inhabitants, and that Main street and Broadway are the principal streets in said city."

The following provisions of the statutes of Iowa are cited by counsel as the only ones having any application to the case:

"Sec. 616. Taxation of Lands. No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which tax shall be paid into the city or town treasury."

"Sec. 1342. Real Property of Railways. Lands, lots and other real estate belonging to any railway company, not used exclusively in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, and grain elevators, shall be subject to assessment and taxation on the same basis as property of individuals in the several counties where situated."

Code of Iowa of 1897.

Upon the agreed statement of facts, the Circuit Court rendered a judgment for the defendant, and the plaintiff sued out this writ of error.

Emmet Tinley (S. B. Snyder and John Y. Stone, on the brief), for plaintiff in error.

John N. Baldwin, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The railroad company has paid the state, county, and school taxes assessed on the east half of the bridge, but resists the payment of the municipal taxes assessed thereon by the city of Council Bluffs, upon the ground that the bridge, though within the corporate limits of the city, is in fact in the country, and receives no benefit or protection, directly or indirectly, from the municipal government, and the city incurs no expense, directly or indirectly, on account of the same.

A long and unbroken line of decisions of the Supreme Court of Iowa establish the doctrine that private property cannot be taken for public use without just compensation, and that the taxation of property for municipal purposes, which receives no benefits or protection whatever from the municipal government, and imposes no burdens whatever upon the city, is a violation of this constitutional guaranty and is illegal. *Morford v. Unger*, 8 Iowa, 82; *Fulton v. Davenport*, 17 Iowa, 404; *O'Hare v. Dubuque*, 22 Iowa, 144; *Bridge Co. v. Dubuque*, 32 Iowa, 427; *Deiman v. Ft. Madison*, 30 Iowa, 542; *Taylor v. City*

of Waverly, 94 Iowa, 661, 63 N. W. 347. It is said these decisions relate to lands within the city limits used for agricultural purposes, and have no application to a bridge across the Missouri river within the city limits. In express terms, such a bridge is not included in these decisions, but the decisions rest on the broad constitutional guaranty against taking private property for public use without adequate compensation—a principle as applicable to a bridge like the one involved in this case as to lands. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823.

In the brief of counsel for the city it is frankly stated that the last decision of the court, which follows and affirms its previous decisions, is not, and "does not purport to be, based on any statute."

The long and unbroken line of decisions which we have cited must be accepted as conclusively settling the law of the state on this subject, and are binding on this court. *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174.

Prima facie, all property within the corporate limits of a city is subject to municipal taxation, but it is a settled principle of law in that state that the corporate limits of a city may exceed its taxable limits, and that real property to which the public ways of the city do not extend, and which is beyond the reach of police protection, and receives none, and beyond the reach of fire protection, and receives none, and beyond the reach of the city lights, and receives no benefit from them, and that is, in a word, denied the enjoyment of any of the benefits and protection which commonly flow from a municipal government, cannot lawfully be taxed by that municipality for its municipal purposes. This principle, undoubtedly, does not meet with universal assent. Judge Cooley (*Cooley on Taxation* [2d Ed.] 157, 159) refers to and criticises unfavorably the Iowa and Kentucky cases on this subject, but the principle is recognized in guarded language by the Supreme Court of the United States in the case of *Henderson Bridge Co. v. Henderson City*, supra, where exemption from municipal taxation for a bridge across the Ohio river was sought on this ground under the fourteenth amendment to the Constitution of the United States. The Supreme Court, affirming the decision of the court of appeals of Kentucky in the same case, held the bridge was liable to municipal taxation because it was "within the statutory boundary of the city of Henderson, and within reach of the police protection afforded by that city for the benefit and safety of all persons and property within its limits."

Accepting the rule prescribed by the Supreme Court of the United States in the case cited, which is, in substance, that adopted by the Supreme Court of Iowa—that, in order to bring municipal taxation within the scope of the constitutional provision that private property shall not be taken for public use without just compensation, "the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax"—we proceed to inquire whether, upon the agreed statement of facts, the municipal tax imposed upon this bridge falls within this rule.

From the agreed statement of facts and the annexed plat, it is ap-

parent that the city of Council Bluffs has the corporate limits of a great city, with the population and municipal improvements and agencies of a comparatively small one. Its boundaries seem to have been established in anticipation of a future growth in population which has not yet come about. The result is that there is a large scope of territory within its corporate limits, devoted to agricultural pursuits or lying vacant, which differs in no respect from ordinary farm and pasture lands in the country. Large bodies of these lands, which, under the decisions of the Supreme Court of the state, are exempted from municipal taxation, and which are not taxed for municipal purposes, lie between the railroad bridge and the populated district of the city, and it is very clear that land lying where this bridge is situated would not be subject to municipal taxation.

The bridge is used exclusively for railroad purposes. No wagon or foot bridge is connected with it, and no street or streets lead to or from the city to it. It is not within reach of the police protection of the city, and is patrolled and guarded by the servants of the railroad company. It is not within reach of any of the means provided by the city for extinguishing fires, and is far beyond the limits of the lighted portion of the city. In a word, it does not receive or enjoy any benefit or protection whatever from these or other like municipal agencies and appliances provided by the city for the benefit and safety of persons and property in the populated portion of the city. The case would not be different in these respects if the bridge was situated miles outside of the city limits. Upon this state of facts, and under the decisions of the Supreme Court of the state, the bridge is not liable for the municipal taxes assessed in favor of the city.

The present decision applies to existing conditions, which may be so changed in the future that the bridge will become liable to taxation for municipal purposes.

The judgment of the Circuit Court is affirmed.

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**DELAWARE INS. CO. OF PHILADELPHIA v. GREER et al.**

(Circuit Court of Appeals, Eighth Circuit. February 23, 1903.)

No. 1,774.

**1. INSURANCE—CONTRACTS—CONSTRUCTION.**

Policies and contracts of insurance must be construed, like other contracts, according to the ordinary, popular sense of the terms they contain. The meaning of their stipulations, in their common, popular sense, is not to be discarded for some hidden meaning, that nothing but the exigency of a hard case and the ingenuity of an acute mind would discover.

**2. SAME—MORTGAGE CLAUSE—CONSTRUCTION.**

The effect of the mortgage clause, "loss, if any, payable to ———, mortgagee, as his interest may appear," or of words of similar import, often attached to policies of fire insurance, is to make the mortgagee the simple appointee of the mortgagor, to receive the proceeds of the amount of his interest, and to place his indemnity at the risk of every act and omission of the mortgagor that would avoid, terminate, or affect the insurance of the latter's interest under the terms of the policy.

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¶ 1. See Insurance, vol. 28, Cent. Dig. § 292.

**8. SAME—FORECLOSURE CLAUSE—MORTGAGE CLAUSE—CONSTRUCTION.**

A policy of insurance to a mortgagor, to which was attached a mortgage clause in the above form, contained these provisions: "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void \* \* \* if with the knowledge of the insured foreclosure proceedings be commenced or notice be given of sale of any property covered by this policy by virtue of any mortgage or trust deed." and "if with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto." *Held:*

(1) The mortgage clause expressed, more clearly than any other stipulation could have done, the provision and condition that the insurance of the mortgagees was subject to the risk of every act or neglect of the mortgagor which would avoid or terminate the latter's insurance under the original policy, because that had been the adjudicated construction of this mortgage clause for more than 40 years when it was attached to the policy.

(2) The condition of an avoidance of the policy for the commencement of foreclosure proceedings was not limited to foreclosure proceedings of which the insured had notice at the time or before they were commenced, but it covered all such proceedings, the commencement of which he acquired knowledge of at any time before the loss occurred.

(Syllabus by the Court.)

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

S. B. Amidon (J. F. Conly, on the brief), for plaintiff in error.

W. W. Padgett and S. H. Barr, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On September 15, 1899, the Delaware Insurance Company issued its policy of fire insurance to John A. Henderson, the owner of a half interest in a building, and of the land on which it was situated, in the sum of \$5,000. Henderson had made two mortgages upon the property—one to James H. Truskett, for \$1,000, and one to Greer, Mills & Co., a copartnership, and the defendants in error in this case, for \$5,000. The insurance policy contained this provision:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void \* \* \* if with the knowledge of the insured foreclosure proceedings be commenced or notice be given of sale of any property covered by this policy by virtue of any mortgage or trust deed."

On February 28, 1900, Truskett commenced proceedings to foreclose his mortgage. On March 5, 1900, the summons in that suit was served upon the mortgagor, Henderson. Greer, Mills & Co. were defendants in that action, and on May 7, 1900, they filed an answer and cross-petition, in which they prayed for the foreclosure of their mortgage. On June 5, 1900, a decree of foreclosure of both the mortgages was made, and Greer, Mills & Co., filed a præcipe for an order of sale under that decree. On June 17, 1900, the building burned.

Before the proceedings in foreclosure were commenced, the insurance company, at the request of the mortgagees, had attached to its policy the following clauses:

"Loss, if any, payable to James H. Truskett, mortgagee, as his interest may appear." "Loss, if any, under this policy, payable to Greer Mills Live Stock Commission Company, as their interest may appear, subject to a prior mortgage held by James H. Truskett."

The insurance company had no notice or knowledge of the foreclosure proceedings until after the fire. Greer, Mills & Co. brought an action on the policy to recover for the loss which they sustained by the fire.

The statement of these facts creates a strong impression that the insurance company was not liable under the contract upon which this action was based. Their agreement reads that, if foreclosure proceedings be commenced with the knowledge of the insured, the policy shall be void, unless otherwise provided by agreement indorsed thereon or added thereto. There was no other provision by any such agreement. Foreclosure proceedings were commenced. The insured knew that they had been commenced weeks before the fire. Is it not the logical conclusion that the policy was void when the fire occurred? The court below answered this question in the negative, and counsel for the defendants in error seek to sustain its conclusion upon three grounds:

Their first proposition is that the mortgagees, Greer, Mills & Co., were excepted from the operation of the foreclosure provision of the policy. They argue that a mortgage is an incident of a debt; that the right to foreclose is an attribute of a mortgage; that, when the insurance company agreed that the loss should be paid to the mortgagees as their interest might appear, they thereby consented to the exercise by them of their right to foreclose; and from these premises they draw the conclusion that the mortgagees were thereby excepted from the provision of the policy that it should be void if foreclosure proceedings were commenced with the knowledge of the insured. The soundness of the premises upon which counsel base their contention is conceded, but the alleged conclusion does not follow. On the other hand, the plain reading of the clauses of the policy is, and the evident intention of the parties to the contract was, in the first place, to concede the right of the mortgagees to foreclose their mortgage, and, in view of this situation, to clearly provide what the rights and relations of the parties should be if the mortgagees exercised their right to commence their proceedings to foreclose. The parties to the policy, in other words, recognized the right of the mortgagees to enforce the terms of their mortgage and provided, in plain terms, that if they commenced proceedings for that purpose, and these proceedings came to the knowledge of the insured, the policy should be void. That this is the true construction of the contract is evident both from the customary meaning of its terms, and from the fact that at the time it was made there were two mortgage clauses in common use—the one here selected, which subjects the insurance of the mortgagee to the risk of all the acts and omissions of the mortgagor, and the union mortgage clause, which,

in express terms, excepts the insurance of the mortgagees from many or all of the deeds and delinquencies of the mortgagor. *Syndicate Insurance Co. v. Bohn*, 65 Fed. 173, 12 C. C. A. 539, 27 L. R. A. 614. The parties to this policy selected and appended to it the former clause, and by its legal effect their rights must be measured.

The cases of *Ins. Co. v. Boardman*, 58 Kan. 339, 49 Pac. 92, 62 Am. St. Rep. 621, and *Dodge v. Hamburg-Bremen Fire Ins. Co.*, 4 Kan. App. 415, 46 Pac. 25, arose upon policies containing the union mortgage clause, and are neither controlling nor persuasive upon the question at issue in the case before us.

The second contention of counsel for the defendants in error is that the mortgagees were excepted from the effects of the deeds and delinquencies of the insured specified in the policy, because that instrument contained the provision that "if with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto," and there was no stipulation attached or appended to the mortgage clause which in so many words declared that the insurance in favor of the mortgagees was subject to the same terms and conditions as that of the mortgagor. But the clause which these parties selected and attached to the policy had a known, definite, and adjudicated meaning; it had a settled legal effect when they chose and appended it to the contract—the meaning and effect that the indemnity thereby secured to the mortgagees was subject to the risk of every act and neglect of the mortgagor which would avoid the original policy in his hands. No form of words could have been devised or adopted, relating to the insurance of these mortgagees, which would so clearly and conclusively have expressed the intention of the parties to this contract to subject the indemnity secured by the mortgagees to the risk of the acts and omissions of the mortgagor, as the clause which they selected and attached to the policy, because a long line of adjudications, covering more than 40 years, had established the fact that this was its true meaning and effect. *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, 393; *Bates v. Equitable Ins. Co.*, 10 Wall. 33, 36, 19 L. Ed. 882; *Smith v. Union Ins. Co.*, 120 Mass. 90, 91; *Baldwin v. Ins. Co.*, 60 N. H. 164, 166; *Martin v. Ins. Co.*, 38 N. J. Law, 140, 142, 20 Am. Rep. 372; *State Ins. Co. v. Maackens*, Id. 564; *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28; *Savings Inst. v. Central Ins. Co.*, 119 Mass. 240; *Brunswick Savings Inst. v. Com. Union Ins. Co.*, 68 Me. 313, 28 Am. Rep. 56; *Bank v. Amazon Ins. Co.*, 125 Mass. 431. The true construction of the clause "Loss, if any, payable to \_\_\_\_\_, mortgagee, as his interest may appear," or of words of similar import, when attached to policies of fire insurance, is, and has been for more than 40 years, that the mortgagee is thereby made the simple appointee of the mortgagor, and that his indemnity is at the risk of the acts and omissions of the latter which would avoid, terminate, or affect the mortgagor's insurance under the original policy.

The opinions in *Oakland Home Fire Ins. Co. v. Bank of Commerce* (Neb.) 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663, *Boyd v. Thuringia Ins. Co.* (Wash.) 65 Pac. 785, 55 L. R. A. 165, *Ins. Co. v. Boardman*, 58 Kan. 339, 49 Pac. 92, 62 Am. St. Rep. 621, and *Delaware Ins. Co. v. Truskett* (Kan.) 70 Pac. 1131, which have been called to our attention in support of the opposite view, have been thoughtfully read and considered. The case of *Ins. Co. v. Boardman* is not in point, because the court was there considering the union mortgage clause, which expressly provides that the insurance of the mortgagee shall not be invalidated by the acts or neglects of the mortgagor, of which he has no knowledge. The opinions in the other three cases fairly sustain the contention of counsel for the defendants in error, but they are opposed to the established rule and the great weight of authority, and they do not commend themselves to our judgment, because they repudiate the long-settled construction and established meaning of the mortgage clause attached to the policy in hand, and ignore the invariable rule that, where the intent of the parties to an agreement is clearly expressed by the use of unambiguous terms or of stipulations that had a known and adjudicated meaning when they used them, they must be held to have intended that which they expressed, and no room is left for construction. The clause which the parties to this action selected and attached to the policy clearly expressed the condition that the insurance of the interest of the mortgagees was subject to the conditions which governed the insurance of the mortgagor, and they must abide by their agreement.

Finally, counsel seriously argue that the true meaning of the provision in the policy that it should become void "if with the knowledge of the insured foreclosure proceedings be commenced" is that the policy should become void only when the insured has knowledge of the foreclosure proceedings before or at the time when they are commenced. Their conclusion from this construction is that since the mortgagor in this case never had any knowledge of the foreclosure proceedings until the summons was served upon him, a few days after the suit in foreclosure was commenced, the prescribed condition precedent to the invalidity of the policy never existed, and the insurance company remained liable to pay the subsequent loss. In support of this position counsel have not failed to find the opinions of two courts: *Bellevue Roller Mill Co. v. London & L. Fire Ins. Co.* (Idaho) 39 Pac. 196, and *North British & Mercantile Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091. It is by no means impossible that, if the exigency of the case had required, the diligence of counsel would have been rewarded with the discovery of a ruling somewhere that the stipulation here under consideration really required that the mortgagor should not only know of the foreclosure proceedings before they were commenced, but that he should also institute them against himself. It is plain that the effect of such a construction is merely to cancel this provision of the policy, for defendants in foreclosure proceedings are seldom informed of the time and place of their commencement at the time or before they are begun. Contracts of insurance, however, are not made by or for casu-



ists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover. "Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken in their plain, ordinary, and popular sense." *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 463, 14 Sup. Ct. 379, 38 L. Ed. 231; *Fred J. Kiesel & Co. v. Sun Ins. Office of London*, 88 Fed. 243, 246, 31 C. C. A. 515, 518; *McGlother v. Provident Mut. Acc. Co.*, 89 Fed. 685, 689, 32 C. C. A. 318, 322. The terms of the provision of the policy under consideration are clear and unambiguous. The meaning of these terms, when taken in their ordinary and popular sense, is that the policy becomes void if the foreclosure proceedings are instituted, and this fact becomes known to the insured, at any time before the fire occurs. The result is that, unless otherwise provided by agreement indorsed on or added to the policy, the insurance of a mortgagee under the customary clause, which reads, in substance, "Loss, if any, payable to ——— mortgagee as his interest may appear," ceases if foreclosure proceedings are instituted against the mortgagor, and the latter knows that they have been commenced, at any time before the fire which causes the loss occurs. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 417; *Hartford Fire Ins. Co. v. Clayton* (Tex. Civ. App.) 43 S. W. 910; *Steam Laundry Co. v. Traders' Ins. Co.* (Mo.) 52 S. W. 238, 239, 74 Am. St. Rep. 521; *Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992; *McKinney v. Western Assur. Co.* (Ky.) 30 S. W. 1004. The case under consideration falls fairly within this rule. The judgment below is accordingly reversed, and, as this case is here upon an agreed statement of facts, the case is remanded to the Circuit Court, with directions to enter a judgment upon the merits in favor of the insurance company, with costs.

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SMITH v. HOPKINS.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 865.

**1. APPEAL—ASSIGNMENTS OF ERROR.**

Under Circuit Court of Appeals Rule 11 (31 C. C. A. cxlvi, 90 Fed. cxlvi), providing that assignments of error shall set out separately and particularly each error asserted and intended to be urged, assignments that the judgment is contrary to law, contrary to the evidence, and contrary to the preponderance of the evidence, cannot be reviewed.

**2. SAME—DIRECTION OF VERDICT—EXCEPTION—NECESSITY.**

An assignment that the court erred in directing the jury to find the issues for the defendant cannot be reviewed, in the absence of an exception to such direction at the trial.

**8. SAME—NEW TRIAL—REVIEW.**

The denial of a motion for a new trial cannot be reviewed by the Circuit Court of Appeals.

**4. SAME—RENDITION OF JUDGMENT—REVIEW.**

An assignment that the court erred in rendering judgment is too general to present any question for review.

**5. SAME—REVIEW OF EVIDENCE.**

An assignment that the court erred in excluding certain testimony, which included four printed pages of questions propounded to the witness on the trial, was objectionable for failure to set out each error asserted separately and particularly, and was, therefore, insufficient to present any question for review.

**6. SAME—CONDUCT OF COURT.**

An assignment that the court gave improper verbal instructions, followed by two printed pages of remarks by the court during the progress of the trial, some of which declared reasons for certain rulings and others regulated the conduct of the trial, to many of which remarks no exceptions were taken, could not be reviewed.

**7. SAME—HARMLESS ERROR.**

Where a case was withdrawn from the jury at the close of plaintiff's testimony, remarks by the court during the progress of the trial were without prejudice.

**8. NEGLIGENCE—INJURY TO LICENSEE.**

A railroad company leased land on the north side of a river, which it improved for a pleasure ground, and thereafter leased other land on the south side for the same purpose, but this land was not improved, and was only slightly used. The only means of crossing the river was by defendant's trestle, and a stairway was constructed on the south side of the river as an approach to the grounds. Plaintiff's intestate, a boy 18 years of age, in company with others, crossed the trestle for a walk during a visit to the grounds, and went on defendant's right of way to a pile of railroad ties beyond the stairway. Plaintiff's intestate went on the pile, which fell, and he was killed. *Held*, that intestate was a mere licensee, and that the railroad company was not bound as to him to exercise care in piling the ties.

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

This is a suit to recover damages for the death of the intestate of the plaintiff in error, and a review is sought of the judgment below, entered upon a verdict directed by the court.

In the year 1890 the railway company, prior to the receivership, leased several acres of land situated upon the north side of the Mackinaw river, in Tazewell county, Ill., cleared the land, and fitted the same for a pleasure resort, building dining and dancing halls, cottages, and stands, and sought to induce the public to frequent the place for the purpose of pleasure, including fishing and boating. These pleasure grounds lay partly on the east and partly on the west side of the railway, and north of and extending to the Mackinaw river, and were fenced and in charge of a custodian. The station was on a trestlework at an elevation of 15 feet above the ground, the trestle continuing a distance of 300 feet to the north and a distance of from 780 to 900 feet to the south, within that distance spanning the Mackinaw river. At the north end of the trestlework, and to the north of the station, were stairs descending to the pleasure ground below, and at the center of the platform of the station was an incline descending to the grounds upon the east side of the railway. In October, 1895, the receiver executed a new lease of these pleasure grounds, and also of a piece of ground on the south of the river adjacent to the west line of the right of way, and upon the north bordering upon the river. This lease was for the period of 1 year, with the privilege of a further period of 14 years if desired by the receiver or his successors or by the purchaser of the railway. It was agreed that the tract on the south side of the river might be cleared, but should not be fenced, and might be used in connection with and as part of the pleasure grounds then occupied by the company on the north side of the river. It was, however, shown in evidence that the land upon the south bank of the

river had never been cleared, and was not in fact prepared for or used as pleasure grounds at the time of the injury complained of, but was covered with an undergrowth and sand and drift. At the east of the right of way, and on the south bank of the river, was a pasture lot owned by some other party, and fenced, which was resorted to occasionally by pleasure seekers at the grounds for the purpose of playing ball. The south shore of the river was sometimes resorted to for fishing. The ties of this trestlework were eight inches wide and four inches apart, and people frequently crossed the river upon the trestlework, there being no other bridge spanning the river. At the south end, and on the west side of the trestlework, were steps leading to the land below, supposed to have been placed there at the time of the construction of the bridge. At a distance of 15 feet south of these steps the company had placed upon its right of way a pile of railway ties without proper support, and it was in respect of this pile that negligence is charged. On the 23th of May, 1900, the plaintiff's intestate, a lad of 18 years of age, a scholar in a high school, being one of a picnic party on that day visiting the grounds, with two or three of his companions crossed upon the railway bridge from the north, and upon the right of way of the company south of the trestlework, for a walk, and without any special purpose, and went upon this pile of railway ties. The pile fell, and young Smith was killed.

Franklin L. Velde, for plaintiff in error.

W. S. Horton, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The first, second, and third assignments of error are to the effect that the judgment is contrary to law; that it is contrary to the evidence; that it is contrary to the preponderance of evidence. These assignments are unavailing under the rule (rule 11; 31 C. C. A. cxlvi, 90 Fed. cxlvi) that "an assignment of errors shall set out separately and particularly each error asserted and intended to be urged."

The first assignment does not specify wherein the judgment was contrary to law, nor do the second and third assignments specify—assuming that we may review the evidence—wherein the judgment was contrary to the evidence, or to the preponderance of the evidence.

The sixth assignment, that the court erred in directing the jury to find the issues for the defendant, cannot be considered, because there was no exception to the ruling of the court in making such direction.

The seventh assignment, that the court erred in refusing to grant a new trial, is a matter with which this court has nothing to do. *Van Stone v. Stillwell & Bierce Manufacturing Co.*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961.

The eighth assignment, that the court erred in rendering judgment, is alike unavailing, being too general for review.

The fourth assignment is to the effect that the court improperly excluded certain testimony, which includes nearly four printed pages of questions propounded to the witnesses upon the trial. This assignment, within our ruling in *Atchison, Topeka & Santa Fé R. Co. v. Mulligan*, 14 C. C. A. 547, 67 Fed. 569, is not in conformity with the rule requiring that an assignment shall set out separately and particularly each error asserted. The writer dissented from the ruling in that particular, but it is the rule of this court, to be adhered to

so long as the ruling stands. It is further to be said that the assignment does not comply with rule 11, which requires that, when the evidence rejected is oral testimony, a written statement of the substance of what the witness was expected to testify shall be filed and brought to the attention of the court before the retirement of the jury. *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *United States ex rel. Coquard v. Indian Graves Drainage District*, 29 C. C. A. 578, 85 Fed. 928. We do not hesitate to enforce the rule in this particular case, because many of the questions ruled out were subsequently allowed and the testimony admitted.

The fifth assignment is to the effect that the court gave improper verbal instructions to the jury, and that is followed by two printed pages of remarks by the court during the progress of the trial and at different stages of it; some of them declaring reasons for certain rulings, and others regulating the conduct of the trial. The assignment embraces many remarks to which no exceptions were taken at the trial, and as to which no complaint can now be made. The assignment is, moreover, ineffectual because whatever remarks the court may have made to the jury are of no moment, since the cause was withdrawn from the jury and a verdict directed without objection.

This covers substantially the case presented, upon which we are constrained to affirm the judgment. We are, however, unwilling so to do without saying that in our opinion the result reached and the direction for a verdict were entirely right. This pile of railway ties was upon the right of way of the railroad company. It was upon no part of the pleasure grounds, if the unimproved grounds south of the river may be so designated. The company owed no duty to the plaintiff's intestate with respect to the manner in which those ties should be piled. He had no business upon them. Assuming that there was implied invitation to the public to go upon the unimproved land south of the river, the receiver owed no duty to the public to make a pleasure ground of the right of way. The ties were not within, but beyond, the approach to the land, and, in extending the walk beyond the approach and upon the right of way, the plaintiff's intestate was at most a mere licensee, and bound to take things as he found them. The receiver owed him no duty except to refrain from aggressive injury. The boy was 18 years of age, and of understanding mind. The cases to which we are referred with respect to dangerous appliances in public places likely to attract children of tender age, of which the turntable case, *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745, is an example, can have no application.

The judgment is affirmed.

CENTRAL ELECTRIC CO. V. SPRAGUE ELECTRIC CO.  
(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 835.

**1. CONTRACTS—DEBTS OF THIRD PERSON—PAYMENT—PRIVITY.**

An indirect interest in the performance of an undertaking by defendant to pay the debts of a third person does not constitute sufficient privity to entitle a creditor to maintain an action at law thereon.

**2. FEDERAL COURTS—FORM OF ACTION—PAYMENT OF DEBT OF THIRD PERSON—WHAT LAW GOVERNS.**

Whether the remedy to enforce a contract for the payment of the obligations of a third person in the federal courts is by suit in equity or by action at law is dependent on the law of the forum.

**3. SAME.**

Where a corporation, on purchasing the assets of another corporation, contracted to pay the latter's debts, a creditor of the vendor corporation was entitled to sue the vendee at law to recover the debt.

**4. SAME—CORPORATIONS—EVIDENCE.**

Where, in an action by a creditor of a corporation which had transferred its assets to defendant, plaintiff claimed that defendant had contracted to pay the debts of the vendor, but the minutes of the resolution by defendant evidencing such agreement were not produced, and the only witness thereto testified that the minutes showed a transfer of the property, but that he was not certain as to the liabilities and obligations, except that defendant paid certain liabilities for goods purchased, the evidence was insufficient to establish the agreement.

**5. SAME—BEST EVIDENCE—FAILURE TO PRODUCE.**

Where plaintiff claimed that defendant corporation had agreed to pay the obligations of another corporation, whose assets defendant had acquired, the fact that defendant's minutes showing such agreement were in another state did not relieve plaintiff from the duty to produce such minutes, or a certified copy thereof, as the best evidence of such agreement.

**6. SAME—STATEMENTS OF OFFICERS.**

Statements of officers of a corporation that the company had agreed to pay the obligations of another corporation, whose assets it had acquired, were incompetent to show such agreement.

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

The defendant in error (plaintiff below) brought its action at law in assumpsit to recover of the plaintiff in error (defendant below) for certain goods sold and delivered. To this there was a plea of the general issue, with notice of set-off to the effect that, prior to the organization of the defendant in error, the plaintiff in error was accustomed to purchase goods from the Interior Conduit & Insulation Company, which company had agreed to take back and credit upon its account, at the cost price, all goods which the plaintiff in error might purchase, and which it was unable to sell or which should become unsalable, and that from the years 1894 to 1898 it so purchased of the conduit company goods which had proved unsalable, and by reason thereof it had a claim against the conduit company which it sought to set off against the claim of the defendant in error; that in February, 1898, the defendant in error was organized as a corporation, and took over all the property of the conduit company acquired in its business, and its good will, and assumed all its contracts and liabilities. At the trial, evidence was introduced by the plaintiff in error to sustain its claim with respect to the set-off against the conduit company, and it undertook, by consent, under an insufficient notice to produce, to show the contents of a resolution of the defendant in error with respect to an alleged assumption by it of the liabilities of the conduit company. A former secretary and treasurer

testified that the defendant in error acquired and continued the business of the conduit company, and that a certain resolution was adopted with respect to the assumption of certain liabilities of the conduit company; that it provided for the assumption of the executory contracts of the conduit company, and the payment of such debts of that company as were exhibited upon its books, and not otherwise; but he did not remember, and could not state, whether that resolution provided for the assumption of all of the indebtedness of the conduit company. It was also shown by the evidence of McKinlock, the president of the plaintiff in error, that in February, 1898, after the organization of the defendant in error, Mr. Johnson, the former president of the conduit company, and then the vice president of the defendant in error, stated that the property and assets of the conduit company had been taken over by the Sprague Electric Company, and that the latter company was to pay the obligations of the conduit company. There was evidence tending to establish the claim of set-off of the plaintiff in error against the conduit company.

At the conclusion of the testimony the court excluded all the evidence offered on the defendant's claim to a set-off, and submitted the case to the jury upon the claim of the defendant in error, who returned a verdict in its favor.

John M. Hamline, for plaintiff in error.

Wm. Brace, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

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

It is an undoubted general principle that, to sustain an action at law upon a contract, privity of contract is necessary (*National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75), and an indirect interest in the performance of an undertaking does not constitute such privity (*Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667). There are, however, exceptions to the rule—as where the plaintiff is the sole beneficiary of the promise, or where assets have been acquired by the promisor which in equity belong to another, or where the promise is to pay the plaintiff. There are other exceptions noted in the books.

It is settled in the federal courts that whether the remedy in such cases is in equity or at law is dependent upon the law of the forum. *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; *Union Mutual Life Insurance Company v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531. It is needful, therefore, to inquire whether by the law of the state of Illinois a remedy at law is afforded.

The nature of the claim here presented should be precisely apprehended. The plaintiff in error asserts itself to be a creditor of a corporation which transferred all its assets to the defendant in error; the latter, as is claimed, assuming all its contracts and obligations.

It has been ruled by the Supreme Court of Illinois that if one, upon consideration, promises another to pay that other's debt to a third person, an action at law may be maintained by the third person upon the promise (*Brown v. Strait*, 19 Ill. 88; *Beasley v. Webster*, 64 Ill. 465; *Steele, Administrator, v. Clark, Administrator*, 77 Ill. 474; *Chicago & A. R. R. Co. v. Coal Co.*, 79 Ill. 126), and that a mortgagee may sue at law the grantee of the mortgaged premises, who has

assumed the debt, the latter becoming primarily liable (Thompson v. Dearborn, 107 Ill. 92; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975; Harts v. Emery, Executor, 184 Ill. 560, 56 N. E. 865). The ruling in these cases proceeds upon the ground that the promise is to pay a specified debt, and to a determinate person; but that court would seem to still hold to the doctrine that a stranger to the contract, who is to derive only an incidental benefit therefrom, cannot maintain an action thereon at law. Crandall v. Payne, 154 Ill. 627, 39 N. E. 601. It may not, however, be denied that the cases of Shoher & Carqueville Lithographing Co. v. Kerting, 107 Ill. 344, and Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762, go far to sustain the proposition that in the state of Illinois, where one has agreed, for a consideration, to pay all the debts of another, a creditor of the latter may maintain an action at law upon the promise against the former, notwithstanding that the specific debt is not stated in the promise. In the former case a corporation purchasing the business of the firm as part of the consideration of the transfer, assumed its debts and liabilities. It was held that a creditor of the firm could have his action at law for his debt against the corporation. In the latter case a surviving partner purchased the firm property, agreeing to pay the debts of the firm; and he was held liable at law to the executor of the deceased partner for the indebtedness of the firm to the deceased partner appearing upon the firm's books, notwithstanding he had paid to the executor the amount agreed upon for the transfer of the interest of the deceased. The doctrine of these cases would seem to be somewhat shaken by the later holding in Crandall v. Payne, and the line of demarcation between the rule and the exception to be not well defined. In this state of the law, we assume, for the purposes of this case, that in the state of Illinois an action at law may be maintained by a creditor upon the promise of a third person to the debtor, grounded upon consideration, to pay all the debts of the debtor, and that therefore this action at law may be maintained if there has been shown such a promise.

The assumption of an obligation by a corporation must be the act of its board of directors, and its action is manifested by resolution spread upon its records. The minutes constituted, necessarily, the best evidence of such promise. Secondary evidence may be resorted to upon failure after due notice to produce the record, but that secondary evidence must speak to the language of the promise. The question here is, therefore, whether any evidence was introduced, competent to go to the jury, of the character of the promise. It was incumbent upon the plaintiff in error to show the nature of that resolution and promise. It attempted so to do by calling one who may be termed an unwilling witness, but that is of no moment; the character of the resolution and promise being not disclosed. The witness stated that the proceedings covering the acquirement of the property by the defendant in error were embodied in certain minutes contained in its minute book; that these minutes showed that the executory and official contracts of the conduit company were accepted, but the witness was not certain as to the liabilities and obligations;

that the defendant in error paid certain of the liabilities of the conduit company for goods purchased, and which appeared upon the books of the conduit company, but not otherwise, but that he could not remember that the minutes provided that the defendant in error should pay all the liabilities of the conduit company; that he was not certain about it. This is substantially all the evidence touching the minutes which are said to contain the supposed promise. It is suggested that the witness sought to avoid disclosure of the nature of the resolution or promise contained in the minutes; but, if that was so, it could not avail the plaintiff in error. It was bound to show the nature of the transaction. It failed to show that the promise comprehended the payment of debts (especially of disputed claims), and if the witness prevaricated, and, knowing the nature of the promise, failed to disclose its character, the plaintiff in error was not thereby relieved of its duty to prove the nature of the promise; and, because the witness prevaricated (if he did), it was not for the jury to guess its character. The way was open by proper proceeding to cause the production of the original minutes, or to obtain a certified copy of them; and the plaintiff in error was not relieved from its duty in that regard by the fact that, to produce such testimony, it was necessary to go to the home of the defendant in error, in another state.

The evidence of the witness McKinlock, the president of the defendant in error, to the effect that the former president of the conduit company, and then the vice president of the defendant in error, declared to him that the latter company was to pay the obligations of the conduit company, cannot be considered. The corporation could only be bound by its corporate act, and not by the declaration of its officer. The statement was not with respect to the contents of the minutes. It was not in the nature of secondary evidence, and there was no proof of his authority to bind the corporation by his declaration.

We are of opinion, therefore, that there was no proper evidence to submit to the jury from which it could justly say that there was here a promise to pay all the obligations of the conduit company.

The judgment will be affirmed.

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WALKER et al. v. HOUGHTELING et al.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1902.)

No. 858.

**1. FRAUDULENT CONVEYANCES—TRANSFER OF PROPERTY TO RELATIVE.**

The fact that a creditor preferred by an insolvent debtor is a relative is not in itself a badge of fraud, but is a circumstance to be considered and given its due weight in determining the good faith of the transaction, and whether a transfer of property by the debtor was in fact made in payment of a just debt.

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¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 329, 330.



**2. EXECUTION—SUIT BY CLAIMANT OF PROPERTY—EVIDENCE CONSIDERED.**

Evidence examined, and *held* insufficient to support the claim that a bill of sale of property executed by a mother in favor of her children, at a time when an action was pending against her, was made in good faith in payment of an actual indebtedness owing from her to the children, or that it was delivered prior to the levy of an execution, issued upon the judgment recovered against her in the action, on the property.

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

See 100 Fed. 253, 104 Fed. 513, 107 Fed. 619.

In 1899 the appellee Marcia E. Houghteling commenced an action at law in the court below against James H. Walker and Emeline Tate Walker, his wife, substantially to charge the latter with the rental of a house occupied by them and leased to the husband. Liability was predicated upon the statute of Illinois, which charges the property of both husband and wife, or of either of them, for the expenses of the family and the education of the children. The trial of the suit began on the 3d day of January, 1900, and judgment was rendered January 25, 1900, in favor of the plaintiff in that suit against both of the defendants. The judgment was appealed to this court, and affirmed. *Walker v. Houghteling*, 46 C. C. A. 512, 107 Fed. 619. On January 26th, execution was issued upon that judgment, and delivered for execution to the appellee John C. Ames, marshal of the United States for the Northern District of Illinois, and on the 27th of January he levied the same upon the personal property in the residence of the defendants to the writ. Thereupon, on January 29, 1900, the appellants here, who are the children of Mr. and Mrs. Walker, the judgment debtors in the writ, filed their bill in the court below against the appellees, claiming to be the owners of and in possession of the property so levied upon, and praying that the appellees, the defendants to the bill, might be enjoined from interference with the property and directed to surrender the same to them. On January 31, 1900, the court ordered that the marshal deliver the goods to the complainants upon filing with the clerk their bond, with surety, conditioned that in default of prosecuting their bill to effect they should pay the amount of the judgment recovered in the suit referred to, which bond was approved and filed. The answer substantially pleaded title in the judgment debtors. The matter was referred to a master to take testimony and report conclusions, and on February 8, 1901, he returned the testimony taken by him between April, 1900, and January, 1901, with his conclusions thereon.

In 1893, Mr. Walker, Sr., was a member of the corporation of James H. Walker Company, doing a large wholesale and retail business in the city of Chicago. The corporation failed during the panic of that year. The son had been in the service of the company, and was then 24 years of age. The age of the daughter does not appear definitely, but she was a minor. Both of them resided with their parents, and still so reside, paying nothing for their maintenance. The father, by reason of financial disaster, became, in part at least, unable to support the family, and it is claimed that the daughter, at some time between 1893 and 1896, advanced to the mother for the support of the household the sum of \$500, upon the understanding or agreement that she should be refunded the amount; that the son, during the same period, advanced some \$30,000 to his mother for the same purpose and upon a like understanding. The son entered into the dry goods commission business with a capital of eight or nine hundred dollars, and also became a broker trading upon the board of trade, where he claims to have made much money. On January 9th, during the trial of the suit at law, or while the cause was under consideration by the court, Mrs. Walker signed a bill of sale to her children, by which she undertook to sell to them "all my remaining household effects and books, also every article of furniture, pictures, and bric-a-brac that I possess. All equity in my mortgage against John L. Cochrane on North State street, and all my equity in the following life insurance policies: policy No. 132,683 in the Northwestern Mutual of Milwaukee; policy No. 159,526 in the Northwestern Mutual of Milwaukee;

policy No. 227,359 in the Equitable Assurance Association of New York." It is conceded that this bill of sale was signed by her in anticipation of a possible unfavorable result of the litigation, and to prevent the plaintiff in that suit from obtaining satisfaction of her claim out of the property; but it is also claimed by her that it was also executed to secure to her children the advances claimed to have been made by them to her. Whether and when this bill of sale was delivered—before or after the levy—was a question of contention before the master. The bill of sale was not recorded, but it was claimed that possession had been delivered—a symbolic delivery—by delivering to the son the key of the house. The master reported as follows:

"I find, first, that during the period referred to by the witness James H. Walker, Jr., there was advanced by him from time to time to his mother, Emeline Tate Walker, a large sum of money, the exact amount of which has not been definitely established, except as such advances are shown to have been made by his testimony.

"Second. That to secure the payment of said advances, Emeline Tate Walker, defendant in the judgment referred to, did on the 9th day of January, A. D. 1900, sign a bill of sale to the complainants of the property described therein, being the same property levied upon by the execution referred to, but

"I find and report that the testimony does not show that said bill of sale was actually delivered to the complainant before the levy of said execution; and

"I find that said bill of sale was not placed upon record, and that the defendants had no notice of its existence prior to or at the time of the levy referred to.

"I find further that upon the facts appearing from the testimony and the circumstances under which the alleged conveyance is shown to have been made, that it was not made in good faith, but that the purpose of said conveyance was to place the property beyond the reach of the judgment creditor, Marcla E. Houghteling, and given for the sole purpose of hindering and delaying creditors, and in fraud of them;

"And that the property mentioned and described in the amended bill was, at the time of the levy of said execution, the property of Emeline Tate Walker.

"I therefore find and report that the allegations of the complainants' bill and amended bill are not sustained by the proof, and I therefore recommend that the bill and amended bill be dismissed for want of equity."

The court below overruled the exceptions to the master's report, and dismissed the bill for want of equity, from which ruling this appeal is taken.

John M. Harlan, for appellants.

Frank Johnson, Jr., for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

In the absence of restrictive legislation, a debtor may prefer one creditor to the exclusion of another. Such act, in a sense, may hinder and delay the unpreferred creditor, but is not for that reason alone unlawful. "The test to be applied is whether the debtor, in exercising the privilege of making the preference, acts in good faith, with the intent to pay, or secure the payment of, a just indebtedness against him, and he cannot be deprived of the right on the ground that he knows or intends that the preference given to one creditor, to the extent such preference shall be available and effective, will operate to hinder and delay other creditors." *Nelson v. Leiter*, 190 Ill. 414, 422, 60 N. E. 851. We are therefore to consider whether

the bill of sale in question was in fact executed in good faith, with honest intent to secure an actual indebtedness. There also arises upon this record the further question whether the bill of sale was in fact delivered prior to the levy. These may be considered together. We start with the concession that a conveyance to a relative to secure an honest debt is lawful. As an isolated fact, it is not in itself a badge of fraud. The fact of the relationship, however, is a circumstance to be considered and to be given its due weight in any investigation of circumstances surrounding the transfer of property by an insolvent debtor, and a court of equity should carefully scrutinize such a transaction.

It is not essential to enter upon any elaborate review of the voluminous testimony in this record. We have given to it a careful scrutiny, and it is only needful to state some of the salient features of it which constrain our judgment. For some years Mr. Walker, Sr., was a successful merchant, maintaining his family, consisting of a wife, two sons, and a daughter, in a manner fitting to his position. Financial disaster overtook him in the panic of 1893, and temporarily, and for a period of about three years, disabled him, in part at least, in the support of his family. It is claimed that the appellant, Mr. Walker, Jr., then a young man of 24 years of age, who with a capital of eight or nine hundred dollars during the year 1893 started in business upon his own account, during that period of three years advanced to his mother from time to time, as a loan, some \$30,000 for the support of the household, and that the daughter, then a minor, also advanced the sum of \$500. This money of the son is claimed to have been made upon the board of trade, which is not impossible, and as the master has found that advances were made by him to a large and indefinite amount, in the absence of direct testimony to the contrary, we are not disposed to question the fact. It is, however, a circumstance somewhat singular that until now the son, claiming to make these large advances as loans to be repaid by his mother, should for a period of 10 years after his majority have lived in the family upon the bounty of his mother, without paying or crediting her for his support. It is also a circumstance somewhat remarkable, if it was understood and agreed that these advances should constitute an indebtedness by mother to son, that no account of the advances should have been kept by either; the mother being wholly unable to state any amount, and the son being able to state in part the amount, and that by loose bank checks in his possession. There was not only no legal or moral duty resting upon the father and mother to support the son, but there was moral if not legal duty resting upon the son under the circumstances to contribute, so far as his circumstances would permit, to the support of his parents. Under such circumstances it is incumbent upon the son, claiming an indebtedness from the mother in preference of another creditor, to show clearly that there was an express agreement that the advances should constitute an indebtedness to be paid—one which could be enforced by legal action. We are not satisfied from the evidence that there was such an understanding. These advances seem to have ended in the early part of the year 1896, when the

father again became able to support his family. The mother had some independent property, not sufficient to pay these advances. She was not earning money, nor, so far as the record discloses, in a position to pay the debt—if debt there was—otherwise than by subjecting the property she then had to that debt. And yet, from the year 1896 to the present, there was no accounting between the assumed debtor and creditor; no demand or suggestion of payment by the son; no request for security, and no suggestion of it, until after the commencement of the trial by Mrs. Houghteling against the mother, and then it came from the mother, not from the son, and for the avowed purpose of defeating Mrs. Houghteling's claim. On January 9, 1900, while the suit against the mother was either upon trial or had been submitted to the court for decision, Mrs. Walker, becoming fearful of an adverse decision, obtained a blank bill of sale, which she filled up, conveying all her property to her three children, one of them being a minor son who had not, so far as the record discloses, made any advance to the mother. Her thought was, she says, to give all her property to her children, but she subsequently erased the name of the minor son. The testimony concerning this bill of sale and its delivery is peculiar. That it was signed and acknowledged on the 9th day of January is made certain, not by the testimony of the mother or of the son, but by the testimony of the attorney, the notary, and the witness. The testimony of the mother and son are in direct conflict with each other and with the testimony of the parties which makes certain the date of the execution. Indeed, it may be said that the testimony of each—mother and son—is in direct conflict with itself. The testimony of each is replete with contradictions and evasions upon material points in the case, and we are compelled to regard it as quite unreliable. Thus, the mother declares she filled up this blank bill of sale at her house, and when only her husband was present; that he went out and procured the necessary revenue stamps, which she canceled at the house, and she then handed the paper to her husband, and had not seen it since until the hearing. When it was called to her attention that the bill of sale was witnessed and was acknowledged before a notary, she declares that her husband got the persons to come to the house for that purpose, whereas, in fact, it was signed by her and acknowledged at the office of her attorney. The son asserted that he was present at the office of the attorney when it was signed and executed, which was untrue in fact, as he afterwards acknowledged when it was clearly shown that he was not there. The son states that subsequently the document was delivered to him by his father in the library of the house, his mother and sister being present; that he immediately handed it back to the father to deposit it in the lock box in the safety deposit vault to which both the father and son had access. This account is not corroborated by any one; not by the mother, who was examined as a witness, and who testified that she had not seen the bill of sale from the time it was executed, and by her given to her husband, down to the time of the hearing; and neither the father nor the sister, who were alleged to be present, were called to testify. It is sufficient to say that the testimony of the mother and

son is so contradictory and evasive that we cannot safely rely upon it.

The master found that the testimony does not show that the bill of sale was actually delivered before the levy of the execution. We cannot say that he erred in this conclusion of fact. He had the advantage of observing the behavior of these witnesses when upon the stand. We can only judge them by the recorded testimony, and upon that we are unable to say that there was ever any actual delivery of the bill of sale. It certainly was in the possession of the father after the alleged delivery, and was by him shown to the marshal who then had the writ of execution. The avowed intention of the mother, who executed this bill of sale without solicitation and upon her own motion, was to defeat the claim of Mrs. Houghteling. We are satisfied that it was not made in good faith; that it was not designed to place this property in the possession of the son and daughter for the purpose that out of it they might secure the payment of an honest debt. We think it was a mere subterfuge, and that the property remained in the control and custody of the mother. This conclusion is fortified by the fact that when an order of the court had been obtained to return the property levied upon, the appellants to furnish bond with the American Surety Company as surety, it became necessary to secure the company for its engagement. For this purpose the sum of \$2,200 was borrowed of a bank to use as a cash indemnity with the surety company. The loan was made of the bank upon the security of the Cochrane mortgage mentioned in the bill of sale, and the son testified that the bank knew that the mortgage had been assigned to him, yet this loan of the bank was made upon the notes of the father and of the mother, and not of the son, and the money was paid in a check to their order, and indorsed to the son, who delivered it to the surety company. It also appeared by the record that in 1898, after his advances had ceased, loans were obtained upon the insurance policies and the Cochrane mortgage, aggregating \$12,275, which money was received by him, and which he first stated was his own money and in his own possession, but subsequently said was received by his father and mother. It is somewhat remarkable that a mother who was anxious to have her son paid his debt, and a son who relied upon the payment of the debt, should not have suggested the application of a dollar of this money to the payment of the debt.

It is insisted that there was no delivery of possession; that the symbolical delivery by the father handing the key of the house to the son after assignment of the lease—if that, in fact, was done—was insufficient; that there was no actual, visible, and continued change of possession, the family remaining in possession, and the mother in control of the property, precisely as before the alleged sale. We deem it unnecessary to consider this branch of the case, as the marshal testified that prior to his levy the father exhibited to him the bill of sale, and was by him notified of the claim of the children. We assume, without deciding, that such notification put the appellee upon inquiry, and obviated the necessity of such change of possession as the law required.

It was incumbent upon these complainants to make good their claim to this property. They have failed to do this. They have failed to show satisfactorily delivery of this bill of sale. They have failed to show that it was made in good faith, with an honest design to secure a debt—if there was a debt. They have shown that it was made to hinder and delay the appellee in the collection of her debt. We find no occasion to disturb the finding of the master. The decree is affirmed.

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**INTERSTATE COMMERCE COMMISSION v. NASHVILLE, C. & ST.  
L. RY. CO. et al.**

(Circuit Court of Appeals, Fifth Circuit. February 24, 1903.)

No. 1,199.

**1. CARRIERS—UNREASONABLE RATES—EVIDENCE TO ESTABLISH.**

A finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves, and in violation of section 1 of the interstate commerce act (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points.

**2. SAME—PREFERENCE BETWEEN LOCALITIES.**

The same evidence which warrants a finding that dissimilar circumstances and conditions exist which justify a lower rate for a longer haul to one point than for a shorter haul to another also establishes that the charging of such rates does not give one point an undue preference and advantage over the other, in violation of section 3 of the interstate commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).

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

J. N. Stripling and L. A. Shaver, for appellant.

Ed. Baxter, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The Interstate Commerce Commission found that, on account of dissimilar circumstances and conditions, the appellees were justified in charging more for the short haul from St. Louis, Nashville, and Chattanooga, and over the Georgia Southern & Florida Railway Company, to Hampton, Fla., than for the longer haul from the same initial points over the same lines to Palatka, Fla. This conclusion of the commission seems to be warranted by the evidence before the commission, and there is nothing in the additional evidence taken in the Circuit Court to justify finding a different result. This leaves it clear that in the matters complained of the appellees are not violating the fourth section of the interstate commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).

The bill in this case charges that the rates charged by the appellees on goods shipped from St. Louis and Tennessee points to Hampton, Fla., are unreasonably high in themselves, in violation of section 1 of the act to regulate commerce (24 Stat. 379 [U. S. Comp. St.

1901, p. 3154]). As we read the opinion of the commission, filed as an exhibit to the bill, the commission did not find that the Hampton rates were in and of themselves unreasonable, but found argumentatively that they were too high, not as based upon the matters to be considered in determining such questions, as pointed out in *United States v. Freight Association*, 166 U. S. 331, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *Smyth et al. v. Ames et al.*, 169 U. S. 546, 547, 18 Sup. Ct. 418, 42 L. Ed. 819, but largely upon a consideration of rates and charges between St. Louis, Nashville, and Chattanooga, and Jacksonville and Palatka, Fla. The evidence submitted to the commission, supplemented by evidence taken in the Circuit Court, is not sufficient for us to find affirmatively that the Hampton rates were in and of themselves unreasonable. The commission furnishes the authority for the proposition that with regard to the exaction of unreasonable rates the burden of proof is on the complainant. See *Harding v. C., St. P., M. & O. R. Co.*, 1 I. C. Rep. 104; *Brewer v. L. & N. R. R. Co.*, 7 I. C. Rep. 234. Certainly, the complainant has failed in this instance to prove that the Hampton rates were in violation of the first section of the interstate commerce act.

The bill also charges that the Hampton rates are in violation of section 3 of the commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), in that said rates, taken in connection with the rates of the appellees from the same Northern points to Palatka, Fla., give said Palatka an undue preference and advantage over said Hampton, and subject said Hampton to an undue prejudice through this advantage. The basis of this complaint is that goods shipped from St. Louis and Tennessee points to Palatka can be thereafter shipped by Palatka merchants to Hampton, and there sold on an equal footing with the same goods shipped from St. Louis and Tennessee points direct to Hampton, thus enabling the Palatka merchants to compete in Hampton with the Hampton merchants; while the rates as charged will not allow the Hampton merchants to ship goods from St. Louis and Tennessee points to Hampton, and from there to Palatka, to compete in Palatka on the same footing with Palatka merchants. In other words, it is charged as a duty of the Georgia, Florida & Southern Railway Company, the terminal carrier, to make such rates to Hampton and Palatka as will enable the Hampton merchants to compete in Palatka with Palatka merchants dealing in Western goods; but it must not be forgotten that the rates to Palatka, which is a competitive point, are made by other carriers with through lines which are not parties to this suit. The fallacy involved is that Hampton, which is an inland place with no natural advantages, shall be put upon the same footing as Palatka, which is situated upon a stream navigable all the year round, and has, in addition, several through railroad connections. It seems to be clear that the same reasons, in which we concur, which justify the commission in finding that the defendant carriers can lawfully charge more for the short haul to Hampton than the long haul to Palatka over the same line, sufficiently answer this charge of discrimination.

The decree of the Circuit Court is affirmed.

## CLEVELAND, C., C. &amp; ST. L. RY. CO. v. MORTON.

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

No. 872.

## 1. RAILROADS—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Plaintiff, on arriving at a railroad crossing, observed a passenger train standing on the third track from him, ready to move. He crossed the first track, and, on reaching the second, stepped back to avoid the steam from the passenger engine; and while in that position, slightly over the first track, he was struck by a switch engine running thereon. The court charged that if the switch engine was driven across the crossing without the bell being rung or the whistle blown, from the place where it started, if that was within 80 rods of the crossing, and if the fireman who was running the engine did not exercise reasonable care in looking ahead, which caused the injury, plaintiff was entitled to recover, though he did not use such care for his own safety as might have been expected of a boy of his age, provided the injury could have been avoided, notwithstanding plaintiff's negligence, if the fireman had exercised reasonable care in looking ahead. *Held*, that such instruction was erroneous, as entirely excluding plaintiff's contributory negligence in case defendant was guilty of the negligence named.

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

Geo. F. McNulty and John F. Dye, for plaintiff in error.

E. C. Craig, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. This action was brought originally by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, in the Circuit Court of Coles County, State of Illinois, to recover damages for personal injuries said to have been caused by the negligence of the railway company. Subsequently, the case was removed to the Circuit Court of the United States, for the Southern District of Illinois, upon the petition of the defendant below, showing that the plaintiff below was a citizen of Illinois, and that the defendant below, was a citizen of the States of Ohio and Indiana. On the trial of the case in the Circuit Court, the plaintiff below was awarded a verdict for seven thousand five hundred dollars. A motion for a new trial was made and denied, and thereupon judgment upon the verdict was entered; and to reverse such judgment, this writ of error is prosecuted.

Plaintiff in error has assigned twenty alleged errors, none of which need be considered, except the third, which is based on the following instruction:

"The court instructs the jury that if you believe from a preponderance of the evidence that this switch engine was driven onto this Eleventh Street crossing without the bell being rung or the whistle blown, and that the bell was not rung or the whistle blown continuously from the place where it started to 11th street, if that place was within eighty rods from the said crossing, and that the said engine was also driven onto the said crossing in charge of a fireman alone, and that the said fireman did not keep a lookout, and that he did not exercise reasonable care in looking ahead, and if you further believe from the evidence that the plaintiff had started across the tracks at 11th



street, and on account of another engine passing on another track was standing on the crossing, and if you further believe from the evidence that the fireman could have seen the plaintiff standing there had he exercised reasonable care in looking ahead, and if you further believe from the evidence that had the fireman seen the plaintiff he could have by the exercise of reasonable care prevented the injury, and if you further believe from the evidence that the injury was occasioned as a result of the bell not ringing or the whistle not being blown, then and in that case it will be your duty to find your verdict for the plaintiff, although you may believe from the evidence that the plaintiff did not use such care for his own safety as might be expected of a boy of his age and discretion, provided if you believe from the evidence the injury could have been avoided notwithstanding his negligence if the fireman had exercised reasonable care in looking ahead."

The possible effect of this instruction, upon the fortunes of the case, will be understood in the light of the following facts:

John Morton, at the time of receiving the injuries, was a boy of about twelve years, on his way to the Post Office, in the City of Mattoon, on an errand for his mother. His way lay southward along Eleventh Street. Arriving at the railroad crossing, he observed an engine attached to a passenger train, standing on the third track from the north, apparently ready to move. After crossing the first track, and upon reaching the second, the passenger engine started up, which caused the boy to step backward to avoid the jets of steam. While in that position, a little south of the first track, and still engaged in watching the passenger engine, he was struck by a switch engine running on the north track. This switch engine was operated by a fireman only, the engineer having alighted a block away.

The claim of the plaintiff below was, that the fireman was not on the look-out, and that no bells were rung, or other signals given.

The principal question relates to contributory negligence. If the boy, having looked up and down the north track, (as he says he did) and seeing nothing approach, became so absorbed in the passenger engine that he did not look again upon the other track, and if the situation thus created was such that boys of his age, in a like situation, would have become in a like manner absorbed, the imputation of contributory negligence might not necessarily follow. A boy of twelve, less sensitive to danger than a maturer man, is, at the same time, more likely to become oblivious to his general surroundings by the presence of some interesting detail, such as the passing of an engine. The law requires of such a boy only the care commensurate with his years and appreciation of danger.

But, in the instruction under consideration, immunity from contributory negligence is not made to turn upon the boy's excusable absorption in the passing passenger engine. For anything that appears in the instruction, the boy may not have been so absorbed. He may have been apprised of the approach of the other engine, thinking it would stop. He may have thought that he stood in the clear between the tracks. Various considerations, other than that of absorption in the passing engine, may account for his conduct. Now, while none of these would excuse his conduct, the instruction treated them as if they would. It in effect, excluded the whole law of contributory negligence, in case the railway company was guilty of the negligence named.

In this, the instruction was too broad. Were the boy's absorption in the passing engine the only inference that could reasonably arise on the facts proven, a different question would arise. But as has been pointed out, such is not the case. Other motives are reasonably inferable. Their existence upon the proof, it was the right of counsel for the railway company to argue, and the province of the jury to consider. Their withdrawal from the jury's consideration—and such is the effect of the instruction—was erroneous.

The judgment of the Circuit Court is reversed, and the case remanded with instruction to grant a new trial.

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In re SCHUJAHN.

SCHOTT v. GLAUSER et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 884.

1. EXECUTORY SALE.

A contract reciting: "Sold to-day to G. & E. two hundred and twenty-five (225) cases of fall made Brick Cheese as follows: One hundred (100) cases to be shipped at once. These hundred cases I sell to G. & E. at 10¼c per pound, if the cheese is accounted for between now and December first. If G. & E. do not account for this lot before the first of December at 10¼c per pound they may do so at any time between December first and January first at the then ruling market price. I agree to pay the storage on this lot up to the time of the final acceptance by G. & E. One hundred and twenty-five (125) cases are to be kept by me in factory subject to G. & E.'s order and may be accounted for by them under the same conditions as the above hundred (100) cases, the price between now and the first of December to be 10½c for the hundred and twenty-five cases, and after the first of December the market price," etc.—shows a mere executory sale, and does not pass the title in present.

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

The substantial facts of this cause are as follows: Frank Schujahn, a manufacturer of cheese in Dodge County, Wisconsin, on the 28th of October, 1901, entered into a contract with appellees, cheese dealers in Chicago, in the terms following:

"Chicago, Oct. 28, 1901.

Sold today to Glauser & Ehrat two hundred and twenty-five (225) cases of fall made Brick Cheese as follows: One hundred (100) cases to be shipped at once. These hundred cases I sell to Glauser & Ehrat at 10¼c per pound, if the cheese is accounted for between now and December first. If Glauser & Ehrat do not account for this lot before the first of December at 10¼c per pound they may do so any time between December first and January first at the then ruling market price. I agree to pay the storage on this lot up to the time of the final acceptance by Glauser & Ehrat.

One hundred and twenty-five (125) cases are to be kept by me in factory subject to Glauser & Ehrat's order and may be accounted for by them under the same conditions as the above hundred (100) cases, the price between now and the first of December to be 10½c for the hundred and twenty-five cases, and after the first of December the market price.

All this cheese is to be of strictly fancy quality and guaranteed to hold out in weight.  
Frank Schujahn."

Schujahn was, at the time of the making of this contract, insolvent; but appellees had no notice of such insolvency. On the same day appellees

delivered their check to Schujahn for \$2,000. and took from him his promissory note for the same sum, payable at sight, with six per cent. interest, and containing a power of attorney authorizing confession of judgment. The check was paid to Schujahn in due course of business.

November 9th, 1901, Schujahn was adjudged a bankrupt upon his voluntary petition, and Schott, appellant, was in due course elected and qualified as trustee.

November 2nd, 1901, a large portion of the property of Schujahn was seized upon attachment; and with knowledge of this fact, and of Schujahn's then insolvency, November 4th, 1901, the following contract was entered into between the parties:

"Chicago.....190..

Agreement entered into today between Frank Schujahn, party of the first part, and Glauser & Ehrat, party of the second part. Frank Schujahn agreed to deliver to Glauser & Ehrat two hundred and twenty-five (225) cases of fall made Brick Cheese f. o. b. cars Rubicon and Hartford, Wisconsin. Said Frank Schujahn agrees to deliver hundred (100) cases of the above Cheese at once and (125) one hundred and twenty-five cases between today and January first, 1902.

Glauser & Ehrat agree to pay said Frank Schujahn at the rate of ten and one quarter (10¼c) cents per pound for the first mentioned hundred (100) cases of Brick Cheese and they agree to pay at the rate of ten and one-half cents (10½c) for the other one hundred and twenty-five (125) cases of Brick Cheese. They also agree to advance said Frank Schujahn two thousand dollars (\$2000) in cash on these two hundred and twenty-five (225) cases now in the cellars of his factories situated in Hartford and Hullsberg, Wisconsin, receipt of which is hereby acknowledged by him.

Frank Schujahn.

Chicago, October 28th, 1901."

The petition of appellees was to have the cases of cheese named in the contract of October 28th, declared appellees' property; and set the same apart to them. On this petition the referee ruled adversely to appellees; but upon review, the ruling was reversed by the District Court, and an order entered requiring the trustee to deliver the cases of cheese to the appellees as the property of the appellees. From this order this appeal is prosecuted.

Jackson B. Kemper, for appellant.

Harry M. Silber, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the foregoing facts, delivered the opinion of the Court:

It is unnecessary to pass upon the effect of the memorandum agreement of November 2nd. The case turns on whether the memorandum agreement of October 28th constitutes an executed sale of the cheese, whereby the title passed from Schujahn to the appellees.

We are of the opinion that the sale was executory merely, to be completed in the future by the delivery to, and acceptance by the appellees. The contract provides for final acceptance in futuro, and it seems plain that if any of the cheese had not been of the quality named, rejection would have been within the power of the appellees. The transaction was thus incomplete, remaining open to some further act upon the part of the appellees. A transaction thus situated is not such sale as passes in præsentia the title to the property.

The order appealed from will be reversed, with instructions to the District Court to enter an order dismissing the petition of the appellees.

## CHANDLER v. THOMPSON.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1902.)

No. 883.

**1. JUDGMENT—FRAUD OF OTHER CREDITORS—COLLATERAL ATTACK.**

Judgments offered as claims against the estate of a bankrupt are open to collateral attack on the petition of a creditor alleging that they represented no real indebtedness, but were fraudulently and collusively confessed and entered pursuant to a scheme between the judgment creditor and the bankrupt to defraud other creditors of the latter.

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

Herman W. Stillman, for appellant.

Perry L. Turner, for appellee.

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

GROSSCUP, Circuit Judge, delivered the opinion of the Court:

The appellant, Frank R. Chandler, is a judgment creditor of the bankrupt, upon a judgment for costs rendered in Cook County, Illinois. The appellee is also a judgment creditor of the bankrupt, in two judgments for \$14,427.40 and \$12,803.40, entered by confession in the Circuit Court of Cook County, Illinois, June 13th, 1896, upon judgment notes dated January 4th, 1896; one of said judgments being in favor of appellee, and the other in favor of one Minnie A. Perham, subsequently assigned to appellee. The appellee and Minnie A. Perham, are daughters, by a former wife, of one Alfred L. Ward, husband of Clara E. Ward.

Clara E. Ward having been declared a bankrupt, and the judgments before mentioned having been offered as claims against the estate, a petition was filed by appellant objecting to said judgments as claims, and praying their disallowance upon grounds stated as follows:

"And the undersigned upon information and belief, charges the fact to be that the said bankrupt, Clara E. Ward, never borrowed any money from the said Minnie A. Perham, or Alice A. Thompson, and was never indebted to them, or either of them, and never knowingly executed any promissory notes to their order, or powers of attorney to confess judgments in their favor, for any sum whatsoever, and that the notes upon which the said confessions were entered, and the powers of attorney thereto attached were caused to be executed by the said Alfred L. Ward, and said confessions were entered and said creditor's bill filed, all by and at the instigation of the said Alfred L. Ward, as part of a scheme on the part of the said Alfred L. Ward in aid of said suit in the name of Clara E. Ward against said firm, and as a further suit against said firm in case said first named suit should terminate favorably to said firm; and that said confessions were designed to hinder, delay and defraud the said firm of Chandler and Company and the owners of said mortgages, and that the same are fraudulent, and should be disallowed and discharged by this Honorable Court."

When the case came on for hearing before the referee, evidence was offered in support of the objections, but excluded upon the ground that the judgments could not be impeached in any court other

¶ 1. See Judgment, vol. 30, Cent. Dig. § 958.

than the one in which they were rendered; and it is upon this ruling, approved by the court, that the real question in this appeal is presented.

The averments, in the petition, of fraud and collusion are inartistically drawn. They show in substance, however, that no real debt underlay the judgments, but that the judgments were entered in pursuance of a scheme (to which both judgment creditor and judgment debtor were parties) to hinder, delay, and defraud certain claimants, in the collection of claims pending against Clara E. Ward.

The case, thus presented, is not that of an attack collaterally upon the judgments by the parties thereto, or their privies. It is the case of an attack by the trustee of third persons, strangers to the judgment, whose rights and interests would be injuriously affected, if the judgments were allowed to stand proved as claims. As to such persons, a judgment procured through the collusion of the parties thereto, and founded upon no real debt, is to be treated as void, and open to collateral attack whenever, and wherever it may come in conflict with their rights or interests. Black on Judgments, § 293. A judgment not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against creditors of the judgment debtor. *Palmer v. Martindell*, 43 N. J. Eq. 90, 10 Atl. 802.

The District Court should have given appellants an opportunity to prove the allegations of their petition, and for failure to so do, the order appealed from is reversed, with instructions to proceed further, in accordance with this opinion.

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DAVIS v. PERRY.

(Circuit Court of Appeals, Second Circuit. January 8, 1903.)

No. 21.

1. PATENTS—VALIDITY AND INFRINGEMENT—INKSTAND.

The Davis patent, No. 605,177, for an inkstand, discloses invention in view of the simplicity of the device and the elimination of parts from the inkstands of the same general type in the prior art, and its utility and success, although the improvement is a narrow one. Claims 1 and 3 also *held* infringed by inkstands made in accordance with the Astley patent, No. 661,334.

2. SAME—INFRINGEMENT—DEFENSES.

Where infringement would necessarily or naturally result from the ordinary use of a device, a defendant cannot escape liability for infringement by merely showing the possibility of a different use. The decisive question is whether the operation of the alleged infringing device when in use is the same, and produces the same results.

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

For opinion below, see 115 Fed. 333.

F. P. Warfield, and Charles H. Duell, for appellant.

Clifton V. Edwards, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. This cause comes here upon an appeal of the complainant in the court below from a decree of the United States Circuit Court for the Eastern District of New York dismissing the bill alleging infringement of patent No. 605,177, granted June 7, 1898, to Emry Davis, for an inkstand. In the suit as originally brought infringement was also alleged of complainant's patents Nos. 399,844, granted March 19, 1889; 413,390, granted October 22, 1889; and 491,640, granted February 14, 1893. The court entered a decree ordering the bill dismissed as to all of the patents in suit on the ground of noninfringement. The complainant appealed, and on this hearing withdrew the appeal as to all the patents except No. 605,177.

In the specification of said patent the patentee states that this invention relates to the class of inkstands covered by prior patents granted to him, and that "the object of the invention is to provide an improvement on the form and style of inkstands covered by said patents, and one which is more simple in construction and operation, and also less expensive."

The claims are as follows:

"(1) An inkstand comprising the combination of an exteriorly-cylindrical air-filled funnel-float centrally-tubular, and an interiorly-cylindrical reservoir provided with a base, and in which the float closely fits to slidably engage the interior walls thereof, the said 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, substantially as shown and described.

"(2) An inkstand formed of a cylindrical body or reservoir provided with a base, 6, and an annular flange, 8, in combination with an exteriorly-cylindrical float substantially occupying the interior of the reservoir, and fitting wholly within the same, the said float being provided with an annular flange, 14, at top, adapted to rest upon and project above the flange, 8, of the reservoir, and the said float being vertically movable in and freely removable from the said reservoir, substantially as shown and described.

"(3) In an inkstand, a reservoir consisting of a cylinder open at the top, and provided with a closed lower end, supported by a base, in combination with a funnel float having exteriorly longitudinal and lateral dimensions and form approximately corresponding to those of the interior of the reservoir, substantially as shown and described.

"(4) In an inkstand, the combination with a reservoir having a uniform width at and upward from the bottom thereof, and open at the top throughout its width, of a centrally-tubular air-filled float having exterior longitudinal and lateral dimensions and form approximately corresponding to those of the interior of the reservoir, whereby the whole of said reservoir is occupied by the float, the said float normally resting upon the bottom of said reservoir and projecting above the top of the same, whereby it is adapted to deliver the ink from its lowest level without the top of said float being movable below the top of the reservoir or below the ink at its highest level, and the delivery of said float being wholly from the center thereof, said float fitting closely in the reservoir, whereby the walls of the same engage therewith.

"(5) An inkstand consisting of an interiorly-cylindrical vertical reservoir, and a hollow cylindrical air-filled float mounted therein and closely fitting said reservoir, and adapted to move vertically therein, and consisting of an outer tube, the upper end of which is closed by a conical cap, the base of which extends upwardly, and the apex of which extends downwardly and inwardly and is provided with a tubular extension which projects downwardly and centrally through said outer tube, said outer and inner tubes being each open at the bottom, the longitudinal and lateral dimensions of the float being substantially equal to the corresponding dimensions of the interior of the reservoir, substantially as shown and described.

"(6) An inkstand consisting of an interiorly-cylindrical vertical reservoir, and a hollow cylindrical air-filled float mounted therein and closely fitting said reservoir, and adapted to move vertically therein, and consisting of an outer tube, the upper end of which is closed by a conical cap, the base of which extends upwardly, and the apex of which extends downwardly and inwardly and is provided with a tubular extension which projects downwardly and centrally through said outer tube, said outer and inner tubes being each open at the bottom, and 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, substantially as shown and described.

"(7) In an inkstand the combination with a reservoir wholly open at the top, and interiorly-cylindrical, of an exteriorly-cylindrical hollow air-filled float, having a central vertical delivery, said 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, the upper end of said float being provided with an annular flange whereby the upper portion of said float and said flange conjunctively form the closure of the open top of the reservoir.

"(8) An inkstand consisting of two parts, one adapted to receive the other within it, the same being wholly open at one end and closed at the other, said part forming the ink-reservoir, and the other part of the device being formed to telescope within said first part or reservoir, and closely fit the wall thereof, said part being of a length corresponding with the depth of the reservoir and being provided with a flange to limit the telescoping of the parts and permit their mutual detachment, said inner part being adapted to deliver or supply the ink, and being formed into a funnel at the top, into a float throughout its length, and into a tube throughout its center.

"(9) In an inkstand the combination with a float of the character described of a reservoir formed to receive the said float within it, and to closely surround the same, said reservoir being provided with a base on which said float is adapted to rest, and extending approximately to the top of said float, 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."

The improvement covered by the patent chiefly consists, as stated by the patentee, in such a combination of a float with an interiorly-cylindrical reservoir, both of which were old, as dispenses with an outer supply reservoir and an interior feeding reservoir, and provides "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."

The patents chiefly relied upon to support the defense of lack of patentable novelty are said prior patents Nos. 399,844, 413,390, and 491,640, granted to complainant, and patents Nos. 32,207 and 39,754, granted in 1861 and 1863, respectively, to Joseph W. Ross, and patents Nos. 425,672 and 425,674, granted in 1890 to J. Heberling.

The prior Davis patent 491,640 comprised an outer ink reservoir provided with an air-tight cover having an air vent and plug. A circular sleeve integral with said cover extended downward nearly to the bottom of said reservoir, and was open thereto. The ink from this reservoir passed through an aperture in the bottom of an ink tube identical in structure with that of the patent in suit, arranged to fit said ink sleeve and float in the surrounding ink. There

were many practical objections to the efficiency of this inkstand, chiefly because the whole operation of the stand depended upon the quantity of air in the air chamber, and was affected by variations in its temperature, and because it was necessary to manipulate the plug to meet the varying conditions. The only structural change covered by the fourth patent consisted in putting a flat closed bottom on the sleeve. The question is whether this change involved invention. This construction obviated the objections necessarily attendant upon the use of the air chamber and plug. It was simpler, more efficient, and more easily fitted and cleaned than the earlier Davis inkstands. The essence of the inventive conception consisted in the discovery that the functions discharged in this class of inkstands by the co-operation of the outer air chamber and reservoir with the inner sleeve, and for the discharge of which it had always been supposed that such co-operation was necessary, could be discharged by an inner sleeve alone, and in the practical utilization of this discovery by the mechanical expedient of inclosing its bottom. That this was not obvious is shown by the experience of this patentee with prior patents, and by the prior art in general.

In the earlier of the Ross patents, granted 40 years ago, the only reservoir shown is one having an aperture at the bottom, and its so-called float is only a small funnel floating on the top of the ink, which has to be pushed out of the way by the pen in order to reach the ink. One of the drawings of the second patent, however, shows the bottom of the reservoir closed. But there is no suggestion that such construction was considered practicable, or was designed for use, other than as illustration of the use of a new class of material for floats.

Heberling patents, Nos. 425,672 and 425,674, are only remotely relevant. They belong to the old class of fountain inkstands in which the air is fed from one reservoir to another by a positive stroke of a cup or bell.

We concur in so much of the opinion of the court below as holds that the patentability of the device results from its simplicity and the elimination of parts. The improvement is a narrow one. The prior art, however, fails to show such a structure, and, in view of the facts already stated, and its utility and success, we think the device of the patent in suit involved the exercise of the inventive faculty.

The construction of defendant's inkstand is substantially identical with that of the patent in suit, except that the interior reservoir is perforated, and is, therefore, open, as in the third Davis patent. It comprises also an outer ink reservoir, which supplies an additional means for filling the inner reservoir through the hole in its base. But the defendant places a washer of felt or other soft material in the bottom of the outer reservoir, which operates to seal the hole in the inner reservoir when filled with ink and ready for use. Consequently, when the inkstand is in use, the outer reservoir, thus equipped, serves only as a convenient support for the inner ink reservoir. This inkstand is manufactured according to the specifications of patent No. 661,334, to F. M. Ashley. It appears from the specifications and claims of said patent that, unless the hole in the inner reservoir is



sealed, the inkstand will not work. As is stated in the opinion of the court below, "If the aperture in defendant's tube were closed, and the ink were poured into it, it would be the device described in the letters." In these circumstances the question whether the structure of defendant is or is not an improvement on that of complainant is immaterial. Nor is it material that the improvement, if any, constitutes an additional element with an additional function. The inkstand, when in practical use, is identical in construction with that covered by complainant's patent.

Where infringement would naturally or necessarily result from the ordinary use of a device, a defendant cannot escape liability for infringement by merely showing the possibility of a different use. The decisive question is whether the operation of the alleged infringing device when in use is the same, and produces the same results. And the question herein is answered by showing how defendant's inkstand operates when it is filled and used, not what improved means may be added in order to fill it so as to be ready for use. *Snyder v. Bunnell* (C. C.) 29 Fed. 47; *Westinghouse v. New York Air-Brake Company* (C. C.) 59 Fed. 581, 597; *Thomson-Houston Electric Company v. Kelsey Electric Railway Specialty Company* (C. C.) 72 Fed. 1016.

The claims, with the exceptions of claims 1 and 3, cover details of construction not found in defendant's device, such as the "annular flange" of claim 2, or the flange to limit the telescoping of the parts of claim 8, or constructions which do not correspond with the specification and drawings, such as the "float nominally resting upon the bottom of said reservoir" of claims 4, 7, 8, and 9. The defendant's inkstand infringes the broad combination covered by claims 1 and 3.

The decree of the court below is reversed, without costs, with directions to the court below to enter a decree in accordance with this opinion.

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CARY MFG. CO. v. STANDARD METAL STRAP CO.

(Circuit Court of Appeals, Second Circuit. January 15, 1903.)

No. 39.

1. PATENTS—INFRINGEMENT—PARTS HAVING DIFFERENT FUNCTIONS.

Where in a patented reel for box straps nail holes were punched in the frame for the purpose of fastening it to a support when required, and the nails were also used to effect a brake action on the strap coil, the nail holes were patentable only in respect to the latter function, there being no invention in making them for the former purpose; and the patent is not infringed by a reel having similar nail holes for fastening purposes, but which is equipped with a different and noninfringing brake.

2. SAME—REEL FOR BOX STRAPS.

The Cary patent, No. 403,247, for a reel for box straps, construed, and held not infringed.

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

For opinion below, see 113 Fed. 429.

A. G. N. Vermilya, for appellant.

W. P. Preble, Jr., for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. This is an appeal from the decree of the United States Circuit Court for the Southern District of New York dismissing complainant's bill for infringement of patent No. 403,247, granted to Spencer C. Cary May 14, 1889, for a reel for box straps. This patent has already been discussed in the suit of this complainant against De Haven (C. C.) 88 Fed. 698, where the court held that the patent was an extremely narrow one, and was infringed by defendant. In the case at bar the court below reached the same conclusion, and held that the effect of the new evidence of the state of the prior art was to further narrow the patent.

The second claim—the only one in suit—comprises a reel, consisting of a spool mounted on a hollow axle, and a frame, composed of two parallel arms extending diametrically across said spool in opposite directions and beyond its rim, and which are united at their outer ends, and have openings in said outer ends adapted to receive fastening pins. The only novel element in this construction consists of the nail holes in the outer ends of the frame, which may be used both in fastening the reel to a support, and in braking the strap coil by loosening or tightening the pressure of the arms thereon. The frame in defendant's reel is slotted from the center downwardly, in order to permit the strap as it is unwound to descend and rest upon the bottom of the frame or support, which thus acts as a brake. In the patented device the brake action may be effected by means of the nails exerting side pressure on the frame; in defendant's device by a slot and gravity. But because one form of defendant's device has also nail holes at the outer ends of said frame, by means of which the reel may be fastened to a support, complainant claims that it infringes the patented device. This contention is urged on the theory that "those holes are for anything for which they can be used without change, and, since they are exactly such holes as those of the claim of the patent, arranged just as those holes are arranged, and combined with exactly such other elements, they come within that claim, whether defendant so uses them or not." We cannot assent to this view. The defendant has provided its reel with an independent, noninfringing brake device, which apparently is satisfactory and sufficient for all practical braking purposes. It has thereby dispensed with the necessity of infringing the patented brake device. It has also provided in the appropriate place nail holes, the usual means employed where it is desired to fasten a device to a support. The patentee acquired no monopoly in his construction for this latter purpose. As Judge Lacombe said in the former case: "It certainly was not invention to punch nail holes in the arms so as to fasten the device against a post." The mere fact that the nail holes provided for a legitimate purpose might possibly be perverted to an illegitimate use is not, in these circumstances, sufficient to support the charge of infringement.

The decree is affirmed, with costs.

## BRADLEY v. ECCLES

(Circuit Court, N. D. New York. March 5, 1903.)

## 1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

If there is substantial doubt as to the validity of an unadjudicated patent, and the defendant is responsible in damages, a preliminary injunction against its infringement should not be granted.

## 2. SAME—PRIOR PUBLIC USE—EVIDENCE.

Affidavits of disinterested persons as to the prior public use of a patented article, which are positive in their statements, free from inconsistencies and improbabilities and accompanied by exhibits, cannot be ignored on a motion for a preliminary injunction against infringement, and are sufficient to overcome the prima facie validity of the patent, and prevent the granting of the injunction, where uncontradicted.

## 3. SAME—UNADJUDICATED PATENT.

The validity of the Hannan reissued patent, No. 11,260, for a thill coupling, held not sufficiently established, as against a showing of prior public use and abandonment, to warrant the granting of a preliminary injunction against its infringement; it never having been adjudicated.

In Equity. Suit for infringement of reissued letters patent No. 11,260, for a thill coupling, granted to William Henry Hannan August 16, 1892. On motion for preliminary injunction.

On the 5th day of January, 1903, on the bill of complaint and certain affidavits, an order was granted in this action restraining the defendant, Richard Eccles, from making and selling, in infringement of reissued letters patent No. 11,260, dated August 16, 1892, his thill coupling, which he claims the right to make and sell under letters patent No. 714,163, dated November 25, 1902. This restraining order was accompanied by an order to show cause why same should not be continued until the trial and determination of this action on the merits, or until the further order of the court. On the return of said order, the defendant having filed his answer to the bill of complaint, and having read and filed certain affidavits and presented certain exhibits, and full argument having been had, the question is fairly presented whether a case has been made that will justify the court in continuing such restraining order during the pending of the action.

Howard P. Dennison, for complainant.

William A. Megrath, for defendant.

RAY, District Judge. From an inspection of the exhibits in this case duly filed, it is evident that the defendant, Richard Eccles, is infringing the complainant's patent, and that the restraining order should be continued in force during the pendency of this action if the complainant's patent is valid. The defendant is manufacturing and selling the precise thing for which a patent was granted to the complainant under reissued letters patent No. 11,260. The defendant has a patent, but apparently it covers a different thing, and the description, specifications, and claims are different. If they cover the same thing, with same elements, then defendant's patent is void, but it is not seriously contended such is the case.

The defendant makes no serious claim that he is not infringing the complainant's patent, provided it is valid, but insists that same is void because of prior use and abandonment to the public. In behalf of this contention he makes a very strong case. Indeed, the defense

¶ 1. See Patents, vol. 38, Cent. Dig. § 495.

is complete, and demonstrates the invalidity of the complainant's patent, if the statements made by certain witnesses in their affidavits filed herein, and read on the argument of this motion, are to be accepted as true. The complainant files no affidavit in answer, but insists that these witnesses are testifying to matters that occurred so long ago (some 15 years since) that their memory must be unreliable, and that therefore such affidavits ought, on the motion, at least, where there is no opportunity for cross-examination, to be disregarded, or not given full faith and credit according to their terms. These witnesses are entirely disinterested, and speak emphatically and positively, and their statements are free of inherent improbabilities. No reason is discovered for discrediting them. They may and they may not speak mistakenly, or even without knowledge on the subject, but such testimony as theirs is not to be disregarded on the theory that it may be erroneous.

The complainant's reissued letters patent No. 11,260, dated August 16, 1892, claim as follows:

"Having described my invention, what I claim as new, and desire to secure my letters patent, is:

"(1) The combination, with the draft-eye, composed of a fixed section and a movable section, of a spring-arm secured at one end and free at the other, a cam-lever pivoted to the free end of said spring-arm, and a tie attached to the cam-lever outside of its fulcrum, and connecting the cam-lever with the movable section of the draft-eye, whereby the spring-arm exerts a constant pressure upon the movable section, and also holds the cam-lever yieldingly in a locked position, substantially as set forth.

"(2) The combination, with the axle, of a draft-eye, composed of a forwardly projecting fixed section and a movable section hinged to the front end of the fixed section, a spring-arm secured to the axle and projecting forwardly therefrom, a cam-lever hinged to the free front end of the spring-arm, and a tie attached to the cam-lever outside of the fulcrum and connecting the cam-lever with the hinged section of the draft-eye, substantially as set forth.

"(3) In combination with the axle-clip, coupling-pin, fixed lower draft-eye section, h, and the upper eye-section, h', hinged to the front of the fixed section, the spring-arm, C, secured at one end to the clip-tie, and extending from the rear thereof forward underneath the same, the cam-lever, d, hinged to the free end of said spring-arm, and the bail, e, connected to the cam-lever, and adapted to engage the rear end of the hinged eye-section, substantially as set forth.

"(4) The combination, with the front axle and thill-iron, of the clip-tie, C', elongated in the direction lengthwise of the axle, and formed at the center of its length with the draft-eye section, b, axle-clips, C, C, secured to the two ends of said clip-tie, the draft-eye section, b', hinged to the eye-section, b, the spring-arm clamped between the central portion of the clip-tie, and extending from the rear of the clip-tie underneath the same, and forward therefrom, the cam-lever, d, hinged to the free end of said spring-arm, and the bail, e, connected to said cam-lever, and adapted to bear on top of the rear end of the hinged draft-eye section, substantially as described and shown.

"In testimony whereof, I have hereunto signed my name this 26th day of August, 1891.

William Henry Hannan."

The defendant's letters patent, No. 714,163, dated November 25, 1902, claim as follows:

"Having thus described my invention, I claim and desire to secure by letters patent:

"(1) In a shaft or thill coupling, the combination with the draft-bar, a, having a seat for the coupling-pin, of a clip for securing the draft-bar to the

axle, a lug or projection, m, depending from said draft bar, a pivoted cap or lever to hold the coupling-pin in the draft-bar seat, a bail to engage said cap or lever and secure it in operative position, a retaining-spring having a vertical pivot connection at one end with the said depending lug or projection, and a lever having a jointed connection with the other end of said retaining-spring and with the said loop or bail, whereby when the said loop or bail is released from the pivoted cap or lever the said retaining-spring and the bail and lever carried thereby may be swung aside horizontally for convenient access to the nuts of the said clip securing the coupling to the axle.

"(2) In a shaft or thill coupling, the combination with a draft-bar having a coupling-pin seat, a cap pivoted to said draft-bar to hold the coupling-pin in the draft-bar seat, a substantially U-shaped retaining-spring having a vertical pivot connection at one end with said draft-bar, upon which said spring and its supported parts may be swung horizontally beneath said draft-bar to permit convenient access to the nuts of the draft-bar-securing clip, a lever pivotally connected with the other end of said retaining-spring, and a bail pivotally connected with said lever, and adapted to engage and hold the said coupling-pin cap in closed position.

"In testimony whereof, I affix my signature in presence of two witnesses.  
"Richard Eccles."

Whatever may have been the purpose or determination of the Patent Office in issuing these patents, or of the patentees in describing the inventions and obtaining them, or whatever may be the proper construction and interpretation of the claims of the parties respectively and above quoted, the fact remains, and cannot be disputed (and this plainly appears by placing the thill coupling made and sold by the defendant by the side of that made and sold by the complainant), that the defendant makes and sells the same thill coupling made and sold by the plaintiff, and which is fully and accurately described in his claim above quoted, but so attached and mounted upon another piece of iron, called "lugger projection," as to enable the operator to turn the thill coupling from side to side by means of a pivot. This pivoted attachment contains no new idea of means—in short, no invention whatever. This pivot idea and the pivot itself have been in use so long that the mind of man runneth not to the contrary. The idea of so attaching the plaintiff's thill coupling to the vehicle as to be turned from side to side by means of a pivot is possibly and probably a good one, but there was no invention in its unfolding or application—only the exercise of mechanical skill by so placing or attaching the plaintiff's invention as to make its use more convenient. Almost any skilled mechanic could have done this in the mode and manner used by the defendant. If the defendant's claim describes the same thing as is described in the complainant's claim, then defendant has patented the same thing before patented to the plaintiff, and defendant is not protected. If defendant has a patent on the same thing as is described in complainant's letters patent, and there is added the pivoted attachment (old), then the defendant is not protected. If defendant has not patented the same thing as is described in complainant's letters patent, but is making and selling this same thing with this old pivoted arrangement added, then he is not protected.

In all views of the case, we come back to the question whether or not the reissued letters patent No. 11,260, dated August 16, 1892, are so clearly valid as to justify the court in continuing the restraining order against the defendant. The defendant brings into

court two old thill couplings, in use many years, with affidavits of the owners that these identical couplings have been in use constantly since the last half of the year 1887. These are, in all essentials, the same as those now made and sold by the complainant under reissued letters patent No. 11,260, and are the same thill couplings described in the said letters patent. The defendant also presents and files the affidavits of experts that they have carefully considered patent No. 11,260, reissued August 16, 1892, to William Henry Hannan (the complainant's patent in suit), and have compared the claims of said patent with defendant's device and the prior art, with a view to determining the validity of said patent, and whether or not defendant's device is an infringement of any of the claims thereof. These witnesses give with great particularity the condition of the prior art, and say in conclusion that the complainant's alleged invention, described in letters patent No. 11,260, is, in their judgment, not patentable, by reason of its prior use, etc. These affidavits are supported by exhibits tending strongly to support their assertion.

It is settled law that restraining orders in patent cases, prior to the trial on the merits, when the validity of the patent in question has not been adjudicated, should be granted with reluctance and great caution. If there is substantial doubt of the validity of the complainant's claim, and defendant is responsible in damages, restraining orders should not be granted. In *Steam Gauge Co. v. Miller* (C. C.) 8 Fed. 314, Judge Shipman said:

"Upon a motion for a preliminary injunction, the plaintiffs must establish the point of infringement beyond a reasonable doubt; and, as this question often depends upon the proper construction of the patent, its claims should ordinarily have been construed by a court of competent jurisdiction, or should have been practically construed by the consent and acquiescence of that part of the public which is cognizant of the extent of the monopoly."

The validity of complainant's patent has not been adjudicated by any court, and, in the sense mentioned, there is no proof of acquiescence on the part of the public or of the defendant. Its validity is denied by the defendant, who is pecuniarily responsible.

The following cases would seem to indicate that this restraining order ought not to be continued: *Glaenger et al. v. Wiederer et al.* (C. C.) 33 Fed. 583; *Edward Bar Co., Limited, v. N. Y. & N. H. A. S. Co.* (C. C.) 32 Fed. 79; *American Coat Pad Co. of B. C. v. Phoenix Pad Co.*, 51 C. C. A. 339, 113 Fed. 629. See, also, *Smith v. Meriden Britannia Co.*, 92 Fed. 1003; *Consolidated Fastener Co. v. Am. Fastener Co.* (C. C.) 94 Fed. 523; *High on Injunctions*, §§ 603-610; *Beach on Injunctions*, §§ 856-858.

It is presumed that complainant's patent is valid. The same presumption obtains with reference to the defendant's patent. In *Brown v. Zaubitz* (C. C.) 105 Fed. 242, Judge Coxe held:

"The defense of a prior use, to defeat a patent, must be established beyond a reasonable doubt; and oral testimony, unsupported by patents or exhibits, which is contrary to the probabilities, under the circumstances shown, and inconsistent with previous statements and representations made by the alleged prior user, is insufficient."

But here we have exhibits, sworn affidavits, no contradictions, and no inconsistencies. Such proofs cannot be disregarded. Says a learned author:

"An interlocutory injunction against the infringement of a patent will not be allowed unless complainant's title and defendant's infringement are either admitted, or are so clear and palpable that the court can entertain no doubt on the subject. And whenever, upon the facts presented, a fair and reasonable doubt exists as to whether defendant has actually been guilty of an infringement, or where the right is, in point of law, at least doubtful, and the questions involved are exclusively for a jury, or where a reasonable doubt exists as to the originality and novelty of complainant's invention, or as to the substantial identity between the articles manufactured by defendant and those of complainant, a preliminary injunction will be withheld. So, if it does not satisfactorily appear that complainant is the first and sole inventor of the improvements claimed by his patent, the court will not interfere in the first instance. And where a preliminary injunction has already been granted, but the evidence is doubtful as to the originality of the patent, the injunction may be dissolved, defendants being required meanwhile to keep an account of their sales." High on Injunctions, § 606.

"So long as there is a substantial controversy as to the equities of the parties, the court will not dispose of those equities on a motion for an interlocutory injunction, which does not permit the questions involved to be inquired of and defined accurately according to the approved usages of chancery, and interlocutory relief will be refused, especially where the granting of the application might seriously imperil complainant's rights, and its refusal will not endanger them. And if the patent itself is of recent date, and the specifications are obscure, and the proof of infringement is meager and unsatisfactory, an injunction will not be allowed even upon final hearing. But in such case the bill may be retained, and complainant required to bring an action at law within a reasonable time." High on Injunctions, § 607.

"The presumptions in favor of the novelty of a patent, sufficient to constitute the foundation for a preliminary injunction, may be some or all of the following: The oath of the patentee that he was the original inventor; the granting of the patent after full investigation; undisturbed enjoyment by the patentee of the exclusive rights granted by the patent, coupled with acquiescence on the part of the public; direct adjudications at law or in equity establishing its validity, and prior injunctions restraining its infringement. When such grounds of presumption coexist in favor of the novelty of a patented invention, an injunction will not be refused, or, if granted, will not be dissolved, except upon the most exclusive evidence impeaching the patent." High on Injunctions, § 608.

In 2 Beach on Injunctions, §§ 856-859, the same rules are stated with great clearness. In section 857, that author says:

"A preliminary injunction to restrain the infringement of a patent will not ordinarily be granted where the validity of the patent is open to any considerable doubt. [Citing cases.] \* \* \* To entitle a complainant to a preliminary injunction, he should show either an adjudication sustaining the validity of the patent, or such a public acquiescence as affords a reasonable presumption of its validity."

The same principles are stated in 3 Robinson on Patents, §§ 1171-1175.

It must be remembered that there is a wide difference between granting a temporary restraining order, and a hearing and decision on the merits. The evidence required in the first case may be even stronger than would be required to sustain the patent on a full hearing of the case on the merits. In such a case, having in mind the long line of unbroken authority, and the fact that there is considerable doubt of the validity of complainant's patent, by reason of prior

use and abandonment to the public, it cannot be said that wise or just judicial discretion will permit the continuance of this restraining order. The complainant will sustain same injury if his patent is found valid. The parties should proceed with diligence to take and produce their proofs, and, if this is done, no irreparable injury will be sustained.

The defendant however, will be required, as a condition of vacating the restraining order and refusing to make it permanent, to keep an account of all thill couplings made and sold by him, with the names and places of business of the persons or parties to whom sold, which accounts shall be open for the inspection of the complainant, or his duly authorized agent, from the 1st to the 5th days of each month; and, in case such account is not kept and held open for such inspection, the complainant will apply, on five days' notice, for a renewal of the restraining order.

An order to this effect will be drawn and submitted for signature.

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**GREENE et al. v. MANHATTAN REFRIGERATING CO.**

(Circuit Court, S. D. New York. February 24, 1902.)

**1. PATENTS—VALIDITY AND INFRINGEMENT—AUTOMATIC LUBRICATORS.**

The Buckley patent, No. 590,297, for a force-feed lubricator, the object of the invention being to provide a means whereby several machines may be automatically supplied from a single lubricator and the quantity of oil fed to each regulated, *held* valid as against the defenses of lack of invention, anticipation, and prior use. Also *held* infringed.

In Equity. Suit for infringement of letters patent, No. 590,297, for a force-feed lubricator, granted to John Buckley September 21, 1897. On final hearing.

B. F. Lee and W. H. L. Lee, for complainants.  
George W. Hey, for defendant.

COXE, Circuit Judge. This action is founded on letters patent, No. 590,297, granted September 21, 1897, to John Buckley, of Rochester, N. Y., assignor to the Rochester Automatic Lubricator Company, for improvements in force-feed lubricators. The patent is now owned by complainants.

The object of the invention is to provide means whereby several machines may be supplied from a single lubricator and the quantity of oil fed to each regulated to a nicety. The patentee says:

"In my device I provide a single construction embodying one movable part operated from any convenient prime mover, as the engine itself, and connected with this part are independently adjustable feeding devices, as pumps, so that by means of the adjustments the operator can regulate not only the exact quantity that is required for any moving parts without stopping the operation of the movable part or device, but the frequency with which this quantity is supplied.

"The invention consists in certain improvements whereby the above objects are carried out, and also in certain details of construction, all of which will be more fully stated in the claims at the end of this specification."



The patent has eight claims, all being involved but the fourth, fifth and eighth. The claims involved are as follows:

"1. In a lubricator, the combination with the reservoir, the cylinder outside of the latter, having the inlet-passage leading from the cylinder, the check-valve therein, and the exit-passage having the check-valve therein, of the piston operating in the cylinder, the reciprocating cross-head having a constant stroke, and the relatively adjustable stops between opposite sides of the head and the piston, whereby the stroke of the piston may be adjusted to any portion of that of the head, substantially as described.

"2. In a lubricator, the combination with the reservoir, of the two cylinders outside of the reservoir, inlet and exit passages for the cylinders, and check-valves therein, the two pistons 4 operating in the cylinders, the reciprocating cross-head 7, and the relatively adjustable stops on each of the pistons with which the cross-head engages, substantially as described.

"3. In a lubricator, the combination with a reservoir two pump-cylinders having supply and discharge passages and valves therein, of a reciprocating member, as a cross-head, two pistons operating in the cylinders having the collars and adjustable nuts thereon, co-operating with the member, whereby the stroke of the pistons may be independently regulated, substantially as described."

"6. In a lubricator, the combination with the reservoir, a pump-cylinder, inlet and discharge passages and valves therein, of the piston operating in the cylinder, the reciprocating member, as a cross-head, adjustable slip connections between the piston and reciprocating member for regulating the length of stroke of the former relative to the length of stroke of the latter, the cam-wheel actuating the member, an actuating device for the cam-wheel, as rod 29, and adjustable connections between said actuating device and the cam-wheel, whereby the speed of the cam-wheel may be adjusted relative to the speed of the actuating device, substantially as described.

"7. In a lubricator, the combination with the reservoir, two pump-cylinders, inlet and discharge passages and valves therein, and pistons operating in the cylinders, of a rotary cam-wheel, a reciprocating member, as a cross-head, actuated from the cam-wheel, independent adjustable slip connections between each of the pistons and said member for regulating their stroke relative to the length of stroke of the member, actuating devices, as a rod 29, for rotating the cam-wheel, and adjustable connections between said actuating devices and the wheel, whereby the speed of the cam-wheel may be changed, substantially as described."

Claims 1 and 6 relate to single lubricators and claims 2, 3 and 7 relate to double lubricators. The single lubricator supplies oil to one place only, while the double lubricator supplies more than one part of a given machine.

The defenses are noninfringement, anticipation, lack of novelty and invention, and public use and sale more than two years before the application.

The defendant's principal reliance, so far as prior patents are concerned, seems to be based upon the English patent to John H. Siegrist of September, 1889. This patent shows a complicated lubricating mechanism built into the machine and in this respect it is unlike the Buckley device which can be attached to and removed from the machine to be lubricated without changing the structure of either. In the Buckley lubricator the flow of oil to and from the pump cylinders is controlled by check valves and the quantity of oil supplied can be regulated by varying the length of stroke of the pump piston which is adjustably connected with the reciprocating cross-head. These features are not found in the Siegrist mechanism. Many other differences might be pointed out, but it is unnecessary to do this be-

cause it cannot be contended successfully that the Siegrist patent is an anticipation and it is thought that it involved something more than the skill of the calling to change the complicated and, apparently, useless device there described into the practical, simple and useful device invented by Buckley.

The same observations are true of the other prior patents. They show many features found in the Buckley lubricator, but none of them shows the combinations which are covered by the claims in controversy. The Buckley invention was completed September 19, 1896; the application was filed January 2, 1897. The alleged prior use by Kane has not been established beyond a reasonable doubt. An attempt was made to show that a lubricator, having the essential features of the Buckley structure, was installed at the Buffalo Pumping Station on engine No 8, July 4, 1896, but the testimony is so full of contradictions and uncertainty, both as to time and as to the details of construction, that the court is warranted in rejecting it as not possessing the probative force required by the well-known rule.

The defense that Bauerlein and not Buckley was the inventor of the lubricator in controversy has not been established. The testimony of Bauerlein is inherently improbable and the attempt to corroborate him is insufficient. The weight of testimony and the presumptions to be drawn from undisputed facts all point to Buckley as the inventor.

The principal defense relied on is noninfringement, it being argued that the claims must be so limited that they do not include the Sterling single and double lubricators used by the defendant.

It is insisted that the defendant's lubricators do not have a cylinder outside of the reservoir having an inlet passage leading therefrom into the reservoir and a check-valve therein; that they do not have a reciprocating cross-head having a constant stroke, and the relatively adjustable stops between opposite sides of the head and the piston, as required by the first claim, or "the reciprocating member, as a cross-head" and "adjustable slip connections," as required by the sixth claim.

It is also argued that the Sterling lubricators do not have the two cylinders outside the reservoir, with inlet and outlet passages and check-valves therein, and the cross-head and piston as described in the specification and drawings and claimed in the second claim; that they do not have the two pistons having collars and adjustable nuts thereon co-operating with the cross-head, as required by the third claim, or the cross-head and adjustable slip connections, as required by the seventh claim.

The Sterling lubricators have an oil reservoir and the single and double pump cylinders, respectively. There are inlet and outlet passages connected with these cylinders with check valves and a piston or pistons operating therein. There is a rotary cam-wheel and a reciprocating member which oscillates above the cam. There are independent adjustable connections arranged to slip along the reciprocating member, actuating devices for rotating the cam-wheel and adjustable connections by which the speed of the cam-wheel may be changed.

In short, it is impossible to escape the conclusion that the defendant is using lubricators having all the valuable and essential features of the patented structure and that the differences between the two are of form rather than substance. There are many of these differences which it is unnecessary to enumerate, for they all seem to be ingenious changes made for the purpose of avoiding the letter while appropriating the spirit of the invention.

In short, the court agrees with the following statement of the complainants' expert witness.

"The Sterling lubricators have, it is plain, the same general organization and mode of operation as the lubricator set forth in the patent in suit, producing the same results. The Sterling lubricators, as well as that of the patent in suit, have means of adjusting the stroke of the pistons and thereby the quantity of oil, and also means for adjusting the frequency of the piston's operation. And in the Sterling lubricators, as well as in that of the Buckley patent, the operating devices for the pump pistons are all located outside of the oil reservoir, where they are conveniently accessible.

"As is obvious from my preceding description, the Sterling lubricators differ in mechanical details from that of the Buckley patent, but that does not affect their substantial identity, since the mechanical details of the Sterling lubricators (where different) are the mechanical equivalents of the details set forth in the Buckley patent, which accomplish the same results."

The complainants are entitled to the usual decree.

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GREENE et al. v. BUCKLEY et al.

(Circuit Court, W. D. New York. February 24, 1902.)

**I. PATENTS—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICERS.**

Officers of a corporation cannot be held individually liable for the infringement of a patent by the corporation, where it does not appear that they committed any act of infringement as individuals, or that the corporation is insolvent.

In Equity. Suit for infringement of letters patent, No. 590,297, for a force-feed lubricator granted to John Buckley September 21, 1897. On final hearing.

Lee & Lee, Benjamin F. Lee, and William H. L. Lee, for complainants.

Hey & Parsons and George W. Hey, for defendants.

COXE, Circuit Judge. The parties having so stipulated the court consented to hear this cause in conjunction with the cause against the Manhattan Refrigerating Company. 120 Fed. 952. The testimony being substantially identical the causes were argued together and, of course, the same general decree must be entered in each.

In the present cause a number of individuals are made defendants apparently for the sole reason that they are officers of the infringing corporations. The record has been expanded beyond all reasonable limits and it is exceedingly difficult to find the testimony bearing upon any given point. Such search as I have been able to make

¶ 1. See Corporations, vol. 12, Cent. Dig. § 1475; Patents, vol. 38, Cent. Dig. § 459.

fails to discover proof that these parties, as individuals, have infringed the patent or done any act which renders them personally liable to the complainants. I have also failed to discover proof that the corporations, with which these individuals are connected, are insolvent. In these circumstances the bill must be dismissed as to the individual defendants. *Consolidated Fastener Co. v. Columbian Fastener Co. (C. C.)* 79 Fed. 795, 801; *King v. Anderson (C. C.)* 96 Fed. 500; *Farmers' Mfg. Co. v. Spruks Mfg. Co. (C. C.)* 119 Fed. 594.

The complainants are entitled to the usual decree for an injunction and an accounting against the defendant corporations.

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#### YOUNG v. WOLFE.

(Circuit Court, S. D. New York. February 23, 1903.)

**1. PATENTS—DEFENSE OF PRIOR USE—MEASURE OF PROOF.**

The defense of prior use to outweigh the presumption of validity arising from the granting of a patent must be established beyond a reasonable doubt, in view of the liability to mistake, and the ease with which testimony in its support may be fabricated or colored.

**2. SAME—INFRINGEMENT—ABDOMINAL PAD AND STOCKING SUPPORTER.**

The Young patent, No. 638,540, for a combined abdominal pad and hose supporter, discloses patentable invention, and is not invalid for anticipation or prior use; also *held* infringed.

In Equity. Suit for infringement of letters patent No. 638,540, for a combined abdominal pad and hose supporter, granted to Ella Foster Young, December 5, 1899. On final hearing.

C. C. Linthicum and J. J. Kennedy, for complainant.  
Robert C. Mitchell, for defendant.

COXE, Circuit Judge. This is an equity action for the infringement of letters patent, No. 638,540, granted to the complainant December 5, 1899, for a combined abdominal pad and hose supporter.

The invention has for its object the dual purpose of supporting the hose and maintaining a proper carriage of the body of the wearer. The abdominal pad is flat, with a smooth contact surface large enough to cover the upper central portion of the hypogastric region of the abdomen. The pad is supported by a strap passing around the waist of the wearer, the ends of the strap being secured to the upper portion of the pad. To the lower edge of the pad four hose supporting straps are connected, each being provided with a clasp at its lower end for engagement with the hose. These straps preferably have an elastic section and are adjustable as to length. In practice the pad is supported by the waist belt over the most prominent portion of the abdomen. The outside supporting straps are then clasped to the top of the hose just inside the knee and the inside straps are passed over the outside straps and are attached to the hose at the outside of the knee. The strain of the straps upon the pad and waist belt have the tendency to sink the abdomen, throw out the chest and cause the wearer to stand

¶ 1. See Patents, vol. 38, Cent. Dig. § 104.

erect. The straps do not chafe or cut the person as they do not draw over the hips but in substantially vertical lines.

The patent has two claims, both are involved. They are as follows :

"(1) In a combined abdominal pad and hose supporter, the combination with a flat abdominal pad having a continuous integral body with a smooth unbroken bearing or contact surface and of a size about equal to that of the upper central portion of the hypogastric region, of supports attached to said pad at its upper edge and hose-supporting straps attached to the lower edge of said pad, whereby in use strain is applied to said pad in substantially vertical lines and the pressure is localized, substantially as described.

"(2) In a combined abdominal pad and hose supporter, the combination with a continuous, integral flat body having a smooth, unbroken bearing or contact surface, of a strap secured to the upper edge portion of said pad and adapted to pass around the body and having a fastening for attaching it to the upper edge of the pad, hose-supporting straps secured to the outer lower edge of said pad, extending thence downward in substantial parallelism and adapted to be connected to the hose on the inner side of the leg and other longer hose-supporting straps secured to the lower edge of the pad between the first-mentioned hose-supporting straps and adapted to be carried outward across them and to be secured to the hose on the outer side of the leg, substantially as described."

The defenses are insufficiency of the specification, anticipation, lack of patentability and prior use.

Infringement if not admitted is not seriously denied. The defendant's supporter is almost the exact counterpart of the complainant's. The only difference pointed out is that in the defendant's device the straps are attached in such a way that if each strap leads down to the hose in the line indicated, the supporter may be used without crossing the straps as suggested in the description and drawings of the patent. It is evident that defendant's counsel is not greatly impressed with the force of this contention for he says :

"If it is material to the patent in suit that the inner set of hose supporter straps shall cross over the outer set of straps then the defendant's hose supporter does not infringe."

The answer is twofold: First, it is not material; and second, the defendant's supporter can, by adjusting the length of the straps, be used in the precise manner pointed out in the patent.

The contention that the patent was surreptitiously obtained is based upon the theory that the Patent Office officials failed to understand the invention and were deceived as to its character by the patentee and her attorneys. The court has searched in vain for any facts to sustain this theory; on the contrary, an examination of the file wrapper shows that the patent received unusual attention and the most careful scrutiny in the Patent Office and that every feature of the invention was examined and clearly understood.

The criticism that the patent is vague, indefinite and fatally faulty in not disclosing to the public in clear and certain language the subject matter, which is now claimed to be the invention, cannot be maintained. The best answer is the specification itself. It is thought that no intelligent person, whether skilled in the art or not, can read the description in the light of the drawings and fail to comprehend the invention in all its aspects. A woman reading it would know not only how to make the supporter but how to put it on and wear it. Indeed, the invention is so simple and so easily understood that it seems amazing that so

much can be said about it. If the immaterial and irrelevant testimony were eliminated from the record it would be reduced in size at least one-half.

The utility of the patented device is established beyond question. It is in undoubted demand and, considering the comparatively brief time it has been on the market, it has attained a wide popularity. There is testimony from a number of women who, as wearers, have practical knowledge of the device, that it accomplishes all that is claimed for it in the patent, namely, it improves the figure, reduces the abdomen, helps the wearer to stand erect and is convenient and comfortable. This testimony is uncontradicted, but the attempt is made to break its force by subjecting it to theoretical criticism based upon unwarranted, or at least unproved, premises. In the face of the testimony of a number of intelligent and disinterested women that certain results are accomplished, the opinion of a man, even though he be an expert, that such results are impossible is not particularly persuasive.

Upon the question of utility the defendant's conduct furnishes a very strong presumption in support of the patent. If the device be not useful why does the defendant use it? If it be worthless and accomplishes no more than the old garter supporters, why does she not use the old garter supporters? No rational being would expend time and money for the privilege of using a worthless article.

The invention is not anticipated by any of the prior patents; no one of them describes a device which, if made today for the first time, would infringe the claims of the Young patent. Combined, these prior patents do not so narrow the field of invention as to invalidate the patent for lack of patentability. Although relating, in a sense, to the same art these patents deal with different situations and seek to accomplish different objects and purposes from those of the Young patent. They belong to the same genus, perhaps, but to entirely different species: They relate to abdominal supporters, sanitary belts, garment supporters, waists, corsets, suspenders and garters.

The nearest approach to the patent in hand is the patent granted to Hannah E. Rogers, in July, 1890, for an abdominal supporter. The patent describes a complicated harness, consisting of a belt, which may be drawn tight by lacing cords, and is to be worn by fat people "to relieve the oppression that is liable to occur from gravitation," or, in other words, to hold up the abdomen.

The hose-supporting straps do not and cannot perform the function of the Young patent, their office being to hold up the hose and necessarily, therefore, to hold down the belt. The Young device depresses the abdomen. The Rogers device raises it and makes it more prominent at the point where it is most conspicuous. Young supports the hose by straps from the pad, Rogers by straps attached to the front and back of the belt, thus exerting an entirely different strain or pull.

The examiners in chief carefully considered the scope of the Rogers patent and correctly describe it as follows:

"In the Rogers device there are no supporters at the upper edge of the pad and the strain is exerted in lateral or horizontal lines instead of in a vertical direction. The use of the hose-supporting feature in the Rogers

device is purely incidental, as is shown by the statement on page 1, lines 65 to 68 of the patent, while in the applicant's device the strain produced by the tension on the hose supporters is relied upon to produce the results desired."

It is unnecessary to consider the other patents in detail for the reasons stated. If the Rogers patent does not destroy the Young patent none of the others can do so. The court has examined these patents in vain to find any suggestion, much less an actual structure, which shows, or even hints at, the combination of the Young patent.

As before stated the invention is a simple one; it relates to an article of wearing apparel designed to promote the comfort and improve the appearance of women. If the inventor were the first to accomplish these results she is entitled to the same protection as if she had operated in a broader field and had conferred greater and more lasting benefits upon mankind.

It is thought that the question of invention is settled by two recent decisions of the Circuit Court of Appeals for this circuit which deal with similar devices, but devices which, it seems, called for less exercise of the inventive faculties than is found in the patent in suit. *Parramore v. Taylor*, 52 C. C. A. 45, 114 Fed. 97; *Id.* (C. C.) 105 Fed. 965; *Frost v. Cohn* (decided December 15, 1902, C. C. A.) 119 Fed. 505.

In approaching the defense of prior use the rule of evidence applicable thereto should constantly be borne in mind. The defense must be established beyond a reasonable doubt. The reason for the rule is obvious. It is so easy to fabricate or color testimony which lies almost wholly in the control of the person producing it, the infirmities of the human memory are so great and the liability to mistake so manifest, that the court is never justified in permitting such testimony to outweigh the presumption of validity which attaches to the patent unless it be of such a character as to carry a clear conviction and remove every reasonable doubt. This court has frequently had occasion to consider this defense and it is, therefore, unnecessary to repeat what has been often said heretofore. *Thayer v. Hart* (C. C.) 20 Fed. 693; *Mack v. Spencer* (C. C.) 52 Fed. 819; *Lalance Co. v. Habermann Co.* (C. C.) 53 Fed. 375; *Singer Mfg. Co. v. Schenck* (C. C.) 68 Fed. 191.

One of the alleged prior uses took place in 1871, over 30 years before the date of the witnesses' testimony, the other uses began in 1876 and have continued since that date, but the occurrences principally relied upon took place in 1887 and 1888, over 14 years prior to the date of the testimony.

A discussion of the testimony in all its aspects is unnecessary and will subserve no useful purpose; suffice it to say that it leaves the mind of the court in doubt upon the proposition whether a structure possessing the features of the Young supporter was made prior to 1897.

There can be no question that a number of highly respectable people swear not only that one and two, but many hundreds of such devices were made, but the testimony of these witnesses, as well as those offered in reply, abounds in contradictions, improbabilities and

suspicious omissions. The court cannot believe, as is intimated by both counsel, that any of these witnesses was intentionally untruthful. It is thought rather that the unsatisfactory character of the evidence is the natural consequence of an attempt to compel the human memory to perform an impossible task. The situation developed is but a repetition of what always occurs in these cases and demonstrates the wisdom of the rule which forbids a finding of fact based upon testimony so uncertain.

In view of the success achieved by the Young device it is certainly remarkable, if the same article were on the market since 1871 that the production should have almost ceased at the date of the Young invention.

Again, if the number sold at all approximated the number as stated it would seem that prior use might have been established without the slightest question. The probabilities are all against the proposition that the Young device was widely known for such a long period of time. When it is remembered that the market during all this time abounded in articles for women's use which resembled in appearance the device of the patent it is not surprising that the witnesses were confused as to details and may have honestly believed that the things which they saw in 1871 and 1887 were identical with the Young device. That they were somewhat similar in appearance is quite possible, but that they were similar in function and operation the court cannot believe and is constrained to hold that the defense has not been established.

It follows that the complainant is entitled to a decree for an injunction and an accounting.

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In re FLEISHMAN.

(District Court, N. D. Illinois, N. D. December 2, 1902.)

No. 7,165.

1. BANKRUPTCY—TRUST ESTATE—BANKRUPT'S INTEREST—SURRENDER—CONDITION OF DISCHARGE.

A bankrupt's mother bequeathed one-half the residue of her estate to the bankrupt's wife in trust to pay the interest and income to the bankrupt free from the claims of creditors, and to pay from time to time to the bankrupt so much of the principal as the trustee should deem proper, in such manner as to free it from the claims of creditors. *Held* that, before he could secure a discharge, the bankrupt must assign his interest in the income to his trustee in bankruptcy, though his right to the principal, being conditioned on the option of the trustee, need not be so assigned.

In Bankruptcy.

On February 11, 1902, Moses S. Fleishman filed his petition in this court to be adjudged a bankrupt, and was accordingly so adjudged. Afterwards a trustee in bankruptcy was chosen. Subsequently he presented his application for discharge, in opposition to which the objecting creditors, the Dueber Watch Case Manufacturing Company, and the Hampden Watch Company, filed their specifications, which were thereupon, under the rule of this court, referred to Referee Wean. Upon the hearing of the specifications before Referee Wean, the referee recommended the discharge of the bankrupt, over-



ruled the objections of the objecting creditors, and the hearing now is upon the objections presented to the referee's report by the objecting creditors, which stand as exceptions in this court.

The two principal grounds urged by the objecting creditors for withholding the discharge from the bankrupt are the following: (1) That the bankrupt, "with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, \* \* \* failed to keep books of account or records from which his true condition might be ascertained"; (2) that the bankrupt has not "surrendered all his property and rights of property."

The facts, so far as they relate to the second ground, are as follows: Louise Fleishman, the mother of the bankrupt, died in Chicago on July 18, 1901. Her last will and testament was admitted to probate and record in the probate court of Cook county, Ill., on August 2, 1901. By this will the testatrix gave, devised, and bequeathed one-half of the rest, residue, and remainder of her estate unto Rosa Fleishman, the wife of the bankrupt, Moses S. Fleishman, to have and to hold the same in trust for the uses and purposes stated in said will, in the following words, to wit: "To invest the same and keep the same invested in such manner as to said Rosa Fleishman shall seem proper; to pay over the interest and income to be derived from said trust estate to my dear son, Moses S. Fleishman, free from the claims or rights of any of the creditors of said Moses S. Fleishman to attach or garnish the same, or in any way to subject the same to the debts of said Moses S. Fleishman; to pay over from time to time to said Moses S. Fleishman so much of the principal of said trust fund as to said Rosa Fleishman shall seem proper, in such manner that the same shall be free and clear from the rights of any of the creditors of said Moses S. Fleishman to attach or garnish the same, or otherwise to subject the same to the debts of said Moses S. Fleishman. And I do hereby authorize and empower the said Rosa Fleishman, or her successor in trust, to convert any real estate belonging to me into money, and to sell and by proper deed to convey the same, without any obligation on the part of any purchaser to see to the application of the purchase money. As soon as all claims of creditors of said Moses S. Fleishman have been paid in full, or have become outlawed or otherwise discharged, said trust shall cease, and the balance of said trust fund then in the hands of said Rosa Fleishman shall be paid over and delivered to said Moses S. Fleishman. The object of this trust being to provide a fund for the support and maintenance and for the benefit of said Moses S. Fleishman and his family, which may be preserved for him, free from the rights of any of his present creditors to subject the same to the payment of the debts of said Moses S. Fleishman. In case of the death of said Rosa Fleishman before the objects of this trust have been fully carried out, then and in that case my dear daughter, Sarah May, is hereby made successor in trust to said Rosa Fleishman, with like powers in all respects, discretionary or otherwise, that are hereby vested in said Rosa Fleishman, and she shall receive and hold said trust fund, and invest the same, upon the like trusts and for the same purposes as those hereinbefore mentioned. In case of the death of said Moses S. Fleishman before the termination of this trust, then said trust shall cease, and said trust estate shall be divided among the widow and children of said Moses S. Fleishman as is by the laws of the state of Illinois provided in case of intestacy." Louise Fleishman left over \$40,000 worth of property, consisting of real and personal estate, and the value of the one-half bequeathed to Rosa Fleishman in trust as aforesaid is over \$20,000. Moses S. Fleishman has not surrendered any right or interest acquired by him under the said will of Louise Fleishman, deceased, or any right or interest which he has or may have in said trust estate, or any part thereof, or in or to the income thereof, to the trustee in bankruptcy herein.

Julius & Lessing Rosenthal, for objecting creditors.

Moran, Mayer & Meyer, for bankrupt.

KOHLSAAT, District Judge. Bankrupt's mother bequeathed one-half of the residue of her estate to Rosa Fleishman, wife of the bankrupt, in trust "to pay over the interest and income \* \* \* to my

dear son, Moses S. Fleishman, free from the claims or rights of any of the creditors of said Moses S. Fleishman to attach or garnish the same, or in any way to subject the same to the debts of said Moses S. Fleishman; to pay over from time to time to said Moses S. Fleishman so much of the principal of said trust fund as to said Rosa Fleishman shall seem proper, in such manner that the same shall be free and clear from the rights of any of the creditors of said Moses S. Fleishman to attach or garnish the same, or otherwise to subject the same to the debts of said Moses S. Fleishman." The principal fund amounts to \$20,000. This matter now comes on to be heard upon exceptions to the referee's report. The only exception I deem material to be disposed of is that "the bankrupt has not surrendered all his property and rights of property." A bankrupt who does not surrender his estate to the trustee is not entitled to a discharge, even though he may have scheduled it and otherwise have complied with the statute. He must surrender to his creditors all property rights and benefits which are under his control, and which he has the legal power to transfer, except his exemptions. In *re Harrison*, 46 Minn. 331, 48 N. W. 1132. The fact that the rights or property interests which he holds cannot be reached by creditors is not the measure of his duty in such a case. In enacting the bankruptcy statute, the congress invoked its sovereign authority to provide a method whereby the individual could be freed from his lawful obligations. The act provides an extraordinary remedy in the interest of the debtor and against the rights of the creditors, and the true intent thereof is to enable the debtor to place all his estate at the disposal of his creditors, and himself go free. If he has his property so disposed of as to be out of reach of his creditors, but still his own, with power to assign his rights, why should he not, when he asks for the benefit of this extraordinary relief, surrender whatever he has the power to surrender? If he were compelled to go into bankruptcy, it would be different. He is not required to apply for this discharge, nor can he get it and yet keep back what belongs to his creditors. He has the alternative either to surrender all his property interests for the benefit of his creditors, and be discharged from his debts, or to keep the same, and be denied the benefits of the act. In the case before the court, there can be no claim that the bankrupt has any transferable interest in the principal fund at the present time. 2 *Perry, Trusts*, § 555, and cases cited. That seems to rest entirely on the option of the trustee. But the income is payable to the bankrupt, subject only to its being free from the interference of creditors. The payments can be ascertained, and the extent of bankrupt's interest therein arrived at, should he voluntarily assign the same to the trustee. He is not compelled to do this, and cannot be forced so to do, but unless he does he cannot be discharged in bankruptcy.

The report of the referee recommending the discharge is disapproved, and the discharge is denied.

ALEXANDER et al. v. SOUTHERN HOME BUILDING & LOAN ASS'N.

(Circuit Court, D. South Carolina. February 4, 1903.)

1. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT BY RECEIVER.  
When a Circuit Court of the United States has obtained jurisdiction over a corporation by the filing of a creditors' bill and the appointment of a receiver, a suit by the receiver for the collection of assets is cognizable in such court, regardless of either the citizenship of the parties or the amount in controversy.
2. BUILDING AND LOAN ASSOCIATIONS—ACCOUNTING WITH BORROWING STOCKHOLDER.  
Insurance premiums paid by a borrowing stockholder in a building and loan association on the property mortgaged, although required by the contract, are for his own benefit, and cannot be applied in liquidation of the debt.
3. SAME—LAWS GOVERNING—USURY.  
Where both the subscription and loan contracts of a stockholder in a building and loan association are dated and made payable at the home office of the association, they are governed by the laws of the state of such home office.
4. SAME—MISTAKE OF FACT—ERRONEOUS STATEMENT THAT LOAN WAS PAID.  
A statement sent by a building and loan association to a stockholder, by mistake, that his loan was paid in full, will not bind the association, where it was at once recalled, and no rights intervened.
5. SAME—CONSTRUCTION OF CONTRACT—ACCOUNTING WITH BORROWING STOCKHOLDER.  
The bond of a borrowing stockholder in a building and loan association provided that "upon final settlement with the association it is to retain as installment on the said stock and interest no greater sum than the sum actually advanced, with interest thereon at the rate of eight per cent. per annum." *Held*, that such provision governed the rights of the parties in an accounting after the insolvency of the association, but did not entitle the stockholder to credit on the debt for premiums paid.

In Equity. On ancillary bill by receiver for foreclosure of mortgage.

Ellis, Wimbish & Ellis and T. W. Bacot, for petitioner, receiver.  
Ellis G. Graydon, for respondent.

SIMONTON, Circuit Judge. The original bill was filed in the Circuit Court of the United States for the Northern District of Georgia by M. A. Alexander against the Southern Building & Loan Association, a corporation of the state of Georgia. The purpose of the bill was to administer and wind up the affairs of the said association. That court assumed jurisdiction, appointing John T. Pendleton receiver, and proceeded to administer the affairs of the association. A part of the assets being situate within this district, an auxiliary bill was filed in this court between the same parties as in the suit in the Northern District of Georgia. This court assumed jurisdiction of the auxiliary bill, and, following the practice and exercising

¶ 1. Supplementary and ancillary proceedings in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

¶ 2. What law governs usury in contracts of building and loan associations, see note to Kirlicks v. Interstate Building & Loan Ass'n. 51 C. C. A. 319.

¶ 5. See Building and Loan Associations, vol. 8, Cent. Dig. § 63.

the comity existing between the several Circuit Courts of the United States, recognized and confirmed the appointment of said receiver appointed in the Circuit Court of the Northern District of Georgia. The auxiliary cause having been filed in this court, ancillary proceedings began for the purpose of realizing the assets of the defendant association. Among these assets is a bond of Mrs. N. E. Osborne, a citizen of South Carolina, purporting to be secured by a mortgage of a tract of land in Abbeville county, S. C. Thereupon the receiver, John T. Pendleton, filed by way of ancillary proceedings his bill against the said Mrs. N. E. Osborne. His bill alleges: That she had become and was a subscriber to five shares in the said Southern Building & Loan Association, of the par value of \$100 each. That pursuant to the by-laws and rules of the said association she borrowed from it the sum of \$500, and to secure the same executed on the 10th day of May, 1892, her bond in the penal sum of \$1,000, conditioned to pay to the said association \$3 monthly as installments on the said shares of stock, together with \$2.50 monthly as premium in advance on the said loan, and the further sum of \$2.50 monthly as interest. That in accordance with the rules, regulations, and by-laws of said association, adopted and treated as part of the said bond, the payments thus mentioned were required to be made at the home office of the association at Atlanta, Ga., and continue until the payment of dues so to be made that such should equal the sum or value of \$100, when said shares could be deemed to be matured, and the value thereof be applied in liquidation of the loan. That to secure said bond she executed a mortgage of land set out at large in the bill; said mortgage, besides the usual covenants, providing that the mortgagor keep insured the buildings on the land in the sum of \$500, and to assign the policy to the association. That the defendant made all payments required by the bond promptly up to and including that of September, 1899. That since then no payments whatever have been made on the bond. The bill alleges that there is now due on the bond the original loan, interest thereon to April 1, 1900, \$15 premium accrued and unpaid to the same date, and insurance premiums unpaid \$15. The prayer is for foreclosure of the mortgage.

The defendant interposed a demurrer to the bill as not within the jurisdiction of this court, amount in controversy being less than \$2,000. It is established beyond controversy that when the Circuit Court of the United States has obtained jurisdiction over a corporation by the filing of creditors' bill and the appointment of a receiver any suit by or against the receiver in the course of the winding up of such corporation, whether for the collection of his assets or for the defense of its property rights, must be regarded as ancillary to the main cause, and is cognizable in the Circuit Court, regardless either of the citizenship of the parties or the amount in controversy. *White v. Ewing*, 159 U. S. 39, 15 Sup. Ct. 1018, 40 L. Ed. 67. All the cases upon and sustaining this proposition are quoted. The demurrer is overruled.

The defendant has filed her answer. The answer is in the form of an answer to a complaint as a code pleading. This is not proper, but no exception has been taken to it. It denies that there is any-

thing due on the bond, or that there is any mortgage on the land. This proceeds upon the idea that the bond has been satisfied in full, for in the next sentence the execution of the bond and mortgage is admitted. The next defense is that the transaction of the loan was entered into upon the representation and guaranty that the stock would mature and reach its par value of \$100 per share in 83 months from the time she became a subscriber. She avers that she has paid up all that there is that was contracted for during that period. It is true that the literature holds out the prospect of winding up the transaction in the period stated, but it was put more as an estimate, the term itself importing uncertainty, and so it cannot be construed as a guaranty.

Another defense is that, having become a borrower under this guaranty and representation, she paid upon the loan \$435 and a number of insurance premiums—that is to say, \$25 in 1892, \$50 in 1899, and \$60 for each of the years 1893, 1894, 1895, 1896, 1897, and 1898; that the scheme of all building and loan associations, including this one, is that all payments made by a borrower, whether on stock or otherwise, are to be applied in liquidation of the debt; that, even if 12 per cent. per annum be adopted as the rate to be paid, she has overpaid it. But she had the use of the money, and this implies a promise to pay interest. The insurance was as much for her benefit as for that of the association. The only payments going to the principal of the debt were the installments on the stock. The rule with regard to credits on these loans of building and loan associations is not as broad as that contended for, except when the defense of usury is sustained. Besides this, the contract is expressed in the bond of the defendant, and that was to pay monthly \$3 on installments of stock, \$2.50 interest, and \$2.50 as premium, as well as to observe the covenants set out in the mortgage. The payment of these sums of money specified will discharge the bond if kept up until the stock attains its par value, and nothing is said about payments for insurance or taxes. There is an important proviso in the bond, and that is, upon final settlement the association can only retain as installments on such stock and interest no greater than the sum actually advanced, interest thereon at the rate of 8 per cent. per annum.

The next defense is that the loan was usurious under the law of South Carolina. The home office of the association was Atlanta, Ga. The subscription was made there. The money was lent there. The payments under the contract were to be made there. The contract is a Georgia contract, and construed under the laws of Georgia. *Bedford v. Eastern B. & L. Association*, 181 U. S. 242, 21 Sup. Ct. 597, 45 L. Ed. 836; *McIlwaine v. Ellington*, 49 C. C. A. 446, 111 Fed. 584, 55 L. R. A. 933; *Guaranty Savings, etc., v. Alexander (C. C.)* 96 Fed. 872; *Pollock v. Association*, 51 S. C. 430, 29 S. E. 77, 64 Am. St. Rep. 683. Under the statute law of Georgia a contract like this is not usurious. See opinion in *Interstate B. & L. Association v. Edgefield Hotel Company* (decided a few days ago) 120 Fed. 422.

The next defense is that complainant admitted in writing that the amount due on the debt of the defendant had been paid in full. This

was faintly urged, because it appears that a statement made to that effect was made in mistake, and was at once recalled, and that no rights intervened. "A mistake of fact, honestly made, can always be relieved in equity." *Rhode Island v. Mass.*, 15 Pet. 233, 10 L. Ed. 721. "Money paid by mistake can be recovered." *United States v. Barlow*, 132 U. S. 281, 10 Sup. Ct. 77, 33 L. Ed. 346. "Court of equity will open statement made by mistake, though full receipts have been given." *McCrae v. Hollis*, 4 Desaus. 122. "Even a receipt may be contradicted by parol evidence." *Heath v. Steele*, 9 S. C. 86. The last defense has been abandoned.

The case at bar will depend upon the construction of the last clause of the bond, in these words: "Upon final settlement with the association it is to retain as installments on the said stock and interest no greater sum than the sum actually advanced, with interest thereon at the rate of eight per cent. per annum." That is to say, whatever payments may be made by the defendant either during the currency of the contract or at its conclusion, on final settlement the association cannot retain a greater sum than the amount of the debt, with 8 per cent. annual interest to that date. If more money than this is paid, the surplus may be returned. If this amount is paid on final settlement, the bond must be canceled, and the mortgage satisfied. The words are "installments on said stock and interest." These words exclude the payments on account of premium. The bond is dated 10th of May, 1892. The monthly installments on the stock are \$3; those on the interest \$2.50. Taking the decree in this case as the date of final settlement, and fixing the date as of the 10th of February, 1903, there will then have elapsed 10 years and 9 months, or 129 months. For each of these \$5.50 was due and payable as installments; in all, \$709.50. There has been actually paid installments to and including September, 1899; that is to say, seven years and three months—87 months. The installments being \$5.50 each a month, she has paid \$478.50, and is entitled to credit for this, with interest calculated according to the method of partial payments when each installment was paid.

The standing master will state the account, charging the defendant with \$500 and interest thereon from the 10th of May, 1892, at the rate of 8 per cent. per annum. Upon paying the difference of this amount, with the installments already paid, following the method of partial payments, and the cost of these proceedings, the mortgage will be satisfied, without prejudice to any right she may have to dividends or profits.

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In re BUTTS.

(District Court, N. D. New York. February 27, 1903.)

**1. BANKRUPTCY—DISCHARGE—DEBTS EXCEPTED FROM RELEASE.**

Bankr. Act July 1, 1898, § 17, cl. 4 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), providing that a discharge shall release a bankrupt from all provable debts except such as "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in

any fiduciary capacity," should be so construed as to include within the exception debts created by fraud, embezzlement, or misappropriation in whatever capacity or relation the bankrupt was acting.

2. SAME.

Goods were shipped to a bankrupt under a written contract which on its face purported to be one of sale and purchase, contemplating that the goods would be resold by the purchaser and payment therefor made at stated times in cash or notes received on sales at prices therein fixed. It contained the words: "For conditions of settlement, see reverse side of contract." On the back was the provision: "It is agreed that you will hold in trust and separate for the settlement of our account with you all of said goods unsold and all currency, open accounts, notes, liens, mortgages or other values received for goods sold." *Held*, that such provisions did not convert the contract from one of sale into one creating a trust and establishing a fiduciary relation between the parties, nor render the debt from the bankrupt on account of goods sold and not paid for one created by fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity, within the meaning of Bankr. Act July 1, 1898, § 17, cl. 4 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), so as to prevent its release by a discharge of the bankrupt.

Motion for an injunction staying the American Agricultural Chemical Company, plaintiff, in an action pending in the Supreme Court of the state of New York against the bankrupt, James P. Butts, from prosecuting such action to judgment and enforcing same.

Gibbs & Wilbur, for the motion.  
Edson A. Hayward, opposed.

RAY, District Judge. In the month of October, 1901, the American Agricultural Chemical Company shipped and delivered to the said James P. Butts at Oneonta, N. Y., certain goods under and pursuant to the terms of certain agreements, partly printed and partly in writing (both being the same in terms, and therefore treated here as one), which provide as follows:

"We hereby agree to ship you, under the conditions and stipulations hereinafter named, the following fertilizers at prices and terms named below. The terms and conditions of this contract are as follows, and the prices named below are net to us."

Then follows a description of the goods shipped, with prices, etc.

"Full settlement for spring and fall shipments shall be made by you not later than November 1st, 1902, in cash or by notes (given by purchasers of these goods) received and indorsed by you. If settlement is made in cash at above date, we will allow you a discount of five per cent. (5%) from the face of invoices. For all cash received prior to November 1st, 1902, we will allow you an additional discount from the face of invoices at the rate of eight per cent. (8%) per annum, from the date of such prepayment to November 1st, 1902.

"For conditions of settlement, see reverse side of contract.

"This contract, written and printed, constitutes the entire agreement, and no verbal understanding will be recognized. The above named provisions of this contract, as well as those on the reverse side of this agreement, which are, and are to be considered as a part of this contract, shall not be in force until accepted by the home office."

This was signed by said company by its salesman. Immediately below, the defendant (now bankrupt) signed the following:

"Accepted on conditions named.

J. P. Butts."

On the back of this order so accepted was printed the following:

"The following terms and conditions are, and are to be considered as a part of the terms and conditions stated on the opposite side of this contract form:—

"You agree to render us an account of goods unsold on July 1st and also on November 1st, 1902. It is agreed that you will hold in trust and separate for the settlement of our account with you, all of said goods unsold and all currency, open accounts, notes, liens, mortgages or other values received for goods sold.

"If settlement is made in purchasers' notes, said notes shall be made out on blanks furnished by us, payable to our order at some bank, &c.

"If we request it, you agree to give your own note, payable on bank, with the express understanding that said note is to be received by us as evidence of sales and in confirmation of your guarantee as above stated and not as payment: and notwithstanding the reception of said note, all accounts and notes and moneys received for goods, are to remain our property, but your note shall be enforceable to the extent of all losses suffered by us on all sales made and guaranteed by you."

Under these agreements, goods to the amount of \$1,997.30 were delivered to the said defendant, Butts, and disposed of by him, and not paid for.

The complaint, which sets out the contracts in full, alleges, after stating a proper demand:

"But the said defendant refused, and refuses and neglects, to deliver to the plaintiff the proceeds of any sale, or to return to the plaintiff any of said goods, or any money or property received therefor, or an account thereof; and defendant refuses to account for said property so intrusted to him, or for the proceeds thereof, and has wrongfully, unlawfully, and fraudulently converted said goods and property, and embezzled and misappropriated the proceeds thereof, and converted the same to his own use, which said goods and the proceeds thereof were received by him in his said fiduciary capacity. [The complaint alleges that he received same in such capacity.] That he has fraudulently and wrongfully converted and disposed of said goods and the proceeds thereof to his own use, to the plaintiff's damage in the sum of one thousand one hundred ninety-seven dollars and thirty cents."

That this debt or claim is provable in bankruptcy cannot be successfully questioned or denied. The claim is founded on an express contract, and that the bankrupt was liable for the value of these goods, as fixed by the agreements, cannot be questioned. The legal effect of the allegations of the complaint is not broader than the legal effect of the contract made a part thereof. By section 17 of the act of July 1, 1898 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), "An act to establish a uniform system of bankruptcy throughout the United States," it is provided:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as \* \* \* were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Must the embezzlement, misappropriation, or defalcation have occurred while the person charged was acting as an officer or in a fiduciary capacity, and with direct reference to the funds or property in his hands as such officer or person acting in such fiduciary capacity? This question seems not to have been settled. In *re* Basch (D. C.) 97 Fed. 761, Brown, District Judge, held:

"A debt due by a bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him



for sale on commission, on a contract to return the goods or their specific proceeds, is not a debt created by the bankrupt's 'fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity,' and, therefore, will be released by his discharge in bankruptcy."

In *Upshur v. Briscoe*, 138 U. S. 378, 11 Sup. Ct. 317, 34 L. Ed. 931, the court, in speaking of section 33 of the act of 1867 (14 Stat. 533), says:

"It is to be noted that the language of section 33 of the act of 1867 excepts debts created by the bankrupt 'while acting in any fiduciary character'; and the language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created. In this view, it was said in *Cronan v. Cotting*, supra: 'We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase, "while acting," etc., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, breach of trust.'"

In *Matter of Bullis*, 68 App. Div. 508, 73 N. Y. Supp. 1047, it was stated (while not necessary to the decision of the case) that:

"Subdivision 4 of section 17 of the national bankruptcy law (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), excepting from the operation of the discharge debts 'created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity,' does not, in the use of the words 'fraud,' 'embezzlement' and 'misappropriation,' relate to an individual, and by the word 'defalcation' alone apply to one 'acting as an officer or in any fiduciary capacity.'"

In *Frey v. Torrey*, 70 App. Div. 166, 75 N. Y. Supp. 40, it was held:

"The words 'while acting as an officer or in any fiduciary capacity,' used in subdivision 4 of section 17 of the United States bankruptcy law, excepting from the operation of the discharge in bankruptcy an indebtedness 'created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity,' do not qualify the words 'fraud,' 'embezzlement,' and 'misappropriation,' but only the word 'defalcation.'"

That subdivision 4 of section 17 is open to both constructions is a matter of regret. If this subdivision had been made to read, "or were created by his fraud, embezzlement, or misappropriation, or were created by his defalcation while acting as an officer or in any fiduciary capacity," there would be no question that the words "while acting as an officer or in any fiduciary capacity" would only qualify or apply to the word "defalcation." Or if the subdivision had been made to read, "or were created by his fraud, embezzlement, or misappropriation, or were created by his fraud, embezzlement, or misappropriation or defalcation while acting as an officer or in any fiduciary capacity," there would be no question that debts created by fraud or embezzlement or misappropriation or defalcation would not be affected by a discharge in bankruptcy, irrespective of the existence of the technical trust or fiduciary relation.

The framing of this subdivision was a matter of great difference of opinion, and the words used are the result of an agreement between those who insisted that debts created by fraud, embezzlement, and misappropriation, irrespective of the existence of the technical trust

relation, should not be affected by the discharge, and those who insisted they should be. It was contended that debts created by fraud, by embezzlement, or by misappropriation should not be affected by the discharge in bankruptcy. Indeed, it is difficult to see why they should be. The existence or nonexistence of the technical trust or fiduciary relation would seem to be immaterial so far as the moral turpitude is concerned. Is there any good reason why the executor, trustee of an express trust, or guardian of an infant should be refused a discharge if he embezzles or misappropriates the funds intrusted to him, when the person who does not occupy these technical trust or fiduciary positions may embezzle or misappropriate the funds or property intrusted to him and be discharged from the debt thus created in bankruptcy proceedings? If there is a debt existing for property or money embezzled or misappropriated by a person occupying the technical fiduciary position, there is a "defalcation," for the money or property is gone, and has not been made good. "Defalcation while acting as an officer or in any fiduciary capacity" would seem to imply and include either embezzlement or misappropriation or both. It was supposed that the use of the language employed would forbid the discharge of any person from a debt created by his fraud, or by his embezzlement or misappropriation of funds or property, in whatsoever capacity or relation acting, and also the debts created by the defalcation of an officer or person occupying the technical trust or fiduciary relations known to and recognized by our law. It must be conceded, however, that the word "defalcation" is broader than "embezzlement" or "misappropriation." Neither class of debts so created should be construed out of the section providing what debts shall not be affected by a discharge. But this case does not necessarily turn on this question.

It is clear that a discharge in bankruptcy will not release Butts from the debt due the plaintiff if such debt was created by the embezzlement of funds or property belonging to the plaintiff, or by the misappropriation of property or funds belonging to the plaintiff, within the meaning of the language of the act quoted. The first consideration is whether or not the contracts annexed to the complaint, when properly construed, retained the title of the property therein mentioned and of the proceeds of its sale in the plaintiff. These contracts are mere memoranda made by the salesman of the plaintiff and accepted by the defendant as to a contract or agreement in pursuance of which the plaintiff was to ship goods to the defendant to be sold by him, with discounts from the prices fixed in case settlements were made at or before certain dates mentioned. On the face of these memoranda no mention is made of any trust or trust agreement, or of any fiduciary relation, or retention of title. On the face of the agreements the plaintiff agreed to ship the goods at prices fixed, and the defendant had the right to dispose of the same in any way he saw fit. The defendant could settle or pay cash or notes given by the persons to whom he sold the goods if indorsed by the defendant. These words are contained in the agreement on the face thereof. "For conditions of settlement, see reverse side of contract." On the back of this agreement, we find:

"It is agreed that you will hold in trust and separate for the settlement of our account with you, all of said goods unsold and all currency, open accounts, notes, liens, mortgages or other values received for goods sold."

It will be noted that this holding in trust is simply for the settlement of the account between the plaintiff and the defendant. If it was intended to create a technical trust making the defendant a trustee for the benefit of the plaintiff, it is strange that these trust provisions were printed on the back of the memoranda, and not in them and on the face thereof, where they would be read, probably, by the defendant before signing the paper.

In the last paragraph printed on the back of the memoranda we find an obscure and confused statement to the effect that all accounts and notes and moneys received for goods are to remain the property of the plaintiff. These words, if intended to create a trust or express trust relation between plaintiff and defendant, ought to have been included in and written upon the face of the contract itself. The parties, however, have characterized these clauses upon the back of the memorandum of agreement in the contract, by words forming a part of it, as "conditions of settlement," and they say, "For conditions of settlement, see reverse side of contract." All the printing on the back of the agreement or memoranda is to be considered and treated as conditions of settlement, and not as an agreement between the parties creating or establishing a technical trust, or the trust or fiduciary relation mentioned in the bankruptcy law.

It is self-evident that the real transaction between the plaintiff and the defendant was the sale by the former to the latter of certain goods, with the expectation that they would be resold by the purchaser, and it is not hinted upon the face of the agreement and above the signatures thereto that any trust relation is intended to be created, or that the title of the goods sold by the plaintiff to the defendant is or is intended to be retained in the plaintiff. It ought not to be held, and this court will not hold, that the character of the real transaction between the parties, that of sale by plaintiff and purchase by the defendant, is changed into a technical trust, or that a fiduciary relation is established, or that the plaintiff retained the title to his goods, by the use of such language printed upon the back of the agreement. It was not competent for the parties, in this obscure and uncertain manner, to change the legal effect of the transaction. It is not at all probable that the defendant understood these memoranda to be susceptible of such a construction or to have such meaning or effect as is now claimed by the plaintiff. The words used and the whole construction of the instruments negative such an intent.

These conclusions are fully sustained by adjudicated cases. *Matter of John H. Benedict*, 8 Am. Bankr. Rep. 463, 75 N. Y. Supp. 165; *Burnham v. Pidcock*, 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. Supp. 1007; *Braken v. Milwer*, 5 Am. Bankr. Rep. 23, 104 Fed. 522; *Knott v. Putman*, 6 Am. Bankr. Rep. 80, 107 Fed. 907; *Mulock v. Byrnes*, 129 N. Y. 23, 29 N. E. 244. The facts in *Matter of Benedict*, 8 Am. Bankr. Rep. 463 (see page 465) 75 N. Y. Supp. 165, seem to be almost identical with the facts of this case. The decision in *Watertown Carriage Co. v. Hall*, 75 App. Div. 201, 77 N. Y. Supp. 1028, is

not in conflict with these views. That case holds that "a demand against a bankrupt for the conversion of property is not a provable debt under the bankruptcy law of 1898, and therefore is not released by his discharge in bankruptcy." In that case, the cause of action was simply and purely for the wrongful, fraudulent, and unlawful conversion, misappropriation, and embezzlement of the sum of \$65, lawful money of the United States of America. No contractual relation was alleged or indicated. The wisdom and propriety of enjoining actions of this character, like the one sought to be enjoined in this case, cannot be doubted. In re Basch (D. C.) 97 Fed. 761.

The motion must be granted. It is so ordered.

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In re PECK.

(District Court, D. Connecticut. February 19, 1903.)

No. 960

**1. BANKRUPTCY—SPECIFICATION OF OBJECTIONS TO DISCHARGE—VERIFICATION.**

The verification of specifications of objection to the discharge of a bankrupt by the attorney for the objecting creditors, who states under oath that "the matters alleged above are true, to the best of his knowledge and belief," is sufficient.

**2. SAME—SUFFICIENCY—AMENDMENT.**

So-called specifications of objection to the discharge of a bankrupt which merely state the grounds for refusing a discharge in the language of the statute, without any attempt to specify any particular act of the bankrupt, are wholly insufficient, and no evidence can be received thereunder, nor do they afford any basis for amendment.

**3. SAME—APPLICATION FOR LEAVE TO AMEND.**

Leave to amend the specifications filed in opposition to the discharge of a bankrupt can only be granted by the judge.

In Bankruptcy. On questions certified by referee.

The following proceedings were had before the referee, George A. Kellogg, on the petition of the bankrupt for discharge:

"Specification of Objections to Discharge.

"John R. Booth, of Burlington, Vermont, and the Berlin Mills Company, a corporation organized under the laws of the state of Maine, and having an office and place of business in the city of Portland, Maine, parties interested in the estate of said H. H. Peck, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specifications:

"(1) That the said H. H. Peck, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, and failed to keep books of account or records from which his true financial condition might be ascertained.

"(2) That the said H. H. Peck has committed an offense punishable by imprisonment as provided in the act of Congress in such case made and provided: (a) In that he, the said H. H. Peck, did conceal, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy. (b) In that he has made a false oath in relation to a proceeding in this case.

"Dated at Hartford this 20th day of December, A. D. 1902.

"John R. Booth, The Berlin Mills Company, Creditors,  
"By Benedict M. Holden, Their Attorney."

"State of Connecticut, Hartford County. ss.—Hartford, Dec. 20th, 1902.

"Personally appeared Benedict M. Holden, who made oath and says that he is the attorney for the creditors above named, and that the matters alleged above are true, to the best of his knowledge and belief, before me,

"Kate F. Wolfe, Notary Public. [L. S.]"

"Demurrer to Specifications.

"The petitioner demurs to the specifications filed in the above-named matter, and for reasons thereof assigns the following, to wit: (1) Said specifications are not verified by the oath of the creditor or creditors presenting them. (2) Said specifications are not signed by the creditor or creditors presenting them. (3) Said specifications are signed in the name of John R. Booth and the Berlin Mills Company, creditors, by their attorney, and are not verified either by the positive oath of said creditors or either of them, or by said attorney, but only upon the knowledge and belief of said attorney.

H. H. Peck,

"By Wm. C. Hungerford, His Attorney."

Memorandum of Decision Denying Motion to Dismiss Specifications.

On December 27, 1902, the bankrupt filed a demurrer to the specifications of objections filed by the objecting creditors December 20, 1902, assigning as reasons for demurrer that said specifications were not signed by creditors and were not verified by the oath of creditors, and that the verification by the attorney for the creditors was not sufficiently positive in form.

Since the demurrer objects to the form of the specifications, it is equivalent to a motion to dismiss the specifications for the reasons stated, and will be so considered. Said specifications were signed and verified under oath by Benedict M. Holden, as attorney for John R. Booth and the Berlin Mills Company, creditors of said bankrupt; the said Holden being an attorney at law who has been admitted to practice in the United States District Court, and who had duly entered his appearance for said creditors in opposition to the petition for discharge. In view of subdivision 9 of section 1 of the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), which provides that "'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy"; and of General Orders in Bankruptcy, No. 4, which provides that "every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court"; and in reliance upon the decision of the Circuit Court of Appeals of the Eighth Circuit in *In re Gasser*, 5 Am. Bankr. Rep. 32, 44 C. C. A. 20, 104 Fed. 537, a case exactly in point, I am of the opinion that the signature by Attorney Holden is sufficient; and, since nothing in the law or in the general orders requires pleadings to be verified by the creditor personally, it follows that the verification by the attorney is sufficient. Indeed, in the present case, where the creditors themselves are at a distance, and the attorney is more familiar than they can possibly be with the facts in the case, he is better qualified to verify pleadings than his clients.

The objection raised by the motion that the oath is not positive seems not well taken, since said oath is in the usual form (the identical form of the oath made by the bankrupt himself in his petition for adjudication), and is as positive as any language could make it.

The motion to dismiss is denied.

"Demurrer to Specifications.

"The petitioner demurs to the specifications filed in the above-named matter, and for reasons thereof assigns the following, to wit:

"(1) Said specifications are not sufficiently specific, and do not inform the bankrupt of the particular grounds of the opposition to his discharge.

"(2) Paragraph 1 of said specifications does not state what books of account or records the petitioner destroyed, concealed, or failed to keep, or in what way his true financial condition could not be ascertained.

"(3) Paragraph 2 (a) does not state what property, or the amount thereof,

or where the same was located, that the petitioner concealed from his trustee belonging to his estate in bankruptcy.

"(4) Said specifications do not state in paragraph 2 (b) any particulars representing said alleged false oath, nor set forth the proceeding in relation to which said alleged false oath was made.

"H. H. Peck,

"By Wm. C. Hungerford, His Attorney."

Memorandum of Decision on Demurrer to Specifications.

The bankrupt's demurrer filed January 12, 1903, properly raises the question of the sufficiency of the allegations of the specifications of objections. The two objections stated in the second count of the specifications are defective in that they omit the essential allegation that the acts charged were knowingly and fraudulently done. The rule here stated was applied by Judge Coxe, in the District Court for the Northern District of New York, in the case of *In re Pierce*, 4 Am. Bankr. Rep. 554, 103 Fed. 64, which case is still authority in this circuit.

Both of said allegations here mentioned, and the remaining allegation of the specifications, namely, that the bankrupt failed to keep proper books of account, are further and fatally defective because they do not inform the bankrupt of the particular charge against him, and do not state facts from which the court can understand any issue.

In the case of *In re Hixon*, 1 Am. Bankr. Rep. 610, 93 Fed. 440, Judge Woolson, of the Southern District of Iowa, held that allegations of objections to the bankrupt's discharge must not only be stated in the general words of the statute, or their equivalents, but must also include a statement of facts sufficient to point out the exact charge against the bankrupt, and to show that the act charged against him is clearly within the class defined by the general words. This decision has been followed by a line of cases in other districts, and the same rule has been established in this circuit in the case of *In re Matthew McNamara*, 2 Am. Bankr. Rep. 567, by Morris S. Wise, referee, the referee's report having been affirmed by Judge Addison Brown, of the Southern District of New York, June 29, 1899.

With regard to the allegation of failure to keep books, it has been held in one or two cases that the general words of the statute describing the offense are sufficient for the introduction of evidence where the intent is to allege that the bankrupt kept no books at all. In the present case, however, the attorney for the objecting creditors examined the bankrupt, and the bankrupt's books, consisting of ledgers, cash book, day book, etc., at great length, occupying two days therein, and if there existed any facts sufficient to constitute a bar to the discharge in relation to the books, or to the business dealings and testimony of the bankrupt, the objecting creditors were in a position to specifically charge such acts.

The demurrer is therefore sustained in regard to all allegations contained in the specifications of objections.

Subsequently the objecting creditors, by their attorney, applied for leave to file amended specifications, and the referee made the following certificate to the court:

"To the Honorable James P. Platt, Judge of the District Court of the United States for the District of Connecticut: Pursuant to the provisions of the ninth rule in bankruptcy of said District Court, I hereby report:

"(1) That on the 29th day of November, A. D. 1902, said bankrupt filed his petition for a discharge from all debts provable against his estate, except such debts as are excepted by law from discharge, which petition is herewith transmitted, and thereupon, on the 2d day of December, A. D. 1902, I entered an order appointing the 13th day of December, A. D. 1902, at 10 o'clock in the forenoon, at my office in Hartford, Conn., as the time and place for the examination of said bankrupt, and for creditors and other persons interested to present their proofs and pleas in opposition to said discharge, and that the bankrupt be present at said time and place, and that the notice required by rule 9 in bankruptcy of said District Court be given of the pendency of said petition, and that notice be given said bankrupt by mail to attend at said time and place.

"(2) On the 3d day of December, A. D. 1902, I published the notice required by said rule and said order in the Hartford Courant, and on the 2d day of December, A. D. 1902, I mailed a like notice to each known creditor of said bankrupt, as by said order and return of notice herewith transmitted will appear.

"(3) That, pursuant to said order and said notice, I sat on the 13th day of December, A. D. 1902, at 10 o'clock in the forenoon, for the purposes named in the said order, and said bankrupt appeared, and John R. Booth and the Berlin Mills Company, creditors of said bankrupt, appeared by their attorney, Benedict M. Holden, and gave notice of objection to the petition for discharge, and of intention to file specifications of objections thereto, and asked opportunity to examine the bankrupt at length. Whereupon the hearing was adjourned to December 27, 1902, at 10 o'clock a. m., specifications of objections to be filed on or before December 23, 1902, and opportunity to examine the bankrupt to be given the creditors on December 15, 1902, at 10 o'clock a. m. Thereafter, on December 15, 1902, the bankrupt appeared in the office of the referee, and was examined by the said Benedict M. Holden, attorney for the objecting creditors, during said day, which examination was continued by said attorney on December 18, 1902.

"(4) That on December 20, 1902, said objecting creditors, by their said attorney, Benedict M. Holden, filed specifications of objections to the discharge of the bankrupt, to which specifications the bankrupt filed a demurrer, which was substantially a motion to dismiss the specifications, on the ground that they were not in proper form, which motion was argued by the attorneys for the parties before the referee on December 27, 1902, and denied by the referee as per memorandum of decision filed January 10, 1903 (attorney for the bankrupt taking exception to the ruling of the referee), said specifications, motion, and memorandum of decision thereon being herewith transmitted.

"(5) That on January 12, 1903, the bankrupt, by his attorney, William C. Hungerford, filed a demurrer to the specifications on the ground that they were not sufficiently specific, which demurrer was sustained by the referee for the reasons stated in a memorandum of decision filed January 24, 1903, said demurrer and memorandum of decision thereon being transmitted herewith.

"(6) That thereupon the objecting creditors, January 27, 1903, filed a bill of exceptions (herewith transmitted), contending that the referee erred both in receiving a second demurrer and in sustaining said demurrer.

"With regard to the first contention, the record shows that the first so-called demurrer filed was considered as a motion to dismiss. However, the technicality here suggested by the objecting creditors is immaterial, since it is well settled that the referee must pass upon the sufficiency of the specifications, and receive evidence only in support of sufficient specifications, irrespective of the filing of any pleadings by the bankrupt.

"Subsequently, on February 5, 1903, the objecting creditors filed a motion to amend the original specifications, which motion, with the proposed amendment, is transmitted herewith, and submitted the question of the allowance of the amendment to the referee. The referee is of the opinion that the judge alone can allow an amendment, and the question was so decided by Judge Lochren, of the District of Minnesota, in the case of *In re Kaiser*, 3 Am. Bankr. Rep. 767, 99 Fed. 689, which decision was recently followed in the Southern District of New York in the case of *In re Wolfensohn*, 5 Am. Bankr. Rep. 60. Since, however, the question of the allowance of the proposed amendment in the case before the referee has been submitted to the referee by the parties, the referee, after an examination of the law and the decisions, ventures to state his opinion in the matter. While the allowance of an amendment to specifications of objection is discretionary with the judge of the District Court, and the equitable rule is that amendments should be liberally allowed, nevertheless there seems to be a limit beyond which indulgence should not be granted to the objecting creditors. This limit is defined by Judge Woolson, of the Southern District of Iowa, in language as follows: 'Manifestly, the court would in such a case (where the objecting creditor has attempted to specify, but has failed to push his specifications sufficiently far into detail), where the good faith in the attempt of the cred-

itor is manifest, permit amendment; but such amendment ought to be permitted only where there is manifestly an attempt on the part of the creditor to specify.' In re Hixon, 1 Am. Bankr. Rep. 610, 93 Fed. 440. The original specifications in the case at bar are general and vague, and make no attempt whatever to specify anything. They are such as have been frequently dismissed by judges of the District Court, who have described them as a 'mere cover for fishing excursions.' Judge Woolson, in the case above cited, says that counsel must know, when filing such specifications, that no evidence can be received under them by any court until amendment, and that it would seem that they are entered either to stand as a threat to the bankrupt of further trouble, or as an attempt vexatiously to delay his discharge, 'so certain is it that these miscalled "specifications" do not specify.' The only allegation in the specifications in the present case that escapes the above criticism is the allegation of failure to keep books, and that does not specify anything, unless the intent is to show that no books were kept. But, as stated in the referee's memorandum of decision sustaining the bankrupt's demurrer, that construction of said allegation is not possible in this case, because the attorney for the objecting creditors, in the presence of the referee, examined at great length the bankrupt and a large number of the bankrupt's books, consisting of ledgers, daybooks, bankbooks, etc.; in fact, so exhaustive was this examination, which took place a number of days before the specifications in question were filed, that there seems no reasonable excuse for the filing of these so-called specifications that do not specify anything. It is submitted that there is no substance in these specifications, and, therefore, that there is nothing to amend. If there had been any attempt on the part of the pleader to be specific, however imperfect or defective that attempt, an amendment might be permitted. While additional specifications that are merely enlargements of what has been already filed, and are purely amendatory thereof, may be allowed, in the discretion of the court (In re Osborne, 8 Am. Bankr. Rep. 166, 52 C. C. A. 595, 115 Fed. 1. [First Circuit Court of Appeals]), "there must be on the record, as it stands, the substance of that asked for; the right to amend can go no further than to bring forward and make effective that which is in some shape already there." In re James Mercur, 8 Am. Bankr. Rep. 275, 116 Fed. 655 (Eastern District of Pennsylvania). Judge Phillips, of the Western District of Missouri, in the case of In re Mudd, 5 Am. Bankr. Rep. 243, 105 Fed. 348, held that specifications like those in the case before us, except that they were even less general in terms, ought not to be amended on the ground that such specifications are nothing but dragnets and guesswork, which do not comply with the positive requirements of the statute. Your referee is therefore forced to come to the conclusion that it is too late for the allowance of the amendment offered by the objecting creditors, since the 10 days limited by statute had expired, and this amendment sets out entirely new matter, and there is nothing on record to which it can be attached.

"And the referee further reports that no other objection has been made by any person interested to the petition for discharge, and that the said Harry H. Peck was adjudged a bankrupt herein on the 10th day of October, 1902, and has in all things conformed to the requirements of said act; that, so far as the papers on file with the referee and the proceedings had before him show, the bankrupt has committed none of the offenses and done none of the acts prohibited in subdivision b of section 14 of said act; and that, in the opinion of the referee, the said bankrupt is entitled to his discharge.

"And the referee further reports that the condition of the administration of the estate of the said bankrupt is as follows: The trustee has not filed the final account, but has reported assets sufficient in amount to pay all expenses of administration and a substantial dividend to creditors.

"And the referee further reports that his disbursements in the above-entitled proceeding have been secured by sufficient bond.

"Dated at Hartford, February 14, 1903.

"George A. Kellogg, Referee in Bankruptcy."

Wm. C. Hungerford, for the petitioner.

Benedict M. Holden, for the objecting creditors.



PLATT, District Judge. I am in accord with the referee in his decision upon the so-called "demurrer" filed December 27, 1902. The sufficiency of the creditors' objections to discharge, set forth in the paper filed December 20, 1902, is in no sense attacked in the misnamed demurrer. The label placed thereon by the bankrupt or his attorney is unimportant; its single purpose was to point out an alleged error in the way the objections were signed and verified. It was equivalent to saying to those creditors and their attorney something like this: "Laying aside the question as to whether your objections have any force and merit per se, they cannot be discussed because you have failed to comply with the rules which are in force both in equity and bankruptcy." The referee very properly regarded the paper as a motion to dismiss. He was also right in following *In re Gasser*, 5 Am. Bankr. Rep. 32, 44 C. C. A. 20, 104 Fed. 537, and the oath is certainly positive to the very last analysis.

I also agree with the referee in his treatment of the real demurrer, filed January 12, 1903, which he sustained on January 24, 1903, and I am content to leave the matter where his accompanying memorandum places it.

On January 27, 1903, the objecting creditors filed a bill of exceptions, contending that the referee ought not to have received a second demurrer and acted thereon, and that position has been urged before me with considerable emphasis. My view of the soundness of the referee's position must be apparent from the earlier portions of this opinion, but it really makes no difference how one looks at the matter. The action of the referee has in no sense harmed the objecting creditors, as will be clear after I have disposed of the motion to amend the original specifications. That motion is one which it is my duty to pass upon, and has properly been referred to me for that purpose. I have a high appreciation of the breadth and scope and liberality of the equity rules in the federal courts. I have endeavored, and shall continue to endeavor, to make such use of those rules as will promote justice and fair dealing between man and man; but in the case at issue there seems to be no secure position upon which discretion could gain a resting place, if sent forth in search thereof. The specifications of objection have absolutely no force. There is not even a twig in sight above the ground upon which an amendment can be grafted. Therefore it would be inconsistent, preposterous, absurd, and the exercise of profound indiscretion, to grant the motion.

Assuming that my reasoning is valid, it follows in syllogistic form that all proceedings before the referee since the filing of creditors' objections have been unnecessary and irregular. Under these objections it would have been the duty of the referee to refuse to receive any testimony, and it is evident from his report that he would have taken that position had occasion served.

Motion denied.

As the matter now stands, the referee recommends the discharge of the bankrupt. Bankrupt discharged.

## In re FREAR.

(District Court, N. D. New York. March 20, 1903.)

**1. BANKRUPTCY—IRREGULAR COMPOSITION—CONFIRMATION.**

In a composition offered by a bankrupt, the consideration for the payment of priority claims and costs consisted in part of notes and merchandise, instead of money, as required by Bankr. Act 1898, § 12, subd. "b," 30 Stat. 549 [U. S. Comp. St. p. 3427]. The money, etc., was not deposited in a place designated by the judge, or subject to his order, as required by the same subdivision. The consideration had already been distributed under the order of a referee, contrary to subdivision "e," 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], providing that upon the confirmation the consideration shall be distributed as the judge shall direct; section 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], providing that "judge" means a judge of a court of bankruptcy, not including the referee. *Held*, that the composition would not be confirmed, though the application was not opposed.

**2. SAME—LIMITATION ON POWER TO CONFIRM.**

Bankr. Act 1898, § 2, subd. 9, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], giving the court power to "confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases," does not give the court power to confirm an irregular composition; such power being limited by section 12, specifying what compositions may be confirmed.

This is a motion for an order confirming a composition offered by the bankrupt, and, it is alleged, accepted by a majority in number of all creditors whose claims were allowed, and which number, it is claimed, represent a majority in amount of such claims.

R. W. Meeker, for the motion.

RAY, District Judge. While no one appears to oppose the motion, the question arises on the face of the papers whether the court has power and ought to make an order confirming the composition. After adjudication the bankrupt appeared and submitted to an examination at a meeting of his creditors, and filed in court a schedule of his property and list of his creditors required to be filed by a bankrupt, and then offered, in writing, a composition as follows (so says the referee's report):

"To pay twenty-five per cent. upon all unsecured debts, not entitled to priority, in satisfaction of his debts, as provided by the acts of Congress relating to bankruptcy." Said "creditors present \* \* \* whose claims had been theretofore filed and allowed—said creditors representing a majority in number and amount of all claims theretofore filed and allowed—formally accepted said offer in writing."

The report then says:

"Said offer having been duly accepted, said bankrupt delivered to the undersigned referee the consideration to be paid by him to his creditors, and the money necessary to pay all debts which had priority, and the costs of the proceedings. Said consideration consisted of, first, written receipts from certain creditors, acknowledging payment of twenty-five (25) per cent. compromise by note or merchandise; and, second, one thousand seventy-three dollars and sixty-one cents (\$1,073.61)."

The referee thereupon filed said receipts with the papers in said proceeding, and deposited said sum of \$1,073.61 to his order as referee in bankruptcy "In Re John M. Frear, Bankrupt, in the First Na-

tional Bank of Binghamton, N. Y., the official depository of said court in Broome county."

The referee then goes on to state that he subsequently paid off by checks drawn on such fund the expenses, and the creditors who had theretofore filed claims, "with the exception of such creditors as had theretofore filed receipts mentioned in paragraph four (4), above"; paragraph 4 being that part of the report stating that certain creditors had filed receipts agreeing to accept payment in notes or merchandise. The referee further states that there remains on hand in the First National Bank of Binghamton, N. Y., the sum of \$50.70, which should be returned to the bankrupt.

Section 12 of the act of July 1, 1898, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], "An act to establish a uniform system of bankruptcy throughout the United States," contains the provisions of the law regarding compositions, and provides as follows:

"Sec. 12. Compositions—When Confirmed. (a) A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts. (b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. (c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. (d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

Section 1 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]) of said act, defining the "meaning of words and phrases," says, "Judge shall mean a judge of a court of bankruptcy not including the referee."

It will be observed that subdivision "b" of section 12 specifically provides that:

"An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before. \* \* \* the money necessary to pay all debts which have priority and the costs of the proceeding, have been deposited in such place as shall be designated by and subject to the order of the judge. \* \* \* (d) The judge shall confirm a composition if satisfied that \* \* \* the offer and its acceptance are in good faith and have not been made or procured except as herein provided. \* \* \* (e) Upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed the estate shall be administered in bankruptcy as herein provided."

It will be observed that there has been no compliance with the law. The parties and referee have adopted a mode of composition and

procedure utterly at variance with the law, and now ask the court to approve and confirm it. The proceeding adopted and followed is not sanctioned by the law, and neither the court nor the judge has power to confirm it.

Promises to pay money or merchandise at a future day have been substituted for money; the money, etc., were not deposited in a place designated by the judge, or subject to his order; the offer and its acceptance were procured in violation of the provisions of the law; and, finally, if the judge or court should confirm the composition, so called, it would be impossible to comply with subdivision "e" of section 12, which says, "Upon the confirmation of a composition the consideration shall be distributed as the judge shall direct." The consideration has never been subject to the order of the judge, and has been already distributed, so far as paid in, pursuant to the order of a referee who had no power or jurisdiction in the premises whatever, and whose acts were those of an individual, merely. This court has no power to ratify or confirm such a proceeding, and cannot put its seal of approval thereon. The statute was made to be observed and complied with, and only when there has been a substantial compliance therewith will the judge or court approve and confirm the proceedings. These matters of noncompliance are not technical, but go to the very pith and marrow of the law and objects to be attained. If this proceeding is confirmed or approved, the court or judge will necessarily be compelled in the future to approve any manner or mode of composition to which creditors may not object. No significance can be attached to the fact that no creditor opposes this application. It is not probable that they have employed an attorney, or know of their rights in the matter. But silence or acquiescence on the part of the creditors and their attorneys gives no excuse for the judge or court to violate the statute, or substitute an unauthorized and illegal proceeding for the one provided by law. Such silence confers no jurisdiction. Jurisdiction to confirm this so-called composition could not be conferred by the express consent of all the creditors. The bankrupt is not aided by subdivision 9 of section 2 of the act, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]. That section creates the courts of bankruptcy, and defines their jurisdiction. The court has power to "confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases." This power is limited by section 12 (In re Rudwick, 2 Am. Bankr. R. 114, 93 Fed. 787), and compositions recognized and specified in section 12 only may be confirmed by the court or judge. Other settlements and compromises and so-called compositions are not cognizable by the court or judge, except when they are brought in question in a proper manner, or interfere with the due administration of the bankrupt estate according to law. In such cases the court or judge would be called upon to declare their illegality. The provisions of the law as to compositions are to be strictly construed. In re Martin H. Rider, 3 Am. Bankr. R. 178, 90 Fed. 808. The offer of composition must be presented to all of the creditors of the bankrupt, whether or not they have proved their claims. In re Rider, 3 Am. Bankr. R. 178, 90 Fed. 808. There is no proof that this was

done. Indeed, the fair inference from the referee's report is that it was not done. Notice by mail and by publication of motion to confirm was given. But this is not a presentation of the offer of compromise. The general creditors who do not appear at the first meeting have the right to assume that the estate will be administered in the regular way.

The opinion of Coxe, J. (now Circuit Judge) is so clear and convincing, not only that this must be done, but that the act, so far as it relates to compositions, is to be strictly construed and followed, that nothing more need be said. It is well to quote:

"A law which compels a creditor, against his will, to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed. Loveland, Bankr. p. 549; In re Shields, Fed. Cas. No. 12,784. The present law should be construed in the light of similar prior enactments, and any doubts should be resolved against those who seek to deprive creditors of the right to have the debtor's property applied to the payment of his debts. Nothing short of an absolutely plain and unambiguous provision will convince the court that Congress intended for the first time, it is thought, in the history of bankruptcy legislation, to vest such unusual and dictatorial powers with a minority of the creditors. It may be assumed that the language of section 12 [30 Stat. 549; U. S. Comp. St. 1901, p. 3426] is not as perspicuous as could be desired, but, read as a whole, the intention of Congress seems plain to permit a compromise only when sanctioned by a majority in number and amount of the creditors whose claims have been allowed, after due notice to them of the bankrupt's proposition. If the construction contended for by the bankrupt be accepted, it will lead to most inequitable results. Take, for illustration, a case where there are thirty creditors, and only three have proved their debts, for equal amounts, at the time the composition is offered. If the bankrupt obtains the consent of two of them, the composition must be confirmed, although the remaining twenty-eight creditors may be in open opposition. Section 12 [30 Stat. 549; U. S. Comp. St. 1901, p. 3426] is easily capable of a construction compatible with the intent and purpose which has always ruled proceedings of this kind. After the bankrupt has been examined and filed a list of his creditors he 'may offer terms of composition to his creditors.' This plainly implies that the offer should be made to all his creditors, whether they have proved their debts or not. It is not essential that proofs shall be made before or at the first meeting. They may be made at any time within a year after the adjudication, and it is not necessary that they shall be filed in the first instance with the referee. Section 57, cl. 'n' [30 Stat. 561; U. S. Comp. St. 1901, p. 3444]."

But see In re Hillborn, 4 Am. Bankr. R. 741, 104 Fed. 866.

So far as found, no written offer or acceptance is on file. It follows that the motion to confirm this composition must be denied. It is so ordered.

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WESTERN UNION TEL. CO. v. PENNSYLVANIA R. CO. et al.

(Circuit Court, D. New Jersey. January 14, 1903.)

No. 89.

**1. TELEGRAPH COMPANIES—MAINTENANCE OF LINE—POST ROADS—RIGHT OF WAY—CONDEMNATION—DESTRUCTION OF LINE—INJUNCTION.**

Act July 24, 1866 (14 Stat. 221), authorizes any telegraph company to construct, maintain, and operate its lines over and along any military or post road of the United States, after filing its written acceptance of the obligations required by the act; and Rev. St. § 3961 (23 Stat. 3

[U. S. Comp. St. 1901, p. 2708]), declares that all railroads of the United States are post roads. *Held*, that where a telegraph company which had accepted the act of 1866, and had maintained its line along a railroad right of way for many years, had been directed by the railroad company to remove its line in accordance with the contract under which it was constructed, and had brought suit to condemn a right of way along such railroad, and the maintenance of the line during the pendency of such condemnation proceedings would not result in material damage to the railroad company, but its destruction would result in irreparable damage to the telegraph company, an injunction against such destruction, pending the suit to condemn, should be granted.

John F. Dillon, Henry D. Esterbrook, Rush Taggart, and R. V. Lindabury, for complainant.

John G. Johnson, James B. Vredenburg, and Robert L. Lawrence, for defendant.

KIRKPATRICK, District Judge. Two suits have been brought in this court—the one at law to condemn lands of the defendant company sufficient for the construction, maintenance, and operation of the telegraph lines of the complainant, the Western Union Telegraph Company, under and in accordance with the provisions of a certain act of the Congress of the United States passed July 24, 1866 (14 Stat. 221); and the other in equity to restrain the defendant from interfering with the telegraph lines of complainant now erected upon and along defendants' right of way until the question of the complainant's right to condemn the said lands upon the payment of compensation has been determined by the court.

It appears by the record that the complainant company has maintained its telegraph poles and lines upon the right of way used by the defendant for more than 40 years, and that on September 20, 1881, an agreement was entered into between the complainant and defendant companies, to continue for 20 years from that date, in and by which, for the rent therein reserved, the said defendant company granted to said complainant company a right to place, maintain, and use upon the right of way of the Pennsylvania Railroad Company, and the roads owned, operated, or leased by it, a single line of telegraph poles, and to maintain thereon such wires as the telegraph company might from time to time elect. The said agreement also contained this provision:

"If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company."

In accordance with this provision, and after it had been determined that they would not renew the contract, the railroad company, on the 15th day of May, 1902, gave notice to the telegraph company that it must remove its poles and wires from their right of way on or before December 1st then next ensuing, and that if it failed so to do the railroad company would cause them, under the clause of the contract above referred to, to be removed. The bill recites (and the allegation

is substantiated by affidavit) that the wires which are strung over and upon the defendants' right of way are a part of a main trunk line, used by them in the interchange of communications for public and commercial purposes between people dwelling in different states of the Union; that their destruction would seriously interfere with such communication; that the lines have been erected at great cost, and that their worth in their present condition is in the neighborhood of \$350,000; and that if the wires should be removed from the poles on which they are strung, and the poles cut down, their value would be less than \$50,000. It is alleged that under this condition of affairs the pecuniary loss which would be inflicted upon the complainant by the destruction of its poles and wires, and the inconvenience entailed upon the general public, would be very great. Not only the injury would be one which, should the right which the complainants claim exist, they ought not to be required to suffer, but one for which there could be no adequate pecuniary recovery.

Upon this statement of facts, the complainant asked that the defendant company be restrained from removing its poles and wires from its (the defendant company's) right of way, in accordance with the strict terms of the contract, until their right of condemnation could be heard and determined; and the court granted a rule to show cause why such preliminary injunction should not issue according to the prayer of the said bill, which said rule now comes on to be heard.

Upon the case now presented, it appears that on July 24, 1866 (14 Stat. 221), Congress enacted that:

"Any telegraph company now organized or which may hereafter be organized under the laws of any state, shall have the right to construct, maintain and operate telegraph lines \* \* \* over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law \* \* \* but such lines of telegraph shall be so constructed and maintained as not to \* \* \* interfere with the ordinary travel on such military or post roads."

That act further provided that, before any telegraph company should exercise any of the powers or privileges conferred by the act, such company should file its written acceptance with the Postmaster General of the restrictions and obligations required by the act.

This act, the bill alleges, was accepted by the complainant company on the 8th day of June, 1867, and since that time the complainant company has conducted its business in accordance with such restrictions and obligations.

All railroads of the United States are by law declared to be post roads (Rev. St. § 3964; 23 Stat. 3 [U. S. Comp. St. 1901, p. 2708]), and the right of way of the defendant company thereby became subject to the provisions of the act of 1866. While the question here at issue has not had judicial interpretation by the court of last resort, the statute of July 24, 1866 (14 Stat. 221), as applicable to post roads, has several times been before the courts for their construction. It has been held that, because of this law, one company having exclusive privileges under the state law cannot prohibit the erection of the telegraph lines of another company on the post roads of the United States, where such other companies have accepted the provisions of the act

of July 24, 1866 (14 Stat. 221), when those in control of such roads have given their assent. *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, 24 L. Ed. 708. It has also been decided, in *United States v. Union Pacific Railroad Company*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319:

"That no railroad company owning a post road of the United States over which interstate commerce is carried on can consistently with the act of July 24, 1866 (14 Stat. 221), bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a state, which accepts the provisions of the act and desires the use of that roadway for its line in such manner as will not interfere with the ordinary travel thereon."

The right of a telegraph company which has complied with the provisions of the law to enter a state, and erect its poles and lines therein, in accordance with the act of 1866 (14 Stat. 221), is recognized in the case of the *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

If a state cannot, by legislative enactment, prohibit a foreign corporation which has complied with the act of 1866 (14 Stat. 221) from erecting its poles and wires over a post road belonging to a railroad company which has given its assent thereto, and if a railroad company cannot, by agreement with one telegraph company, bind itself to exclude another telegraph company from the use of its right of way, because it is a post road, how can a railroad company (being a post road) nullify the law by arbitrarily refusing to grant them a right which the law confers? Surely if the railroad company cannot bind itself by agreement to exclude the telegraph company, it cannot do so arbitrarily.

It would seem that inasmuch as the act of July 24, 1866 (14 Stat. 221), gave any telegraph company operating under state laws, and accepting the provisions of the act, the right to erect its poles upon the post roads of the United States, so, too, it prohibited the owners of such post roads from doing anything which might be hostile to the object contemplated by Congress, and render its act ineffectual.

*Postal Telegraph Co. v. Oregon Short Line (C. C.)* 114 Fed. 787, was a suit to condemn a right of way for the plaintiff over the road of the Oregon Short Line. All of the questions raised here were there discussed by the learned judge, and the Circuit Court held that such right of condemnation existed, under the acts of Congress before referred to, and proceeded to assess the damages incurred thereby. Sufficient time has not elapsed since the rendering of this decision to have it passed upon by the court of last resort, and it is not, therefore, binding upon this court. It is not necessary, however, that at this time this court should definitely pass upon that question of right. Enough has been said to show that the contention of the complainant of its right to condemn is not without force.

The only question now before the court, upon the return of this rule, is whether the defendants should be enjoined, pending the determination of the complainant's right to condemn, from interfering with the status quo, and doing to the complainant an injury which may be irreparable. The rule relating to the granting of injunctions in such cases is well settled. The jurisdiction of a court of equity,



among other things, is founded upon the right to prevent permanent injury for which pecuniary compensation is inadequate. It is not necessary that the court should determine that the complainant is entitled to a final award in its favor. It is enough that the case presented seems sufficiently meritorious to warrant the court in preserving the status quo until the real merits of the controversy have been finally determined. In *Allison v. Corson*, 32 C. C. A. 12, 88 Fed. 581, it was said:

"A preliminary injunction may properly issue whenever the questions of law or fact to be ultimately determined are grave and difficult, and the injury to the moving party will be immediate and certain and great if denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

It seems to me that the situation in the case at bar is analogous to that in *City of Newton v. Levis*, 25 C. C. A. 161, 79 Fed. 715, and that the remarks of Sanborn, Circuit Judge, apply here with peculiar force:

"But the court knew that it must ultimately consider and determine these matters at the final hearing of the case, and if, meanwhile, it refused to issue the injunction, the property and business of the electric company would be immediately destroyed and the final decree of the court, if it should be in its favor, would be utterly nugatory."

To grant the injunction asked for in this case would result in irreparable injury to no one, while the refusal so to do, from which there would be no appeal, would result in the destruction of complainant's property, for which they could receive no compensation.

It has been urged on the part of the defendants that the complainant should be required to vacate the premises of the defendant companies, in accordance with the terms of its contract. This, however, would but entail a great destruction in value of property, without compensatory benefit to any one. If the right of condemnation exists, complainants should not be subjected to that loss while exercising it. The defendants also say that they have entered into a new contract with another telegraph company, and that there is not sufficient room on their right of way to permit the maintenance and operation of the lines of more than one telegraph company. This question ought, I think, for the reasons above given, to await the final determination of the cause.

In view of the facts presented, and for the reasons above stated, I have decided to make permanent this injunction. In this way the defendants will have an opportunity to appeal to the next term of the Circuit Court of Appeals, while, should the rule be discharged, the complainant would have no appeal, and the injury to its property which is threatened would have been accomplished before the case had been properly considered.

Let the rule heretofore granted be made absolute.

## HALLETT v. FISH.

(Circuit Court, D. Vermont. March 17, 1903.)

1. **WEIGHT OF TESTIMONY—CONTRADICTION STATEMENTS OF WITNESS—EFFECT.**  
The fact that a witness, testifying that in a certain transaction he acted as agent for a bank, had stated in contradiction of this that he was acting individually, affects only the weight of his testimony, and does not disprove his agency.
2. **BANK'S INSOLVENCY—AID OF THIRD PERSON—INDUCEMENT BY CASHIER—AGENCY FOR BANK—SUFFICIENCY OF EVIDENCE.**  
Evidence in an action by one furnishing aid to an insolvent bank (being induced thereto by its cashier) to recover from the receiver, as a preferred creditor, considered, and *held* to show that the aid was furnished to the cashier in his official capacity, as representative of the bank, and not as an individual.
3. **SAME—FRAUD OF CASHIER—EFFECT AS TO BANK.**  
Where a cashier of an insolvent bank, acting for it, induced his fiancée to furnish securities for a loan to aid the institution, any fraud practiced on her through advantage taken of the relation between them was that of the bank.
4. **SAME—PREFERENCE AS CREDITOR.**  
A woman engaged to marry the cashier of an insolvent bank, who is told by him that the bank is in trouble and needs money or securities immediately, and is induced by him to furnish securities for a loan to the bank, but is not told that the bank's capital is gone, and more, as a result of defalcations by the cashier and others, is entitled to recover from the receiver, as a preferred creditor, the amount of the loan paid by her to save her securities.

In Equity.

H. Henry Powers, for plaintiff.

Frank L. Fish and Ebenezer J. Ormsbee, for defendant.

WHEELER, District Judge. D. Henry Lewis was a director and the cashier of this bank, which, partly through his mismanagement, had become insolvent and embarrassed, and this condition became known to the other officers, and an examination was being had April 9, 1901. The shortage was then supposed by them to be about \$35,000. The plaintiff was engaged to marry Lewis, was temporarily at Vergennes, and had stocks and bonds in a savings bank at Concord, N. H. The shortage was principally at the National Bank of Redemption at Boston. A director provided \$10,000. Lewis applied to the plaintiff for \$25,000. She hesitated, but soon consented to furnish securities for that amount, to be pledged at the Bank of Redemption. She got them from the savings bank, took them to Boston, and let Lewis take them to the Bank of Redemption, where a note of Lewis to that bank for \$25,000 was prepared, with a consent by her that he might pledge her securities for payment of the note, which she went and signed on April 11th, and the amount of the note was credited to the Farmers' Bank. The shortage of the Farmers' Bank was found to be, by greater misapplications of Lewis than were supposed, and those of others, much larger than was expected, showing it to be hopelessly insolvent; and it was closed by the Comptroller of the Currency and put into liquidation on the 13th. The plaintiff paid the note of Lewis to the Bank of Redemption to save her securities, and

has brought this suit to have the amount so paid decreed to her out of the assets. The defense is that the plaintiff dealt with Lewis solely, and has no just claim, or none but that of a common creditor, against the assets of the bank.

The plaintiff's securities have swelled the assets of the bank to the extent of \$25,000, without any advantage to her or loss to the bank; still, if she aided Lewis solely, and he the bank, she must look to him for her property, and the bank was held only to him, however disastrous that may be to her interests. This makes it necessary to see carefully how and on what inducements she parted with her securities. No one saw her about making the arrangement but Lewis, and no one else about carrying it out, but the cashier of the Bank of Redemption; and what it was is to be ascertained from their testimony, and the circumstances shown by the testimony of others. Her testimony is consistent throughout, and does not differ materially from Lewis' as to the facts. That he has stated differently and stated that the securities were furnished to him, and by him to the bank, does not prove that the facts were as he is shown to have stated, but only affects the weight of his testimony in comparison between theirs as to the facts, and the evidence, if any, the other way. Their testimony is that he told her the bank was in trouble and must have immediate help, and there is no testimony that he told her that he was in distress and needed help, or that he was interested in procuring help, otherwise than through the bank. His testimony, although impeached by these contrary statements, for what value is left to it, corroborates hers, and there is nothing but the form of the papers taken by the Bank of Redemption to qualify hers. The paper required of her by that cashier was this:

"Boston, April 11, 1901.

"E. A. Presbrey, Esq., Cashier National Bank of Redemption, Boston, Mass. —Dear Sir: Whereas, D. H. Lewis of Vergennes, Vermont, has given me stocks and securities satisfactory to me in exchange for the following described stocks and bonds, to wit:

"3,000 Bangor & Aroostock 5's, due January 1943, Nos. 398, 399, and 400, July, 1901, coupons attached.

"2,000 U. S. coupon 4's, due 1925, May 1901, coupons attached.

"2,000 Central R. R. Co. of New Jersey 5's, due July 1st, 1937, Nos. 2,154 and 34,781, July, 1901, coupons attached.

"1,000 Indianapolis Water Co., 5's, payable July 1st, 1926, No. 280, July, 1901, coupons attached.

"1,000 Iowa Loan & Trust Co., Des Moines, Debenture 5's, Series 11, No. 96, July, 1909; coupons attached; also the following stocks standing in my name:

"10 shares Northern R. R. Co., Ctf. No. 24,110.

"30 " Concord & Montreal R. R., Class 3, Ctf. No. 1,325.

"55 " Pennsylvania R. R. Co., Ctf. No. 563,247 for five shares and No. 519,404 for fifty shares.

"10 " Quincy R. R. Bridge Co., Ctf. No. 2,949.

"10 " C. B. & Q. R. R. Co. Ctf. No. A64,048.

"I hereby authorize the said Lewis to pledge all of the above-named securities as collateral to his note given this day to the National Bank of Redemption for the sum of \$25,000, dated April 11th, 1901, payable on demand after thirty days' notice.

Frances Pearson Hallett."

The plan for using her securities was made, Lewis' note was executed, and this was prepared for her to sign after Lewis had taken

her securities to the Bank of Redemption, and before she came; and, while it shows that she was dealing with Lewis, it does not show but that she was dealing with the Farmers' Bank through him, and authorizing the pledge of her securities for the benefit of that bank by him. The cashier testifies that Lewis' note was of no importance in the transaction, and that it was discounted for the purpose only of having the proceeds go to the credit of the Farmers' Bank. This all shows that the loan of the securities was made to Lewis as cashier (which was the office she understood he held) of the Farmers' Bank, and that it was induced by regard for Lewis, because help to the bank in its trouble would, as understood by her, be a favor to him. And she was not informed of the true situation of the bank, nor of its condition as the officers understood it, and she could not act on an equality with them. She was told that the bank was in trouble and needed money or securities immediately, but this did not mean to her what it would to experienced bankmen or trained financiers. She was not told that the capital was gone, and more, nor that the disaster was the result of defalcation and crime, which might reach much further. And she was peculiarly exposed to deception by her engagement to Lewis. But for that, she would not have been applied to for the loan, nor have complied. In *Gilmore v. Burch*, 7 Or. 374, 33 Am. Rep. 710, the court says:

"The influence of a man over a woman to whom he is engaged to be married is presumed to be so great that in transactions between them the court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used."

And Kerr on Injunctions, at page 47, says:

"The principle applies equally to the case of third persons who make themselves parties to transactions between persons filling a fiduciary position, and those towards whom they stand in such relation, or who take securities with notice that they have been obtained by a person filling a position of a fiduciary character, from a person towards whom he stood in such relation."

These are not new doctrines or principles in respect to dealings between those standing in confidential or overpowering relations to one another. They are as old as jurisprudence, as universal as equity, and as salutary now as ever.

Whatever advantage Lewis took of his relation to the plaintiff, the bank assumed in adopting his transaction. If the bank had used its assets to secure importunate creditors, or taken the money of depositors at the time and under the circumstances of taking the plaintiff's securities, without disclosing more than was made known to her, the assets taken out would have to be returned, to make all equal, and the deposits would not be drawn into the general wreck. It could no more bring assets of others, without full and fair disclosure, into, than it could save others already in from, the impending disaster, to shift the burden of losses. *Roberts v. Hill* (C. C.) 24 Fed. 571; *Wasson v. Hawkins* (C. C.) 59 Fed. 233; 3 Am. & Eng. Encycl. of Law, "Banks and Banking," V (2d Ed.) 847. There was no inducement of others to act differently from what they would by what she did. It is a question of making her stand losses of oth-

ers, already fixed, for nothing. It does not seem lawful or just that she should.

Decree for plaintiff for \$25,000 of the assets.

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UNITED STATES v. TUCK LEE.

(District Court, N. D. New York. March 21, 1903.)

**1. ALIENS—CHINESE LABORERS—RESIDENCE—SURRENDER—DEPORTATION.**

Act Sept. 13, 1888 (25 Stat. 477 [U. S. Comp. St. 1901, p. 1314]), provides that Chinese laborers who depart from the United States may return at enumerated ports only on compliance with sections 5, 6, and 7, which require that the alien shall have a wife, child, or parent in the United States, or property of a certain value, etc., and that on leaving he shall apply to the collector of customs from the district from which he wishes to depart, at least a month prior to his departure, and make oath concerning his family, property, etc. *Held*, that where a Chinese laborer holding a United States labor certificate departed from the United States at a point other than the places of departure prescribed, without applying to the collector of customs for permission to leave, etc., and thereafter re-entered the United States at a nondesignated point, in the absence of evidence as to his intention in departing, he had forfeited his right to remain in the United States, and was subject to deportation.

Appeal by Defendant from Commissioner's Judgment of Deportation.

George B. Curtiss, U. S. Atty.

R. M. Moore, for defendant.

RAY, District Judge. It was admitted in court on the trial that the defendant is a Chinese person, not a member of the exempt class, and that he came into the United States from the Dominion of Canada, and was apprehended as charged in the complaint and warrant in the case. The defendant came into the state of New York from the Dominion of Canada at Rouses Point on or about the 14th day of July, 1902. This is not one of the designated points at which Chinese persons may enter the United States. The defendant was arrested on or about the 15th day of July, 1902. On the trial he refused to make any statement whatever. The said Tuck Lee is a Chinese person, and a laborer, and not a citizen of the United States, and is not a diplomatic or other officer of the Chinese or any other government, and he came in in violation of law. There is no claim that he was born in the United States.

The defendant is the holder of a labor certificate, No. 6,612, of which the following is a copy:

"United States of America.

"Certificate of Residence.

"Issued to Chinese Laborer, under the Provisions of the Act of May 5, 1892.

"This is to certify that Tuck Lee, a Chinese laborer, now residing at Chicago, has made application No. 1012 to me for a Certificate of Residence, under the provisions of the Act of Congress approved May 5, 1892, and I

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¶ 1. Citizenship of the Chinese, see notes to *Gee Fook Sing v. U. S.*, 1 C. C. A. 212; *Lee Sing Far v. Same*, 35 C. C. A. 332.

certify that it appears from the affidavits of witnesses submitted with said application that said Tuck Lee was within the limits of the United States at the time of the passage of said Act, and was then residing at Ottawa, Ills. and that he was at that time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese laborer, viz.:

"Name: Tuck Lee. Age: 33 yrs.

"Local residence: Ottawa, Ills.

"Occupation: Laundryman. Height: 5 ft. 7½.

"Color of eyes: Dark brown. Complexion: Dark brown.

"Physical marks or peculiarities for identification: Scar on right wrist.

"And as a further means of identification, I have affixed [Photograph] hereto a photographic likeness of said Tuck Lee.

"Given under my hand and seal this 9th day of April, 1894, at Chicago, State of Illinois.

"[Seal]

W. J. Mize,

"Collector of Internal Revenue, First District of Illinois."

At some time after such certificate was issued—the date does not appear—the defendant left the United States at some place unknown, and the occasion or purpose of his going is unknown, as well as the period of his absence. He made no explanation whatever as to the reason why he went, the point of departure, or where he has been or what doing since his departure. The defendant did not surrender his certificate at his point of departure, nor did he obtain one entitling him to return, as required by law. In short, the defendant has neither explained nor justified his omission to comply with the law as to the delivery of his labor certificate to the collector of customs at the port of exit, or his failure to procure a return certificate.

The question then is, can a Chinese citizen and laborer living in the United States, and remaining here under and by virtue of a labor certificate issued under the act of May 5, 1892, depart at will, without complying with the law, remain outside the United States for such period of time as he sees fit, and then return at any point he sees fit, and retain his right to be and remain in the United States? Under such circumstances, is he liable to be deported?

It should be further stated that there is no proof that the defendant has a lawful wife, child, or parent in the United States, or property therein, nor did he leave with the collector of customs a description of his family or property or debts.

Chinese laborers who depart from the United States have the right to return only on compliance with sections 5, 6, and 7 of the act of September 13, 1888 (25 Stat. 477 [U. S. Comp. St. 1901, p. 1314]), continued in force by subsequent statutes. He must have a lawful wife, child, or parent in the United States, or property therein of the value of \$1,000, or debts of like amount due him pending settlement. The marriage must have taken place at least a year prior to the application of the laborer for a permit to return to the United States, and must have been followed by the continuous cohabitation of the parties as man and wife. If the right to return is claimed on the ground of property or of debts, it must appear that the property is bona fide, and not colorably acquired for the purpose of evading the law, and that the debts are unascertained and unsettled, and are not promissory notes or other similar acknowledgments of ascertained liability.

Section 7 of the act provides that a Chinese person, on leaving, shall apply to the collector of customs from the district from which he wishes to depart, at least a month prior to the time of his departure, and make an oath before the collector, containing a full statement descriptive of his family, property, or debts, and furnish to the collector such proof of the facts entitling him to return as shall be required by the rules and regulations prescribed from time to time by the Secretary of the Treasury. He is also required to permit the collector to take a full description of his person. The collector may then decide to issue a certificate entitling such person to return. The right to return is limited to one year, but may be extended for cause.

The law also provides that no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer of the customs at the port of entry the return certificate required, and that a Chinese person possessing a certificate under this section shall be permitted to enter the United States only at a port from which he departed, and no Chinese person, except Chinese diplomatic or consular officers and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of the Treasury.

In *U. S. v. Long Hop* (D. C.) 55 Fed. 58, it was held that this act is in force, except sections 1 to 4, inclusive, and section 15 (25 Stat. 476, 479 [U. S. Comp. St. 1901, pp. 1312, 1313, 1317]). These sections are not in question.

The power to expel or exclude aliens, being a power affecting our international relations, is vested in the political departments of the government, and is to be regulated by treaty or act of Congress, and is to be executed by the executive authority, except so far as the judicial department has been authorized or is required by the Constitution to intervene. *Fong Yue Ting v. U. S.*, 149 U. S. 711-714, 13 Sup. Ct. 1016, 37 L. Ed. 905; *U. S. v. Wong Kin Ark*, 169 U. S. 699-700, 18 Sup. Ct. 456, 42 L. Ed. 890. The right to exclude or expel aliens of any nationality is our inherent and inalienable right as a sovereign and an independent nation, and this power may be exercised entirely through executive officers. Same cases.

If the doctrine laid down in these cases is correct, then this defendant forfeited his right to be and remain within the United States by departing as he did without complying with the law, there being no explanation as to his mode and manner of exit, the period of absence, and the occasion therefor. It may well be that, should a Chinese laborer with a certificate residing in Chicago start for the City of New York, and go through Canada on his way, and be accidentally detained in Canada for days or weeks, he might be permitted to continue his journey and re-enter the United States. In such case it would not be regarded that he had departed from the United States within the true intent and meaning of the law. So, should he take a sea voyage and pass around the world, making a continuous voyage, it would not, perhaps, be treated as a departure from the United States, if he intended to return, and made a continuous voyage. So other cases and examples might be cited, but there

is no necessity. The facts in this case show that this defendant, a Chinese laborer, and not a citizen of the United States, left the United States in violation of the law, and was gone an indefinite period when he returned in violation of law. His labor certificate is no protection against deportation under these circumstances. Congress having prescribed the terms and conditions on which the defendant might remain here, or might depart from and return to the United States, and not having transcended its powers in so doing, this alien was bound to observe them, and, not having done so, is illegally within the United States. When he took his labor certificate he entered into a contract with the government of the United States that he would comply with and obey its laws, not only while here, but in departing from and returning to the United States, and the government undertook to guaranty to him, while in this country, the equal protection of the laws; but his right to remain or be in the United States, or to return thereto in case he departed therefrom, was forfeited when he voluntarily left the United States in violation of law, and then returned in violation of such law. If the law amounts to anything, this is its effect. Nor is this statute in conflict with the provisions of the treaty. Even if it is, the act of Congress abrogates the treaty to that extent. The power of Congress to regulate the whole subject is superior to the treaty-making power.

There is a distinction made between Chinese merchants domiciled within the United States, and who depart therefrom temporarily, with the intention of returning, and Chinese laborers. The latter must procure the certificate. *United States v. Mrs. Gue Lim*, 176 U. S. 468, 20 Sup. Ct. 415, 44 L. Ed. 544; *Lau Ow Bew v. United States*, 144 U. S. 63, 12 Sup. Ct. 517, 36 L. Ed. 340; *Wan Shing v. United States*, 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503.

The burden of proof was on the defendant to show his right to return to and remain in the United States. This he has failed to do. The judgment of deportation is affirmed.

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In re *HILDEBRANT et al.*

(District Court, N. D. New York. March 18, 1903.)

**1. SALES—FRAUD—REMEDIES OF SELLER.**

Where a sale of goods was induced by fraudulent representations as to the buyer's solvency, the seller, on learning of the fraud, may disaffirm the contract, and retake such of his property fraudulently obtained as he may be able to find in the buyer's possession, and also maintain an action against the buyer for the value of the goods not found.

**2. BANKRUPTCY—CLAIMS—FRAUDULENT PURCHASES—DEMAND FOR GOODS—ELECTION OF REMEDIES.**

Where a claimant for goods obtained by a bankrupt under fraudulent representations as to his solvency filed a claim with the trustee for the goods sold and delivered under the contract, but not for the value of goods obtained by fraud, or for damages sustained by the fraud, he thereby elected to affirm the contract, and could not split his demand, and at the same time file a claim for a return of part of the goods sold, remaining in the bankrupt's possession at the time of the filing of his petition.



In Bankruptcy. This is a motion on the part of the trustee in bankruptcy herein to confirm the report of William Lansing, referee in bankruptcy, to whom it was referred, as special master, to take evidence and report, with findings of fact and conclusions of law, as to the title of the petitioner in this proceeding, the A. M. Church Company, to certain goods in the possession of the trustee, and the right of said company to have such goods turned over and delivered to said petitioner.

Chester G. Wager, for trustee.  
 Thomas F. Galvin, for petitioner.

RAY, District Judge. Prior to the filing of the petition in bankruptcy herein, and between the 3d day of October, 1900, and the 31st day of January, 1901, the petitioner, the Andrew M. Church Company, sold and delivered to the said firm of Hildebrant & Buchanan certain goods and merchandise, for which it made and verified its claim against the bankrupt estate in the words and figures following:

"Troy, N. Y., \_\_\_\_\_, 189-.

"Hildebrant & Buchanan in acc't with the Andrew M. Church Co.

"(Cloaks and Shawls.) Importers and Dealers in Dry Goods, Hosiery, Notions, & Fancy Goods.

"New York Office  
 54 & 56 Franklin St. 83, 85 & 87 Third St.  
 57 & 59 Congress St.

1900.			
Oct.	3	Mdse. ....	\$ 178 37
	12	" .....	68 81
	15	" .....	46 20
	16	" .....	115 71
	18	" .....	30 68
	8	Cash Ex. p. chg. ....	30
Nov.	3	.....	103 30
	7	.....	9 26
	16	.....	76 59
	17	.....	20 52
	22	.....	165 61
Dec.	7	.....	2 54
	8	.....	1 75
	8	.....	14 98
Jan.	31	.....	7 75
			\$842 37

"In the District Court of the United States for the Northern District of New York.

"In the Matter of Thomas L. Hildebrant & Edward C. Buchanan as Individuals & as a Copartnership under the Firm Name of Hildebrant & Buchanan, Bankrupts.

"In Bankruptcy. No. 478.

"At the city of Troy, in said district of New York, on the 6th day of May, 1901, came Andrew M. Church, of Troy, in the county of Rensselaer and state of New York, and made oath and says that he is treasurer of the Andrew M. Church Company, a corporation incorporated by and under the laws of the state of New York, and carrying on business at Troy, in the county of Rensselaer and state of New York, and that he is duly authorized to make this

proof, and says that the said Hildebrant and Buchanan, the persons by whom a petition for adjudication of bankruptcy has been filed, were at and before the filing of said petition, and still are, justly and truly indebted to said corporation in the sum of  $842\frac{37}{100}$  dollars; that the consideration of said debt is as follows: Goods, wares, and merchandise, consisting of cotton cloth, etc., sold and delivered to said Hildebrant and Buchanan by said company at the different times mentioned in the annexed statement; that no part of said debt has been paid; that there are no offsets or counterclaims to the same; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

A. M. Church,

"Treasurer of Said Corporation.

"Subscribed and sworn to before me this 6th day of May, 1901.

"Thomas F. Galvin, Notary Public Rens. Co.

"Certificate filed in Albany Co."

This claim was presented to and filed with the trustee on the 6th day of May, 1901, at 3 o'clock p. m. The referee finds, and there is evidence to support the finding, that the total value of the goods sold aggregated in value over \$1,000, and that November 28, 1900, said Hildebrant & Buchanan paid said petitioner the sum of \$150.42 on account of such goods. The petitioner claims this was payment for a specific item of sales made by the petitioner to Hildebrant & Buchanan, and in no way entered into the general account, and was not a payment on account. The evidence fails to support this claim. In fact, it shows that the payment must have been on account. The referee also finds:

"Twelfth. That prior to the purchase of said goods by said bankrupts from the A. M. Church Company, and as and in account thereto, representations were made in regard to the liabilities and assets of said firm by the members thereof, or one of them, which, if they were not intentionally false or fraudulent, were untrue, and were equally calculated to mislead the petitioner, and to induce the sales made to said firm by the petitioner, as if they had been so, and that said representations did induce the petitioner to make the sales set forth in said proof of claim to the said bankrupts; that some of said representations were made directly to said A. M. Church Company, and others to R. G. Dun & Co., a mercantile agency, by which they were reported to said A. M. Church Company prior to said sales being made."

"Ninth. That if any fraudulent statements were made by said Hildebrant & Buchanan, or either of them, or any fraud practiced that induced the A. M. Church Company, the petitioner, to part with its goods to the said Hildebrant & Buchanan, the facts in regard to such fraud or fraudulent statements were fully known to said A. M. Church Company on May 6, 1901, the time when it filed the claim against the bankrupt's estate as stated above."

The referee further finds that at the time of the adjudication the bankrupts had on hand at their factory cotton cloth, unused, of the value of about \$182.75, which passed into the hands of the assignee, but also finds that the whole thereof did not come from the petitioner. He does not find or state either the amount or value of the cloth on hand that was purchased of the A. M. Church Company. The referee does not specially find, but it was admitted on the hearing, and is a fact, that on the 6th day of May, 1901, the petitioner, the Andrew M. Church Company, made and served a written demand and claim for the return of certain of the property sold and delivered to the bankrupts on both the trustee and referee in bankruptcy. Such demand was as follows:

"In the District Court of the United States for the Northern District of New York.

"In the Matter of Thomas L. Hildebrant & Edward C. Buchanan, as Individuals & as a Copartnership under the Firm Name of Hildebrant & Buchanan, Bankrupts.

"In Bankruptcy. No. 478.

"To Hon. William Lansing, Referee, and to Whom It may Concern: Notice is hereby given that the undersigned claims to be the owner and demands the possession of the several pieces of cotton cloth hereinafter mentioned, now in the factory formerly occupied by Hildebrant and Buchanan, in the city of Albany, New York, shipped by the undersigned from the city of Troy, New York, to said Hildebrant and Buchanan, at the city of Albany, New York, between the 3d day of November and the 7th day of December, 1900, upon the ground and for the reason that, at the time when said goods were purchased of the undersigned by said Hildebrant and Buchanan, the said firm was hopelessly insolvent, and known to themselves to be so, and on the further ground that credit in said purchases was obtained through false representations as to the financial standing and condition of said firm made by said firm, or some one on its behalf.

"Following is a statement of the merchandise above mentioned, the return of which is hereby demanded:

1900.		
Nov. 3.	488½ yds. (W.) cotton, at 8¼ cts.....	\$ 40 30
" "	622½ yds. violet cotton, at 7⅝ cts.....	47 46
" "	131 yds. Elkwood cotton, at 7½ cts.....	9 82
" 3, 16, 22.	539 yds. Alpine cotton, at 10½ cts.....	56 65
" 17, 22.	161 yds. Evenston cotton, 13½ cts.....	21 80
" 30.	62 yds. I. X. L. cottons, at 9 cts.....	5 58
Dec. 7th.	12 yds. Elephant cottons, at 9½ cts.....	1 14
Total .....		\$182 75

"The Andrew M. Church Company,

Per A. M. Church, President."

"Dated May 6th, 1901.

While it is undoubtedly true that a party cannot both affirm and disaffirm a contract, when induced by fraud; that an election to proceed on the contract is an affirmation thereof, and waives the fraud—still it cannot be doubted that, when a party is induced to part with his property by fraudulent representations, he may, on discovery of the fraud, retake, by replevin or other appropriate proceedings, such of the property as he can find, and recover in an appropriate action the value of the goods not found, or, more properly speaking, damages for the fraud. But such claim and action for the damages could not be based on the contract, and the action would not be for the contract price, but simply for the damages, measured by the value of the goods not found. This court knows of no decision or rule of law that will deprive a person of the right to retake such of his property, fraudulently obtained, as he can find in the possession of the wrongdoer, and then maintain an action against such wrongdoer for the value of that part disposed of. This is not an election of remedies, nor is it pursuing two inconsistent remedies, nor is it both an attempted affirmation and disaffirmance of the contract. It is a disaffirmance of the contract in toto, and such acts are not open to any other construction. See *Welch v. Seligman*, 72 Hun, 138, 25 N. Y. Supp. 363; *Abb. N. Y. Cyclopedic Dig.* 542. So in this proceeding in bankruptcy the petitioner had the right to demand a return of such of the goods fraudulently obtained as it found in the hands of the trustee, and, by any proper proceeding, to

compel such return, and also present and prove its claim for the value of the goods not found as damages, first, however, having the amount liquidated in the manner provided by the bankrupt act. The question is, did the petitioner put its claim in such form and take such proceedings as to indicate a purpose to affirm the contract and proceed thereunder? It is certain that this petitioner could not split its demand, and affirm the contract as to a part of the goods delivered on certain days, and repudiate as to the other part. An inspection of the bills for goods sold and delivered at the various dates referred to shows that this is what the petitioner has attempted to do. A careful reading of the claim presented also shows that the claim is made for the goods sold and delivered under the contract, and not merely for the value of goods obtained by fraud, or for the damages sustained by the fraud. Evidently the petitioner did not intend to elect to proceed under the contract for the whole of the goods sold and delivered to Hildebrant & Buchanan, less payment made, but to proceed to obtain a return of all the goods found, and procure the allowance of its claim for the balance of the account, under and pursuant to the terms of the contract. It made both claims and instituted both proceedings on the same day—May 6, 1901—but it did not disaffirm the contract, or attempt so to do, only in part, and this it could not do. By affirming it in the main, it must be treated as having affirmed it in toto. The petitioner has mistaken its remedy and procedure, and, while it seems hard that it should suffer for this error, the court sees no way to undo what has been done, or change the legal effect of the acts done. The authorities are decisive: *Droege v. Ahrens & O. M. Co.*, 163 N. Y. 466, 57 N. E. 747; *Mills v. Parkhurst*, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; *Fowler v. Bowery Sav. B.*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; *Seavey v. Potter*, 121 Mass. 297; *Ormsby v. Dearborn*, 116 Mass. 386; *Acer v. Hotchkiss*, 97 N. Y. 395; *Missouri S. & L. Co. v. Rice et al.*, 28 C. C. A. 305, 84 Fed. 131.

It seems clear that the motion to confirm the report of the referee must be granted, and it is so ordered.

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#### LAND TITLE & TRUST CO. v. ASPHALT CO. OF AMERICA.

(Circuit Court, D. New Jersey. June 9, 1902.)

No. 29.

##### 1. RECEIVERS—GROUNDS FOR REMOVAL.

A receiver appointed on account of his special fitness for conducting the practical business in which a corporation was engaged, pending proceedings for its liquidation, and on the recommendation of a majority of the creditors, will not be removed on the petition of a single creditor, whose claim is comparatively small, where no showing of incompetency or mismanagement or fraudulent conduct is made, merely because his connection with the corporation was such that at some future stage of the case he may not be a proper man to enforce rights which it may possibly be necessary or desirable to assert against its officers or promoters.

In Equity. Sur petition of William C. Bullitt for the removal of a receiver.

John Douglass Brown, for the motion.

Charles L. Corbin, Joseph S. Auerbach, and Charles C. Deming, opposed.

PER CURIAM. This petition has been presented to the court on a former occasion. It was left with me, and I read it with great care. I find in it no verified charges against Mr. Mack which in my opinion require the court to order his removal at this time.

When the original bill was filed in this case, it was deemed essential for the protection of the certificate holders and creditors and all of the parties interested in the Asphalt Company of America, or the National Asphalt Company, that the business should be continued, and, in order that it might be continued, it was necessary that some practical man—some man who was acquainted with the practical workings of the asphalt business—should take charge of the 69 or 89 subsidiary companies which composed this corporation, the stock of which was held by this National Asphalt Company; somebody should be appointed receiver who understood the details of the workings of these companies, in order that the business might be carried on and the assets conserved, and that from them, by the workings of the subsidiary companies, there should be realized a sufficient income, or as much income as was possible, to be applied, under the deed of trust, to the payment of the interest on the certificates.

Mr. Biddle, who was the chairman of a committee—perhaps self-constituted, but representing more than a majority of the certificates of the Asphalt Company of America; that is, something over \$15,000,000; I do not know exactly how many, but more than a majority—said to the court that this business ought to be continued, and that no more proper person could be found by the court than Mr. Mack, and that, while Mr. Mack had been an officer in one of these companies, at the same time he was, perhaps, one of the very few men in the country who could be relied on to prosecute this business successfully; and thereupon the court made the appointment. There is nothing before the court here at this time which induces the court to think that the representations made by Mr. Biddle are not strictly in accordance with the facts. There is no allegation or charge made in this petition of Mr. Bullitt's that Mr. Mack is not satisfactorily discharging that part of the business of the receivership which the court intrusted to him. For aught that appears, and as I have reason to believe, the business is still being continued on as favorable a basis as it is possible for it to be continued on, and that the interests of the certificate holders and of the creditors of these various companies, and stockholders, and of all persons who have any claims against the company—their interests are being conserved and looked after by Mr. Mack at this time. Now it is suggested in the petition that this Biddle committee is self-constituted, and that their recommendation should be disregarded by the court, and that the court should listen to this petitioner, who has \$10,000 worth of certificates; but it seems to me that in regard to the practical working of this enterprise the court

should look to the wishes, and pay more regard to the wishes, of \$15,000,000 or \$16,000,000 or \$20,000,000 of certificate holders than it should to one holder of simply \$10,000 worth of certificates. If I should set the precedent of listening to each individual certificate holder, the probability is that I would not be able to find that able and disinterested gentleman of whom the counsel speaks, to act as receiver, against whom a single certificate holder might not be found who would be anxious to come into court and ask for his removal.

Now it is suggested in the petition that the court has not been made acquainted with the holders of the certificates whom Mr. Biddle's committee represents. That is true. I do not know who they are. I only know they are represented to be a majority of all. But neither do I know when or how or for what purpose the \$10,000 of certificates which the petitioner holds were acquired, or if they were not acquired (and they may have been, for aught appears) simply for the purpose of qualifying Mr. Bullitt to appear in this suit. Maybe so, and maybe not. Perhaps it is not.

It is stated in the petition that Mr. Mack said at one time that the earnings of this company were a certain sum of money, and they turned out to be much less. The allegation is not that that statement was made in fraud, but the court is asked to infer from the fact that, although vice president, he was unacquainted with the financial status of the company, and therefore he is an unfit man to be intrusted with its management. The court is unwilling to draw any such inference, because it knows very well that many a practical man is no financier, and many financiers rely upon practical men to carry out the workings of their undertakings.

Now the only other reason suggested as to the removal of Mr. Mack at this time is that he is an unfit person, because he is not in a position to investigate the relations between the Asphalt Company of America and the National Asphalt Company, and that because the Asphalt Company, or the National Asphalt Company, and the Asphalt Company of America, together, had issued \$50,000,000 worth of stock certificates, and obligations of various sorts, there had been some fraud in the promotion of this company, but no express charge of fraud is made. I infer that from what is called the "overcapitalization." While \$50,000,000 seems like a great deal of money, and it is a great deal of money—but it might not be a great deal of money for what one may acquire in these days—the mere fact that there was a large capitalization, and the assets did not realize or were not worked to the extent of producing an income on them all is of itself no evidence of fraud.

Some time—not, perhaps, just now, but some time—it may be necessary for the receivers to inquire into the liability of the subscribers to this stock, and it may be necessary for them to inquire into the question as to whether there was any such fraud in the promotion of these enterprises as would enable them to recover anything on behalf of the certificate holders; but it seems to me that this is not a time for such an inquiry, or, at any rate, for the enforcement of, or attempt to enforce, any liability by reason of it. Before the receivership is wound up—before these receivers are discharged—if it should appear that, in

the opinion of counsel, there is any such liability either on behalf of the original subscribers to the stock of the Asphalt Company of America, notwithstanding the clause in the charter, or that it should appear, in the opinion of counsel, that there is a liability for false representations made by responsible promoters, why, the court would feel that the receivership should not be wound up until the parties who are so advised have had an opportunity, through the receivers, to bring these questions before the court for determination; but, in my opinion, the proper plan is not to go in the first instance to the court, and direct investigations to be made which are—perhaps would be—productive of no good result. But there ought to be such facts and circumstances laid before the receivers themselves as would justify them in bringing the suit, or there ought to be such facts laid before them as, in the opinion of counsel of parties who lay them before the receivers, would justify the bringing of suit. If then the receivers refuse to bring such suits, or do whatever would seem to be necessary for the enhancement of the fund and the protection of the certificate holders, an appeal might be had from the decision of the receivers to the court; and if the court is of opinion that there is a question which ought, in fairness, to be litigated, the court might direct the receivers to bring such suit upon such terms as the court might think reasonable and proper. If they should suggest that it ought to be brought against Mr. Mack himself, as one of the promoters, and Mr. Mack did not then see the propriety of his withdrawal from the receivership, why, the court might suggest it to him in a way which he would recognize as being entirely proper. Of course, Mr. Mack, as receiver, could not bring any suit against himself—the court would not expect him to; and, if such suit were necessary, why, Mr. Mack would be obliged to get out of the way. But, as I said in the beginning, Mr. Mack was appointed one of the receivers in this case for the purpose of conducting the practical management and working of the organized companies, and I do not know that there has any charge been made against him that he is unfit for that position. Under all the circumstances, the court will decline at this time to make any order for Mr. Mack's removal.

The court will also decline to entertain the petition of Mr. Bullitt, or make the order which has been suggested therein. Of course, I will not say, on the petition as it stands, that the court is unwilling to grant the relief. It is unnecessary that the court should require the receivers, or anybody else under its jurisdiction, to make an answer to charges which the court does not feel justified at this time in acting upon.

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In re BOYD.

(District Court, N. D. Iowa, E. D. April 3, 1903.)

**1. BANKRUPTCY—EXEMPT PROPERTY—STATE STATUTES.**

Bankr. Act, § 6, Act July 1, 1898, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], declaring that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the law of the state where the bankrupt has his domicile, did not enlarge the exemptions available to the bankrupt under the state laws, nor prevent the enforcement of Code

Iowa, § 4015, providing that none of the exemptions prescribed in the chapter should be allowed against an execution issued for the purchase money of property claimed to be exempt.

**2. SAME—ESTOPPEL OF BANKRUPT.**

Code Iowa, § 4015, provides that none of the exemptions prescribed by the chapter should be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. *Held* that, where a bankrupt invoked the benefit of the bankrupt act, and thereby precluded a seller of exempt property from obtaining a judgment and levying execution thereon, as required by such section, he was estopped to object that the court of bankruptcy had no jurisdiction to order that such property be sold, and the proceeds applied to the unpaid purchase price, on the ground that no judgment had been recovered or execution levied.

**3. SAME—SALE OF EXEMPT PROPERTY—APPLICATION—BY WHOM MADE.**

Since no title to exempt property passes to the trustee in bankruptcy, creditors having claims for unpaid portions of the purchase price of such property, claiming the right to have it sold, and the proceeds applied to such claims, are the proper persons to present such question, and not the trustee in bankruptcy.

Submitted on exceptions to ruling of referee, holding certain personal property to be exempt to the bankrupt.

H. T. & C. W. Reed, for creditors.

C. C. Upton, for bankrupt.

SHIRAS, District Judge. In this case the bankrupt seeks to have set apart to him as exempt property two plows and a set of harness purchased by him from one B. R. Evans, and a lumber wagon bought from one D. A. Lyon. These parties appeared before the referee, filing separate petitions, wherein they averred that the articles in question had been sold by them on credit to the bankrupt, that a large part of the purchase price remained unpaid, and that the bankrupt could not, under the provisions of the statutes of Iowa, hold the property exempt against their claims for the purchase price, and asking that the trustee be ordered to sell the articles in question, and, after paying the costs of sale, to apply the balance realized from such sale to the payment of the claims of the named creditors. Upon the hearing before the referee the parties stipulated in writing that the plows and harness claimed as exempt had been purchased by the bankrupt from B. R. Evans, and had not been paid for, and that the lumber wagon had been purchased from D. A. Lyon, and, with the exception of one payment of \$10, the price agreed upon had not been paid. The referee held that the bankrupt was entitled to have this property set apart to him as exempt, and, the creditors excepting to this ruling, the question has been certified to the court for review.

It is not questioned that, if the property had been fully paid for, it would be exempt from the claims of creditors under the provisions of section 4008 of the Code of Iowa, but by section 4015 of the Code it is declared that "none of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied," and the question for consideration is whether effect can be given to this section of the Code in cases of bankruptcy. According to the state-



ments of counsel, the ruling of the referee was based upon the thought that the benefit of section 4015 was available only to one who had secured a judgment for the unpaid purchase price, and had caused an execution for the collection of the judgment to be levied upon the property. Section 6 of the bankrupt act (Act July 1, 1898, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), declares, in substance, that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the law of the state wherein the bankrupt has his domicile. It certainly was not the intent of this section to enlarge the exemptions available to the bankrupt under the law of the state. It is clear that, if the bankrupt had not invoked the benefit of the bankrupt act, the property he now claims to be exempt to him would have been liable to be subjected to the payment of the unpaid portions of the purchase price. True, the mode which the creditors would have been compelled to pursue in order to subject the property to the payment of their claims would be to obtain judgment, and cause a levy of execution on the property; but the substance of the right secured by section 4015 of the Code of Iowa is that no property can be held exempt against the debt due for the purchase price, although this right can only be enforced in the state court through the form of a judgment and levy of execution. By instituting the proceedings in bankruptcy, the debtor has brought this property into the custody and under the control of this court, acting as a court in equity. The bankrupt now asks the court to make an order setting apart this specific property to him as exempt under the law of the state. The creditors, B. R. Evans and D. A. Lyon, pray the court for an order declaring the property not exempt as against their claims, and directing the sale thereof for their benefit.

It is a familiar rule that, when property comes under the control and custody of a court, all parties claiming interests or rights therein or thereto will be permitted to assert such rights before the court having custody of the property. It is equally well settled that in such cases regard will be paid and protection be granted to the substance of the right asserted, even though the court may not be able to adopt and follow the form of the remedy which, under the statutes of the state, would be alone open to the claimant if the property was not in the custody of the court. Thus, in *Krippendorf v. Hyde*, 110 U. S. 276, 280, 4 Sup. Ct. 27, 28, 28 L. Ed. 145, it was said:

"The only legal remedy which can be said to be adequate for the purpose of protecting and preserving his right to the possession of his property was an action in replevin. Of this remedy at law in the state court he was deprived by the fact that the proceedings in attachment were pending in a court of the United States, because the property attached, being in the hands of the marshal, is regarded as in the custody of the court. This was the point decided in *Freeman v. Howe*, 24 How. 450 [16 L. Ed. 749], the doctrine of which must be considered as fully and finally established in this court. \* \* \* For if we affirm, as that decision does, the exclusive right of the Circuit Court in such a case to maintain the custody of property seized and held under its process by its officers, and thus to take from owners the ordinary means of redress by suits for restitution in state courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and, as this may not be done by original suits on

account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in auxiliary proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right. And this jurisdiction is well defined by Mr. Justice Nelson, in the statement quoted, as arising out of the inherent power of every court of justice to control its own process so as to prevent and redress wrong. \* \* \* So the equitable powers of the courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law; and when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several states, the very circumstances appear which give the party a title to an equitable remedy because he is deprived of a plain and adequate remedy at law."

Thus is declared the principle that is decisive of the question under consideration. The bankrupt, by instituting proceedings in bankruptcy, placed his property within the custody and control of this court. He now asks the court to set apart to him as exempt certain articles of personal property. Two of his creditors appear, and show to the court that the articles in question were sold by them on credit to the bankrupt, and have not been paid for, and that under the state law the articles remain liable for the unpaid portions of the purchase price. The bankrupt answers thereto that under the state statute the only remedy open to the creditors by which they can enforce their rights against the property is by obtaining judgments and levying executions on the property. To this it is replied that the bankrupt, by his own act in filing his petition in bankruptcy and procuring the adjudication in bankruptcy, has put it out of the power of the creditors to obtain judgments at law against him, and, the property being within the custody of the court, the only remedy now open to them is to invoke the protection of this court. Under these circumstances, it is not open to the bankrupt, while admitting—as he is compelled to do—that the state statute does not exempt this property from liability for the unpaid purchase price thereof, to assert that by bringing the property into the custody of this court and obtaining the adjudication in bankruptcy, he has defeated the rights of the creditors by barring them from following the remedy provided for in the state statute. To justify this court in setting aside this property to the bankrupt as exempt, it must appear that it is exempt under the provisions of the law of Iowa. Under that law the creditors could subject the property to the payment of their claims, the method of so doing being the procuring judgments at law against the debtor and the levy of executions on the property. This method of enforcing the rights of the creditors has been barred to them by the act of the debtor in procuring himself to be adjudged a bankrupt, and in placing the property within the control of this court; but as held in the cited case of *Krippendorf v. Hyde*, that is the very reason why this court is in duty bound to furnish an equivalent remedy, which can be readily done by ordering the trustee to sell the articles claimed

as exempt, and, after paying the costs of sale, to apply the balance left to the payment of the claims of the named creditors, B. R. Evans and D. A. Lyon, any surplus left to be paid to the bankrupt, as these articles are exempt, under the state statute, from the claims of the general creditors.

Upon the question of the proper mode of presenting questions of this character, it seems clear that they should be presented by the party specially interested, rather than by the trustee. As against the general creditors, the property is exempt, and the bankrupt is entitled to have the same assigned to him as exempt, except as against the claim of the person from whom the property was purchased on credit. If such creditor does not, in proper time and while the property is in the custody of the court, assert his claim, and invoke the protection of the court, it will be assumed that he waives his right, and, if the property is set apart as exempt, and is delivered to the bankrupt, so that in fact it passes from the custody of the court, it is difficult to see upon what theory the court can afterwards assert a jurisdiction over the same.

No title to exempt property passes to the trustee, and, if property is exempt as against the creditors generally, it cannot be well held that a title thereto vests in the trustee simply because a single creditor may have the right to subject the property to the payment of his claim. This right is not a title to the property, nor a lien thereon, but is simply a right or privilege personal to the creditor owning the claim for the unpaid purchase price, which certainly does not vest in the trustee, and therefore the same should be presented by the creditor in his own name.

The referee is therefore directed to enter an order upon the application of the bankrupt asking that this property be set aside as exempt, that the same are so set apart as exempt against the claims of the creditors in general, but subject to the claims of B. R. Evans and D. A. Lyon, for the purchase price thereof, and upon the several petitions of said B. R. Evans and D. A. Lyon orders be entered that the trustee make proper sale of the property in question, the proceeds to be applied to payment of costs of sale, to the payment of the amounts due for the purchase price of the several articles, and the surplus, if any, to be paid to the bankrupt.

As the bankrupt and the two named creditors are alone interested, any arrangements they may make to avoid costs of sale, or as to mode of sale, will be approved.

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#### THE CHICKLADE.

(District Court, E. D. Virginia. January 26, 1903.)

#### 1. MARITIME LIENS—SERVICES OF STEVEDORE TO FOREIGN SHIP—CONTRACT MADE BY CHARTERER.

Libelant contracted with a firm of ship brokers to load a foreign ship. During the progress of the work he ascertained that the ship was under

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¶ 1. Maritime liens for supplies and services, see note to *The George Du-mois*, 15 C. C. A. 679.

charter to a firm composed of the same persons as the brokerage firm, but made no inquiry as to the terms of the charter party, nor did he notify the master of any claim against the ship, which sailed without knowledge of any such claim. Libelant presented his claim to the brokerage firm and received a check therefor, which was not paid because the firm became insolvent. By the terms of the charter, the charterers were required to pay for all stevedoring. *Held*, that libelant was not entitled to a lien upon the ship for his services.

**2. SAME—STEVEDORES—DUTIES OF.**

No lien exists against a foreign ship for stevedores services in loading a ship, unless the contract is made with the ship's master, or the latter is advised of the purpose to hold the ship liable at the time the service is performed. The burden of ascertaining the authority of the person at whose instance the stevedore acts, other than the master, should be imposed upon the stevedore.

In Admiralty. Suit in rem to enforce lien for stevedore's charges.

R. H. Riddleberger, for petitioner.

Hughes & Little, for respondent.

WADDILL, District Judge. This is a petition filed in the above-entitled cause by one Alexander Rowland, seeking to recover the sum of \$1,547.58, alleged to be due him, as stevedore, for loading the British steamship Chicklade, at the port of Sabine, Tex.

The question presented is whether, under the facts of this case, the petitioner is entitled to a lien for the services performed by him. Under the law as now settled, a stevedore employed by the master of a vessel, or other person having authority to speak for the owners, and upon the ship's credit, has a lien upon the ship for such work. Such services are maritime in character, stevedores now performing the work formerly done by seamen, and their claims are so recognized and enforced by courts of admiralty. *The George T. Kemp*, Fed. Cas. No. 5,341; *The Canada* (D. C.) 7 Fed. 119; *The Scotia* (D. C.) 35 Fed. 916; *The Wyoming* (C. C.) 36 Fed. 535; *The Mattie May* (D. C.) 45 Fed. 899; *The Seguranca* (D. C.) 58 Fed. 908; *Hughes*, Adm. 113-115. The question in this case is one of fact rather than of law; that is, whether the petitioner rendered his service upon the credit of the ship, and by reason of an agreement with her master, or any one lawfully authorized to contract for the owners. The ship was under charter, dated October 13, 1900, to the Sabine Export Company, for a voyage from the Gulf ports to Europe; one of the conditions being that the charterers were to pay all port charges, including stowage and stevedoring. The petitioner was a resident of Sabine, Tex., and for some time prior to November 19, 1900, had been engaged in the business of a stevedore at that point; prior to which time he, together with R. A. McReynolds and George W. Huggins, had been engaged in the ship and ship brokerage business, under the several names of Sabine Export Company, the Sabine Transport Company, and R. A. McReynolds & Co.; but in January, 1900, the petitioner entered into an agreement with his partners whereby he withdrew from the several companies named, in consideration of their giving him the stevedoring of their vessels at certain rates agreed upon. The said R. A. McReynolds & Co. acted as ship brokers in the chartering of the Chicklade, one C. E. Solely being their representative in Great Britain, and the said firm was composed

of the same persons as the Sabine Export Company, charterers of the ship. The ship arrived at Sabine on the 12th of November, 1900, but prior thereto the petitioner, having been advised of her coming, notified R. A. McReynolds, the president of the Sabine Export Company, the charterers, that he claimed the right to load the ship under the agreement of January, 1900, which was acceded to after some controversy, but with the understanding that thereafter the contract would be terminated. The petitioner, under these circumstances, loaded the ship, and during the progress of the work ascertained that she was under charter to the Sabine Export Company, but made no inquiry as to the terms of the charter party, and in no manner brought to the attention of the ship's master that he would hold the ship liable for his services. Upon completion of the loading, he presented his account against the export company to McReynolds, the president, who gave him the draft of that company on the company at its office in Orange, Tex., which draft was not paid, the company having become bankrupt, though it seems that it had money in bank sufficient to pay said draft at the time it was given. Meantime the ship had sailed to its point of destination, and, stopping at the port of Norfolk to coal, was libeled within the jurisdiction of this court.

It is quite apparent from the evidence that the owners of the ship had no representative, other than its master, at Sabine, Tex., clothed with authority to make contracts to bind the ship, though it seems that McReynolds & Co., as ship brokers, for a commission paid them, made certain advances to the ship for its necessary expenses, and drew upon the owners for the amount so advanced. The petitioner contracted exclusively with the charterers, who themselves were liable for the stevedore's charges, and were without apparent authority to bind the owners of the vessel therefor; and took no precaution whatever to ascertain the source of their authority; and subsequently, when put upon inquiry, on finding that the ship was under charter, utterly failed to follow up the source of information thus coming to his knowledge as to the authority of those for whom he was acting; nor did he make any claim or demand whatever against the master of the ship for the amount due. If, during the progress of the loading of the ship, on ascertaining the fact of the existence of the charter, a suggestion even had been made to the master thereof that demand would be made against her for these charges, the petitioner would have been protected, and at least the ship would have been relieved of responsibility, as the work could have been suspended. Under the terms of the charter party, the ship was not interested in the service being performed by the stevedore, as her freight money would have been earned in any event, and at least it was incumbent upon the petitioner, if he purposed to assert a claim of this character, to have advised the master of the ship, upon information coming to him of the existence of the charter and of its provisions, that he would look to the ship for the payment of his services. This, however, he utterly failed to do, and instead continued to complete his work, accepted a draft from the charterers for the amount due him, and allowed the ship to go to sea on her return voyage in absolute ignorance of the fact that even the assertion of a claim was contemplated against her. However much services of the character in ques-

tion may be looked upon with favor by courts of admiralty, it would be both unfair and unjust to the shipowners to allow the claim asserted in this case. *The Suliote* (D. C.) 23 Fed. 919-926; *The Burton* (D. C.) 84 Fed. 999; *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264-270, 17 Sup. Ct. 323, 41 L. Ed. 710.

In what has been said, sight has not been lost of the fact that ordinarily, where a necessary maritime service is rendered to a foreign vessel, upon the application of the master, or in his behalf, the presumption is that it is rendered upon the credit of the vessel, and the burden of proof is upon those who contend otherwise (*The Grape-shot*, 9 Wall. 141, 19 L. Ed. 651; *The Lula*, 10 Wall. 192, 19 L. Ed. 906; *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696); nor of the trouble that is frequently encountered, when not actually dealing with a ship's master, in determining who has the right to speak for the ship; the duties of consignees or agents of ships, or the agents of charterers or owners, being so similar and undistinguishable that, without some positive knowledge of their relations, contracts, or agreements, it is difficult to determine to which class of agents they belong. Particularly is this true as to stevedores, who are not always experienced business men; but the requirement, even as to them, would not seem to be unreasonable, that imposed the obligation to see that the person with whom they contracted, other than the ship's master or owner, had authority to represent the owners and bind the ship; and, if not satisfied as to their authority, to advise the ship's master that the ship would be looked to for the payment of services to be performed. This would enable the stevedore, in any case, by notifying the master of the ship, before proceeding with the work in hand, to amply and fully protect himself.

The petition will be dismissed, with costs.

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FARMERS' LOAN & TRUST CO. v. CENTRAL R. & BANKING CO. OF  
GEORGIA.

CENTRAL TRUST CO. v. SAME.

(District Court, S. D. Georgia, E. D. March 16, 1903.)

1. CORPORATIONS — REORGANIZATION — STOCKHOLDERS — RIGHTS — MERGER OF  
CLAIMS.

Intervener recovered judgment against a company for accrued dividends on stock held by his intestate. The company subsequently became involved in litigation, and was reorganized under a new charter. Intervener thereupon deposited his stock under the reorganization plan, and received preference bonds of the new company. *Held*, that intervener was bound by his action in entering into the reorganization, and could not assert his judgment, obtained against the old company, against the assets of the new company, to the prejudice of other creditors.

In Equity. Consolidated causes.

Edward S. Elliot and William R. Leaken, for intervener.

Henry C. Cunningham, A. R. Lawton, and T. M. Cunningham, Jr.,  
for Central of Georgia Ry. Co.

SPEER, District Judge. This is an intervention brought against the defendant company to recover accrued dividends on certain shares of the capital stock of the Central Railroad & Banking Company of Georgia, formerly held by the intervener's intestate.

On a previous hearing the amount due upon this claim was ascertained by the court, and a judgment granted therefor against the Central Railroad & Banking Company of Georgia on the 25th day of March, 1898.

It is, however, true that, after the dividends sued for had accrued, the Central Railroad & Banking Company of Georgia having become involved in litigation, the history of which is familiar, and is to some extent set forth by the Circuit Court of Appeals of the Fifth Circuit in the case of Central of Georgia Railway Company v. Paul, 35 C. C. A. 639, 93 Fed. 878, was reorganized, and a new charter granted to the Central of Georgia Railway Company. This proceeding is brought to subject the assets of the new company to this judgment against the old company. It is brought on authority of the decision of the Circuit Court of Appeals in the Paul Case, above referred to. In that case the judgment of this court (affirmed by the Circuit Court of Appeals) maintained and ordered paid a claim for accrued dividends against the Southwestern Railroad Company, which had been collected by the Central, and deposited in its bank. It is, however, true that the claim of the intervener here does not seem to possess the strong equity discoverable in the Paul Case. There the Central Railroad & Banking Company of Georgia had leased the Southwestern Railroad Company, and was bound to pay the dividends due the stockholders of the latter company. In the case now before the court the intervener is a stockholder not of the creditor, but of the debtor, company, and, to use the language of the court in the Paul Case:

"It is an indisputable fact, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia obtained their interest and rights, and by virtue thereof are now either stockholders of the new reorganization, the Central of Georgia Railway Company, or are otherwise provided for."

So far as this intervener is concerned, this is made very clear by the record before the court. He deposited his stock under the reorganization plan, and received in exchange for it, and now holds, third preference income bonds of the Central of Georgia Railway Company. He therefore became a party to the reorganization plan, by means of which his equity against the assets of the old company became merged into the assets of the new company. His position is, therefore, by no means so favorable as that of Mrs. Paul, who relied upon her independent rights as a creditor. The intervener here cannot be permitted to blow hot and cold, and, having entered into the reorganization, he must be held to be bound by his action. Indeed, the Paul Case is authority against his claim. In the language of the court we find the following:

"Equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue such properties into whosoever possession the same may be transferred, unless the stock or property has passed to the hands of a bona fide purchaser; and the rule is well established that stockholders are not entitled to any share of the capital stock, nor to any dividend

of the profits, until all the debts of the corporation are paid"—citing *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483.

Since all the debts of this corporation are not yet paid, the intervenor, so far from being entitled to recover from his associates in the reorganization, may regard himself as fortunate if the values he may possess in the new corporation are not subjected to the payment of such claims as that enforced in *Central of Georgia Railway Company v. Paul*, supra.

For these reasons judgment must be granted against the intervenor.

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**EINSTEIN et al. v. GEORGIA SOUTHERN & F. RY. CO. et al.**

(Circuit Court, S. D. Georgia, W. D. March 4, 1903.)

**1. DIVERSE CITIZENSHIP—TRUSTEES—REFUSAL TO SUE—JURISDICTION.**

In an action by two of three trustees against a corporation residing in another state, the fact that one of the trustees, who refused to join as plaintiff in the suit, and was made a defendant, resided in the same state as the corporation, did not deprive the federal court of jurisdiction, on the ground that the trustee residing in the same state with defendant was a necessary party plaintiff, since that trustee was not really a party to the controversy, but only made such in order that the rights of all interested parties might be determined in one proceeding.

In Equity.

Marion Erwin, for complainants.

Alexander C. King, John I. Hall, W. A. Henderson, and N. E. Harris, for respondents.

**SPEER**, District Judge. In this case suit is brought against a railroad company of this state to recover certain shares of stock alleged to have been issued to a person not entitled thereto. The suit is brought by Einstein and Rice, two out of three trustees, who are nonresidents of this state, representing the interest of the person alleged to be the true owner of the stock. The other trustee is a citizen of the state of Georgia, of this district, and, refusing to join as complainant, is made a party defendant, solely in order that he may be bound by the decree.

If the proper diversity of citizenship between the parties appears from the record, it is, upon authority, clear that the suit was properly brought in the judicial district where the corporation whose stock is in issue has its principal place of business. *Jellenik v. Huron Copper Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. The state statute of Michigan there construed is similar to that obtaining in Code Ga. § 2165.

The defendants the Georgia Southern & Florida Railway Company and Parsons and Edwards and others demur to the bill upon the important ground that since the trustee sued as a defendant was a necessary party plaintiff, and since he is a resident of Georgia,

¶ 1. Diverse citizenship as ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. O. A. 298.



the proper diversity of citizenship does not exist, and therefore that the suit cannot be maintained. In view of the superabundant authority upon this and kindred questions, it is not deemed important to state the views of the court in extenso. 15 Enc. Pl. & Prac. 458 et seq.; 22 Enc. Pl. & Prac. 162 et seq.; *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108, 1 *Rose's Notes on U. S. Reports*, 360-1-2-3. It will be sufficient to observe that, because one trustee refuses to perform the functions devolved upon him by law, this does not absolve the co-trustees from their duties to the trust and its beneficiaries. It is therefore not only their privilege, but their obligation, to bring suit against the wrongdoers, in this case alleged to be a corporation in the state and district where it is incorporated and carries on its business. If the proper diversity of citizenship exists between the trustees suing and the corporation sued, the controversy is wholly between citizens of different states. The recalcitrant trustee is not technically a party to that controversy, and can only be made a party by the process of the court issued to bring him in, in order that his attitude, whatever it may be, or his rights, whatever they are, can be ascertained in one proceeding in accordance with the favorite doctrine of equity. The real controversy between the actors before the court, being one of which the court would clearly have jurisdiction had there been no refractory trustee, to hold otherwise, would be to permit his inertia or reluctance to defeat access on the part of the vigilant nonresident trustees to that court which is especially intrusted by the Constitution and laws of the United States with the preservation and protection of their trust. That he would have been an indispensable party if the suit was against the trustees, or if it had been for joint misconduct or responsibility, or brought for the diminution of the trust or for its construction, may be conceded. This suit, however, is solely for the enhancement of the trust. He can have no possible motive to resist this unless he be a faithless trustee, or denies the rights of the co-trustees, or is in collusion with the defendants. Whether one or the other be the case, he should be sued as defendant, and there would be the proper diversity of citizenship between the parties to the controversy, and the jurisdiction should be maintained. *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917.

In the case at bar, however, no imputation is made upon the trustee. From the record it appears that he was merely unwilling to sue. The demurrer is urged by his codefendants to the bill in its present shape. There is no charge of collusive action upon his part in order to confer jurisdiction upon the court. No plea is filed or facts offered to show such collusion. Now, a court of equity will not permit a trust to fail for the want of a trustee; a fortiori, it will not permit the demands of trustees for the preservation of their trust to be defeated because of the indifference or unwillingness or nonaction of a co-trustee. It is true that the court has power to rearrange the parties so that their true attitude with regard to the controversy may be plainly seen, and, if this inevitably defeats the jurisdiction, the court must so declare; but on a demurrer to this bill, in the absence of averment or proof that a defendant is collusively posing

as such, the court will not make him a plaintiff against his will; nor would it take any action to defeat jurisdiction under such circumstances, if that can be avoided, if the actual controversy is plainly seen to be between citizens of different states, and to involve the requisite jurisdictional amount.

There is much greater liberality in the United States courts in equity than in courts of general jurisdiction, in allowing the omission of parties because they are out of the jurisdiction, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction as to the parties before the court. *Mallow et al. v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599. This is fully and sufficiently expressed in the forty-seventh equity rule, which has been held to be merely declaratory of the law as announced by the decision of the Supreme Court. *Shields v. Barrow*, 17 How. 140, 15 L. Ed. 158. Of course, where parties are indispensable, this rule does not apply. Applying this principle, if it were necessary to do so in this case, the court is of the opinion that it would be at liberty to treat the answer of the resident co-trustee as an intervention pro inter esse suo, and, thus retaining jurisdiction, proceed to determination in such manner that all the parties will be bound by the decree.

The demurrer for the nonjoinder of various agents or committeemen who at one time or another handled the shares of stock in dispute, or claims or liens against the defendant corporation in the liquidation of which the shares were issued, is not maintainable. If such persons had interest at any time, they parted with it before the suit was brought, and their presence before the court is therefore not necessary. 22 Enc. Pl. & Prac. 178. No fraud is charged against these intermediaries, in which capacity, solely, it seems that they acted.

In accordance with these views, order will be taken overruling the demurrers.

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#### In re EATONTON ELECTRIC CO.

(District Court, S. D. Georgia, W. D. March 5, 1903.)

#### 1. JUDGES—DISQUALIFICATION—RELATIONSHIP.

Rev. St. § 601 [U. S. Comp. St. 1901, p. 484], provides that, whenever it appears that the judge of any District Court is so related to either party as to render it improper for him to sit on the trial, it will be his duty, on application by either party, to cause the fact to be entered on the records, and certify the suit to the next circuit court for the district, etc. Section 914 [U. S. Comp. St. 1901, p. 684] provides that the practice, pleadings, and forms and modes of proceeding in *c.ivil* causes in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, etc., in like causes in courts of record of the state within which such Circuit or District Courts are held. Code Ga. § 4045, declares that no judge can sit in any cause or proceeding in which he is related to any party within the fourth degree without the consent of all the parties in interest. *Held* that, even with the consent of the parties, a federal judge should not sit in a cause in which he is related to one of the parties within the fourth degree of consanguinity.

Petition to Review Referee's Findings.

¶ 1. See *Judges*, vol. 29, Cent. Dig. § 233.

M. F. Adams, for petitioners.  
George S. Jones, for respondent.

SPEER, District Judge. At the outset of this cause it appeared that Mr. George A. Speer, of Atlanta, might have an interest in the controversy. Mr. Speer is a relative of mine by consanguinity. We are lineal descendants, three degrees removed, from a common great grandfather, William Speer, formerly of Abbeville district, South Carolina. At the threshold of the case I called the attention of the attorneys of record to the relationship, and inquired as to the interest of Mr. Speer. This was not at the time definitely known. The parties entered into a consent that, notwithstanding the relationship, the case should proceed. It is, however, true that nothing but formal orders were passed; and now that a judicial matter is presented, namely, an application for review of a referee's order directing a sale of the property of the Eatonton Electric Company, I again instituted an inquiry as to the interest of Mr. Speer. I have just received from that gentleman the following telegram: "Judge Emory Speer, Macon, Ga.: Mrs. D. N. Speer, W. A. Speer and I own entire issue first mortgage bonds. [Signed] George A. Speer." In view of this information, now for the first time definitely appearing, notwithstanding the consent of counsel of record to waive the disqualification, it is proper to inquire whether I should act as judge on any contested matter in the suit now pending.

Section 601, Rev. St. [U. S. Comp. St. 1901, p. 484], provides:

"Whenever it appears that the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next Circuit Court for the District; and if there be no Circuit Court therein, to the next Circuit Court in the state; and if there be no Circuit Court in the state, to the next Circuit Court in an adjoining state; and the Circuit Court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein."

Provision is otherwise made for the disposition of such causes when so removed, by section 637, Rev. St. [U. S. Comp. St. 1901, p. 519]. This briefly declares that the Circuit Court shall have the same cognizance of such causes, and in like manner, as the said District Court might have. This being a proceeding in bankruptcy, all the powers of the bankruptcy court will thus be conferred upon the Circuit Court for all the purposes of this case.

By virtue of section 601, Rev. St., supra, the question of disqualification seems to be left, to some extent, to the opinion of the judge presiding; but, of course, his opinion will be formed in accordance with those settled and well-known principles intended to secure absolute impartiality of trial and judgment. Now, it is true that at common law it was held not objectionable for a judge to sit in a cause to which a relative was a party; but even at common law there are cases to the effect that, while relationship may not disqualify a

judge, it is at least sufficient ground for his retirement of his own motion.

It may be regarded, however, as an established principle of American jurisprudence that relationship of the judge to a party to a cause will generally operate to disqualify him from its hearing and determination. 17 Am. & Eng. Ency. Law (2d Ed.) 736. Authorities to this effect are cited from every state in the Union. The disqualifying degree of relationship is prescribed by statute in each state, but apparently not by an act of Congress. Nor have I been able to find a reported decision by a United States court upon judicial disqualification on account of relationship. It is true that section 914, Rev. St. [U. S. Comp. St. 1901, p. 684], provides:

"That the practice, pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be, to the practice, pleadings, the forms and modes of procedure existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

While the act does not expressly authorize the adoption in a United States court of the rule of disqualification enacted by the state Legislature, the spirit of the statute and manifest propriety will, I think, justify the court in adopting, "as near as may be," as its guide on this question, the statute of the state of Georgia. This provides (Code, § 4045):

"No judge or justice of any court can sit in any cause or proceeding in which he is peculiarly interested, or related to any party within the fourth degree of consanguinity or affinity \* \* \* without the consent of all the parties in interest."

It is, however, true that this statute must be considered in connection with the language of section 601, Rev. St., supra, which seems to intrust to the discretion of the judge of the United States court to determine if his relationship renders it improper for him to sit on the trial.

Now, relationship, in Georgia, except certain specific degrees, not involved here, is determinable by the rules of the canon law, as adopted and enforced in the English courts prior to the 4th of July, 1776. Code, § 3355; *Wetter, Guardian, et al., v. Habersham et al., Executors*, 60 Ga. 199, 200. By the canon law, I am a cousin of George, and three degrees removed from the common ancestor, William, and, but for the consent, and being within the fourth degree of consanguinity, would be disqualified under the Georgia statute. It remains to be determined whether it is proper for me to act upon the consent of parties, and, as judge, try the issues of this case. It is my opinion that, for reasons of public policy, and also since Congress has afforded a convenient and accessible tribunal for the trial of the cause, it is my duty to withdraw. In several of the states waiver of disqualification is distinctly forbidden. In the absence of a definite rule for the national courts, it seems appropriate that they should adopt that which will the more effectively shelter the judges from criticism. In the case of *Oakly v. Aspinwall*, 3 N. Y. 547, the Court of Appeals of that state declare:

"It is of great importance that the court should be free from reproach or the suspicion of unfairness. A party may be interested only that the particular suit should be justly determined; but the state—the community—is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind. Although the party consent, he will invariably murmur if he do not gain his cause, and the very man who induced the judge to act when he should have forbore will be the first to arraign his decision as biased and unjust."

This ruling is approved in the Matter of White, 37 Cal. 192, and in Newcome v. Light, 58 Tex. 141, 44 Am. Rep. 604, and other cases.

For these reasons, the court must decline any further connection with this cause, and will direct that it be certified to the Circuit Court of this district for its appropriate action.

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SELL v. SPARKS.

(Circuit Court, D. New Jersey. December 27, 1902.)

1. EQUITY—ACTION AT LAW—STAY—BILL OF SALE—CONSTRUCTION AS MORTGAGE.

Where an action at law was brought against a sheriff by a claimant of goods levied on, claiming title under a bill of sale, and the sheriff claimed that such bill of sale was in fact a mortgage, he was entitled to sue in equity to have such bill decreed a mortgage, and to have the action at law stayed pending the determination of such issue.

In Equity. On bill to have a bill of sale of personal property declared a mortgage, and for a stay of an action at law.

Harvey F. Carr, for complainant.

E. A. Armstrong, for defendant.

KIRKPATRICK, District Judge. John W. Sell, the complainant herein, as sheriff of the county of Camden, attached certain property alleged to be the property of one Schram, an absconding or non-resident debtor; and notwithstanding the fact that Sparks, the defendant herein, claimed to be the owner and in possession of said goods, the sheriff seized and removed the same as the property of Schram. For his so doing, Sparks has begun an action at law against him for damages; setting up a title to said goods under a bill of sale from Schram, which is absolute on its face. It is alleged in the bill of complaint that the instrument purporting to be a bill of sale was in fact intended by the parties to be a mortgage, and the prayer is that it be reformed according to the intention of the parties, and its validity here determined. The right of a creditor to ask the aid of the court of equity to set aside, as void, a fraudulent conveyance made by his debtor, or to declare a deed absolute on its face to be, or to have been intended to be, merely a mortgage, cannot be questioned. The defendant herein, not denying this right, objects to the staying of his suit at law until the question of the force and effect and validity of the instrument under which he claims can be determined here, because he says they can equally well be adjudicated in the suit at law.

In *Abbott v. Hansen*, 24 N. J. Law, 493, the court said:

"A deed absolute on its face will, no doubt, be regarded in many cases, in a court of equity, as a mortgage, if the parties so intended. In a court of law no such doctrine has been recognized."

Parol evidence will not be admitted in an action of law to show that a bill of sale, absolute on its face, was intended to be a mortgage; nor can the terms of the deed be varied by parol in such form of action. *Grant v. Frost*, 80 Me. 202, 13 Atl. 881.

The case of *Philbrook v. Eaton*, 134 Mass. 398, is nearer in point than any brought to the attention of the court. In this case an administrator brought suit in tort for a conversion of certain goods where an absolute bill of sale had been given for the same, and afterwards the vendor thereof sold the same to another party. Held, that parol evidence to show that the bill of sale was given as a mortgage security was inadmissible.

I am of the opinion that, in order that full justice may be done between the parties, the questions as to the effect and validity of this bill of sale given by Schram to Sparks should be determined in this suit. The stay of proceedings heretofore granted herein should be continued. Let the rule be made absolute.

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**R. F. DOWNING & CO. v. UNITED STATES.**

(Circuit Court, S. D. New York. February 13, 1903.)

No. 3,263.

**1. CUSTOMS DUTIES—CARBONS OF VARIOUS LENGTH.**

Electric carbon sticks of various lengths, to be cut required lengths and finished for use in electric lighting, are dutiable, as carbon not specially provided for, at 35 per cent. ad valorem, under paragraph 97 of the tariff act of 1897 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), and not as carbons for electric lighting, at 90 cents per hundred of sticks they would make of the length required, under paragraph 98.

Albert Comstock, for appellant.

D. Frank Lloyd, Asst. U. S. Atty.

**WHEELER**, District Judge. These articles are sticks of electric carbon of various lengths, to be cut to required lengths and finished for use in electric lighting, and have been assessed as carbons for electric lighting, at 90 cents per hundred of sticks they would make of the length required, under paragraph 98 of the act of 1897 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), against a protest that they should be assessed as carbon not specially provided for at 35 per cent. ad valorem, under paragraph 97.

The same question arose in respect to like articles, except as to length of imported sticks, in *U. S. v. Reisinger*, in the Circuit Court of Appeals of this circuit. 36 C. C. A. 626, 94 Fed. 1002. That decision was in favor of the importer, and is controlling here.

Decision reversed.

## WALTER H. GRAEF &amp; CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 5, 1903.)

No. 3,247.

**1. CUSTOMS DUTIES—HAT BANDS.**

Bands of cotton cloth woven in widths from 1 to 2½ inches, and in pieces of various lengths, with perfectly straight or plain selvedged edges or borders, imported in the piece, are not subject to duty as "trimmings," under Act Aug. 27, 1894, par. 276 (28 Stat. 530), but are taxable under paragraph 264 (28 Stat. 529), as manufactures of cotton in the piece, not specially provided for.

Albert Comstock, for appellant.  
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The goods in question were imported under the act of August 27, 1894, which placed a duty, by paragraph 276 (28 Stat. 530), of 50 per cent. ad valorem on "laces, edgings, nettings and veilings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings," composed of cotton, or other vegetable fiber, in chief value, and not specially provided for; and, by paragraph 264 (28 Stat. 529), of 35 per cent. ad valorem on "all manufactures of cotton, \* \* \* in the piece or otherwise \* \* \* not specially provided for." They were assessed by the collector as trimmings, under paragraph 276 (28 Stat. 530). The general appraisers found "that the goods in controversy are articles woven in widths from about one to two and one-half inches, and in pieces of various lengths, with perfectly straight or plain selvedged edges or borders. They are composed wholly or in chief value of cotton, in various colors; were generally known in the commerce of the United States on August 28, 1894, and immediately prior thereto and since, as 'hat bands,' or as 'hat trimmings,' and are expressly designed and chiefly used as bands, and otherwise, in trimming men's hats." And they held "that the goods, being chiefly used as 'trimmings,' and commercially known as such, are dutiable as assessed." But these goods in the piece are not trimmings, in fact. Something must be done to them or with them to make them such. Upon the evidence before the board, and the testimony taken in this court, these goods had not become so distinctively known as "trimmings" as to be included within the meaning of that single word, as used in that paragraph, and be thereby specially provided for.

Decision reversed.

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HATZEL v. MOORE.

(Circuit Court, S. D. New York. January 6, 1903.)

**1. PARTNERSHIP—DEBTS OF FIRM—RELEASE OF PARTNER—ACTIONS—PARTIES.**

A complaint alleged that a firm consisting of defendant and W. was indebted to plaintiff's assignor, and that W. paid a certain sum in satisfaction of one-half of the debt, which was accepted in full satisfaction of all claims against W., and that defendant was liable for the balance. *Held*, that since Code Civ. Proc. N. Y. § 1942, permitting separate com-

position by joint debtors, expressly excludes partnership liabilities until after dissolution, under such allegations one-half of the debt was released as against both partners, and both were liable for the balance, and hence an action could not be maintained against defendant alone.

2. SAME—PARTNERSHIP AND INDIVIDUAL CAUSES—JOINDER.

Where partnership and individual causes of action were joined in the same complaint, but a demurrer was sustained to the count charging a cause of action against the firm, the complaint was good as to the other.

Henry F. Lippold, for plaintiff.  
Philip B. Adams, for defendant.

WHEELER, District Judge. The complaint sets up for a first cause of action a partnership liability of the defendant and one Frederick C. Whitney for \$2,403.94 to a lithographing company, assignor to the plaintiff, on which Whitney paid to that company "the sum of eight hundred and fifty dollars, in full satisfaction and discharge of one-half thereof, which the said company then and there accepted and received of and from the said Whitney in full satisfaction and discharge of all claim therefor, and right or cause of action thereon, against him, the said Whitney, alone, and released him alone from his liability upon said claims, and reserved all of its said company's rights, claims, demands, and cause of action therefor for the balance remaining due thereon, one thousand two hundred and one <sup>97</sup>/<sub>100</sub> dollars, against the said defendant herein, Albert H. Moore, who accordingly thereupon remained indebted to the said lithographing company in that amount, prior to and at time of the assignment hereinafter alleged, with interest from March 13, 1897," and several individual notes of the defendant for a second cause of action.

The defendant has demurred to the first cause of action for nonjoinder of the other partner, and to the complaint for misjoinder of individual with partnership liabilities.

The state code of procedure allowing separate composition by joint debtors (section 1942) expressly excludes partnership liabilities until after dissolution, which is not alleged, and the first cause of action seems to be left as at common law. By that law, as understood, the discharge of all joint debtors is commensurate with that of any, and mere payment of a part of a debt is not a sufficient consideration for a release of the whole. According to that and the allegations here, half the debt is released as to both, and half remains against both, and the demurrer for nonjoinder, which is admitted to be a proper mode of reaching it here, must be sustained.

The joinder of partnership and individual causes of action in the same complaint would seem to be bad, if each separately would be good; but sustaining the demurrer to the partnership count eliminates that, and leaves the other cause of action by itself, single and good.

Demurrer to first cause of action sustained, and to complaint overruled.



**R. BRAUSS & CO. v. UNITED STATES.****(Circuit Court, S. D. New York. February 7, 1903.)**

No. 3,292.

**1. CUSTOMS DUTIES—SPLIT BAMBOO.**

Split bamboo, cut into lengths of 12 inches, and tied in bundles intended for use in making brooms, is not taxable under Revenue Act July 24, 1897, c. 11, par. 208 (30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]), as manufactures of wood, but is entitled to free entry as "bamboo, rattan, and reed unmanufactured," under paragraph 700 (30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]).

Howard T. Walden, for appellant.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. These are bundles of split bamboo, about 12 inches long, intended for use in making brooms, and have been assessed for duty as "manufactures of wood," under paragraph 208 of the act of July 24, 1897, c. 11 (30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]), as against bamboo, in the phrase "bamboo, rattan, reeds unmanufactured," in paragraph 700 (30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]), as part of the free list. If "unmanufactured" does not reach back and include bamboo, these bundles are clearly in the free list, for they contain nothing but bamboo. If it does, it is still on the free list, unless they are bundles of manufactured bamboo. Splitting the bamboo and cutting it into lengths do not make it into anything. *U. S. v. Dudley*, 174 U. S. 670, 19 Sup. Ct. 801, 43 L. Ed. 1129. And putting it up in bundles does not change its character. *Frazer v. Moffitt* (C. C.) 20 Blatchf. 267, 18 Fed. 584.

Decision reversed.

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**MEMORANDUM DECISIONS.**

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The ANCHORIA. (Circuit Court of Appeals, Second Circuit. February 4, 1903.) No. 80. Appeal from the District Court of the United States for the Southern District of New York. H. D. Marshall, for appellant. W. H. Smith, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, upon the opinion below. 113 Fed. 982.

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ANDERSON v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 4, 1903.) No. 73. In Error to the Circuit Court of the United States for the Eastern District of New York. Edmund F. Dreggs, for plaintiff in error. T. C. Chatfield, for the United States. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Judgment of Circuit Court affirmed.

The **ASHBOURNE**. (Circuit Court of Appeals, Second Circuit. March 12, 1903.) No. 133. Appeal from the District Court of the United States for the Southern District of New York. Pierre M. Brown, for appellant. Le Roy S. Gove, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Decree affirmed, with interest and costs. See (D. C.) 112 Fed. 687.

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**BATES v. AMERICAN BUILDING & LOAN ASS'N et al. REED et al. v. SOLOMONS et al.** (Circuit Court of Appeals, Fifth Circuit. January 20, 1903.) No. 1,193. Appeal and Cross-Appeal from the Circuit Court of the United States for the Northern District of Georgia. C. J. Haden, for appellant. J. H. Porter, for appellees. H. B. Tompkins and Robt. C. Alston, for cross-appellants. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

**PER CURIAM.** The opinions of Judge Newman (116 Fed. 676, 679), filed in this case seem to be well considered, and his conclusions correct, and we therefore affirm the decree appealed from. The costs of this court to be paid by the appellant and cross-appellant, one-half by each party.

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**BRAGG v. WRIGHT.** (Circuit Court of Appeals, Seventh Circuit. March 1, 1902.) No. 832. In Error to the Circuit Court of the United States for the Eastern District of Wisconsin. Edward S. Bragg, for plaintiff in error. D. F. Cash, for defendant in error. Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

**PER CURIAM.** This cause comes before us upon the same testimony that was presented when it was last here. *Wright v. Bragg*, 37 C. C. A. 574, 96 Fed. 729. It is urged that that judgment was erroneous, and that we should review our former decision and correct the supposed error. That decision, however, is the law of the case, and we are without authority, upon this appeal, to disturb that judgment. *Supreme Lodge Knights of Pythias v. Lloyd*, 46 C. C. A. 153, 107 Fed. 70; *United States Life Ins. Co. of City of New York v. Cable*, 39 C. C. A. 264, 98 Fed. 761. The judgment is affirmed.

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In re **BRUEN et al.** (Circuit Court of Appeals, Second Circuit. February 4, 1903.) No. 101. Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York. Ralph E. Paine, for petitioner. Waldo G. Morse, for respondent. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges. Upon filing stipulation, appeal is dismissed.

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**CARLETON DRY GOODS CO. v. ROGERS.** (Circuit Court of Appeals, Fifth Circuit. March 17, 1903.) No. 1,193. Appeal from the District Court of the United States for the Northern District of Texas. Before PARDEE and SHELBY, Circuit Judges.

**PER CURIAM.** We find nothing in the reasons presented for a rehearing to make us doubt the correctness of the decision heretofore rendered (120 Fed. 14), and the rehearing is denied.

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In re **COLONIAL BREWERY.** (Circuit Court of Appeals, Second Circuit. February 6, 1903.) Nos. 36-42. Petitions for Revision of Proceedings of the

District Court of the United States for the Southern District of New York. Henry W. Taft, for petitioners. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Orders affirmed in open court.

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In re CRARY. (Circuit Court of Appeals, Second Circuit. January 21, 1903.) No. 49. Petition for Revision of Proceedings of the District Court of the United States for the Western District of New York. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Affirmed in open court.

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In re DASCHER et al. (Circuit Court of Appeals, Second Circuit. March 12, 1903.) No. 189. Appeal from the District Court of the United States for the Eastern District of New York. Henry F. Cochran, for appellants. William H. Hamilton, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Order affirmed, with costs.

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FLEMINGTON COAL & COKE CO. v. WELLS. (Circuit Court of Appeals, Second Circuit. March 6, 1903.) No. 102. In Error to the Circuit Court of the United States for the Eastern District of New York. Eldon Bisbee, for plaintiff in error. Herbert Green, for defendant in error. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Judgment of Circuit Court affirmed.

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In re FOLTZ. (Circuit Court of Appeals, Second Circuit. March 12, 1903.) No. 127. Appeal from the District Court of the United States for the Southern District of New York. F. M. Czaki, for appellant. Chas. R. Carruth, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Order affirmed.

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FORBES et al. v. MERCHANTS' EXPRESS & TRANSPORTATION CO. (Circuit Court of Appeals, Second Circuit. March 12, 1903.) No. 138. Appeal from the District Court of the United States for the Eastern District of New York. Le Roy S. Gove, for appellant. Lawrence Kneeland, for appellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Decree affirmed, with interest and costs. See (D. C.) 111 Fed. 796.

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J. L. MOTT IRON WORKS v. HOFFMAN & BILLINGS MFG. CO. (Circuit Court of Appeals, Seventh Circuit. October 7, 1902.) No. 878. Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. W. P. Preble, Jr., for appellant. E. H. Bottum, for appellee. Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The decree appealed from dismissed appellant's bill for infringement of letters patent No. 449,880, April 7, 1891, to Hammann, assignor, for supply connection for basins and baths, on the ground that the alleged invention exhibited a mere aggregation of old devices and results, and not a patentable combination. A careful consideration of the record and arguments has satisfied us that the decree is right, and that the learned and exhaustive opinion of the trial court (110 Fed. 772) states the reasons therefor with entire adequacy. The decree is affirmed.

**JUMEAU v. BROOKS et al.** (Circuit Court of Appeals, Fifth Circuit, March 3, 1903.) No. 1,209. Appeal from the Circuit Court of the United States for the Southern District of Florida. Jno. G. Reardon, for appellant. Herbert L. Anderson, for appellees. Before McCORMICK and SHELBY, Circuit Judges.

PER CURIAM. The decree of the Circuit Court is affirmed.

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**LUM WAY et al. v. UNITED STATES.** (Circuit Court of Appeals, Second Circuit, March 6, 1903.) No. 123. In Error to the District Court of the United States for the Western District of New York. Royal R. Scott, for plaintiffs in error. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Judgments of District Court affirmed.

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**MANNHEIM INS. CO. v. HOLLANDER.** (Circuit Court of Appeals, Second Circuit, March 12, 1903.) No. 148. Appeal from the District Court of the United States for the Southern District of New York. F. M. Brown, for appellant. Eustace Conway, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Decree affirmed, with interest and costs.

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**The MISSISSIPPI.** (Circuit Court of Appeals, Second Circuit, February 4, 1903.) No. 70. Appeal from the District Court of the United States for the Southern District of New York. J. Parker Kirlin, for appellant. Lawrence Kneeland, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Decree of District Court affirmed, with interest and costs, on opinion below. 113 Fed. 985.

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**In re MORGAN.** (Circuit Court of Appeals, Second Circuit, March 12, 1903.) No. 150. Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York. Samuel Fleischman, for petitioners. Henry B. Johnson, for respondent. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Order affirmed, without intending to imply that the court considers the proposed amended specifications insufficient in form or substance.

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**NEW YORK, N. H. & H. R. CO. v. RYAN.** (Circuit Court of Appeals, Second Circuit, February 4, 1903.) No. 67. In Error to the Circuit Court of the United States for the Southern District of New York. J. W. Barshby, for plaintiff in error. Thos. P. Wickes, for defendant in error. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Judgment of Circuit Court affirmed. See 115 Fed. 197.

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**NORMAN et al. v. KILGORE et al.** (Circuit Court of Appeals, Fifth Circuit, February 24, 1903.) No. 1,196. Appeal from the Circuit Court of the United States for the Southern District of Georgia. N. E. Harris, Washington Dessau, Jos. Hansell Merrill, and Pope S. Hill, for appellants. John I. Hall and Olin J. Wimberly, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The bill shows an equity on the part of the complainant Kilgore, and the circuit court had jurisdiction to grant the injunction

pendente lite. Whether the injunction as granted was in all respects proper depends on the facts, which can only be established contradictorily, and we cannot fairly pass upon the matter at this time on the record as presented on this appeal. As the appellants are permitted to bond the injunction in the court below, no irreparable injury can result from remitting the questions raised on this appeal to final decree. See *Carson v. Combe*, 29 C. C. A. 660, 86 Fed. 202. The decree appealed from is affirmed. See 119 Fed. 1006.

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**NORTHWESTERN COMMERCIAL CO. v. McDOUGALL.** (Circuit Court of Appeals, Ninth Circuit.) No. 915. In Error to the District Court of the United States for the Second Division of the District of Alaska. Du Bose & Stevens, J. L. McGinn, and John P. Hartman, for plaintiff in error. Bruce Knott and Albert H. Elliot, for defendant in error.

PER CURIAM. This cause came on regularly to be heard on the transcript of record and the motion of counsel for the defendant in error to dismiss the cause for the reason, as disclosed by the record, that a writ of error was not duly sued out and allowed therein. Whereupon, upon due consideration thereof, and the court being fully advised in the premises, it is ordered and adjudged that the said motion to dismiss the cause be, and is hereby, granted, and the cause dismissed for want of jurisdiction.

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In re **QUEEN CO.** (Circuit Court of Appeals, Ninth Circuit.) No. 909. Petition for Revision of Proceedings of the District Court of the United States for the Northern District of California. Henry G. W. Dinkelspiel, for petitioners. Upon motion of counsel for petitioners, the petition for review is dismissed.

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**RAINE v. AMERICAN STEEL & WIRE CO. OF NEW JERSEY.** (Circuit Court of Appeals, Second Circuit. January 29, 1903.) No. 79. In Error to the Circuit Court of the United States for the Northern District of New York. F. E. Smith, for plaintiff in error. C. C. Van Kirk, for defendant in error. Before WALLACE and LACOMBE, Circuit Judges. No opinion. Affirmed in open court.

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**ROUSS v. UNITED STATES.** (Circuit Court of Appeals, Second Circuit. January 30, 1903.) No. 88. Appeal from the Circuit Court of the United States for the Southern District of New York. Albert Comstock, for appellant. J. Frank Lloyd, for the United States. Before WALLACE and LACOMBE, Circuit Judges. No opinion. Affirmed in open court. See 113 Fed. 816.

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**ROYAL TRUST CO. et al. v. WASHBURN, B. & I. R. RY. CO. BARDON v. SAME.\*** (Circuit Court of Appeals, Seventh Circuit. October 7, 1902.) No. 861. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. Richard Sleight, for appellant. M. F. Gallagher, for appellees. Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. This case involved the claim of Bardon for vendor's lien for rails sold to the railroad company, and is in every respect, so far as it was decided, identical with the case of *John O'Brien Lumber Company, intervener, appellant, v. Royal Trust Company and Horace S. Oakley, trustees, A. C. Frost, receiver, et al.* (No. 860, just decided) 120 Fed. 11. For reasons there given the decree of the Circuit Court will be affirmed.

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\* Rehearing denied November 15, 1902.

**SAN FRANCISCO NAT. BANK v. DODGE.** (Circuit Court of Appeals, Ninth Circuit. January 5, 1903.) No. 926. Appeal from the Circuit Court of the United States for the Northern District of California. W. S. Wood, E. S. Pillsbury, and Alfred Sutro, for appellant. Franklin K. Lane, for appellee.

**PER CURIAM.** It appearing to the court that the case involves the same question determined in case of Nevada Nat. Bank of San Francisco v. Dodge (No. 794) 119 Fed. 57, a decree is entered affirming the decree of the Circuit Court for the Northern District of California.

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**THE SCOW 39 E.** (Circuit Court of Appeals, Second Circuit. February 4, 1903.) No. 55. Appeal from the District Court of the United States for the Southern District of New York. Peter S. Carter, for appellants. Samuel A. Park, for appellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Decree of District Court affirmed, with interest and costs.

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**THE SEGURANCA.** (Circuit Court of Appeals, Second Circuit. March 12, 1903.) No. 147. Appeal from the District Court of the United States for the Eastern District of New York. Chas. C. Nadal, for appellant. Alfred C. Cocran, for appellee. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Decree affirmed, with interest and costs.

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**TEXAS & P. RY. CO. v. CRUMP & BLACK.** (Circuit Court of Appeals, Fifth Circuit. March 17, 1903.) No. 1,217. In Error to the Circuit Court of the United States for the Eastern District of Texas. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges. T. J. Freeman and W. T. Armistead, for plaintiff in error. J. Q. Mahaffey, for defendants in error.

**PER CURIAM.** As we find none of the assignments of error well taken, nor any reversible error patent on the face of the record, the judgment of the Circuit Court is affirmed.

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**UNITED STATES v. HAM TOY et al.** (Circuit Court of Appeals, Second Circuit. March 6, 1903.) No. 119. In Error to the District Court of the United States for the Western District of New York. Chas. H. Brown, for plaintiff in error. Royal R. Scott, for defendant in error. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Judgment of District Court affirmed.

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**UNITED STATES v. OIL SEEDS PRESSING CO.** (Circuit Court of Appeals, Second Circuit. February 2, 1903.) No. 91. Appeal from the Circuit Court of the United States for the Southern District of New York. J. Frank Lloyd, for the United States. Before WALLACE, LACOMBE, and COXE, Circuit Judges. No opinion. Affirmed in open court. See (C. C.) 114 Fed. 793.

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**UNITED STATES v. STAPLETON. SAME v. EDWARDS. SAME v. FOWLKES. SAME v. DILLON. SAME v. MERRITT. SAME v. BURNEY. SAME v. DOUGLASS. SAME v. LOWENSTEIN. SAME v. BUFF. SAME v. CUNNINGHAM. SAME v. LOWRY. SAME v. JONES. SAME v. SMITH. SAME v. MARTIN. SAME v. BELL. SAME v. PUCKETT. SAME v. ELLISH. SAME v. JACKSON.** (Circuit Court of Appeals, Fifth Circuit. January 27, 1903.) Nos. 702-719. In Error to the District Court of the Unit-

ed States for the Northern District of Alabama. J. Ward Gurley, for the United States. James E. Zant, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The parties in the above 18 cases having stipulated that the same order should be made therein as in No. 701, United States v. McCrory, 119 Fed. 861, therefore, in accordance with the opinion in the last-named case, this day handed down, the judgment of the District Court in each of said cases is reversed, and said causes are remanded to said District Court, with directions to dismiss them; and it is so ordered.

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In re WHEELER. (Circuit Court of Appeals, Second Circuit. January 28, 1903.) No. 74. Appeal from the District Court of the United States for the Southern District of New York. Eugene Freyer, for appellant. O. C. Brown, for respondent. Before WALLACE, LACOMBE, and COXE, Circuit Judges. Appeal dismissed in open court upon the ground that petition for review should have been filed, instead of appeal taken.

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YOUNG v. DALEY. (Circuit Court of Appeals, Second Circuit. March 12, 1903.) No. 116. Appeal from the Circuit Court of the United States for the Northern District of New York. Robert A. Hardle, for appellant. Frank C. Curtis, for appellee. Before WALLACE and LACOMBE, Circuit Judges. No opinion. Decree of Circuit Court affirmed.

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FOLEY v. PENNSYLVANIA R. CO. (Circuit Court, S. D. New York. December 27, 1902.) Gilbert R. Hawes, for plaintiff. Henry G. Ward, for defendant.

PER CURIAM. This action is brought for the death of the intestate by the wrongful act of the defendant, for the benefit of the next of kin. He was single, 32 years old, a teamster earning \$2 a day, and lived with his father and brother. The verdict is for \$500, which the plaintiff moves to set aside as inadequate. The amount which would have been left for the next of kin after his own wants had been supplied out of his income, if he had lived, is so uncertain that it was peculiarly within the province of the jury, and so much so that we should not disturb a verdict unless passion or prejudice should appear. Under all the circumstances, neither does appear here. Motion overruled, and judgment on verdict.

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RICORDI et al. v. JOHN CHURCH CO. et al. (Circuit Court, S. D. New York. January 9, 1903.) I. M. Dittenhoefer, for plaintiffs. Duncan Edwards, for defendants.

WHEELER, District Judge. The demurrer of one defendant and plea of the other do not appear to raise any different question of jurisdiction from that which was raised and decided on the hearing of the motion for a preliminary injunction. That decision is followed now as an authority in the cause, and also because, on examination of the subject, it is concurred in. Demurrer and plea overruled. Defendants to answer over by February rule day.





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Where the objection on appeal to a decision in admiralty is that it is based on a fact found by the lower court, the decision will not be reversed, unless it clearly appears that there was error.—*Baker-Whiteley Coal Co. v. Neptune Nav. Co.* (C. C. A.) 247.

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**§ 2. Decisions reviewable.**

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**§ 3. Presentation and reservation in lower court of grounds of review.**

An assignment relating to alleged errors and improper verbal instructions to the jury held insufficient to justify a review thereof.—Smith v. Hopkins (C. C. A.) 921.

An assignment of error to the direction of a verdict for defendant cannot be reviewed, in the absence of an exception thereto at the trial.—Smith v. Hopkins (C. C. A.) 921.

**§ 4. Record and proceedings not in record.**

The Circuit Court of Appeals can act only on a record which comes from the court below, properly certified, and cannot give leave to withdraw the record on a former appeal, and refile the same to complete the record on a later appeal.—Merriman v. Chicago, D. & V. R. Co. (C. C. A.) 240.

**§ 5. Assignment of errors.**

Under Circuit Court of Appeals Rule 11 (31 C. C. A. cxlvi, 90 Fed. cxlvi), assignments of error that the judgment is contrary to law, contrary to the evidence, and contrary to the preponderance of the evidence cannot be reviewed.—Smith v. Hopkins (C. C. A.) 921.

An assignment that the court erred in improperly excluding certain testimony, consisting of four printed pages of questions propounded to the witness on the trial, held insufficient.—Smith v. Hopkins (C. C. A.) 921.

An assignment that the court erred in rendering judgment is too general to present any question for review on appeal.—Smith v. Hopkins (C. C. A.) 921.

**§ 6. Dismissal, withdrawal, or abandonment.**

The Circuit Court of Appeals will not dismiss an appeal, on motion, on the ground that the record filed is insufficient; that being a matter to be determined at the hearing on the merits, or to be corrected by certiorari for a diminution of the record.—Merriman v. Chicago, D. & V. R. Co. (C. C. A.) 240.

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Where the ex parte proofs produced by the parties on the hearing of a motion for a preliminary injunction are conflicting, the case will not be reviewed on the merits, on an appeal from the order entered; but such order will be affirmed, unless it clearly appears that the court below improperly exercised its discretion.—Chickering v. Chickering & Sons (C. C. A.) 69.

The appointment of a receiver is discretionary, and will not be reviewed, unless a gross abuse of discretion is shown.—Briggs v. Neal (C. C. A.) 224.

While findings of fact made by a master and concurred in by the Circuit Court are entitled to great weight, and will generally be followed by the appellate court, they are not conclusive, and it is the duty of the appellate court to examine the record and form its own conclusions.—Briggs v. Neal (C. C. A.) 224.

Where there was no dispute as to the terms of the written contract sued on as proved, the admission of evidence of prior negotiations is harmless error.—Rainey v. Potter (C. C. A.) 651.

An appellate court will not on a second writ of error review questions decided on a former

writ of error in the same cause.—Stoll v. Loving (C. C. A.) 805.

In an action on a fire policy, failure of the court to charge that, if the damage by fire was less than the total insurance, the recovery against defendant should be proportionate only, *held* without prejudice.—Orient Ins. Co. v. Leonard (C. C. A.) 808.

Where a case was withdrawn from the jury at the close of plaintiff's testimony, remarks by the court to the jury during the progress of the trial were without prejudice.—Smith v. Hopkins (C. C. A.) 921.

The denial of a motion for a new trial cannot be reviewed by the Circuit Court of Appeals.—Smith v. Hopkins (C. C. A.) 921.

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#### § 2. Award.

Under the Connecticut statute, providing for arbitration in pending actions, the court is not justified in setting aside an award, or a judgment entered thereon, unless some irregular or improper conduct on the part of the arbitrators is shown.—Judson v. United States (C. C. A.) 637.

A judgment entered in a proceeding by the United States to condemn property on an award of arbitrators selected by the attorneys for the parties, and to whom the matter of damages was submitted by stipulation between them, *held* valid and binding on the United States.—Judson v. United States (C. C. A.) 637.

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#### § 1. Requisites and validity.

Under the statutes of Missouri and the decisions of the state courts, a mutual insurance company organized in that state cannot make a valid assignment in case of insolvency, and an assignee of such company has no title which will support a suit in a federal court to recover assets alleged to have been wrongfully diverted by its officers.—Beale v. Connecticut Fire Ins. Co. (C. C. A.) 790.

#### § 2. Administration of assigned estate.

Under the Kentucky statutes relating to assignments for the benefit of creditors, as amended by Act March 16, 1898 (Sess. Acts 1898, p. 104), an assignee has power to sell real property at public or private sale, as he deems best, and to convey title thereto by virtue of the pow-

er given in the deed of assignment.—Blanton v. Kentucky Distilleries & Warehouse Co. (C. C.) 318.

Under the Kentucky statutes an appraisal of real estate before its sale by an assignee for the benefit of creditors is not required.—Blanton v. Kentucky Distilleries & Warehouse Co. (C. C.) 318.

The fact that personal property was included in an appraisal with real estate, with which it was sold, at a sale where an appraisal of the realty was required by statute, is an irregularity only, which is cured by a confirmation of the sale by the court without objection.—Blanton v. Kentucky Distilleries & Warehouse Co. (C. C.) 318.

A bill to compel an accounting of profits derived from a patent *held* not maintainable, when brought by the decedent's assignee for the benefit of creditors and the executrix.—Commonwealth Trust Co. v. Frick (C. C.) 688.

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## § 2. Petition, adjudication, warrant, and custody of property.

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The question of the right to property or funds in custodia legis is one which the bankruptcy court may summarily determine without the formality of technical pleadings.—In re J. C. Winship Co. (C. C. A.) 93.

A library corporation, not engaged in publishing or any mercantile pursuit, *held* not within Bankr. Act, § 4b [U. S. Comp. St. 1901, p. 3423], and it cannot, therefore, be adjudged an involuntary bankrupt.—In re Parmelee Library (C. C. A.) 235.

A man whose principal business is the cultivating of land or employing it for purposes of husbandry, and who relies upon such business as his chief source of income, is engaged chiefly in farming, within the meaning of the bankruptcy act, and cannot be adjudicated an involuntary bankrupt, although the manual labor may be done largely by employes, and some of the land may be farmed by tenants.—Wulbern v. Drake (C. C. A.) 493.

Petition to adjudge a person an involuntary bankrupt, if not sufficient because not specifically charging that bankrupt was in the excepted class, *held* capable of amendment.—Beach v. Macon Grocery Co. (C. C. A.) 736.

Under Bankr. Act, §§ 3a, 3b (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901 p. 3422]), and Sess. Laws Colo. 1891, p. 247, levy of execution on insolvent judgment debtor's land under a judgment obtained prior to the passage of the bankrupt act *held* not a "preference through legal proceedings," constituting an act of bankruptcy.—Owen v. Brown (C. C. A.) 812.

Under Bankr. Act 1898, § 2 [U. S. Comp. St. 1901, p. 3420], the federal District Court, *held* without jurisdiction to adjudge a traveling gambler a bankrupt, where he had resided within the district but two months.—In re Williams (D. C.) 34.

A federal District Court of one district has no jurisdiction, under Bankr. Act, § 2 [U. S. Comp. St. 1901, p. 3420], to enjoin the payment of claims therein to an alleged bankrupt, where the bankruptcy proceedings are pending in another district.—In re Williams (D. C.) 38.

Bankr. Act 1898, § 69 [U. S. Comp. St. 1901, p. 3450], *held* not to authorize the issuance of a warrant for the seizure of an alleged bankrupt's property, against whom an involuntary petition is pending on the application of the

petitioning creditors, supported by the bankrupt's affidavit, waiving the statutory proof and the required bond.—In re Sarsar (D. C.) 40.

An admission of insolvency by a corporation, in its answer to a petition against it filed in a state court praying for the appointment of a receiver, is not an admission in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt, within the meaning of Bankr. Act 1898, § 3a, cl. 5 [U. S. Comp. St. 1901, p. 3422].—In re Wilmington Hosiery Co. (D. C.) 179.

Bankr. Act 1898 [U. S. Comp. St. 1901, p. 3418], nowhere denounces a mere intent on the part of an insolvent debtor not to become a bankrupt, and the doing or permitting any of the things specified in section 3a, cl. 1 [U. S. Comp. St. 1901, p. 3422], with intent not to become a bankrupt, is not necessarily doing or permitting them with intent to hinder, delay, or defraud creditors, so as to constitute an act of bankruptcy.—In re Wilmington Hosiery Co. (D. C.) 180.

An intent to hinder or delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone them in the collection or enforcement of their claims.—In re Wilmington Hosiery Co. (D. C.) 180.

Bankr. Act 1898, § 3a, cl. 1 [U. S. Comp. St. 1901, p. 3422], requires an actual intent to hinder, delay, or defraud creditors as an element of the acts of bankruptcy therein defined.—In re Wilmington Hosiery Co. (D. C.) 180.

One does not "permit" a removal of property, within the meaning of Bankr. Act 1898, § 3, cl. 1 [U. S. Comp. St. 1901, p. 3422], who has neither the power nor right to prevent its removal.—In re Wilmington Hosiery Co. (D. C.) 180.

The word "removed," as used in Bankr. Act 1898, § 3, c. 1 [U. S. Comp. St. 1901, p. 3422], means an actual or physical change in the position or locality of the property constituting the subject of the removal; and the mere taking possession of the property by a receiver appointed by competent authority is not such a removal.—In re Wilmington Hosiery Co. (D. C.) 180.

Where an insolvent corporation, against which a bill was filed, alleging its insolvency and praying the appointment of a receiver, made answer admitting its insolvency, and a receiver was thereupon appointed, who took possession of its property, the corporation did not thereby permit its property to be removed, with intent to hinder or delay its creditors, or any of them, within the meaning of section 3a (1), of the bankruptcy act [U. S. Comp. St. 1901, p. 3422].—In re Wilmington Hosiery Co. (D. C.) 180.

Property transferred as security for a just debt is not to be excluded from consideration, in determining the debtor's solvency, in involuntary proceedings against him in bankruptcy, under Bankr. Act, § 1, subd. 15 [U. S. Comp. St. 1901, p. 3419], merely because the transfer may constitute a preference.—In re Doscher (D. C.) 408.

A statement of insolvency, in a petition filed by the directors of a corporation in a state

court for the dissolution of the corporation, is not sufficient proof of insolvency in involuntary proceedings in bankruptcy, where the rule as to what constitutes insolvency in the state courts is different from that prescribed by the bankruptcy act.—In re Doscher (D. C.) 408.

### § 3. Assignment, administration, and distribution of bankrupt's estate.

A contract construed, and held to be one of bailment, and not of conditional sale, which vested title to the property in the party to whom it was furnished for sale.—In re Galt (C. O. A.) 64.

The District Court held without jurisdiction of a suit in equity by a trustee in bankruptcy against a nonresident creditor, which did not consent nor appear.—Havens & Geddes Co. v. Pierek (C. C. A.) 244.

That a trustee, elected to represent a bankrupt, was a stockholder in a corporation having a large claim against the bankrupt, etc., held not to disqualify him to act as trustee.—In re Lazoris (D. C.) 716.

An attorney for creditors held not entitled to vote at an election of a trustee in bankruptcy without formal powers of attorney.—In re Lazoris (D. C.) 716.

### § 4. — Preferences and transfers by bankrupt, and attachments and other liens.

Where property was acquired by a bankrupt from a transferrer, who was indebted to a creditor, such creditor held not entitled to set off a credit for such property against a subsequent preference under Bankr. Act, § 60, par. "c" [U. S. Comp. St. 1901, p. 3445].—Carleton Dry Goods Co. v. Rogers (C. C. A.) 14.

Where a subsequent credit was given in consideration of a payment by a bankrupt on another's debt, and not for property passing from the creditor to the bankrupt, the credit was not available as a set-off, under Bankr. Act, § 60, par. "c" [U. S. Comp. St. 1901, p. 3445].—Carleton Dry Goods Co. v. Rogers (C. C. A.) 14.

Under the law of North Carolina, which makes a mortgage effective from the date when it is filed for record, a chattel mortgage given by bankrupts is good, as against their other creditors, where it was filed for record on the day before the filing of the petition in bankruptcy.—Davis v. Turner (C. C. A.) 605.

A chattel mortgage, given by an insolvent firm in good faith within four months prior to its bankruptcy, is not void under the bankruptcy act, where it was given for a present loan of money, which was used in paying debts of the firm, and was duly recorded, so as to become effective prior to the bankruptcy, but is protected by section 67d [U. S. Comp. St. 1901, p. 3449].—Davis v. Turner (C. C. A.) 605.

A trustee in bankruptcy will not be subrogated by the court to the rights of an attaching creditor to enable him to defeat a lien of one who has the superior equity.—In re Sentenne & Green Co. (D. C.) 436.

The title to goods furnished to a bankrupt for sale by him *held* to have passed to him under the terms of the contract, and to have vested in his trustee, notwithstanding a clause of the contract reserving ownership in the seller until payment was made.—In re Galt (D. C.) 443.

**§ 5. — Administration of estate.**

Where creditors seek to overturn finding of referee in bankruptcy, the burden of proof is on them to show the facts to be as they insist.—In re Williams (D. C.) 542.

A report of a referee on questions of fact is presumed to be correct until the contrary is shown.—In re Williams (D. C.) 542.

A sale of an asset of a bankrupt, fairly and regularly made, will not be set aside at the instance of one who has no other interest than the desire to become the purchaser at a resale, and who offers to make a higher bid, against the objections of all the creditors who could alone be benefited.—In re Belden (D. C.) 524.

**§ 6. — Claims against and distribution of estate.**

The reduction of an allowance of \$1,000 to attorneys for creditors in involuntary bankruptcy proceedings to \$196.68 *held* erroneous.—Smith v. Cooper (C. C. A.) 230.

Where a bank held two series of notes against a bankrupt, upon both of which it had received preferential payments, one being signed by a single surety and the other by the same surety with others, the surety, having paid the balance due on the first series, cannot prove his claim therefor without surrendering the preferences received by the bank on both.—Livingstone v. Heineman (C. C. A.) 786.

The claim of a surety for a bankrupt for reimbursement on account of money paid in discharge of his obligation belongs in the same class as claims of general or unsecured creditors.—Livingstone v. Heineman (C. C. A.) 786.

A surety for a bankrupt, who has discharged the debt, either before or after the bankruptcy, by Bankr. Act 1898, § 57i (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), is subrogated "to the rights of the creditor," and is affected by any preference received by the creditor before payment, which inheres in the claim.—Livingstone v. Heineman (C. C. A.) 786.

The fact that the clerks of a bankrupt were given vacations with pay, within three months prior to the bankruptcy, the pay, however, to be withheld until the end of the year, during which time the bankruptcy occurred, does not deprive them of the right to prove their claims for such pay, nor to their priority as wages due which were earned within three months.—In re B. H. Gladding Co. (D. C.) 709.

A contract between an employer and its clerks, by which the pay of such clerks during their vacations was to be withheld until the end of the year, and forfeited "if for any reason employment was severed" before that time, was for the benefit of the employer, for the purpose of securing a continuance of service, and

on its bankruptcy before the time fixed, which defeated such object, the court will not enforce the forfeiture.—In re B. H. Gladding Co. (D. C.) 709.

An involuntary bankrupt's attorney *held* not entitled to charge the estate for services in posting the bankrupt's books and in making extra copies of the schedules.—In re Connell & Sons (D. C.) 846.

An involuntary bankrupt's estate *held* liable to his attorney only for the reasonable value of the services actually required.—In re Connell & Sons (D. C.) 846.

Where, in a proceeding for the allowance of attorney's fees to involuntary bankrupts for representing them at their examination before the referee, and for being present and acting as counsel for them, through such examination, there was no proof that the employment of counsel was reasonably necessary, the claim should be disallowed.—In re Rosenthal & Lehman (D. C.) 848.

Under Bankr. Act, § 64b [U. S. Comp. St. 1901, p. 3447], the court may allow an attorney for the bankrupt in an involuntary proceeding for services actually rendered in good faith for the real purpose of impartially administering the estate.—In re Rosenthal & Lehman (D. C.) 848.

Where a claimant against a bankrupt for goods fraudulently obtained filed a claim based on the contract, he could not recover other goods similarly sold remaining in the bankrupt's possession.—In re Hildebrant (D. C.) 992.

**§ 7. Composition.**

Under Bankr. Act 1898, §§ 1, 12, 30 Stat. 544, 549 [U. S. Comp. St. 1901, pp. 3419, 3426], application to confirm composition denied.—In re Frear (D. C.) 978.

Bankr. Act 1898, § 2, subd. 9, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], *held* not to give court power to confirm irregular composition of bankrupt; such power being limited by section 12, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3427].—In re Frear (D. C.) 978.

**§ 8. Rights, remedies, and discharge of bankrupt.**

A bankrupt in South Carolina is not entitled to exemption from personal property which is not paid for.—Cannon v. Dexter Broom & Mattress Co. (C. C. A.) 657.

Business block, occupied as a residence six days before bankruptcy and in contemplation thereof, *held* a homestead under Const. Ark. art. 9, §§ 3, 5.—In re Irvin (C. C. A.) 732.

The destruction by a bankrupt, at a time when he was contemplating the filing of a petition in bankruptcy, of the books of account of a firm of which he had formerly been a member, and which were material to a proper understanding of his financial condition, is ground for refusing him a discharge.—In re Conley (D. C.) 42.

A bankrupt cannot be denied his right to claim property as exempt under the laws of Georgia because the same has not been paid

for, where the claim of the creditor has not been reduced to judgment, and no steps have been taken to fix a lien on the property for the purchase money, except by asking, in the objections to the allowance of the exemption, that such lien be established.—In re Butler (D. C.) 100.

A court of bankruptcy is without jurisdiction to enjoin proceedings in a state court against a bankrupt in an action on the case for fraud, pending his discharge, since such action cannot affect the proceedings in bankruptcy, and in no case could the discharge constitute a defense thereto.—In re Wollock (D. C.) 516.

Bankr. Act 1898, § 17, cl. 2 [U. S. Comp. St. 1901, p. 3428], does not limit the claims exempted from release by a discharge on account of fraud to such as have been reduced to judgment.—In re Wollock (D. C.) 516.

A specification of objections to the discharge of a bankrupt is not a pleading, within the meaning of Bankr. Act 1898, § 18c [U. S. Comp. St. 1901, p. 3429], requiring all pleadings setting up matters of fact to be verified, and such specifications need not be verified.—In re Jamieson (D. C.) 697.

As precedent to obtaining discharge, *held* necessary for bankrupt to assign his interest in spendthrift trust to trustee in bankruptcy.—In re Fleishman (D. C.) 960.

A contract for the sale of goods *held* not to retain title in the seller to such goods or their proceeds, or create a fiduciary relation between the parties, so that the debt of the purchaser for the proceeds of goods sold and not paid for would not be released by his discharge in bankruptcy.—In re Butts (D. C.) 966.

Bankr. Act July 1, 1898, § 17, cl. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], construed as to debts excepted from release by the bankrupt's discharge on the ground of fraud, etc.—In re Butts (D. C.) 966.

Leave to amend the specifications filed in opposition to the discharge of a bankrupt can only be granted by the judge.—In re Peck (D. C.) 972.

The verification of specifications of objection to the discharge of a bankrupt by the attorney for the objecting creditors, who states under oath that "the matters alleged above are true to the best of his knowledge and belief," is sufficient.—In re Peck (D. C.) 972.

So-called specifications of objection to the discharge of a bankrupt, which merely state the grounds for refusing a discharge in the language of the statute, without any attempt to specify any particular act of the bankrupt, are wholly insufficient, and no evidence can be received thereunder, nor do they afford any basis for amendment.—In re Peck (D. C.) 972.

Bankr. Act § 6, Act July 1, 1898, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], *held* not to enlarge exemptions allowable under state laws, nor prevent the enforcement of Code Iowa, § 4015, prohibiting the allowance of exemptions on executions for purchase money.—In re Boyd (D. C.) 999.

A bankrupt *held* estopped to object to the jurisdiction of the court of bankruptcy to order exempt property sold for the benefit of the seller in payment of the price, though he had not recovered judgment and levied execution as required by Code Iowa, § 4015.—In re Boyd (D. C.) 999.

The claim of creditors of a bankrupt to have exempt property sold to pay unpaid portions of purchase price should be presented by the creditors, and not by the trustee in bankruptcy.—In re Boyd (D. C.) 999.

### § 9. Appeal and revision of proceedings.

Appeal from discharge in bankruptcy *held* dismissible under Bankr. Act 1898, § 25 [U. S. Comp. St. 1901, p. 3432], and Circuit Court of Appeals Rule 14, subd. 3 (31 C. C. A. liv. 90 Fed. liv), on account of insufficiency of the record.—Williams Bros. v. Savage (C. O. A.) 497.

One *held* not entitled to a second petition for review of the same proceeding in bankruptcy.—Beach v. Macon Grocery Co. (C. C. A.) 736.

A trustee may appeal from an order denying his motion to expunge a claim allowed, unless further preferences were surrendered, and directing a return of a preference previously surrendered by the creditor.—Livingstone v. Heineman (C. O. A.) 786.

On appeal by a creditor of a bankrupt from an order approving a composition, under which a majority of the creditors have received the amounts to which they were entitled, the assenting creditors are necessary parties.—Marshall Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A.) 815.

### § 10. Costs and fees.

Where no attachment of an involuntary bankrupt's property was made before adjudication, and no bond given, as authorized by Bankr. Act, § 3e [U. S. Comp. St. 1901, p. 3423], the fact that a temporary injunction restraining payment of debts to the bankrupt was granted without bond did not justify allowance of counsel fees and expenses on dismissal of the petition.—In re Williams (D. C.) 34.

## BANKS AND BANKING.

### § 1. Banking corporations and associations.

Fiancée of cashier of insolvent bank, furnishing securities for loan to it through inducement of cashier, *held* entitled to recover from receiver as preferred creditor.—Hallett v. Fish (C. C.) 986.

Evidence *held* to show that cashier, in securing aid for loan to insolvent bank, was acting for the bank, and not for himself.—Hallett v. Fish (C. C.) 986.

### § 2. Functions and dealings.

Where a husband deposited money in bank in his wife's name, but stated that he would draw the checks, the bank became *prima facie* the debtor of the wife, the transaction being notice to it of her ownership; and, where the money was in fact her separate property, it could not discharge such indebtedness by paying out the



money on checks to which her name was signed by her husband without her authority or knowledge.—*Brown v. Daugherty* (C. C.) 526.

That a husband had been doing business in his wife's name, and handling her property and money without objection on her part, does not estop her from recovering from a bank for money deposited by him in her name, and which was her property, which was paid out by the bank on checks drawn by him without authority, where the bank had no knowledge of such prior transactions, and did not act on the faith of the husband's general agency.—*Brown v. Daugherty* (C. C.) 526.

Insolvent bank held to have assumed whatever advantage its cashier took of his fiancée in securing aid from her for loan to the institution.—*Hallett v. Fish* (C. C.) 986.

### § 3. National banks.

The distribution of the assets of an insolvent national bank, from the moment of the appointment of a receiver, is governed by the federal law, to the exclusion of the law of any state; and by such law holders of outstanding drafts or checks issued by such bank are not entitled to preference over general creditors, and cannot enforce payment against the drawee, nor has the drawee the right to pay the same from the funds of the insolvent bank in its possession, although by the law of the state a draft or check is held to be an assignment of the fund pro tanto.—*First Nat. Bank v. Selden* (C. C. A.) 212.

## BAR.

Of action by former adjudication, see "Judgment," § 5.

## BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

## BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 2.

## BILL OF DISCOVERY.

See "Discovery," § 1.

## BILL OF LADING.

See "Carriers," § 2.

## BILL OF REVIEW.

See "Equity," § 8.

## BILLS AND NOTES.

Parol or extrinsic evidence, see "Evidence," § 5.

### § 1. Requisites and validity.

Where farmers' notes were transferred by a country merchant to a cotton factor to secure advances, and it is contended that the transfer

was not legal, because not in writing, in the absence of proof to the contrary, it will be presumed that such notes were either payable to bearer or to order and were duly indorsed.—*In re Williams* (D. C.) 542.

## BONA FIDE PURCHASERS.

Of land, see "Vendor and Purchaser," § 1.

## BONDS.

Municipal bonds, see "Municipal Corporations," § 2.

Of United States officer, see "United States," § 1.

On granting preliminary injunction, see "Injunction," § 2.

## BOOKS.

Right to trade-mark in device stamped on book, see "Trade-Marks and Trade-Names," § 2.

## BREACH.

Of condition, see "Insurance," § 2.

Of contract, see "Contracts," § 4; "Sales," § 2.

Of warranty, see "Sales," § 6.

## BUILDING AND LOAN ASSOCIATIONS.

Where the subscription contract and the loan contract of a borrowing stockholder are both by their terms payable at the home office of the association in the state in which it is incorporated, the latter contract is governed by the law of such state, although the mortgaged property is situated in another state.—*Interstate Building & Loan Ass'n v. Edgefield Hotel Co.* (C. C.) 422.

The bond of a borrowing stockholder construed, and held to entitle such stockholder to settle, on the insolvency of the association, by paying the amount borrowed, with 8 per cent. interest, being credited thereon as partial payments with the installments of stock and interest paid.—*Interstate Building & Loan Ass'n v. Edgefield Hotel Co.* (C. C.) 422.

Where both the subscription and loan contracts of a stockholder in a building and loan association are dated and made payable at the home office of the association, they are governed by the laws of the state of such home office.—*Alexander v. Southern Home Building & Loan Ass'n* (C. C.) 963.

The contract of a borrowing stockholder construed, and the amount due under its provisions determined.—*Alexander v. Southern Home Building & Loan Ass'n* (C. C.) 963.

A statement sent by a building and loan association to a stockholder, by mistake, that his loan was paid in full, will not bind the association, where it was at once recalled and no rights intervened.—*Alexander v. Southern Home Building & Loan Ass'n* (C. C.) 963.

Insurance premiums paid by a borrowing stockholder in a building and loan association

on the property mortgaged, although required by the contract, are for his own benefit, and cannot be applied in liquidation of the debt.—*Alexander v. Southern Home Building & Loan Ass'n* (C. C.) 963.

## BURDEN OF PROOF.

In criminal prosecutions, see "Criminal Law," § 1.

## CANCELLATION OF INSTRUMENTS.

See "Quieting Title."

Rescission of contract, see "Contracts," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

### § 1. Right of action and defenses.

An agreement which contains nothing unfair, and which truthfully states the understanding of the parties so far as it attempts to state it, will not be canceled because it is inchoate and incomplete.—*Kerr v. Southwick* (C. C. A.) 772.

### § 2. Proceedings and relief.

A bill for the cancellation of an instrument for fraud will not support a decree which, although finding the instrument valid, enjoins the defendant from misrepresenting its legal effect as construed by the court.—*Kerr v. Southwick* (C. C. A.) 772.

## CARGO.

See "Shipping."

## CARRIERS.

Carriage of goods by vessels, see "Shipping," § 4.

Carriage of passengers by vessels, see "Shipping," § 5.

Combinations in restraint of trade, see "Monopolies," § 1.

### § 1. Control and regulation of common carriers.

A railroad company is under no duty as a common carrier to permit hackmen to enter its stations for the purpose of soliciting business from its passengers, and therefore its granting of such right to one person or concern does not entitle others to equal privileges on the same terms.—*Donovan v. Pennsylvania Co.* (C. C. A.) 215.

A railroad company may enjoin hackmen from congregating on the sidewalk around the doors of a station to solicit business in such numbers as to materially interfere with ingress and egress.—*Donovan v. Pennsylvania Co.* (C. C. A.) 215.

A finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves, and in violation of section 1 of the interstate commerce act (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), cannot properly be based on evidence which only tends to show that they are too high, as compared with the rates charged between the initial points and one or two other points.—*Interstate Commerce Com-*

*mission v. Nashville, C. & St. L. Ry. Co.* (C. C. A.) 934.

The same evidence which warrants a finding that dissimilar circumstances and conditions exist, which justify a lower rate for a longer haul to one point than for a shorter haul to another, also establishes that the charging of such rates does not give one point an undue preference and advantage over the other, in violation of section 3 of the interstate commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).—*Interstate Commerce Commission v. Nashville, C. & St. L. Ry. Co.* (C. C. A.) 934.

### § 2. Carriage of goods.

Promise of carrier not to insist on provision in bill of lading exempting it from loss or damage by fire *held* founded on valuable consideration.—*Texas & P. Ry. Co. v. Cau* (C. C. A.) 15.

A general Eastern freight agent of a Western railroad, having his office in New York, has apparent power by virtue of his position to contract for the through carriage of goods over his own and connecting lines of transportation, and such a contract, made with one having no knowledge of any limitations on his power, will bind receivers operating his road, and for whom he is acting.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.) 873.

The fact that a shipper, after receiving a bill of lading, negotiates the same, is not a ratification or adoption of its terms, as between him and the carrier, which will operate to annul a prior valid contract under which the goods were shipped, and under which rights have vested and obligations have accrued.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.) 873.

The mere receipt of a bill of lading does not alter or affect a prior contract under which goods have been actually shipped and are in course of transit, without an actual consent to the change.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.) 873.

Receivers, operating a railroad, *held* liable in damages for a loss resulting to a shipper, with whom they contracted for through shipment over their line and a connecting steamship line, from delay in transshipment, on the ground that they failed to exercise care to prevent such delay.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.) 873.

### § 3. Carriage of passengers.

A railroad company is liable in damages, without notice or demand, for the action of a conductor in wrongfully ejecting a passenger, where the conductor acted without malice; and, in an action to recover such damages, evidence of negotiations between the parties for a settlement is not admissible, on the theory that it shows a ratification by the company of the conductor's action.—*Pennsylvania Co. v. Lennhart* (C. C. A.) 61.

In an action to recover damages for plaintiff's wrongful ejection from a railroad train, it was error to permit plaintiff to testify to further transactions and conversations between him and employes of the company, after his ejection and after his right of action was com-

plete.—*Pennsylvania Co. v. Lenhart* (C. C. A.) 61.

A railroad company held liable in damages for the ejection of a passenger for his refusal to pay fare, where he presented a mileage book which, under the circumstances and the terms of the contract, it was the conductor's duty to accept.—*Pennsylvania Co. v. Lenhart* (C. C. A.) 61.

A passenger on a railroad train is not required to pay fare, when demanded by the conductor, where he has presented a legal ticket, in order to save the company from liability for damages for his wrongful ejection.—*Pennsylvania Co. v. Lenhart* (C. C. A.) 61.

Evidence in an action for injury to a passenger on a steamboat, caused by a failure of part of its machinery to operate, held sufficient to require the submission of the question of defendant's negligence to the jury.—*Wilmington Steamboat Co. v. Walker* (C. C. A.) 97.

In an action against a railroad company for the death of a passenger, deceased held as a matter of law not guilty of contributory negligence in riding in the car reserved for colored passengers.—*Florida Cent. & P. R. Co. v. Sullivan* (C. C. A.) 799.

**CAUSE OF ACTION.**

See "Action"; "Malicious Prosecution," § 1.

**CERTIFICATE.**

Receivers' certificates, see "Railroads," § 2.

**CHANCERY.**

See "Equity."

**CHANGE OF POSSESSION.**

Necessity as against creditors of grantor, see "Fraudulent Conveyances," § 1.

**CHARGE.**

By carrier, see "Carriers," § 1.  
To jury in civil actions, see "Trial," § 3.

**CHARTER.**

Of corporation, see "Corporations," § 1.

**CHARTER PARTIES.**

See "Shipping," § 1.

**CHATTEL MORTGAGES.**

By bankrupt as preference, see "Bankruptcy," § 4.  
By partners, see "Partnership," § 1.  
In fraud of creditors, see "Fraudulent Conveyances."  
Parol or extrinsic evidence, see "Evidence," § 5.

**§ 1. Requisites and validity.**

An instrument conveying personal property as security for a debt will be treated as a mortgage in equity, although informal in its language.—*Davis v. Turner* (C. C. A.) 605.

**§ 2. Filing, recording, and registration.**

Evidence held not to show that a chattel mortgage by a country merchant to his cotton factor was fraudulently withheld from record.—*In re Williams* (D. C.) 542.

**§ 3. Construction and operation.**

A provision of a chattel mortgage with reference to after-acquired property construed, and held to apply only to property added to maintain or increase the efficiency of the mortgaged plant.—*In re Sentenne & Green Co.* (D. C.) 436.

**§ 4. Removal or transfer of property by mortgagor.**

A chattel mortgage of a mechanical plant, covering additions made to maintain or improve its condition and efficiency, which is valid against the mortgagor, will be enforced as to additions made to the plant for that purpose by a purchaser from the mortgagor, who assumed all his obligations under the mortgage.—*In re Sentenne & Green Co.* (D. C.) 436.

**§ 5. Payment or performance of condition, release, and satisfaction.**

Where a country merchant shipped cotton to a factor holding a mortgage lien, and made drafts against the proceeds of the shipment, leaving a balance due the factor in good faith, the mortgage given as lien protects such balance.—*In re Williams* (D. C.) 542.

**CHINESE.**

Exclusion or expulsion, see "Aliens," § 1.

**CHOSE IN ACTION.**

Assignment, see "Assignments."

**CIRCUIT COURTS OF APPEALS.**

See "Courts," § 6.

**CITATION.**

See "Process."

**CITIES.**

See "Municipal Corporations."

**CITIZENS.**

See "Aliens"; "Indians."  
Citizenship ground of jurisdiction of United States courts, see "Courts," § 4; "Removal of Causes," § 1.  
Privileges and immunities, see "Constitutional Law," § 3.

**CIVIL RIGHTS.**

See "Constitutional Law," § 2, 3.

## CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 6.  
 Against estate of decedent, see "Executors and Administrators," § 1.  
 Against property in hands of receiver, see "Receivers," § 3.  
 Against United States, see "United States," § 2.  
 Of patent, see "Patents," § 5.  
 To property of bankrupt, see "Bankruptcy," § 2.

## CLOUD ON TITLE.

See "Quieting Title."

## COLLATERAL ATTACK.

On judgment, see "Judgment," § 4.

## COLLISION.

### § 1. Steam vessels meeting or crossing.

Two steamships both *held* in fault for a collision in the night in Chesapeake Bay, while on crossing courses, for violation of the inland navigation rules.—The Straits of Dover (C. C. A.) 900; The Bluefields, Id.

### § 2. Steam vessels and sail vessels.

A steamer *held* in fault for a collision with a meeting schooner at sea in a fog, for failing to keep a proper lookout, because of which she did not hear the schooner's fog signals and keep out of the way, as was her duty as the burdened vessel.—The Gadsby (D. C.) 851; The Frank A. Palmer, Id.

### § 3. Vessels in tow.

Evidence considered, on which it was *held* that a steamer 240 feet long, passing up the "lime kiln crossing" in the Detroit river, was solely in fault for a collision with the second of two barges in tow of a meeting steamer, on account of her improper navigation in changing her course across the channel, which is only 440 feet wide, after meeting the first tow.—Mitchell Transp. Co. v. Green (C. C. A.) 49; Green v. Mitchell Transp. Co., Id.

A steamer passing free through a rather narrow channel, and meeting another vessel with tows, is bound to take into account the fact that such tows are likely to be somewhat unwieldy, and vary more or less in their several courses, and to guard against the danger and keep out of the way, if she can without peril to herself.—Mitchell Transp. Co. v. Green (C. C. A.) 49; Green v. Mitchell Transp. Co., Id.

A steam lighter *held* in fault for a collision in the night with a barge in tow on a hawser in New York Bay for failing to keep a lookout and to observe the lights on the tug, indicating a tow astern.—The Komuk (D. C.) 841; The Clarence, Id.

A tug and barge in tow in New York Bay in the night have the burden to show that the failure of the barge to carry the lights required by the pilot rules did not contribute to a

collision between the barge and a crossing steam vessel.—The Komuk (D. C.) 841; The Clarence, Id.

### § 4. Vessels at rest, at anchor, or at piers.

Evidence considered, and *held* to sustain a decree holding a schooner, anchored in a narrow channel in Narragansett Bay, in the night, solely in fault for a collision with a steamer, on the ground that she did not maintain a proper anchor light.—The Maggie Ellen (C. C. A.) 662.

### § 5. Fog or thick weather.

The requirement of article 16 of the international navigation rules [U. S. Comp. St. 1901, p. 2868] that all vessels shall go at a moderate speed in a fog, "having careful regard to the existing circumstances and conditions," is absolute, and a vessel is not relieved from liability for its violation because so constructed that she cannot be properly controlled at a speed which is moderate under the circumstances and conditions.—The Eagle Point (C. C. A.) 449.

### § 6. Narrow channels, harbors, rivers, and canals.

A collision between two ocean steamships meeting in Patapsco river, where the channel is 600 feet wide, *held* due solely to the fault of one for maintaining full speed and for the violation of the inland navigation rules by her pilot in attempting to pass on the wrong side of the channel.—The Acilia (C. C. A.) 455; The Crathorne, Id.

Article 25 of the inland rules, requiring steam vessels in narrow channels to keep to the side on their starboard hand, is applicable to navigation in a channel in the Chesapeake Bay 600 feet wide, and is mandatory, superseding all prior rules and local customs.—The Acilia (C. C. A.) 455; The Crathorne, Id.

A ferryboat and a tug both *held* in fault for a collision in North River while on crossing courses.—The De Veaux Powell (D. C.) 522; The Lackawanna, Id.

A lighter *held* in fault for a collision caused by her backing into another vessel when leaving her pier, through the fouling of her propeller by driftwood, which might have been prevented by the exercise of proper care.—The Despatch (D. C.) 856.

### § 7. Special circumstances and errors in extremis.

Evidence *held* not to exonerate a barge in tow from liability for a collision with a meeting tow in a channel in St. Mary's river.—The Australia (C. C. A.) 220.

### § 8. Suits for damages.

Where a collision in a channel between two passing tows results from the sheering of one across the channel, the burden rests upon her to free herself from liability by showing that the sheer was caused by some force which could not have been overcome by exercise of proper care and skill in navigation.—The Australia (C. C. A.) 220.

Where it is shown that a collision was caused by the deviation of one of the vessels, which

was in tow, from the course of the towing steamer, the burden rests upon her to free herself from liability.—*Davidson v. American Steel Barge Co.* (C. C. A.) 250.

Two steamers which came into collision on crossing courses in the night and in a dense fog 150 miles east of Sandy Hook both held in fault for excessive speed in violation of the international rules.—*The Eagle Point* (C. C. A.) 449.

Evidence held not to sustain the defense of inevitable accident, nor overcome the presumption of fault against a steamer which, when passing down a river, came into collision with and sunk a barge which was properly moored to the bank.—*The Mary S. Blees* (D. C.) 44.

## COMBINATIONS.

See "Monopolies," § 1.

## COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

Combinations in restraint of, see "Monopolies," § 1.

Constitutional guaranty of liberty to contract as applied to contract restraining interstate commerce, see "Constitutional Law," § 2.

### § 1. Power to regulate in general.

A state cannot invest a corporation organized under its laws with the power to do acts in the corporate name which would operate to restrain interstate commerce.—*United States v. Northern Securities Co.* (C. C.) 721.

### § 2. Means and methods of regulation.

A state law providing for the inspection of beer sold therein is not in violation of the interstate commerce clause of the constitution, as applied to beer shipped into the state from other states, because the fees imposed for inspection may amount to more than the cost of such inspection to the state.—*Pabst Brewing Co. v. Crenshaw* (C. C.) 144.

It is not within the police powers of a state to subject an article of interstate commerce passing through the state, or temporarily stored therein for distribution in the original packages to purchasers in other states, to exactions in the way of fees for inspection; and a federal court will enjoin such exactions as placing an unconstitutional burden on interstate commerce, although made under an erroneous construction of the state law.—*Pabst Brewing Co. v. Crenshaw* (C. C.) 144.

The Missouri act providing for the inspection of beer and other malt liquors (Sess. Laws 1899, p. 228) construed, and held not in violation of the federal constitution, as applied to beer manufactured outside the state and shipped into the state for sale therein.—*Pabst Brewing Co. v. Crenshaw* (C. C.) 144.

## COMMON CARRIERS.

See "Carriers."

## COMPENSATION.

Of grand jurors, see "Grand Jury."

Of juror, see "Jury," § 1.

Salvage, see "Salvage," § 1.

## COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 3.

## COMPLAINT.

In civil actions, see "Pleading," § 2.

In criminal prosecutions, see "Indictment and Information."

## COMPOSITIONS WITH CREDITORS.

In bankruptcy proceedings, see "Bankruptcy," § 7.

## COMPROMISE AND SETTLEMENT.

See "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.

In insurance policies, see "Insurance," § 2.

In leases, see "Landlord and Tenant," § 1.

Precedent to action, see "Limitation of Actions," § 2.

## CONFIDENTIAL RELATIONS.

Of parties to contract or conveyance, see "Fraudulent Conveyances," § 1.

## CONFIRMATION.

Of composition, see "Bankruptcy," § 7.

## CONFLICT OF LAWS.

As to loans by building and loan associations, see "Building and Loan Associations."

What law governs carriage of passengers on vessels, see "Shipping," § 5.

## CONSIDERATION.

Of contract, see "Contracts," § 1.

## CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

## CONSTITUTIONAL LAW.

See "Bankruptcy," § 1.

### § 1. Distribution of governmental powers and functions.

The question whether a combination between competing interstate railroads which affects interstate commerce may not be more beneficial to the public than competition would be cannot be considered by the court in a suit to restrain such combination as in violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).—United States v. Northern Securities Co. (C. C.) 721.

### § 2. Personal, civil, and political rights.

The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which directly and substantially operate to regulate or restrain interstate commerce.—United States v. Northern Securities Co. (C. C.) 721.

### § 3. Privileges or immunities, and class legislation.

Act Jan. 30, 1897, forbidding the sale of liquor to Indians, held not unconstitutional, as depriving the Indian of one of the privileges and immunities of citizenship.—Mulligan v. United States (C. C. A.) 98.

## CONTEMPT.

### § 1. Acts or conduct constituting contempt of court.

An assault on a judicial officer, because he has discharged a judicial duty, is an attack upon the court for what it has done in the administration of justice.—Ex parte McLeod (D. C.) 130.

The highest consideration of the public good demands that the courts protect their officers against revenges induced in consequence of the performance of their duties.—Ex parte McLeod (D. C.) 130.

It is a contempt of court, when an officer of the court is assaulted for judicial acts by one who has been arraigned before him.—Ex parte McLeod (D. C.) 130.

Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], depriving federal courts of the power to punish, as for contempt, improper publications made to influence the trial of a pending case, does not deprive those courts of the power to punish as for contempt an assault on a court officer, while yet in office, growing out of the performance of duty in a past case.—Ex parte McLeod (D. C.) 130.

An assault on a United States commissioner because of past discharge of duty is a contempt of the court, whose officer the commissioner is, in the administration of criminal laws.—Ex parte McLeod (D. C.) 130.

### § 2. Punishment.

Where an assault was committed on an officer of the court, and defendant was prosecuted for assault, and the animosities existing between the parties have given place to kindly relations, and it seems that no public good will result therefrom, no punishment for contempt will be inflicted.—Ex parte McLeod (D. C.) 130.

## CONTRACTS.

Assignment, see "Assignments."  
Cancellation, see "Cancellation of Instruments."  
Constitutional guaranty of liberty to contract, see "Constitutional Law," § 2.  
Parol or extrinsic evidence, see "Evidence," § 5.  
Specific performance, see "Specific Performance."

### Contracts of particular classes of parties.

See "Carriers," § 2; "Master and Servant"; "United States," § 2.

Foreign corporations, see "Corporations," § 6.  
Telegraph and telephone companies, see "Telegraphs and Telephones," §§ 1, 2.

Trustee of insolvent, see "Insolvency," § 1.

### Contracts relating to particular subjects.

See "Patents," § 6.

Compensation for salvage, see "Salvage," § 2.

Construction of drain, see "Drains," § 1.

Limitation of liability for injury to tow, see "Towage."

Transportation of goods, see "Carriers," § 2.

### Particular classes of express contracts.

See "Bills and Notes"; "Insurance"; "Sales."

Bills of lading, see "Carriers," § 2.

Charter parties, see "Shipping," § 1.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Sales of realty, see "Vendor and Purchaser."

### Particular classes of implied contracts.

See "Assumpsit, Action of."

### Particular modes of discharging contracts.

See "Release."

### § 1. Requisites and validity.

A restrictive covenant, made by one capable of contracting, which is unlimited as to time, and in area covers the entire United States, and is ancillary to the main lawful contract, being in part consideration of the payment for good will sold, and reasonable, and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid, may be enforced.—National Enameling & Stamping Co. v. Haberman (C. C.) 415.

### § 2. Construction and operation.

Where the court admits parol testimony as to the meaning of words used in a written contract, in view of the surrounding circumstances and conditions under which they were used, upon the contention of one of the parties that they are ambiguous, and such testimony is contradictory, the question of the construction of the contract is one for the jury.—Cameron Mill & Elevator Co. v. Chas. F. Orthwein's Sons (C. C. A.) 463.

The question of the place of delivery of wheat under an oral contract of sale confirmed by letters exchanged by the parties *held* to be one for the jury.—Cameron Mill & Elevator Co. v. Chas. F. Orthwein's Sons (C. C. A.) 463.

Indirect interest in the performance of an undertaking by defendant to pay the debts of a third person *held* insufficient to entitle a creditor to sue at law thereon.—Central Electric Co. v. Sprague Electric Co. (C. C. A.) 925.

### § 3. Rescission and abandonment.

A subsequent agreement of both parties is necessary to cancel an agreement.—Central Coal & Coke Co. v. George S. Good & Co. (C. C. A.) 793.

### § 4. Performance or breach.

Either party to a contract may perform his part, and charge the other with liability thereunder, without the consent of the other.—Central Coal & Coke Co. v. George S. Good & Co. (C. C. A.) 793.

In an action for breach of a contract by its wrongful termination by defendants, where the answer alleges nonperformance by plaintiff, the question whether its termination was justified is one for the jury.—Lincoln v. Orthwein (C. C. A.) 880.

The grantor of an option, who prevents its exercise within the time specified, must give a reasonable time thereafter after the obstruction he interposed is removed.—Blodgett v. Lanyon Zinc Co. (C. C. A.) 893.

### § 5. Actions for breach.

Evidence considered, and *held* to show that a license under a patent was granted to a partnership, and not to a corporation having the same name, subsequently organized, so that the corporation could not maintain a suit thereon.—J. S. Toppan Co. v. McLaughlin (C. C.) 705.

## CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

## CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

### Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Mortgages."

## COPYRIGHTS.

### § 1. Nature and acquisition.

The copyrighting of the volumes of a particular edition of an author's works which had been previously published, some with and some without copyright, protects only what is original in the new edition, and does not enlarge the rights of the owner of the copyright as to any matter previously published.—Kipling v. G. P. Putnam's Sons (C. C. A.) 631.

Pictures printed in successive colors from metal plates *held* entitled to copyright as

"prints," under Rev. St. § 4956 [U. S. Comp. St. 1901, p. 3407].—Hills & Co. v. Austrich (C. C.) 862.

A copyright notice considered, and *held* sufficient.—Hills & Co. v. Austrich (C. C.) 862.

### § 2. Infringement.

There is nothing in the copyright law which prohibits a licensee of the owner of a copyright for books from selling the same in unbound sheets, nor can the rights of a purchaser of such sheets with respect to binding and reselling the same be affected by any private agreement between the licensee and owner.—Kipling v. G. P. Putnam's Sons (C. C. A.) 631.

One who has purchased unbound copyrighted volumes from the owner of the copyright or his licensee has the right, so far as the copyright statute is concerned, to bind and resell the same.—Kipling v. G. P. Putnam's Sons (C. C. A.) 631.

Owner of copyrighted literary production does not lose his exclusive property therein because a licensee, authorized to publish the article on condition that he print therewith the usual copyright notice, inadvertently omits to do so.—American Press Ass'n v. Daily Story Pub. Co. (C. C. A.) 766.

## CORPORATIONS.

Admissions by corporate officers, see "Evidence," § 3.

Combinations in restraint of trade, see "Monopolies," § 1.

Effect of dissolution on pending actions, see "Abatement and Revival," § 1.

Liability of corporate officers for infringement of patent by corporation, see "Patents," § 7.

Power to assign for creditors, see "Assignments for Benefit of Creditors," § 1.

Subject to bankruptcy act, see "Bankruptcy," § 2.

Taxation of corporations and corporate property, see "Taxation," § 2.

### Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations."

Banks, see "Banks and Banking."

Telegraph and telephone companies, see "Telegraphs and Telephones," § 1.

### § 1. Incorporation and organization.

The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation.—United States v. Northern Securities Co. (C. C.) 721.

### § 2. Members and stockholders.

A stockholder, sued in another jurisdiction on a judgment rendered against the corporation in Kansas to enforce his statutory liability, is concluded by such judgment as to the liability of the corporation.—Martin v. Wilson (C. C. A.) 202.

A proceeding to enforce the statutory liability of a stockholder, whether at law or in equity, is based on a legal, and not an equitable, right; and, where the right to enforce it at law is barred, a court of equity will apply the same limitation by analogy.—*Hale v. Coffin* (C. C. A.) 470.

### § 3. Officers and agents.

In an action against the estate of a director of a corporation to recover profits alleged to have been illegally made, such director's partner *held* not a proper party.—*American Spirits Mfg. Co. v. Easton* (C. C.) 440.

### § 4. Corporate powers and liabilities.

Evidence *held* to support a finding that the agent of a steamship company had authority to employ a broker to sell one of the company's vessels and to contract to pay him a commission.—*Hartford & N. Y. Transp. Co. v. Plymmer* (C. C. A.) 624.

An agent, authorized by a corporation to sell property, may be presumed by those dealing with him to be authorized to employ the usual agencies in making the sale; and, where he employs a broker, the question whether it is usual and suitable, and within his authority under the circumstances of the case, is one for the jury.—*Hartford & N. Y. Transp. Co. v. Plymmer* (C. C. A.) 624.

Where the general manager of a corporation, who was also a director, authorized an agent to sell property of the corporation at a stated price, less a broker's commission, a ratification of the sale so made through a broker by the board of directors must be presumed to have been made with knowledge of all facts known to the manager, and binds the company to the payment of the broker's commission.—*Hartford & N. Y. Transp. Co. v. Plymmer* (C. C. A.) 624.

A deed of assignment executed by an insolvent corporation, though without a vote of the stockholders, as required by the charter for a conveyance of property, is valid where during four years, while the assignee was administering the estate, no objection was raised by any stockholder.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

Where a person, served with process as the representative of a corporation, deposed that he was not "at that time" secretary, etc., his failure to object that he was not such "at or after the time" of service did not justify the inference that he was such officer.—*Scott v. Stockholders' Oil Co.* (C. C.) 698.

### § 5. Reincorporation and reorganization.

In an action against a corporation for the payment of a debt due from another company, whose assets defendant acquired, evidence *held* insufficient to establish defendant's agreement to pay such debts.—*Central Electric Co. v. Sprague Electric Co.* (C. C. A.) 925.

Where a corporation, on purchasing the assets of another, agreed to pay the latter's debts, a creditor of the vendor *held* entitled to sue the vendee at law thereon.—*Central Electric Co. v. Sprague Electric Co.* (C. C. A.) 925.

Stockholder of a corporation, who entered into reorganization, could not assert a judgment obtained against the original corporation to the prejudice of the rights of creditors of the new corporation.—*Farmers' Loan & Trust Co. v. Central R. & Banking Co.* (D. C.) 1006; *Central Trust Co. v. Same, Id.*

### § 6. Foreign corporations.

Under the statutes of Virginia, jurisdiction to render judgment against a foreign corporation cannot be acquired by an acceptance of service by an employé not authorized by the company to represent it.—*New River Mineral Co. v. Seeley* (C. C. A.) 193.

The prohibition by a state of actions in its courts by a foreign corporation does not limit the right of that corporation to maintain such actions in national courts, nor forbid the corporation from defending actions in the state courts.—*Blodgett v. Lanyon Zinc Co.* (C. C. A.) 893.

In the absence of an express provision of statute to the contrary, the contracts of a foreign corporation, which has failed to comply with the statute permitting it to do business in the state where the contracts are made and the acts done, are valid.—*Blodgett v. Lanyon Zinc Co.* (C. C. A.) 893.

In the absence of prohibitive legislation, a corporation may contract, acquire, hold, and convey real estate as fully in another state as in the state of its incorporation.—*Blodgett v. Lanyon Zinc Co.* (C. C. A.) 893.

Service on a foreign corporation may be made in Georgia on its local agent.—*Barnes v. Western Union Tel. Co.* (C. C.) 550.

## COSTS.

Claim for, as debt provable against estate of bankrupt, see "Bankruptcy," § 6.  
In bankruptcy, see "Bankruptcy," § 10.

### § 1. Nature, grounds, and extent of right in general.

Where petition to adjudge defendant an involuntary bankrupt was dismissed for want of jurisdiction, costs cannot be allowed.—*In re Williams* (D. C.) 34.

### § 2. On appeal or error, and on new trial or motion therefor.

Stipulations by counsel, intended to eliminate unnecessary matter from the record on appeal, should be recognized and followed by the clerk.—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* (C. C. A.) 267; *Same v. Michigan Knitting Co., Id.*

## COUNTIES.

County attorneys, see "District and Prosecuting Attorneys."

## COURTS.

Contempt of court, see "Contempt."  
Judges, see "Judges."  
Judicial power, see "Constitutional Law," § 1.



Jurisdiction of action by trustee in bankruptcy, see "Bankruptcy," § 3.  
Removal of action from state court to United States court, see "Removal of Causes."  
Review of decisions, see "Appeal and Error."

**§ 1. Establishment, organization, and procedure in general.**

The courts of one circuit are not controlled by the views of another as to a patent, nor absolved from an independent examination of the questions involved.—*Cimiotti Unhairing Co. v. American Fur Refining Co. (C. C.) 672.*

**§ 2. United States courts.**

The Circuit Court is bound by a decision of the Circuit Court of Appeals with respect to the legality of a contract of a city, in a subsequent case between the same parties involving the same question, notwithstanding a contrary decision by the Supreme Court of the state.—*City Water Supply Co. v. City of Ottumwa (C. C.) 309.*

When a circuit court of the United States has obtained jurisdiction over a corporation by the filing of a creditors' bill and the appointment of a receiver, a suit by the receiver for collection of assets is cognizable in such court, regardless of either the citizenship of the parties on the account of controversy.—*Alexander v. Southern Home Building & Loan Ass'n (C. C.) 963.*

**§ 3. — Jurisdiction and powers in general.**

A federal court can enjoin the enforcement of an unconscionable judgment of the state or a federal court for fraud, accident, or mistake.—*National Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

The federal courts have full jurisdiction to enjoin unconscionable judgments to which defendants had meritorious defenses, which they were prevented from availing themselves of by fraud, accident, or mistake.—*National Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

Code Neb. §§ 602, 611, which authorizes an original suit in the court in which an unconscionable judgment was rendered to enjoin its collection, *held* not to impair the original equitable jurisdiction of the circuit courts of the United States to grant relief for a like cause in cases in which the citizenship of the parties and the amounts in controversy give those courts jurisdiction.—*National Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

A state legislature may enlarge the rights and remedies in equity in the federal courts.—*National Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

The states cannot by legislation impair or destroy the equitable jurisdiction of the federal courts.—*National Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

The test of the equitable jurisdiction of the federal courts, vested in them by the judiciary act of 1789, where it has not been subsequently changed by act of Congress, is the adequacy of the remedy at law for wrongs of that character under consideration in the year 1789.—*National*

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*Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

The test of the equitable jurisdiction of a federal court is the presence or absence of an adequate remedy in such court, and not the presence or absence of such a remedy in a state court.—*National Surety Co. v. State Bank of Humboldt (C. C. A.) 593.*

A suit of which a circuit court is given jurisdiction by the judiciary act of 1837-88 [U. S. Comp. St. 1901, p. 507], on the ground that the United States is plaintiff, can only be maintained in the district of which defendant is an inhabitant.—*United States v. O'Brien (C. C.) 446.*

A Circuit Court has jurisdiction of a suit, where the plaintiff and defendant are citizens of different states and the requisite amount is involved, although neither is an inhabitant of the district, when the defendant has appeared and answered to the merits without objection.—*Occidental Consolidated Min. Co. v. Comstock Tunnel Co. (C. C.) 518.*

A corporation, which is a citizen of New York and carries on its business through an agent in the Southern District of Georgia, may be sued there by a citizen of Georgia who resides in the district.—*Barnes v. Western Union Tel. Co. (C. C.) 550.*

**§ 4. — Jurisdiction dependent on citizenship, residence, or character of parties.**

A federal court is without jurisdiction of a suit for the specific performance of a contract, in which the complainant owns only a part interest, when the owner of the remaining interest, who is joined as a defendant, is a citizen of the same state as his codefendants, the other parties to the contract.—*Joseph Dry Goods Co. v. Hecht (C. C. A.) 760.*

In an action by two nonresident trustees against a corporation, the fact that a trustee who refused to join as party plaintiff was a resident *held* not to deprive the court of jurisdiction on the ground of diverse citizenship.—*Einstein v. Georgia Southern & F. Ry. Co. (C. C.) 1008.*

**§ 5. — Procedure, and adoption of practice of state courts.**

The question of the finality of a judgment or decree, for the purpose of review by writ of error or appeal in the federal courts, is not affected by the procedure in the state courts, but is governed by the rules established by federal legislation and decisions of the federal courts.—*Menge v. Warriner (C. C. A.) 816.*

Whether the remedy to enforce a contract for the payment of the obligations of a third person is by suit in equity or at law in the federal courts depends on the law of the forum.—*Central Electric Co. v. Sprague Electric Co. (C. C. A.) 925.*

Where a suit begun by foreign attachment was removed to the federal court, such court had jurisdiction of a rule on plaintiff to show cause of action and why an attachment should not be dissolved.—*Commonwealth Trust Co. v. Frick (C. C.) 688.*

### § 6. — Circuit courts of appeals.

The Circuit Court of Appeals will not, unless in exceptional cases, consider assignments of error in plain disregard of its rules.—*Mitchell Transp. Co. v. Green* (C. C. A.) 49; *Green v. Mitchell Transp. Co., Id.*

A Circuit Court of Appeals does not acquire jurisdiction of a cause by writ of error, unless such writ, together with the record, is returned to the next ensuing term of the court to which it is made returnable, or a sufficient cause is then shown why it is not so returned.—*Pender v. Brown* (C. C. A.) 496.

An appeal lies to the Circuit Court of Appeals from an interlocutory order appointing a receiver, although such order was made *ex parte* and without notice to defendant.—*Joseph Dry Goods Co. v. Hecht* (C. C. A.) 760.

### § 7. Concurrent and conflicting jurisdiction, and comity.

It is no violation of Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], for federal courts to enjoin plaintiff in an unconscionable judgment of the state court from using it to extort money from a defendant.—*National Surety Co. v. State Bank of Humboldt* (C. C. A.) 593.

A federal court has the same jurisdiction in equity to restrain judgment plaintiffs in unconscionable judgments in state courts from using them to extort money from defendants that they have to enjoin such plaintiffs in like judgments in the federal courts.—*National Surety Co. v. State Bank of Humboldt* (C. C. A.) 593.

A federal court of equity *held* not to have acquired such priority of jurisdiction in a suit by a property owner to enjoin the maintenance of a street railroad, unless compensation was made for the easement, as required or authorized it to stay proceedings subsequently instituted by the railroad company in a state court to condemn the easement under the power of eminent domain.—*Benjamin v. Brooklyn Union El. R. Co.* (C. C.) 428.

## COVERTURE.

See "Husband and Wife."

## CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances"; "Insolvency."

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

## CRIMINAL LAW.

Extradition of persons accused, see "Extradition."

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Prosecuting officers, see "District and Prosecuting Attorneys."

### Particular offenses.

See "Contempt."

Offenses against postal laws, see "Post Office," § 1.

Sales of liquors to Indians, see "Indians."

Violations of liquor laws, see "Intoxicating Liquors," § 1.

Violations of revenue laws, see "Internal Revenue."

Words imputing crime as slander, see "Libel and Slander," § 1.

### § 1. Evidence.

A charge, in a criminal case in which the intent is an essential element of the offense, is erroneous which states that the intent may be presumed from the doing of the unlawful act, and that such presumption must be overcome by evidence which satisfies the jury beyond a reasonable doubt that defendant did not have such intent.—*German v. United States* (C. C. A.) 665.

An instruction in a criminal case, which places on defendant the burden of proving the defense of insanity by a preponderance of evidence, is erroneous.—*German v. United States* (C. C. A.) 665.

### § 2. Appeal and error, and certiorari.

An instruction, in a prosecution for using the mails with intent to defraud, that the court of appeals had held that the letter sent was a proposition to sell counterfeit money, *held* harmless.—*Milby v. United States* (C. C. A.) 1.

## CUSTOMS DUTIES.

### § 1. Goods subject to duty, rate, and amount.

Women's corsets, made of cotton as the material of chief value, trimmed around the upper border with cotton lace edging, are dutiable under paragraph 339 of the tariff act of 1897 [U. S. Comp. St. 1901, p. 1662], as wearing apparel "made wholly or in part of lace," notwithstanding the small relative value of the lace.—*Wanamaker v. United States* (C. C. A.) 16.

Imported currants packed in casks are dutiable under paragraph 264 of the tariff act of 1897 [U. S. Comp. St. 1901, p. 1651], which imposes a duty of 2 cents per pound on currants, "Zante or other," without any deduction on account of the dirt or other impurities contained therein.—*United States v. Reid, Murdoch & Co.* (C. C. A.) 242.

Electric carbon sticks of various lengths, and finished for use in electric lighting, are dutiable as carbon not specially provided for, under paragraph 97 of the tariff act of 1897 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), and not as carbons for electric lighting, under paragraph 98.—*R. F. Downing & Co. v. United States* (C. C.) 1014.

Cotton cloth used for hat bands imported in the piece, *held* not taxable for duty as "trimmings," under Act Aug. 27, 1894, par. 276 (28 Stat. 530), but as manufactures of cotton in the piece not otherwise provided for, under para-

graph 264 (28 Stat. 529).—Walter H. Graef & Co. v. United States (C. C.) 1015.

Bundles of split bamboo, cut into 12-inch lengths, held not taxable for duty as manufactures of wood under Act July 24, 1897, c. 11, par. 208. 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], but entitled to admission free under paragraph 700 (30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]).—R. Brauss & Co. v. United States (C. C.) 1017.

## DAMAGES.

### *Damages for particular injuries.*

See "Death," § 1; "Libel and Slander," § 3.

Breach of warranty, see "Sales," § 6.

From improper food furnished to passengers on vessels, see "Shipping," § 5.

### § 1. Pleading, evidence, and assessment.

To warrant the awarding of substantial damages for breach of a contract, the loss to the plaintiff must be ascertainable, and established by evidence, to a reasonable degree of certainty.—South African Reduction Co. v. Peck (C. C. A.) 88.

Where one party to a contract for work, by wrongfully terminating the same, has rendered it impossible for the other party to prove his exact damages, he may approximate the same by the best evidence obtainable.—Lincoln v. Orthwein (C. C. A.) 880.

## DEATH.

Of partner, see "Partnership," § 2.

### § 1. Actions for causing death.

Rule in action by administrator for wrongful death for estimating damages under Florida statute determined.—Florida Cent. & P. R. Co. v. Sullivan (C. C. A.) 799.

Under Rev. St. Fla. §§ 2342, 2343, an administratrix appointed in Alabama of a deceased resident of that state may sue in Florida for negligence causing the death of her intestate.—Florida Cent. & P. R. Co. v. Sullivan (C. C. A.) 799.

A declaration in an action for death, alleging that decedent left a wife and child surviving, held not objectionable for failure to allege damages sustained by decedent's next of kin.—Peden v. American Bridge Co. (C. C.) 523.

## DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances"; "Insolvency."

## DECEDENTS.

Estates, see "Executors and Administrators."

## DECLARATION.

In pleading, see "Pleading."

## DECREE.

In equity, see "Equity," § 7.

## DEEDS.

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

Of trust, see "Chattel Mortgages," § 1; "Mortgages."

## DEFAMATION.

See "Libel and Slander."

## DELAY.

In transportation or delivery of goods by carrier, see "Carriers," § 2.

Laches, see "Equity," § 2.

## DELIVERY.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

## DEMAND.

Before action, see "Limitation of Actions," § 2.

## DEMURRAGE.

See "Shipping," § 6.

## DEMURRER.

In pleading, see "Pleading."

## DEPOSITS.

In bank, see "Banks and Banking," § 2.

## DESCENT AND DISTRIBUTION.

See "Executors and Administrators."

## DESCRIPTION.

Of property mortgaged, see "Chattel Mortgages," § 3.

## DISCHARGE.

From indebtedness, see "Bankruptcy," § 8; "Release."

## DISCOVERY.

### § 1. In equity.

A federal court of equity is without jurisdiction of a suit in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand.—Safford v. Ensign Mfg. Co. (C. C. A.) 480.

A bill held not to state a cause of action for an accounting between persons occupying fiduciary relations, but for discovery and relief in relation to a legal demand, and therefore not within the jurisdiction of a federal court of equity.—Safford v. Ensign Mfg. Co. (C. C. A.) 480.

## DISCRETION OF COURT.

As to examination of witness, see "Witnesses," § 1.  
Review in civil actions, see "Appeal and Error," § 7.

## DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 6.  
Dismissal of cause removed from state court, see "Removal of Causes," § 3.

## DISQUALIFICATION.

Of judge, see "Judges," § 1.

## DISSOLUTION.

Of partnership, see "Partnership," § 3.

## DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.  
Of trust funds, see "Trusts," § 1.

## DISTRICT AND PROSECUTING ATTORNEYS.

A district attorney of the United States, authorized to institute and conduct proceedings to condemn land for a public building within a state, has the same power to bind the United States by an agreement to submit the matter of damages to arbitration, in accordance with a provision of the state statute applicable to such actions, as the attorney for an individual litigant would have.—Judson v. United States (C. C. A.) 637.

## DITCHES.

See "Drains."

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 4; "Removal of Causes," § 1.

## DOCUMENTS.

As evidence in civil actions, see "Evidence," § 4.

## DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 4.

## DRAINS.

### § 1. Establishment and maintenance.

A drainage and levee district created under the Illinois statute may be held liable for damages for breach of a contract lawfully made by its commissioners under the powers conferred by such statute, and in the carrying out of the purpose for which it was created.—Rood v. Claypool Drainage & Levee Dist. (C. C. A.) 207.

In a contract between a drainage district and one who agrees to construct certain ditches for the district, it is an implied condition that the district will provide the necessary right of way, without which the contractor could not perform the contract on his part.—Rood v. Claypool Drainage & Levee Dist. (C. C. A.) 207.

## DUPLICITY.

In indictment, see "Indictment and Information," § 1.

## DUTIES.

Customs duties, see "Customs Duties."  
Excise duties, see "Internal Revenue."

## EJECTION.

Of passenger, see "Carriers," § 3.

## ELECTION.

Between counts in indictment, see "Indictment and Information," § 1.  
Of trustee in bankruptcy, see "Bankruptcy," § 3.

## ELECTRICITY.

Evidence to show the position of an electric wire five or ten minutes after plaintiff was injured by coming in contact with it held admissible as tending to show its position at the time of the injury, there being evidence to justify the inference that its position had not been materially changed.—Gloucester Electric Co. v. Kansas (C. C. A.) 490.

## EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 1.

### § 1. Nature, extent, and delegation of power.

Under the laws of Iowa, the eastern half of the Union Pacific railroad bridge across the Missouri river, lying within the corporate limits of the city of Council Bluffs, is not taxable by such city for municipal purposes, since it is distant from the settled portion of the city, and receives no benefit or protection from the city government, and imposes no burdens upon the city.—Arnd v. Union Pac. R. Co. (C. C. A.) 912.

Where the express powers conferred upon a telegraph company by its charter, granted by a

legislative act, are sufficient to effect the charter object, no power can be implied therefrom to condemn for the use of the company property already actually held and used for another public use.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

The question of the future needs of a railroad in fulfilling its chartered purpose and performing its public duty as a common carrier is one which should be given full consideration by a court before it undertakes to deprive the railroad company of any part of its right of way in condemnation proceedings instituted by another corporation.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

Act Pa. March 24, 1849, chartering the Atlantic & Ohio Telegraph Company, did not confer on that company the right to condemn right of way for its lines over the right of way of a railroad.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

Act July 24, 1866, Rev. St. §§ 5263, 5264 [U. S. Comp. St. 1901, pp. 3579, 3580], does not confer upon telegraph companies the right to exercise the power of eminent domain to condemn the right of way for their lines over private property.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

### § 2. Proceedings to take property and assess compensation.

A telegraph company, by occupying the right of way of a railroad with its lines under a lease for a long term of years, acquires no rights or equities by reason of its tenancy which give support to a subsequent proceeding to condemn the demised premises under the power of eminent domain.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

## EMPLOYES.

See "Master and Servant."

## EQUITY.

Equitable jurisdiction of United States courts, see "Courts." § 3.

### Particular subjects of equitable jurisdiction and equitable remedies.

See "Account"; "Cancellation of Instruments"; "Discovery" § 1; "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Quiet Title"; "Receivers"; "Specific Performance"; "Trusts."

Relief against judgment, see "Judgment," § 3. Suits for infringement of patents, see "Patents," § 7.

### § 1. Jurisdiction, principles, and maxims.

Where a director of a corporation was employed to purchase cereals for a company, a bill in equity to compel an accounting of profits illegally received by him *held* not sustainable on the theory that it was a suit to enforce a trust.—*American Spirits Mfg. Co. v. Easton* (C. C.) 440.

### § 2. Laches and stale demands.

Where a cause in equity to avoid a patent accrued 32 years before interveners sought relief, and the analogous limitation at law was 5 years, and an innocent purchaser had bought the land in reliance on the patent, and no excuse for delay was shown, they were estopped by laches.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton, Id.*

Where a suit is brought within the time fixed by the analogous statute of limitations, the burden is on the defendant to show that circumstances existed which require the application of the doctrine of laches; but, where the suit is brought after such statutory time, the burden is on the complainant to prove facts taking the case out of the doctrine of laches.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton, Id.*

### § 3. Parties and process.

An intervener *held* not entitled, on the facts appearing, to be placed in charge of the suit, to the displacement of the original complainants.—*Edwards v. Bay State Gas Co. of Delaware* (C. C.) 585.

### § 4. Pleading.

An answer in a suit in equity in a federal court is not subject to exception because it fails to answer an averment of the bill that a true and correct copy of a plat referred to therein is attached and made an exhibit; there being no rule of pleading requiring the attaching of such exhibits.—*Peters v. Tonopah Min. Co. of Nevada* (C. C.) 587.

An exception will not lie to an answer in equity for the failure to answer and admit or deny an allegation of the bill, unless such allegation is material.—*Peters v. Tonopah Min. Co. of Nevada* (C. C.) 587.

Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], prohibiting the quashing of any declaration for defect in form, *held* to apply to equity cases.—*Dancel v. United Shoe Machinery Co.* (C. C.) 839.

Under Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], a complaint in an action removed from the state court, demurred to for want of facts, *held* not subject to dismissal for failure to contain the address, statement of citizenship, or proper prayer, or because the cause was erroneously placed on the law calendar.—*Dancel v. United Shoe Machinery Co.* (C. C.) 839.

### § 5. Taking and filing proofs.

In a suit in equity for infringement, the failure to object to the introduction of evidence does not preclude an objection to its relevancy on the hearing.—*Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 282.

### § C. Masters and commissioners, and proceedings before them.

Where a circuit court determines that a special reason exists for appointing a deputy clerk special master, such appointment is not reversible error because, through inadvertence, the reason is not assigned in the order as required by Act March 3, 1879, 20 Stat. 415 [Comp. St. 1901, p. 591].—*Briggs v. Neal* (C. C. A.) 224.

Where a bill presents a case in which the taking of an account is necessary, a reference to a master may properly be made on the pleadings, and notice to the defendant is not essential.—*Briggs v. Neal* (C. C. A.) 224.

**§ 7. Decree and enforcement thereof.**

A defendant in equity can only be given affirmative relief on a cross-bill.—*Interstate Building & Loan Ass'n v. Edgefield Hotel Co.* (C. C.) 422.

**§ 8. Bill of review.**

Formal permission by an appellate court to apply to the Circuit Court for leave to file a bill of review for the reconsideration of a decree which has been affirmed on appeal does not preclude such court from considering the application on its merits.—*Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort* (C. C.) 165.

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of drains, see "Drains," § 1.  
Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.

## ESTATES.

Decedents' estates, see "Executors and Administrators."  
Estates for years, see "Landlord and Tenant."

## ESTOPPEL.

By judgment, see "Judgment," § 5.  
To object to introduction of evidence at trial, see "Trial," § 2.

**§ 1. By deed.**

An estoppel by the covenants of a deed is overcome by the estoppel created by the subsequent judgment of a competent tribunal.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton*, *Id.*

## EVIDENCE.

See "Discovery"; "Witnesses."  
Harmless error in admission, see "Appeal and Error," § 7.  
Reception at trial, see "Trial," § 2.  
Review on appeal or writ of error, see "Appeal and Error," § 7.

*As to particular facts or issues.*

See "Damages," § 1; "Fraudulent Conveyances," § 2.  
Anticipation of patent, see "Patents," § 2.  
Fault of collision, see "Collision," §§ 3, 4.  
Invention, see "Patents," § 2.  
Prior use of invention, see "Patents," § 2.  
Receipt of goods by vessel, see "Shipping," § 4.  
Unfair competition in trade, see "Trade-Marks and Trade-Names," § 3.

### *In actions by or against particular classes of parties.*

See "Master and Servant," § 1.  
Reorganized corporations, see "Corporations," § 5.

### *In particular civil actions or proceedings.*

See "Libel and Slander," § 3.  
Admiralty, see "Collision," § 8.  
For breach of contract, see "Contracts," § 5.  
For ejection of passenger, see "Carriers," § 3.  
For infringement of patent, see "Patents," § 7.  
For personal injuries, see "Electricity"; "Master and Servant," § 1.  
On insurance policy, see "Insurance," § 4

### *In criminal prosecutions.*

See "Criminal Law," § 1.  
For offenses against postal laws, see "Post Office," § 1.

## § 1. Relevancy, materiality, and competency in general.

Where there is a direct conflict in the oral testimony of the parties who made a contract with respect to the party in whose behalf it was made, the correspondence between them, both before and after it was made, becomes of paramount importance, and, if pertinent, is controlling.—*J. S. Toppan Co. v. McLaughlin* (C. C.) 705.

## § 2. Best and secondary evidence.

That the best evidence of an agreement was in another state held not a sufficient excuse for plaintiff's failure to produce the same, so as to entitle him to give secondary evidence, thereof.—*Central Electric Co. v. Sprague Electric Co.* (C. C. A.) 925.

The proceedings of a meeting of the stockholders of a corporation are facts which may be proved by the oral testimony of any witness who was present, and especially is such evidence admissible where it is shown that the record book containing the minutes of the meeting has been lost.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

## § 3. Admissions.

Offer by pledgor, releasing pledge of corporate stock on condition that, if it became of value sufficient to pay debt or any part thereof, the releasee should become proportionately liable, to take back stock in consideration of releasee's liability, held not to make the latter absolutely liable on refusal.—*Conyngham v. Baldwin* (C. C. A.) 500.

Declarations of certain officers of a corporation held incompetent to prove an agreement by a corporation to pay the debts of another.—*Central Electric Co. v. Sprague Electric Co.* (C. C. A.) 925.

## § 4. Documentary evidence.

In an action for libel, plaintiff held entitled to a subpoena duces tecum, directed to the person in control of the shipping, mailing, and subscription lists of the newspaper publishing the libel, to produce the same at the trial.—*Palmer v. Mahin* (C. C. A.) 737.

**§ 5. Parol or extrinsic evidence affecting writings.**

A chattel mortgage on a stock of goods *held not void* for insufficiency of description, when aided by parol evidence to identify the stock.—*Davis v. Turner* (C. C. A.) 605.

A note signed by the members of a bankrupt firm individually may be shown by extrinsic evidence to be an obligation of the firm, although under seal, and, if given for a consideration received by the partnership, it may be proved as a partnership debt.—*Davis v. Turner* (C. C. A.) 605.

Parol evidence is admissible to contradict or vary the terms of a written contract, in an action in which the contract assailed is between strangers to the parties to the suit.—*Central Coal & Coke Co. v. George S. Good & Co.* (C. C. A.) 793.

**§ 6. Opinion evidence.**

Hypothetical questions asked of an expert *held not objectionable* on the ground that the facts assumed were not conceded or established by the evidence.—*Orient Ins. Co. v. Leonard* (C. C. A.) 808.

Experts *held* entitled to compare explosiveness of mill dust to gunpowder, and state experiences relating to the same, though they were unable to give the dates of such experiences.—*Orient Ins. Co. v. Leonard* (C. C. A.) 808.

**§ 7. Weight and sufficiency.**

Contradictory statements of witness *held not* to disprove the truth of his testimony.—*Hallett v. Fish* (C. C.) 986.

**EXAMINATION.**

Of expert witnesses, see "Evidence," § 6.  
Of witnesses in general, see "Witnesses," § 1.

**EXCEPTIONS.**

Necessity for purpose of review, see "Appeal and Error," § 3.

**EXCISE.**

Duties, see "Internal Revenue."  
Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

**EXECUTORS AND ADMINISTRATORS.**

**§ 1. Allowance and payment of claims.**

The provision of Rev. St. Me. c. 87, limiting the time for bringing an action to charge an heir or devisee with a claim against the estate of the decedent, is a statute of limitations applicable to all claims founded upon a legal demand, whether asserted in an action at law in a state court or by a suit in equity in a federal court.—*Hale v. Coffin* (C. C. A.) 470.

In the absence of fraud, the fact that one having a claim against the estate of a decedent is a nonresident of the state does not prevent such claim from being barred by the state statute

limiting the time for enforcing the same.—*Hale v. Coffin* (C. C. A.) 470.

The right of the United States to maintain an action against an executor for the value of timber unlawfully cut from public lands by his testator is not limited nor affected by a state statute requiring all claims against the estate of a decedent to be first presented to the executor for allowance.—*United States v. Bean* (D. C.) 719.

**§ 2. Actions.**

The United States may maintain an action against an executor to recover the value of timber alleged to have been unlawfully cut and removed from public lands by his testator; the trespass being one from which the estate received a benefit.—*United States v. Bean* (D. C.) 719.

**§ 3. Foreign and ancillary administration.**

A suit in equity *held not* one to enforce a lien on property which could be maintained in a federal court in a district of which neither party was an inhabitant.—*Filer & Stowell Co. v. Rainey* (C. C.) 718.

A suit cannot be maintained against foreign executors in Illinois in either a state or federal court, where there is no property of the testator's estate within the jurisdiction.—*Filer & Stowell Co. v. Rainey* (C. C.) 718.

**EXEMPLARY DAMAGES.**

See "Libel and Slander," § 3.

**EXEMPTIONS.**

Of bankrupt, see "Bankruptcy," § 8.

**EXPERT TESTIMONY.**

In civil actions, see "Evidence," § 6.

**EXTRADITION.**

**§ 1. International.**

A stockholder, agreeing to give his entire attention to the corporation in consideration of 40 per cent. of the profits, *held* a person "hired or salaried," within French extradition treaty authorizing extradition for embezzlement.—*In re Balensi* (C. C.) 864.

**FALSE IMPRISONMENT.**

See "Malicious Prosecution."

**§ 1. Civil liability.**

It is not unlawful for a police officer to arrest and detain a person at the request of one on whom the officer has a right to rely, and while the person arrested was in the commission of an act supposed to be criminal, although it was not technically so; and such an arrest will not support an action for false imprisonment against the person causing it.—*Van v. Pacific Coast Co.* (C. C.) 699.

**FEDERAL COURTS.**

See "Courts," §§ 2-6.

**FEDERAL QUESTIONS.**

Ground for jurisdiction, see "Courts," § 2.

**FEEES.**

In bankruptcy, see "Bankruptcy," § 10.  
Of jurors, see "Jury," § 1.

**FELLOW SERVANTS.**

See "Master and Servant," § 1.

**FILING.**

Chattel mortgage, see "Chattel Mortgages," § 2.

**FINAL JUDGMENT.**

Appealability, see "Appeal and Error," § 2.

**FIRES.**

Caused by operation of railroad, see "Railroads," § 3.  
Compensation for salvage of vessel from fire, see "Salvage," § 2.

**FIXTURES.**

Signs placed on real estate without owner's consent held to become fixtures, and property of landowner, so as to relieve him from liability for damages occasioned structures by their removal.—*Jacoby v. Johnson* (C. C. A.) 487.

**FOG.**

Collision of vessels, see "Collision," § 5.

**FORECLOSURE.**

Of lien, see "Railroads," § 1.

**FOREIGN ADMINISTRATION.**

See "Executors and Administrators," § 3.

**FOREIGN CORPORATIONS.**

See "Corporations," § 6.

**FOREIGN JUDGMENTS.**

See "Judgment," § 6.

**FORFEITURES.**

Of insurance, see "Insurance," § 2.

**FORMER ADJUDICATION.**

See "Judgment," § 5.

**FORMS OF ACTION.**

See "Assumpsit, Action of."

**FRAUD.**

See "Fraudulent Conveyances."  
Fraudulent use of mails, see "Post Office," § 1.

*In particular classes of conveyances, contracts, or transactions.*

See "Judgment," §§ 2, 4.

Joinder of parties to prevent removal of cause to federal court, see "Removal of Causes," § 1.

**FRAUDULENT CONVEYANCES.**

By bankrupt, see "Bankruptcy," § 4.  
By mortgagor of chattels, see "Chattel Mortgages," § 4.

§ 1. **Transfers and transactions invalid.**

A chattel mortgage given by a firm of merchants on their stock of goods is not void, for fraud, because the mortgagors remained in possession for a few weeks and carried on their business as usual, where there was no provision therefor in the mortgage, and there is uncontradicted testimony of the parties that the transaction was in good faith.—*Davis v. Turner* (C. C. A.) 605.

The fact that a creditor, preferred by an insolvent debtor, is a relative, is not in itself a badge of fraud, but is a circumstance to be considered, and given its due weight, in determining the good faith of the transaction.—*Walker v. Houghteling* (C. C. A.) 928.

§ 2. **Remedies of creditors and purchasers.**

Evidence considered, and held not to support a claim that a transfer of property by a mother to her children, pending an action against her, was made in good faith in payment of an actual indebtedness.—*Walker v. Houghteling* (C. C. A.) 928.

**GOOD FAITH.**

Of party asking equitable relief, see "Specific Performance," § 2.

Of purchaser, see "Vendor and Purchaser," § 1.

**GRAND JURY.**

See "Indictment and Information."

Where grand jurors attended the district court of the United States on the first day of the term, and were discharged until the thirteenth day thereafter, on which day they again attended and were finally discharged, they were entitled, under U. S. Rev. St. § 852, as amended, to mileage for two round trips or four single



trips between their residence and the place of holding court.—In re Grand Jurors' Mileage (D. C.) 307.

## GRANTS.

Of public lands, see "Public Lands."

## HABEAS CORPUS.

### § 1. Jurisdiction, proceedings, and relief.

A federal court will not discharge a prisoner held by state authorities by writ of habeas corpus, on the ground that his conviction was in violation of the constitution of the United States, except in cases of emergency, where some special reason exists.—In re Stone (C. C.) 101.

## HACKMEN.

Use of carrier's premises, see "Carriers," § 1.

## HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.  
In criminal prosecutions, see "Criminal Law," § 2.

## HEARING.

By arbitrators, see "Arbitration and Award," § 1.

## HIGHWAYS.

Accidents at railroad crossings, see "Railroads," § 3.

## HUSBAND AND WIFE.

### § 1. Mutual rights, duties, and liabilities.

Under Rev. St. Mo. 1889, § 6869, where a husband invested money which was the separate property of his wife in business and in property without written authority from her, and with the proceeds, when sold, purchased a farm in her name, the proceeds of such farm, although received by him, were her property.—Brown v. Daugherty (C. C.) 526.

Under Gen. St. Kan. 1889, § 3752, providing that property owned by a woman at the time of her marriage shall remain her separate property, a husband, who receives the proceeds of such property when sold, holds the same in trust for the use and benefit of his wife, and the money remains her property, when taken by him in to another state, to which the parties move.—Brown v. Daugherty (C. C.) 526.

### § 2. Wife's separate estate.

When it is sought to bind a married woman by acts of her husband on the ground of his agency, the evidence must be clear, cogent, and unequivocal.—Brown v. Daugherty (C. C.) 526.

## IMPLIED CONTRACTS.

See "Assumpsit, Action of."

## IMPORTS.

Duties, see "Customs Duties."

## IMPRISONMENT.

See "False Imprisonment."

Habeas corpus, see "Habeas Corpus."

## IMPROVEMENTS.

Public improvements, see "Municipal Corporations," § 1.

## INCORPORATION.

See "Corporations," § 1.

## INCUMBRANCES.

On property insured, see "Insurance," § 2.

## INDIANS.

Statute forbidding sale of liquor to Indians as deprivation of privileges and immunities of citizenship, see "Constitutional Law," § 3.

Under Act Cong. Jan. 30, 1897, prohibiting the sale of liquors to any Indian to whom an allotment of land has been made, or to any Indian under charge of an Indian superintendent, that indictment alleged that the Indian to whom the liquor had been sold was a ward of the government, and the evidence showed that he was a ward of the government and also an Indian to whom an allotment of land had been made, held no variance.—Mulligan v. United States (C. C. A.) 98.

## INDICTMENT AND INFORMATION.

See "Grand Jury."

For offenses against postal laws, see "Post Office," § 1.

### § 1. Joinder of parties, offenses, and counts, duplicity, and election.

The general rule is that the prosecution will not be required to elect between the several counts of an indictment, when they have been inserted in good faith for the purpose of meeting the evidence as it may transpire, and where the offenses charged, although technically different, are of the same general nature, and substantially the same, arising out of the same transaction, and concerning which the same testimony must be relied on for a conviction.—Terry v. United States (C. C. A.) 483.

### § 2. Waiver of defects and objections, and aid by verdict.

A conviction based on several counts of an indictment will not be reversed, if any of the counts are sufficient.—Milby v. United States (C. C. A.) 1.

## INFRINGEMENT.

Of copyright, see "Copyrights," § 2.  
 Of patent, see "Patents," § 7.  
 Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

## INJUNCTION.

In suits for infringement of patent, see "Patents," § 7.  
 Restraining creation of municipal debt, see "Municipal Corporations," § 2.  
 Restraining use of carrier's premises by hackmen, see "Carriers," § 1.  
 Review of discretion of court on motion for, see "Appeal and Error," § 7.  
 Restraining unfair competition in trade, see "Trade-Marks and Trade-Names," § 3.

### § 1. Subjects of protection and relief.

The action of a labor organization, whose members are engaged in a strike, in undertaking to prevent the employer from carrying on its business by preventing other men from entering or remaining in its service, by any manner of violence, threats, or intimidation, is unlawful, and will be enjoined, where there is no adequate remedy at law.—Union Pac. R. Co. v. Ruef (C. C.) 102.

The law upholds and will protect the right of freedom of contract between employer and employé, and the right of every person or corporation to hire and discharge men at pleasure, subject to liability for damages for breach of contract, and the right of every man to work or to quit work at his pleasure, subject to the same liability, making no distinction between union and nonunion workmen.—Union Pac. R. Co. v. Ruef (C. C.) 102.

Picketing by a labor organization, whose members are engaged in a strike, in and of itself, where properly conducted, is lawful; but when accompanied by violence, or any manner of coercion or intimidation, to prevent others from entering or remaining in the service of their employer, it is unlawful.—Union Pac. R. Co. v. Ruef (C. C.) 102.

That assaults committed and threats of violence made by strikers may be subject to punishment under the criminal laws does not deprive a court of equity of jurisdiction to enjoin their continuance, when necessary to protect the complainant's property or business from civil injury.—Union Pac. R. Co. v. Ruef (C. C.) 102.

All members of a labor union who, during a strike, participate in the establishment and maintenance of a system of picketing, which results in unlawful acts of violence, threats, or intimidation, which are not repudiated by the organization, must be held chargeable with responsibility for such results.—Union Pac. R. Co. v. Ruef (C. C.) 102.

An injunction against unlawful action by strikers and their associates will not include the names of defendants, who are not shown to have participated in any of the unlawful acts proved, or to have aided, abetted, or counsel-

ed the same.—Union Pac. R. Co. v. Ruef (C. C.) 102.

Evidence considered, and held to establish the unlawful interference by strikers and others associating with them with the business of their former employer, which entitled the latter to an injunction.—Union Pac. R. Co. v. Ruef (C. C.) 102.

Where a telegraph company had accepted the act of 1866 (14 Stat. 221) entitling it to construct its line on post roads, it was entitled to an injunction restraining a railroad company from destroying a line previously constructed alone its right of way, pending the determination of such condemnation proceedings.—Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 981.

### § 2. Preliminary and interlocutory injunctions.

Requiring a bond as a condition to the granting of a preliminary injunction is a matter within the discretion of a circuit court.—Briggs v. Neal (C. C. A.) 224.

Where the right to an injunction depends upon complainant's title, such title must be clearly shown before a preliminary injunction will be granted.—Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 362.

## IN REM.

Remedies in admiralty, see "Admiralty," § 1.

## INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of bank, see "Banks and Banking," § 1.

Of loan association, see "Building and Loan Associations."

Of national bank, see "Banks and Banking," § 3.

### § 1. Assignment, administration, and distribution of insolvent's estate.

A contract made by a trustee of an insolvent corporation, by which it was agreed that a third party should conduct a pending suit at his expense and receive a share of the recovery, held valid and enforceable.—Wooster v. Trowbridge (C. C. A.) 667; Lewis v. Same, Id.

## INSPECTION.

Interference with interstate commerce, see "Commerce," § 2.

## INSTRUCTIONS.

In civil actions, see "Trial," § 3.

## INSURANCE.

Power of mutual insurance company to assign, see "Assignments for Benefit of Creditors," § 1.

### § 1. The contract in general.

In construing a policy of insurance, its stipulations are to be considered in their common,

popular sense.—*Delaware Ins. Co. v. Greer* (C. C. A.) 916.

**§ 2. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.**

The condition for the avoidance of a policy, if "with the knowledge of the insured foreclosure proceedings shall be commenced or notice be given of sale" under any mortgage, covered all proceedings of which he acquired knowledge at any time before the loss.—*Delaware Ins. Co. v. Greer* (C. C. A.) 916.

**§ 3. Right to proceeds.**

Under a policy with loss payable to the mortgagee, containing a clause that the policy should be void if with the knowledge of the insured foreclosure proceedings be commenced or notice be given of sale of the property under any mortgage, and that, if any interest shall exist in favor of a mortgagee by the consent of the insurance company other than the interest of the insured as described in the policy, the conditions shall apply in the same manner to such interest. *Held*, that the insurance of the mortgagee was subject to the risk of every act of the mortgagor which would avoid the latter's insurance under the original policy.—*Delaware Ins. Co. v. Greer* (C. C. A.) 916.

A mortgage clause providing that loss, if any, shall be payable to the mortgagee, attached to a policy of insurance, makes the mortgagee the appointee of the mortgagor to receive the proceeds of the amount of his interest, and to place his indemnity at the risk of every act and omission of the mortgagor.—*Delaware Ins. Co. v. Greer* (C. C. A.) 916.

**§ 4. Actions on policies.**

Proofs of death furnished by the beneficiary in a life insurance policy are admissible on behalf of the company in an action on the policy, and are prima facie proof against plaintiff of the facts therein stated, and conclusive unless shown to be erroneous, or to have been made through mistake or misapprehension.—*Hassencamp v. Mutual Ben. Life Ins. Co.* (C. C. A.) 475.

Evidence introduced by plaintiff in rebuttal in an action on a life insurance policy *held* not sufficient to overcome the statements in the proofs of loss that insured committed suicide.—*Hassencamp v. Mutual Ben. Life Ins. Co.* (C. C. A.) 475.

Where, in an action on a policy, the fire was alleged to have been the result of an explosion of mill dust, evidence as to the condition of the mill, collection of dust, etc., *held* admissible.—*Orient Ins. Co. v. Leonard* (C. C. A.) 808.

In an action on a policy, an instruction *held* not objectionable as relieving the jury from determining whether the damage by fire alone exceeded the entire amount of the insurance.—*Orient Ins. Co. v. Leonard* (C. C. A.) 808.

In an action on a fire policy, an instruction *held* to sufficiently present the theories of both plaintiff and defendant to the jury.—*Orient Ins. Co. v. Leonard* (C. C. A.) 808.

A complaint *held* sufficiently definite and certain under the Code of South Carolina.—*Bank*

of *Timmons v. Fidelity & Casualty Co. of New York* (C. C.) 315.

**§ 5. Mutual benefit insurance.**

In an action against an incorporated fraternal insurance association for breach of an insurance contract with a member which it had power to make, the internal affairs of the association and the equities of the members as between themselves are immaterial.—*Black v. Supreme Council American Legion of Honor* (C. C.) 580.

Where an incorporated fraternal insurance association or order, without legal right, has reduced the amount payable on its benefit certificates below what it contracted to pay, a nonassenting member may treat the contract as rescinded, and recover the amounts he has paid thereon.—*Black v. Supreme Council American Legion of Honor* (C. C.) 580.

The fact that member of fraternal association, on learning that it had reduced the amount payable on his certificate below that called for by the contract, stopped payment of check sent in payment of a previous assessment does not preclude him from suing for breach of the contract.—*Henderson v. Supreme Council American Legion of Honor* (C. C.) 585.

## INTERLOCUTORY INJUNCTION.

See "Injunction," § 2.

## INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

## INTERNAL IMPROVEMENTS.

Grants of lands in aid, see "Public Lands," § 1.

## INTERNAL REVENUE.

An indictment under Rev. St. § 3279 [U. S. Comp. St. 1901, p. 2126], charging that defendant "unlawfully and knowingly did carry and deliver to wit, raw material to a distillery" on which no sign was kept as required by law, is insufficient for not stating that the distillery was one for the production of spirits, and setting forth the kind of raw material.—*Terry v. United States* (C. C. A.) 483.

## INTERNATIONAL LAW.

See "Aliens"; "Extradition," § 1.

## INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

## INTOXICATING LIQUORS.

Sales to Indians, see "Indians."  
Statute forbidding sale of liquor to Indians as deprivation of privileges and immunities of citizenship, see "Constitutional Law," § 3.

**§ 1. Offenses.**

A private carrier of liquor, receiving packages marked with the name of the seller's customers, in carrying the same to them in a town where the seller was not authorized to sell, *held* not guilty of retailing liquor without a license.—*United States v. Lackey* (D. C.) 577.

**INVENTION.**

See "Patents."

**JOINDER.**

Of offenses in indictment, see "Indictment and Information," § 1.

Of parties to prevent removal of cause to federal court, see "Removal of Causes," § 1.

**JUDGES.**

See "Courts."

**§ 1. Disqualification to act.**

Under Rev. St. §§ 601, 914 [U. S. Comp. St. 1901, pp. 484, 684], and Code Ga. § 4045, a federal judge in Georgia should not, even by consent, sit in a cause in which he is related to one of the parties within the fourth degree of consanguinity.—*In re Eatonton Electric Co.* (D. C.) 1010.

**JUDGMENT.**

Decisions of courts in general, see "Courts," § 1.

Decree in equity, see "Equity," § 7.

On appeal or writ of error, see "Appeal and Error," § 8.

Review, see "Appeal and Error."

**§§ 1, 2. On trial of issues.**

Under Rev. St. Ill. c. 7, § 6, par. 9, a judgment on a verdict in an action for death *held* not subject to arrest on the ground that the declaration did not allege damage to decedent's next of kin.—*Peden v. American Bridge Co.* (C. C.) 523.

**§ 3. Equitable relief.**

Where jurisdiction to render a judgment against a defendant is claimed upon a substituted service, and the record shows that such service was not made as prescribed by the statute, a recital in the judgment that "process was duly executed on the defendant according to law" is not conclusive.—*New River Mineral Co. v. Seeley* (C. C. A.) 193.

A judgment obtained against a corporation of another state by its general manager in the state where the action was brought without the knowledge of any of its officers *held* so affected by fraud and concealment on the part of the plaintiff that it should be set aside in equity.—*New River Mineral Co. v. Seeley* (C. C. A.) 193.

Failure of an auditor of public accounts of a state, whom a foreign corporation had been compelled by statute to appoint its agent to receive service of process, to comply with the statute requiring him to send a summons to the defendant immediately on his receipt, is not

such negligence of the defendant as will estop it from securing equitable relief from an unconscionable judgment, which it was prevented from defending itself against by the neglect of such officer.—*National Surety Co. v. State Bank of Humboldt* (C. C. A.) 593.

**§ 4. Collateral attack.**

Fraudulent judgments, presented as claims against bankrupt's estate, *held* open to collateral attack by other creditor.—*Chandler v. Thompson* (C. C. A.) 940.

**§ 5. Merger and bar of causes of action and defenses.**

A decree against a city, in a suit by a property owner, adjudging void a contract for paying on the ground that it increased the city's debt beyond the constitutional limit, is not an adjudication between the parties that plaintiff's property is not liable for the reasonable value of the improvement on its front, which bars a suit to recover therefor under Code Iowa 1873, §§ 478, 479.—*City of Davenport v. Allen* (C. C.) 172.

**§ 6. Actions on judgments.**

Under the laws of Kansas the assignment of a judgment carries with it the legal title, and the assignee of a judgment rendered in that state and there assigned may sue thereon in his own name in the courts of any other state or jurisdiction.—*Martin v. Wilson* (C. C. A.) 202.

**JUDICIAL POWER.**

See "Constitutional Law," § 1.

**JURISDICTION.**

Relief against judgment for want of, see "Judgment," § 3.

*Jurisdiction of particular actions or proceedings.*

See "Habeas Corpus," § 1.

By trustee in bankruptcy, see "Bankruptcy," § 3.

For causing death, see "Death," § 1.

*Special jurisdictions.*

See "Bankruptcy," § 2.

Particular courts, see "Courts."

**JURY.**

See "Grand Jury."

Instructions in civil actions, see "Trial," § 3.

**§ 1. Summoning, attendance, discharge, and compensation.**

The legal fiction that a term of court is but one day cannot affect construction of Rev. St. U. S. § 852, as amended [U. S. Comp. St. 1901, p. 656], providing that jurors, on attendance at any court, shall receive as mileage compensation five cents a mile for the distance necessarily traveled in going to and returning from court.—*In re Grand Jurors' Mileage* (D. C.) 307.

**JUSTIFICATION.**

Of actionable words, see "Libel and Slander," § 2.

**LABOR UNIONS.**

Restraining acts of, see "Injunction," § 1.

**LACHES.**

Effect in equity, see "Equity," § 2.  
In proceedings in admiralty, see "Admiralty," § 1.

**LANDLORD AND TENANT.**

Lease of telegraph line, see "Telegraphs and Telephones," § 1.

**§ 1. Leases and agreements in general.**

Under a lease with the stipulation that, if no well was sunk within two years, it should be void, unless the lessee should yearly pay \$40, such payment may be made at any time during the year.—*Blodgett v. Lanyon Zinc Co.* (C. C. A.) 893.

**§ 2. Terms for years.**

The acceptance by the treasurer of a railroad company of rent from a telegraph company after notice had been given terminating its lease *held*, under the facts shown, not a waiver of such notice by the railroad company which entitled the telegraph company to an injunction to prevent a re-entry.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

The acceptance of rent by a landlord after the giving of a notice to quit which terminates the tenancy is not in itself a waiver of such notice, but is only evidence to be considered with all other facts in the case.—*Western Union Tel. Co. v. Pennsylvania R. Co.* (C. C.) 362.

**LANDS.**

See "Public Lands."

**LAW OF THE CASE.**

Effect on new trial of decision on appeal, see "Appeal and Error," § 8.

**LEASES.**

See "Landlord and Tenant."

**LETTERS PATENT.**

For inventions, see "Patents."  
For public lands, see "Mines and Minerals," § 1.

**LIBEL AND SLANDER.****§ 1. Words and acts actionable, and liability therefor.**

A publication of an article that is libelous per se entitles the victim to compensatory dam-

ages, regardless of the intent with which the publication was made.—*Palmer v. Mahin* (C. C. A.) 737.

The charge that one is a blackmailer and has brought blackmailing suits *held* libelous per se.—*Palmer v. Mahin* (C. C. A.) 737.

An unprivileged publication of a false charge that another is guilty of a crime, or one that tends to expose another to public hatred or contempt, is libelous per se.—*Palmer v. Mahin* (C. C. A.) 737.

**§ 2. Justification and mitigation.**

The facts that the information from which an unprivileged communication was made was derived from another, and that the name of the informant was published in the libel, are no defense to a claim for compensatory damages.—*Palmer v. Mahin* (C. C. A.) 737.

The publication of a statement that the victim of a libelous charge denies it is not a retraction of it.—*Palmer v. Mahin* (C. C. A.) 737.

**§ 3. Actions.**

The unprivileged publication of an article libelous per se raises a conclusive presumption of damages.—*Palmer v. Mahin* (C. C. A.) 737.

Plaintiff, in the absence of a plea of justification, can show the falsity of the charges.—*Palmer v. Mahin* (C. C. A.) 737.

Nothing is competent to show the intent of defendant in publishing a libel in mitigation of damages which was not known to the libeler when he made the publication.—*Palmer v. Mahin* (C. C. A.) 737.

Where plaintiff is charged with bringing blackmailing libel suits, he can show his business reputation and standing when the libel, which was the foundation of those suits, was published, to show the basis of the suits and the intent in bringing them.—*Palmer v. Mahin* (C. C. A.) 737.

In an action for libel, plaintiff can show the extent of the circulation of the newspaper which published it.—*Palmer v. Mahin* (C. C. A.) 737.

It is incompetent for the publisher of a libel to testify, in mitigation of damages, that he made the publication for the public good.—*Palmer v. Mahin* (C. C. A.) 737.

For the purpose of mitigating exemplary damages, the publisher of a libel may show that he believed the statements to be true, and was innocent of any intent to injure, or of any ill will towards his victim; but such evidence is inadmissible to affect the compensatory damages.—*Palmer v. Mahin* (C. C. A.) 737.

In addition to compensation for actual loss, the jury may allow exemplary damages for libel, when the publication was inspired by a willful intent to injure or in reckless disregard of the rights of the person defamed.—*Palmer v. Mahin* (C. C. A.) 737.

In an action for libel, plaintiff *held* entitled to recover exemplary damages.—*Duke v. Morning Journal Ass'n* (C. C.) 860.

In an action for libel, justifying a recovery of punitive damages, a verdict of \$36,000 held excessive, and reduced to \$20,000.—*Duke v. Morning Journal Ass'n* (C. C.) 860.

## LICENSES.

For making, use, or sale of patented articles, see "Patents," § 6.  
Injuries to licensees, see "Negligence," § 1.

## LIENS.

See "Maritime Liens."  
Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.  
On railroads, see "Railroads," § 1.

## LIMITATION.

Of claim of patent, see "Patents," § 5.  
Of municipal indebtedness, see "Municipal Corporations," § 2.

## LIMITATION OF ACTIONS.

Laches, see "Equity," § 2.  
Limitation of action to enforce liability of stockholders for corporate debts, see "Corporations," § 2.

### § 1. Statutes of limitation.

An action on a cause of action arising in a state where it has not become barred because defendant was a nonresident, although sufficient time has elapsed, is not barred under the statute of Illinois, providing that, where barred by the law of the state where it arose, it shall be barred in Illinois.—*Martin v. Wilson* (C. C. A.) 202.

### § 2. Computation of period of limitation.

When demand is necessary before action, limitation does not begin to run until there has been a reasonable time for such demand under the circumstances of the case.—*Birckhead v. De Forest* (C. C. A.) 645.

Under Code Civ. Proc. N. Y. § 410, limitation does not begin to run against an action by a client against attorneys for money received and detained until the client has knowledge of the facts which entitle him to sue without demand.—*Birckhead v. De Forest* (C. C. A.) 645.

Under the statute of Iowa, as construed by its Supreme Court, limitation does not run in favor of a defendant during the time he is a nonresident of the state.—*City of Davenport v. Allen* (C. C.) 172.

## LIMITATION OF LIABILITY.

For loss of tow, see "Towage."  
Of carrier, see "Carriers," § 2.

## LIQUOR SELLING.

See "Intoxicating Liquors."

## LITERARY PROPERTY.

See "Copyrights."

## LOAN COMPANIES.

See "Building and Loan Associations."

## MACHINERY.

Dangerous machinery, see "Negligence," § 1.  
Production and use of electricity, see "Electricity."

## MALICIOUS PROSECUTION.

See "False Imprisonment."

### § 1. Want of probable cause.

Evidence considered in an action for malicious prosecution, and held to establish probable cause for plaintiff's arrest, and absence of malice.—*Van v. Pacific Coast Co.* (C. C.) 699.

## MANDATE.

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 8.

## MARITIME LIENS.

### § 1. Nature, grounds, and subject-matter in general.

Neither a dry dock fitted into piers, to which it is held by cleats, so that it has only a vertical motion, nor a steamer therein for repairs, is a vessel in navigable waters, so as to give a maritime lien for a tort thereon.—*The Warfield* (D. C.) 847.

### § 2. Creation, operation, and effect.

Under the New York statute a lien cannot be enforced against a vessel for supplies, where the notice of lien states that they were furnished to such vessel and another, without showing the amount furnished to each.—*The Warner Miller Co.* (D. C.) 520.

No lien exists against a foreign ship for stevedore's services in loading a ship, unless the contract is made with the ship's master, or the latter is advised of the purpose to hold the ship liable at the time the service is performed. The burden of ascertaining the authority of the person at whose instance the stevedore acts, other than the master, should be imposed upon the stevedore.—*The Chicklade* (D. C.) 1003.

A stevedore, who contracts for the loading or discharging of ship with persons other than the master or owners, is bound to ascertain whether such persons have authority to represent the owners and bind the ship, and, if not satisfied of such authority, to advise the master that the ship will be looked to for payment, in order to give him a right to a lien, where in fact there was no such authority, but the contract was made in behalf of the charterer, who was required by the charter to do the stevedoring.—*The Chicklade* (D. C.) 1003.

**MARRIAGE.**

See "Husband and Wife."

**MARRIED WOMEN.**

See "Husband and Wife."

**MASTER AND SERVANT.**

Restraining interference with employment, see "Injunction," § 1.

**§ 1. Master's liability for injuries to servant.**

Where the question is one of general law, unaffected by statute, employes of a railroad company engaged in operating the same train are fellow servants, and the company is not liable for the injury of one through the negligence of another and without fault or negligence on the part of the company.—*Hale v. Kansas City Southern Ry. Co.* (C. O. A.) 735.

When A., and not B., is the one who selects and retains an individual at the particular piece of work to which he is assigned, such individual does not become B.'s servant merely because the latter indirectly pays for his services and gives him his working orders.—*The Slingsby* (C. C. A.) 748.

A winchman, assigned by a ship to such service in discharging cargo, *held* the servant of the ship, and not of the stevedores, who directed his work, but had no power to substitute another in his place.—*The Slingsby* (C. C. A.) 748.

In an action for personal injuries by a brakeman against a railroad company, a charge on discovered peril *held* properly given.—*Texas & P. Ry. Co. v. Putman* (C. C. A.) 754.

In an action by a brakeman for injuries, the evidence *held* to make a question for the jury as to the engineer's negligence.—*Texas & P. Ry. Co. v. Putman* (C. O. A.) 754.

In an action for personal injuries by a brakeman against a railroad company, plaintiff's own evidence *held* not to show contributory negligence, so as to relieve defendant of the burden of proving it.—*Texas & P. Ry. Co. v. Putman* (C. C. A.) 754.

Under the statutes of Texas a servant of a railroad company does not assume the risk of injury through the negligence of his fellow servants.—*Texas & P. Ry. Co. v. Putman* (C. C. A.) 754.

An allegation in a complaint, which states a bare legal conclusion which arises by implication from the facts alleged, is surplusage, and will be stricken out on motion.—*Green v. Indian Gold Min. Co.* (C. C.) 715.

**§ 2. Liabilities for injuries to third persons.**

The liability of a master arising out of an act of negligence committed by his servant does not rest upon the ground that the master himself was negligent, but upon considerations of public policy, which hold him responsible for

the acts of his agents when acting about his business.—*Helms v. Northern Pac. Ry. Co.* (C.) 389.

A joint action cannot be maintained against a railroad company and an employe to recover for an injury resulting solely from the negligence of the employe.—*Helms v. Northern Pac. Ry. Co.* (C. C.) 389.

**MASTERS IN CHANCERY.**

See "Equity," § 6.

**MASTERS OF VESSELS.**

See "Shipping," § 2.

**MERGER.**

Of cause of action in judgment, see "Judgment," § 5.

**MILEAGE.**

Of grand jurors, see "Grand Jury."

Of juror, see "Jury," § 1.

**MINES AND MINERALS.****§ 1. Public mineral lands.**

Neither the laws of the United States nor of Nevada require the notice of location of a lode mining claim to be recorded; and hence, unless a rule of the mining district requiring such recording is shown, an averment in a bill that complainant recorded its notice of location of a claim is immaterial, and need not be answered.—*Peters v. Tonopah Min. Co. of Nevada* (C. C.) 587.

**MITIGATION.**

Of damages, see "Libel and Slander," § 2.

**MONOPOLIES.**

Review of effect of combinations as encroachment on legislature, see "Constitutional Law," § 1.

**§ 1. Trusts and other combinations in restraint of trade.**

The anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), declaring illegal every "combination, in the form of trust or otherwise," in restraint of interstate trade or commerce, prohibits every scheme devised with the purpose and effect of placing restraints upon interstate commerce, whatever may be its form.—*United States v. Northern Securities Co.* (C. C.) 721.

The fact that the purpose of a combination to unite the control of two interstate and competing railroads in the same hands has been accomplished, so far as to form a corporation which has acquired the majority of the stock of both roads, is not a defense to a suit by the United States to have it declared illegal, and restrained, as in violation of the anti-trust act

(Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).—United States v. Northern Securities Co. (C. C.) 721.

A corporation formed to acquire, hold, and vote a majority of the stock of each of two competing lines of interstate railroads, pursuant to a combination between stockholders, operates in direct restraint of interstate commerce, by destroying any motive for competition, and is illegal, as in violation of the anti-trust law (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).—United States v. Northern Securities Co. (C. C.) 721.

The anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) applies to interstate carriers of freight and passengers, and any contract or combination which restricts the right of such a carrier to fix its own rates independently of its natural competitors places a direct restraint upon interstate commerce.—United States v. Northern Securities Co. (C. C.) 721.

## MORTGAGES.

By partners, see "Partnership," § 1.  
Of personal property, see "Chattel Mortgages."  
Of railroads, see "Railroads," § 1.  
Right of mortgagee to proceeds of insurance, see "Insurance," § 3.

### § 1. Rights and liabilities of parties.

A mortgagee, put in possession of a going concern, which by the terms of the mortgage he is required to keep in operation, cannot be charged with the rental of the property while so in possession.—Briggs v. Neal (C. C. A.) 224.

A foreign corporation, named as trustee in a deed of trust, having no powers prior to default, held not entitled to sue in the federal court, before default, to restrain strikers from injuring the grantors' property; the grantors and the strikers being residents of the same state.—Illinois Trust & Sav. Bank v. Minton (C. C.) 187.

## MUNICIPAL CORPORATIONS.

### § 1. Public improvements.

A city, which paid the claim of a contractor for paving done, where the special assessment therefor was illegal, held entitled to maintain a suit in equity against a property owner to recover on a quantum meruit under the Iowa statute.—City of Davenport v. Allen (C. C.) 172.

### § 2. Fiscal management, public debt, securities, and taxation.

Where municipal bonds are void for lack of power to issue the same, they cannot be validated by the payment of interest thereon.—Clarke v. Town of Northampton (C. C. A.) 661.

Municipal bonds issued under the New York statute held void for insufficiency of the petition to confer jurisdiction to issue the same.—Clarke v. Town of Northampton (C. C. A.) 661.

To a suit by a taxpayer against a city to enjoin it from creating a debt beyond the consti-

tutional limit, by carrying out a contract made with a person or corporation, such person or corporation is not an indispensable party defendant.—City Water Supply Co. v. City of Ottumwa (C. C.) 309.

Under the provision of the Iowa constitution limiting the indebtedness which may be contracted by any municipality to 5 per cent. of the value of its taxable property, such per cent. is to be computed on the assessed value of the property for taxation, and not on the actual value, where the two are not the same.—City Water Supply Co. v. City of Ottumwa (C. C.) 309.

A contract made by a city held to create an indebtedness beyond the city's power to contract under the state constitution.—City Water Supply Co. v. City of Ottumwa (C. C.) 309.

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 5.

## NAMES.

See "Trade-Marks and Trade-Names."

## NATIONAL BANKS.

See "Banks and Banking," § 3.

## NEGLIGENCE.

Causing death, see "Death," § 1.

### By particular classes of parties.

See "Carriers," §§ 2, 3.

Employers, see "Master and Servant," § 1.

Railroad companies, see "Railroads," § 3.

Salvors of vessel, see "Salvage," § 1.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 2.

Condition or use of particular species of property, works, or machinery.

See "Electricity"; "Railroads," § 3.

Tugs, see "Towage."

Vessels, see "Shipping," §§ 3, 4.

### Contributory negligence.

Of passenger, see "Carriers," § 3.

Of person injured at railroad crossing, see "Railroads," § 3.

### § 1. Acts or omissions constituting negligence.

A contractor, vendor, or manufacturer is not generally liable to third parties for negligence in the construction, manufacture, or sale of the articles he handles.—Huset v. J. I. Case Threshing Mach. Co. (C. C. A.) 865.

An act of negligence of a manufacturer or vendor, dangerous to life or health, in the preparation or sale of food and poisons, is actionable by parties having no contractual relations with the manufacturer or vendor.—Huset v. J. I. Case Threshing Mach. Co. (C. C. A.) 865.



An owner, who impliedly invites third parties to use defective machinery manufactured by him, is liable for injuries resulting from his negligence in the manufacture or care.—*Huset v. J. I. Case Threshing Mach. Co. (C. C. A.) 865.*

A manufacturer or vendor, who, without notice of its qualities, supplies to another a machine which he knows to be imminently dangerous to any one who may use it, *held* liable to one who sustains injury from its dangerous condition, whether he has any contractual relations with him or not.—*Huset v. J. I. Case Threshing Mach. Co. (C. C. A.) 865.*

A pedestrian, walking on a railroad right of way beyond a pleasure ground, and killed by the falling of a pile of ties on which he went, *held* a mere licensee, as to whom defendant was not bound to exercise care in piling the ties.—*Smith v. Hopkins (C. C. A.) 921.*

### § 2. Contributory negligence.

In an action for death by wrongful act, an instruction that the defense of contributory negligence will not avail, if defendant by the exercise of reasonable care could have avoided the accident, *held* to correctly state the law.—*Turnbull v. New Orleans & C. R. Co. (C. C. A.) 783.*

### § 3. Actions.

In an action to recover damages alleged to have been caused by defendant's negligence, the evidence *held* to have been such as to require the submission of the case to the jury.—*Western Dredging & Improvement Co. v. Heldmaier (C. C. A.) 238.*

## NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

## NEW TRIAL

Remand by appellate court for new trial, see "Appeal and Error," § 8.

Review of discretion of court in granting or refusing, see "Appeal and Error," § 7.

### § 1. Proceedings to procure new trial.

Court's error in instructing on measure of damages *held* not curable by directing remitter.—*Jacoby v. Johnson (C. C. A.) 487.*

## NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 2.

## NOTES.

Promissory notes, see "Bills and Notes."

## NOTICE.

*Of particular facts, acts, or proceedings.*

See "Copyrights," § 1; "Trial," § 1.

Appointment of receiver, see "Receivers," § 2.

Claim of title to realty, see "Vendor and Purchaser," § 1.

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Termination of tenancy, see "Landlord and Tenant," § 2.

*To particular classes of parties.*

See "Principal and Agent," § 1.

## OFFICERS.

*Particular classes of officers.*

See "District and Prosecuting Attorneys"; "Judges"; "Receivers."

Bank officers, see "Banks and Banking," § 2.

Corporate officers, see "Corporations," §§ 3, 4.

United States officers, see "United States," § 1.

## OPINIONS.

Of courts, see "Courts," § 1.

## ORDER OF PROOF.

At trial, see "Trial," § 2.

## ORDERS.

Review of appealable orders, see "Appeal and Error."

## PAROL EVIDENCE.

See "Evidence," § 5.

## PARTIES.

Character ground of jurisdiction, see "Courts," § 4.

Defects ground for abatement, see "Abatement and Revival," § 1.

Persons entitled to enforce specific performance of contract, see "Specific Performance," § 1.

Persons who may be adjudged bankrupts, see "Bankruptcy," § 2.

*In actions by or against particular classes of parties.*

See "Corporations," § 3.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

*In particular actions or proceedings.*

See "Equity," § 3.

Appeals in bankruptcy, see "Bankruptcy," § 9.

For infringement of patent, see "Patents," § 7.

*To particular classes of conveyances, contracts, or transactions.*

See "Contracts," § 2.

## PARTITION.

### § 1. Actions for partition.

The power of partition will never be exercised, where the title is denied, until the party seeking partition has had an opportunity to try his title at law.—*Bearden v. Benner (C. C.) 690.*

Adverse possession bars a suit for partition as long as the onster continues.—*Bearden v. Benner* (C. C.) 690.

In partition, where the title is in good faith placed in issue, the bill will be retained in order that the partition may be effected, if complainants should prevail at law in an assertion of their legal title.—*Bearden v. Benner* (C. C.) 690.

## PARTNERSHIP.

### § 1. Rights and liabilities as to third persons.

A mortgage of partnership goods as security for a partnership debt is not invalid because signed by the partners individually, nor because of the addition of a seal to the individual names.—*Davis v. Turner* (C. C. A.) 605.

### § 2. Death of partner, and surviving partners.

A partner may provide by his will that the partnership shall continue after his death, and, if assented to by the other partners, such provision becomes effective, and the partnership is not dissolved by his death, nor are contracts previously made and depending on the continuance of the partnership terminated thereby.—*Lincoln v. Orthwein* (C. C. A.) 880.

The death of a partner *held* not to terminate a contract for rendition of services to the partnership during a specified time, where the partnership business was continued in accordance with a provision of the will of the deceased partner.—*Lincoln v. Orthwein* (C. C. A.) 880.

### § 3. Dissolution, settlement, and accounting.

Evidence *held* to require the submission to the jury of an action to charge defendants as partners with liability for the proceeds of mortgaged property sold by them as attorneys after the firm had in fact been dissolved, but while it was ostensibly still in existence.—*Birkhead v. De Forest* (C. C. A.) 645.

## PATENTS.

For public lands, see "Mines and Minerals," § 1.

### § 1. Subjects of patents.

The validity of a patent for an article of manufacture is not affected by the fact that such article can be produced on machines previously in use, and adapted to produce various articles, where it was not previously made, and the instruction of the patent was necessary to enable a workman to construct it on the machine.—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* (C. C. A.) 267; *Same v. Michigan Knitting Co., Id.*

### § 2. Patentability.

The fact that an article is not more useful than other similar articles does not affect its patentability: but if it is useful and new, and invention is involved in its production, it is a proper subject for a patent.—*Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.* (C. C. A.) 267; *Same v. Michigan Knitting Co., Id.*

The Mills patent, No. 613,844, for a bogus-coin detector for coin-operated vending machines, is not void for lack of utility because the device has only been used in connection with gambling machines.—*Fuller v. Berger* (C. C. A.) 274.

An invention is useful, within the meaning of the patent law, if it is used, or is designed and adapted to be used, to accomplish a good result, though in fact it is oftener used, or is as well, or even better, adapted to be used, to accomplish a bad result.—*Fuller v. Berger* (C. C. A.) 274.

The making of a sheet metal broom case for holding the upper part of the brush flaring to conform to the shape of the broom, or the making of it in a single piece joined at one side, rather than in two pieces, does not involve patentable invention.—*Lay v. Indianapolis Brush & Broom Mfg. Co.* (C. C. A.) 831.

Where the question is one of anticipation by a prior patent, the date of issue of such patent controls, and not the date of the actual invention.—*Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 282.

While the mere mechanical adaptation of an old device to an analogous use is not invention, a new application of the same in a different art, whereby a new and distinct result is produced, may be.—*Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 289.

A machine for inserting wire coil clasps in belt ends *held* to disclose a patentable combination.—*Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 295.

An old operative machine, embodying the essential features of a patented machine, shown by the testimony of a number of witnesses, who had seen and examined it, to have been constructed some three years prior to the patent by another than the patentee, *held* sufficiently substantiated to be admissible as an anticipation.—*Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 295.

The combination of two old elements in a single structure in a manner which produces a new and useful result, or an old result in a more facile, economical, and efficient way, may involve invention.—*Peters v. Union Biscuit Co.* (C. C.) 679.

The fact that a large number of inventions have been made and patents granted relating to the same subject-matter, none of which discloses the device of a later patent, nor any which so successfully accomplished the result sought, is strong evidence that such patent discloses invention.—*Peters v. Union Biscuit Co.* (C. C.) 679.

The testimony of a witness as to the existence and use of a structure, essentially the same as that of a patent, 12 or 15 years prior to the time of giving the testimony, unsupported by any exhibit, is too uncertain and unreliable to establish anticipation.—*Peters v. Union Biscuit Co.* (C. C.) 679.

Affidavits of prior public use *held* sufficient to overcome the prima facie validity of an unad-

judicated patent, and to prevent the granting of a preliminary injunction against its infringement, where uncontradicted.—Bradley v. Eccles (C. C.) 947.

The defense of prior use must be established beyond a reasonable doubt.—Young v. Wolfe (C. C.) 956.

### § 3. Applications, and proceedings thereon.

The negligence of an attorney, which works the abandonment of an application for a patent under the statute, does not constitute unavoidable delay, which will avoid the effect of such abandonment as to the applicant.—Lay v. Indianapolis Brush & Broom Mfg. Co. (C. C. A.) 831.

A second application for a patent, filed nearly three years after a prior application for the same invention had been finally rejected, was not a continuation of the old application.—Lay v. Indianapolis Brush & Broom Mfg. Co. (C. C. A.) 831.

### § 4. Reissues.

Where a reissue is for the same invention, a broader claim than that in the original patent will not invalidate it.—Fay v. Mason (C. C.) 506.

### § 5. Construction and operation of letters patent.

The claims of a patent construed with reference to the specification, including the drawings, and limited thereby.—Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. (C. C. A.) 267; Same v. Michigan Knitting Co., Id.

The scope of the claims of a patent is not restricted by verbal changes, made to meet objections of the patent office, that the claims did not clearly define the construction intended, and without abandoning any of the essential features claimed for the invention and described in the specification.—Diamond Drill & Machine Co. v. Kelly Bros. (C. C.) 282.

In a patent for a machine for making and inserting wire coil clasp fasteners for belt ends, the words "in a wire coil machine, substantially as described," found in a claim, carry nothing into the claim which is not specifically enumerated there, either for the purpose of narrowing it to avoid anticipation or broadening it to make out infringement.—Diamond Drill & Machine Co. v. Kelly Bros. (C. C.) 289.

### § 6. Title, conveyances, and contracts.

A contract between owners of patents, by which it was agreed that one should render services in inducing infringers to take licenses and should receive a share of the license fees and damages for infringement recovered, construed.—Wooster v. Trowbridge (C. C. A.) 667; Lewis v. Same, Id.

Allegations of a complaint in an action to recover the amount due under an assignment of a patent from a subsequent assignee held to entitle plaintiff to a decree in equity for the amount due.—Dancel v. United Shoe Machinery Co. (C. C.) 839.

A complaint to recover money under a contract for the assignment of a patent held in-

sufficient to state an action at law.—Dancel v. United Shoe Machinery Co. (C. C.) 839.

### § 7. Infringement.

A patentee, who has adopted a name to denote and identify the patented article, may license the use of the name in connection with the right to manufacture and sell the article, and the licensee has no right, after the expiration of the license, to continue the use of the name in connection with a different and competing article.—Adam v. Folger (C. C. A.) 260.

It is within the discretion of the court to grant a preliminary injunction against infringement of an unadjudicated patent, when defendant was a licensee thereunder until his license was canceled by the patentee, although the greater part of the time was prior to the issuance of the patent.—Adam v. Folger (C. C. A.) 260.

A bill which seeks to enjoin an unauthorized person from using a patented article, and also from using the generic name of that article, is not multifarious.—Adam v. Folger (C. C. A.) 260.

While a patent for a combination is not infringed if any one of the elements of the combination is omitted, a change in the form or the location or sequence of the elements will not avoid infringement, where they are all employed to perform the same functions, unless form, location, or sequence is essential to the result or to the novelty of the claim.—Adam v. Folger (C. C. A.) 260.

A patentee, who, after disposing of his patent, joins in forming a new company, which manufactures an infringing article, but which he claims to be a new and independent invention of his own, is liable as a contributory infringer.—Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. (C. C. A.) 267; Same v. Michigan Knitting Co., Id.

Neither the nonuse nor misuse of a patented device by the owner of the patent deprives him of the right to maintain a suit in equity to enjoin infringement.—Fuller v. Berger (C. C. A.) 274.

In a suit to enjoin infringement of a patent, an inquiry into the use made of the patented device by the complainant is irrelevant.—Fuller v. Berger (C. C. A.) 274.

Where infringement would necessarily or naturally result from the ordinary use of a device, a defendant cannot escape liability for infringement by merely showing the possibility of a different use.—Davis v. Perry (C. C. A.) 941.

Where nail holes punched in the frame of a patented device were used for fastening it to a support, but also had a functional use in connection with the operation of the device, they were patentable and protected from infringement only in respect to the latter use.—Cary Mfg. Co. v. Standard Metal Strap Co. (C. C. A.) 945.

An idea is not patentable, but only the particular mechanical device or combination for carrying it into effect.—Diamond Drill & Machine Co. v. Kelly Bros. (C. C.) 289.

A bill for infringement of three patents held not demurrable on the ground of multifariousness.—Edison Phonograph Co. v. Victor Talking Mach. Co. (C. C.) 305.

The date of invention is presumptively that of the issue of the patent, and evidence of a prior conception of the completed invention must be clear, positive, and unequivocal.—Fay v. Mason (C. C.) 506.

The rule that the burden rests upon the complainant in a suit for infringement to prove that his invention was prior to defendant's applies only where the issue is raised by defendant by giving the 30 days' notice required by Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394].—Fay v. Mason (C. C.) 506.

In proceedings by joint owners of a patent to restrain infringement, the agreement between the parties plaintiff with regard to the patent is immaterial, as concerns the defendant.—Cimiotti Unhairing Co. v. American Fur Refining Co. (C. C.) 672.

A licensee, whose license is not such as to amount to an assignment of the patent, is not a necessary party complainant in a suit for its infringement.—Peters v. Union Biscuit Co. (C. C.) 679.

The managing officers of a corporation, who actually participated in the adoption and use by the corporation of an infringing device, are liable for the infringement as joint tortfeasors.—Peters v. Union Biscuit Co. (C. C.) 679.

If there is substantial doubt as to the validity of an unadjudicated patent, and the defendant is responsible in damages, a preliminary injunction against its infringement should not be granted.—Bradley v. Eccles (C. C.) 947.

Officers of a corporation cannot be held individually liable for the infringement of a patent by the corporation, where it does not appear that they committed any act of infringement as individuals, nor that the corporation is insolvent.—Greene v. Buckley (C. C.) 955.

**PATENTS ENUMERATED.**

**GERMAN.**

57,148. Ironing machine..... 507  
77,219. Ironing machine..... 507

**UNITED STATES.**

**ORIGINAL.**

32,207. Inkstand ..... 943  
39,754. Inkstand ..... 943  
208,685. Broom ..... 831  
241,458. Knitted gloves ..... 271  
272,890. Broom ..... 831  
288,255. Paper box ..... 682  
337,299. Secondary battery ..... 672  
340,769. Feed baler..... 513  
383,258. Machine for plucking furs.. 673, 674  
399,844. Inkstand ..... 942, 943  
403,247. Reel for box straps..... 945, 946  
413,390. Inkstand ..... 942, 943  
425,672. Inkstand ..... 943, 944  
425,674. Inkstand ..... 943  
433,791. Coil clasp..... 282

449,880. Supply connection for basins and baths ..... 1019  
459,036. Sewing machine..... 839  
462,563. Knitted gloves..... 267, 268  
473,182. Packing rings..... 301  
482,965. Machine for making and inserting wire coils..... 289  
491,640. Inkstand ..... 942, 943  
511,080. Paper box..... 682  
557,766. Ironing machine..... 507  
560,819. Ironing machine..... 506  
590,297. Force-feed lubricator..... 952, 955  
593,406. Machine for making and inserting wire coils..... 296  
603,738. Bagatelle board..... 306, 307  
605,177. Inkstand ..... 941, 942  
613,844. Bogus-coin detector..... 274  
621,974. Package for biscuit..... 679  
626,069. Broom case..... 834  
638,540. Abdominal pad and hose supporter ..... 956  
652,542. Broom case..... 831  
660,277. Ironing machine..... 506  
661,334. Inkstand ..... 941, 944  
678,949. Ironing machine..... 506, 508, 511  
680,769. Water heater..... 260  
714,163. Thill coupling..... 948

**REISSUE.**

11,260. Thill coupling..... 947, 948, 949, 950  
11,664. Ironing machine..... 506

**PAYMENT.**

By receiver, see "Receivers," § 3.  
Of mortgage, see "Chattel Mortgages," § 5.  
Of price of goods sold, see "Sales," § 2.

**PERSONAL INJURIES.**

See "Negligence."  
Caused by electricity, see "Electricity."  
To employe, see "Master and Servant," § 1.  
To passenger, see "Carriers," § 3.  
To traveler on highway crossing railroad, see "Railroads," § 3.

**PETITION.**

In bankruptcy, see "Bankruptcy," § 2.  
In pleading, see "Pleading."

**PHYSICIANS AND SURGEONS.**

Liability of United States for medical attention to soldier, see "United States," § 2.

**PICKETING.**

Restraining, see "Injunction," § 1.

**PLEADING.**

*In particular actions or proceedings.*

See "Account," § 1; "Equity," § 4.  
For causing death, see "Death," § 1.  
For breach of warranty, see "Sales," § 6.  
For infringement of patent, see "Patents," § 7.

For personal injuries, see "Master and Servant," § 1.

Indictment or criminal information or complaint, see "Indictment and Information," § 4.

On insurance policy, see "Insurance," § 4.

To recover payment under contract for assignment of patent, see "Patents," § 6.

### § 1. Form and allegations in general.

A plaintiff is not required, either by the Code of Procedure of South Carolina or the practice of the federal courts, to set out in *hæc verba* a written instrument sued on in the complaint; but it is sufficient if he states its legal effect.—*Bank of Timmonsville v. Fidelity & Casualty Co. (C. C.)* 315.

### § 2. Declaration, complaint, petition, or statement.

The provision of *Cut. Comp. Laws Nev.* § 3151, that in an action upon several accounts it shall not be necessary to set out the items of such accounts, but that a bill of particulars may be demanded, has no application to a complaint setting up a number of separate causes of action in tort.—*Eisele v. Oddie (C. C.)* 695.

Under the Nevada statute, requiring a complaint setting up a number of causes of action to state them separately, a complaint is demurrable which alleges a cause of action for the seizure and detention of real estate, the destruction and detention of personal property, and an assault and personal injury, and demands judgment in a lump sum, without alleging the damages arising from either one of the alleged wrongful acts.—*Eisele v. Oddie (C. C.)* 695.

### § 3. Demurrer or exception.

Where a complaint joined partnership and individual causes of action, but the count on the partnership cause was eliminated on demurrer, the balance of the complaint was sustainable.—*Hatzel v. Moore (C. C.)* 1015.

### § 4. Filing, service, and withdrawal.

Application of an attorney for defendant for leave to withdraw his demurrer and answer to insist on the technical irregularity of the service denied.—*Barnes v. Western Union Tel. Co. (C. C.)* 550.

## POLICY.

Of insurance, see "Insurance."

## POSSESSION.

Of mortgaged property, see "Mortgages," § 1.

Retention by grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

## POST OFFICE.

### § 1. Offenses against postal laws.

In a prosecution for the use of the mails for the purpose of furthering a scheme to defraud and to further a scheme to sell counterfeit money, evidence *held* sufficient to justify a submission of the case to the jury.—*Milby v. United States (C. C. A.)* 1.

A count in an indictment for the fraudulent use of the mails *held* to sufficiently charge a scheme to defraud, within *Rev. St.* § 5480, as amended by Act March 2, 1889 [*U. S. Comp. St.* 1901, p. 3696].—*Milby v. United States (C. C. A.)* 1.

An indictment charging an intent to defraud third persons unknown, who might receive counterfeit money from purchasers from defendant, *held* to contain a sufficient allegation of an intent to defraud.—*Milby v. United States (C. C. A.)* 1.

Act March 3, 1889, amending *Rev. St.* § 5480 [*U. S. Comp. St.* 1901, p. 3696], *held* not to restrict such section to a scheme to defraud by the sale of counterfeit money, but to extend it to include the use of the mails for the sale of counterfeit money.—*Milby v. United States (C. C. A.)* 1.

Evidence *held* not to sustain a conviction under an indictment charging the use of the mails to carry out a scheme to defraud.—*O'Neil v. United States (C. C. A.)* 236.

In a prosecution for using the mails with intent to defraud, an instruction *held* erroneous as placing on defendant the burden of rebutting certain inferences of guilt arising from the evidence.—*Melton v. United States (C. C. A.)* 504.

## PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 5.

In patent office, see "Patents," § 3.

Procedure of particular courts, see "Courts."

Prosecution of actions in general, see "Action," § 1.

*In particular civil actions or proceedings.*

See "Account," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

*Particular proceedings in actions.*

See "Abatement and Revival"; "Costs"; "Damages," § 1; "Evidence"; "Judgment"; "Jury"; "Limitation of Actions"; "Pleading"; "Process"; "Removal of Causes"; "Trial."

*Particular remedies in or incident to actions.*

See "Discovery"; "Injunction"; "Receivers."

*Procedure in criminal prosecutions.*

See "Criminal Law"; "Extradition."

*Procedure in exercise of special jurisdictions.*

In admiralty, see "Admiralty"; "Collision," § 8.

In bankruptcy, see "Bankruptcy," § 2.

In equity, see "Equity."

In insolvency, see "Insolvency."

*Procedure on review.*

See "Appeal and Error"; "New Trial."

## PREFERENCES.

As act of bankruptcy, see "Bankruptcy," § 2.

By carriers, see "Carriers," § 1.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

**PREJUDICE.**

Ground for reversal in civil actions, see "Appeal and Error," § 7.

**PRELIMINARY INJUNCTION.**

See "Injunction," § 2.

**PREMIUMS.**

On loans by building and loan associations, see "Building and Loan Associations."

**PRESENTMENT.**

Of claims against estate of decedent, see "Executors and Administrators," § 1.

**PRESUMPTIONS.**

In criminal prosecutions, see "Criminal Law," § 1.

**PRINCIPAL AND AGENT.**

Agency of partner for firm, see "Partnership," § 1.

Corporate agents, see "Corporations," § 4.

**§ 1. Rights and liabilities as to third persons.**

Where a charter of a vessel purporting to be made with defendants was presented at their office to their clerk in charge, who was authorized to execute such charter in their behalf, and was signed by him with his own name, it bound defendants, in the absence of proof that the clerk notified the person presenting it that he was not acting for them.—*Rainey v. Potter* (C. C. A.) 651.

Where an agent acts for himself adversely to his principal in a given transaction, neither notice to nor knowledge of the agent can be lawfully imputed to the principal.—*Central Coal & Coke Co. v. George S. Good & Co.* (C. C. A.) 793.

**PRIORITIES.**

Of claims against estate of bankrupt, see "Bankruptcy," § 6.

**PROBABLE CAUSE.**

For prosecution, see "Malicious Prosecution," § 1.

**PROCESS.**

See "Injunction."

In action against corporation, see "Corporations," § 4.

In action against foreign corporations, see "Corporations," § 6.

**§ 1. Defects, objections, and amendment.**

Where a United States marshal is a plaintiff, and service of process is effected by his deputy,

and no intentional wrong is charged, appearance by defendant and an answer to the merits waives irregularity of process.—*Barnes v. Western Union Tel. Co.* (C. C.) 550.

**PROHIBITION.**

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

**PROMISSORY NOTES.**

See "Bills and Notes."

**PROOF.**

Taking and filing proof in equity, see "Equity," § 5.

**PROPERTY.**

Of wife, see "Husband and Wife."

Protection of rights of property by injunction, see "Injunction," § 1.

Subject to appropriation for public use, see "Eminent Domain," § 1.

Taking for public use, see "Eminent Domain."

*Particular species of property.*

See "Copyrights"; "Fixtures"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

**PROSECUTING ATTORNEYS.**

See "District and Prosecuting Attorneys."

**PUBLICATION.**

Of work before deposit of title or copies, see "Copyrights," § 1.

**PUBLIC DEBT.**

See "Municipal Corporations," § 2.

**PUBLIC IMPROVEMENTS.**

By municipalities, see "Municipal Corporations," § 1.

**PUBLIC LANDS.**

Mineral lands, see "Mines and Minerals," § 1.

**§ 1. Survey and disposal of lands of United States.**

Under Act Cong. Sept. 28, 1850 (9 Stat. 519), granting swamp lands to the state of Arkansas, the judgments of the auditor and governor of the state, by issuing patents or deeds of the state to the parties they find entitled to them, determine such right.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton, Id.*

The patent issued by the state of Arkansas to swamp lands granted to it by Act Cong. Sept. 28, 1850 (9 Stat. 519), is impervious to collateral attack.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton, Id.*

**PUBLIC USE.**

Taking property for public use, see "Eminent Domain."

**PUNISHMENT.**

For contempt of court, see "Contempt," § 2.

**QUANTUM MERUIT.**

See "Assumpsit, Action of."

**QUIETING TITLE.****§ 1. Right of action and defenses.**

Where the assessment of the property of a railroad company by a state is apparently valid, and the tax levied thereon creates a lien, a court of equity has jurisdiction of a suit to inquire into the validity of the assessment, and to enjoin the collection of the tax if found illegal.—*Kansas City, Ft. S. & M. R. Co. v. King* (C. C. A.) 614.

Only those who have a clear legal and equitable title to land, connected with possession, have any right to sue to acquire title or set aside a cloud thereon.—*Bearden v. Benner* (C. C.) 690.

In an action to quiet title, where plaintiff is not in possession, an alleged necessity for an accounting does not confer jurisdiction in equity.—*Bearden v. Benner* (C. C.) 690.

**RAILROADS.**

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers." Combinations in restraint of trade, see "Monopolies," § 1.

Taxation of railroad property, see "Taxation," § 2.

**§ 1. Indebtedness, securities, liens, and mortgages.**

The failure to record a railroad mortgage covering both real and personal property as a chattel mortgage, and to file the annual affidavits required in case of such mortgages by the Kansas statute, does not render it invalid, as against creditors of the company, where possession is taken of the mortgaged property by a receiver in a foreclosure suit, and it is sold and delivered to the purchaser before such creditors take any steps to obtain a lien thereon.—*State Trust Co. v. Kansas City, P. & G. R. Co.* (C. C.) 398.

The fact that by the terms of a railroad mortgage the trustees therein are not authorized to enter and take possession of the property until six months after a default does not preclude a court of equity from entertaining a bill to foreclose before that time, and appointing receivers, when it is found necessary for the protection of the mortgaged property and to insure the due performance of the obligations which the mortgagor owed to the public.—*State Trust Co. v. Kansas City, P. & G. R. Co.* (C. C.) 398.

A court of equity, which has sold railroad property in a foreclosure suit free from all demands against the mortgagor, except an obligation on the part of the purchaser to see that the costs, liabilities of the receivership, and such preferential claims as may be allowed are paid, will not thereafter entertain petitions of intervention by unsecured creditors, whose claims are not preferential, to charge the purchaser with their payment, on the ground that it is merely a reorganization of the old company.—*State Trust Co. v. Kansas City, P. & G. R. Co.* (C. O.) 398.

General creditors of an insolvent railroad company, who permit all of its property and funds subject to their claims to be taken and disbursed in a foreclosure receivership in payment of other liabilities, without asserting any claim thereto, have no equity to require payment from the proceeds of the mortgaged property.—*State Trust Co. v. Kansas City, P. & G. R. Co.* (C. C.) 398.

General creditors of a railroad company, who permit its property to be taken possession of by receivers, and to be sold under a decree of foreclosure for the payment of preferential debts, receivers' liabilities, and the mortgage indebtedness, without taking any steps to enforce their demands, are precluded by laches from thereafter maintaining petitions of intervention to compel payment of the same from the fund in the hands of the receivers, on the ground that such receivers took possession of and sold property not covered by the mortgage.—*State Trust Co. v. Kansas City, P. & G. R. Co.* (C. C.) 398.

**§ 2. Receivers.**

A receiver's certificates, duly issued by the court in the administration and maintenance of the property, held to have precedence over a vendor's lien on the property.—*Royal Trust Co. v. Washburn, B. & I. R. R. Co.* (C. C. A.) 11; *John O'Brien Lumber Co. v. Royal Trust Co.*, Id.

Receivers, authorized by order of court to continue the business of a railroad company, have power to contract for transportation of goods beyond their line of road, and to assume liability for the entire distance over connecting lines.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.) 873.

**§ 3. Operation.**

The question of the contributory negligence of a person injured while driving over a railroad crossing held, under the evidence, to have been properly submitted to the jury.—*Cowen v. Grabow* (C. C. A.) 258.

Evidence in an action for the destruction of stock while in the yards of a railroad company held sufficient to require the question whether the fire originated from sparks emitted by passing engines and was due to negligence to be submitted to the jury.—*Carter v. Pennsylvania R. Co.* (C. C. A.) 663.

In an action for injuries at a railroad crossing, an instruction held erroneous as entirely excluding plaintiff's contributory negligence, in case defendant was guilty of the negligence

specified.—Cleveland, C., C. & St. L. Ry. Co. v. Morton (C. C. A.) 936.

When, by agreement between railroad companies owning connecting lines, cars are transferred from one road to the other, both companies owe the duty to employés of the receiving company to exercise reasonable care to see that such cars are in proper repair.—Hoye v. Great Northern Ry. Co. (C. C.) 712.

## RATIFICATION.

Of acts of corporate officer, see "Corporations," § 4.

## RECEIVERS.

Of railroad companies, see "Railroads," § 2.  
Review of discretion of court in appointing, see "Appeal and Error," § 7.

### § 1. Nature and grounds of receivership.

The appointment of a receiver is an extraordinary remedy, and cannot properly be resorted to in a suit, the sole purpose of which is to collect a debt, where it is not alleged that the debtor is insolvent, or that he has not property subject to execution sufficient to satisfy the decree prayed for.—Joseph Dry Goods Co. v. Hecht (C. C. A.) 760.

### § 2. Appointment, qualification, and tenure.

It is error for a court to appoint a receiver without notice to defendant and an opportunity to be heard, except in cases of imperious necessity requiring immediate action, and where the rights of the plaintiff can be protected in no other way.—Joseph Dry Goods Co. v. Hecht (C. C. A.) 760.

A showing *held* insufficient to warrant the removal of a receiver.—Land Title & Trust Co. v. Asphalt Co. of America (C. C.) 996.

### § 3. Allowance and payment of claims.

A contract by a receiver, by which he agreed that he would not enforce any claim for commissions to the detriment of the claim of a creditor, does not entitle the creditor to payment from commissions allowed the receiver from funds which would otherwise have been applied in payment of claims having precedence over that of such creditor.—Bloomfield v. Roy (C. C. A.) 502.

## RECORDS.

See "Chattel Mortgages," § 2.

As notice of claims of title to realty, see "Vendor and Purchaser," § 1.

Transcript on appeal or writ of error, see "Appeal and Error," § 4.

The purpose of registry statutes is to estop the holder of the actual title, evidenced by an unrecorded deed or decree, from denying that the title of record is the real title.—Boynton v. Haggart (C. C. A.) 819; Rozell v. Boynton, Id.

## REFERENCE.

See "Arbitration and Award."

Referees in bankruptcy, see "Bankruptcy," § 5.  
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## REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

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See "Records."

## REHEARING.

See "New Trial."

## REINCORPORATION.

See "Corporations," § 5.

## REISSUE.

Of patent, see "Patents," § 4.

## RELEASE.

### § 1. Construction and operation.

A complaint against a single partner on a debt, one-half of which had been paid by the other partner, but on which both were liable, *held* not sustainable.—Hatzel v. Moore (C. C.) 1015.

## REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 8.

Of cause removed from state court, see "Removal of Causes," § 3.

## REMOVAL.

Of receiver, see "Receivers," § 3.

## REMOVAL OF CAUSES.

### § 1. Citizenship or alienage of parties.

A suit brought in a court of a state of which neither party is a resident is not removable into a federal court, on the ground of diversity of citizenship, under the judiciary act of 1887-88 [U. S. Comp. St. 1901, p. 508], unless both plaintiff and defendant waive objection to the jurisdiction of such court.—Foulk v. Gray (C. C.) 156.

Where the cause of action alleged in a complaint against a railroad company and one of its employés is based solely on the alleged negligence of the employé, no concurrent negligence of the company being charged, the cause is removable by the company, as involving a separable controversy; the requisite diversity of



citizenship and amount involved being shown.—*Helms v. Northern Pac. Ry. Co.* (C. C.) 389.

One of the defendants *held* entitled to removal of the cause, on the ground that the other defendant had no connection with the cause of action and was joined fraudulently to prevent removal.—*Ross v. Erie R. Co.* (C. C.) 703.

An action to recover for a personal injury alleged to have resulted from the concurring negligence of two defendants, each of whom owed a separate duty of care to the plaintiff, is not removable by one defendant, who is a nonresident of the state, on the ground that it involves a separable controversy.—*Hoye v. Great Northern Ry. Co.* (C. C.) 712.

### § 2. Proceedings to procure and effect of removal.

Where there was no separable controversy in an action against several defendants, one of whom had waived his right to remove his cause to the federal courts, a subsequent joint petition for removal cannot be granted.—*Abel v. Book* (C. C.) 47.

### § 3. Remand or dismissal of cause.

A defendant, by removing a cause brought in a court of a state of which neither party is a resident, waives the right to object to the jurisdiction of the federal court over him; and plaintiff also waives the right to object to the court's jurisdiction, where, after the removal, he consents to the entry of orders affecting matters in controversy.—*Fouk v. Gray* (C. C.) 156.

## REMOVAL OF CLOUD.

See "Quieting Title."

## RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

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Of intoxicating liquors, see "Intoxicating Liquors."

Of property of bankrupt, see "Bankruptcy," § 5.

Of realty, see "Vendor and Purchaser."

Of vessels by masters, see "Shipping," § 2.

### § 1. Requisites and validity of contract.

Whether a contract by which one party agrees to send to the other goods to be sold by him constitutes a bailment or a conditional sale depends on whether the sender has the right to compel a return of the thing sent, or whether the receiver has the option to pay for the same in money.—*In re Galt* (C. C. A.) 64.

### § 2. Performance of contract.

That one has knowingly received the property of the vendor under an agreement of sale, and has notified him when he received it that he accepted it as the property of a third person, and that he has paid such third person for it, does not relieve him from liability to the vendor for the purchase price.—*Central Coal & Coke Co. v. George S. Good & Co.* (C. C. A.) 793.

### § 3. Operation and effect.

Contract for sale of cheese *held* to be executory merely.—*In re Schujahn* (C. C. A.) 938; *Schott v. Glauser*, *Id.*

### § 4. Warranties.

Evidence *held* to establish an implied warranty, in a sale of oil by a manufacturer to be used in the manufacture of oilcloths, that such oil was of the same quality as that previously furnished to the purchaser and fit for the purpose for which the seller knew it was bought.—*Cleveland Linseed Oil Co. v. A. F. Buchanau & Sons* (C. C. A.) 906.

### § 5. Remedies of seller.

A contract for the sale and purchase of hops to be grown thereafter does not constitute a sale, and on the refusal of the party agreeing to buy to receive the hops when tendered at the time and place of delivery, without justification, the other party cannot recover the price in an action for goods sold and delivered, but his remedy is by an action for damages for breach of contract.—*Star Brewery Co. v. Horst* (C. C. A.) 246.

### § 6. Remedies of buyer.

Allegations of a complaint *held* sufficient to raise and support an implied warranty of fitness in a sale by a manufacturer of an article for a particular use.—*Cleveland Linseed Oil Co. v. A. F. Buchanau & Sons* (C. C. A.) 906.

In an action for breach of an implied warranty of fitness in an article sold for a particu-

lar use, the measure of damages is the actual loss sustained by the plaintiff by reason of such breach, and any evidence showing such loss is admissible.—*Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons* (C. O. A.) 906.

Where property is obtained by fraudulent representations, the seller may recover the goods in the buyer's possession and sue for the value of the part disposed of.—*In re Hildebrant* (D. C.) 992.

## SALVAGE.

### § 1. Right to compensation.

Additional expense in raising beached vessels, made necessary partly through the negligence of the wrecking company doing the work and partly through misinformation given by the owner, will be divided between them in awarding salvage to the wrecking company for its services.—*Merritt & Chapman Derrick & Wrecking Co. v. North German Lloyd* (D. C.) 17; *The Saale*, *Id.*

The fact that the owners of a salving ship were also owners of the ship salvaged does not preclude them from recovering salvage compensation from the cargo saved, where the peril which rendered the service necessary did not arise through any breach of the contract of carriage.—*Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat* (D. C.) 432.

### § 2. Amount and apportionment.

The amount earned as salvage by libellant, a wrecking company, in raising and clearing from bodies and wreckage the steamships *Bremen*, *Main*, and *Saale*, after they had been beached following the fire on the *Hoboken* dock, where they were partly burned, considered and determined.—*Merritt & Chapman Derrick & Wrecking Co. v. North German Lloyd* (D. C.) 17; *The Saale*, *Id.*

Salvage compensation awarded to tugs for services in beaching the steamship *Saale* after she had taken fire at her dock at *Hoboken*, and in assisting in putting out the fire and saving the lives of persons on board.—*Merritt & Chapman Derrick & Wrecking Co. v. North German Lloyd* (D. C.) 17; *The Saale*, *Id.*

A steamer *held* entitled to recover compensation from the cargo of another steamer belonging to the same owners, which she had in tow, for salvage services rendered in extinguishing a fire on the tow, amounting to 5 per cent. of the value of the cargo saved; the award to be divided between the owners and crew.—*Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat* (D. C.) 432.

An arrangement by one vessel to tow another belonging to the same owners, which had become disabled, did not include an agreement to render salvage services to the cargo of the tow, by extinguishing a fire which occurred without fault of either vessel, so as to preclude a recovery for such services.—*Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat* (D. C.) 432.

## SATISFACTION.

See "Release."

## SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 2.

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## SET-OFF AND COUNTERCLAIM.

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## SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage"; "Towage."

### § 1. Charters.

Evidence considered, and *held* to show that the improper loading of a chartered vessel with lumber, which resulted in a shortage of cargo, was due to the fault of the charterer in failing to supply the proper dimensions at the proper times while the loading progressed.—*The John A. Briggs* (C. C. A.) 6; *Balch v. 1,261,000 Feet of Lumber*, *Id.*

A charterer *held* not entitled to rescind a charter on the ground that the vessel did not maintain the speed she was represented to have by the owner during the negotiations, where he subchartered her for a voyage of several months, whereas the representation was made with reference to short voyages across the Atlantic, for which purpose it was understood she was to be used.—*Clydesdale Shipowners' Co. v. William W. Brauer S. S. Co.* (D. C.) 854.

### § 2. Master.

The authority of a master to sell his ship is restricted within the narrowest limits, and will be implied only in cases of actual and extreme necessity, and when it is impracticable for him to communicate with the owners.—*The Yarkand* (C. C. A.) 887.

A sale of a stranded Russian ship by the master on the recommendation of a competent board of survey, in which he concurred, *held* authorized under the circumstances and to convey a valid title.—*The Yarkand* (C. C. A.) 887.

### § 3. Liabilities of vessels and owners in general.

A ship *held* liable for the injury of a stevedore from the falling of a defective hatch cover, of which the ship's officers knew, but failed to warn the stevedores.—*The Earl of Dunmore* (D. C.) 858.

**§ 4. Carriage of goods.**

Evidence examined in an action at law by a shipper against a steamship company to recover for failure to deliver cargo, and held such as to justify the submission to the jury of the question whether the merchandise in controversy was actually received on board defendant's ship.—*Kelley v. Cunard S. S. Co.* (C. C.) 536.

Upon the issue whether goods claimed to have been shipped, but which were not delivered by the carrier, were in fact received on board, the testimony of the ship's officers whose customary duty it was to check off merchandise received aboard is received as evidence of great importance.—*Kelley v. Cunard S. S. Co.* (C. C.) 536.

Damage to sugar cargo from leakage through a manhole from a water ballast tank held to have been due to the insufficient fastening of the manhole at the time of sailing, and that the owners did not exercise due diligence to render the vessel seaworthy, so as to be exempt from liability under the provisions of the Harter act (25 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).—*American Sugar Refining Co. v. Rickinson* (D. C.) 591.

**§ 5. Carriage of passengers.**

Citizens of the United States, who shipped as horsemen on an English ship to care for mules on a voyage from this country to a foreign port under a contract by which they were to be returned free, were passengers on the return voyage, and their rights as such were governed by the laws of the United States.—*The European* (C. C. A.) 776.

Passengers by sea, other than cabin passengers, coming to the United States from a foreign port, who without necessity are furnished with bad and improper food, are entitled to recover as damages an amount equal to the amount fixed by the statute in case of short allowance.—*The European* (C. C. A.) 776.

**§ 6. Demurrage.**

That no provision was made in relation to demurrage in a contract of affreightment does not show that no demurrage was to be charged; but the rights of the parties are to be determined by the general rule as to reasonable dispatch.—*Price v. Morse Iron Works & Dry Dock Co.* (D. C.) 445.

**SLANDER.**

See "Libel and Slander."

**SPECIFICATIONS.**

In opposition to discharge of bankrupt, see "Bankruptcy," § 8.

**SPECIFIC PERFORMANCE.****§ 1. Nature and grounds of remedy in general.**

The fact that a vendor, at the time of making a contract for the sale of property, was not in such position that he could be compelled to perform an agreement with respect to a collateral

matter, not of great importance, will not defeat his right to enforce specific performance, where such fact was known to both parties, and he has placed himself in position to perform, and such that his full performance can be compelled by the court.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

An assignee for the benefit of creditors may maintain a suit for the specific enforcement of a contract by which he sold real property belonging to the assigned estate, covenanting to give a clear title, notwithstanding the existence of liens thereon, where it is agreed between him and the lienholders that they are to be paid from the proceeds of the sale, and they are made parties to the suit.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

The purchaser of a distillery held not relieved from specific performance on the ground that he would be compelled to pay taxes due the state and county or the United States on whisky owned by third parties and stored in the warehouse.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

**§ 2. Good faith and diligence.**

A tender of a deed by a vendor which is insufficient, but was intended to be in compliance with the contract, will not defeat his right to a specific performance in equity, even where a tender is essential.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

A tender of a deed by a vendor is not essential to enable him to maintain a suit for specific performance, where the purchaser has notified him that he will not comply with the contract.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

Where a contract for the sale of property consisting of both personality and realty provided that the purchaser should divide the consideration between the two deeds to be made, and should furnish the vendor with forms for such deeds, which it refused to do on demand, the vendor was not bound to tender a deed as a condition precedent to the commencement of a suit for specific performance.—*Blanton v. Kentucky Distilleries & Warehouse Co.* (C. C.) 318.

**SPEED.**

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§ 2. **Levy and assessment.** That a state board adopted a different method of valuation in assessing the property of one railroad company in the state from that applied to the property of other companies, owing to its peculiar character, does not authorize a court of equity to enjoin the levy and collection of taxes thereon, where such method was within the powers of the board and did not result in overvaluation of the property.—Kansas City, Ft. S. & M. R. Co. v. King (C. C. A.) 614.

**TELEGRAPHS AND TELEPHONES.**

§ 1. **Establishment, construction, and maintenance.**

A telegraph company, which maintains its lines on the right of way of a railroad under a lease, cannot deny the title of its landlord while it continues such occupancy, nor the right of the landlord to re-enter after the lease has been terminated.—Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 362.

A contract by which a railroad company undertakes to grant to a telegraph company the right to occupy with its line the portion of the right of way previously occupied by another company is not invalid, under the provisions of Const. Pa. prohibiting any such company from acquiring any competing line of telegraph.—Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 362.

To a suit by a lessee to determine rights under a contract between its lessor and a third party, the lessor is a necessary party.—Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 362.

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A contract between the Northern Pacific Railroad Company and the Western Union Tel-

graph Company relating to the construction of the telegraph line along the railroad's right of way *held* not in violation of Act Aug. 7, 1888, §§ 1, 2 [U. S. Comp. St. 1901, p. 3583].—*United States v. Northern Pac. Ry. Co.* (C. C.) 546.

That a subsidized railroad company, in sending telegraph messages over its own wires to points beyond its lines, made an additional charge for the designation of the connecting telegraph company, *held* not an arbitrary impost or discrimination, within Act Aug. 7, 1888, § 2 [U. S. Comp. St. 1901, p. 3583].—*United States v. Northern Pac. Ry. Co.* (C. C.) 546.

Where a telegraph company accepts a message as to the sale of a horse, and fails to deliver a written copy thereof to the person for whom it was intended, whereby the sale is defeated, the question of negligence and consequent injury is for the jury.—*Barnes v. Western Union Tel. Co.* (C. C.) 550.

## TENDER.

Of performance of contract as condition to specific performance, see "Specific Performance," § 2.

## TERMS.

Of leases, see "Landlord and Tenant," § 2.

## TITLE.

Removal of cloud, see "Quieting Title."  
Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.  
To bank deposits, see "Banks and Banking," § 2.  
To patents, see "Patents," § 6.

## TORTS.

Causing death, see "Death," § 1.

*By particular classes of parties.*

Employés, see "Master and Servant," § 2.

*Particular torts.*

See "False Imprisonment," § 1; "Libel and Slander"; "Malicious Prosecution"; "Negligence."  
Maritime torts, see "Collision."

## TOWAGE.

Collisions with tugs and vessels in tow, see "Collision," § 3.

A tug *held* liable for injury to a steamship which she was employed to take out from her slip, in which there were other vessels, and which, through the negligence or insufficient equipment of the tug, was forced against a pier.—*Baker Whiteley Coal Co. v. Neptune Nav. Co.* (C. C. A.) 247.

Where the owner of a tug was without fault, he may limit his liability for the loss of the tow.—*In re Moran* (D. C.) 556; *Atlantic, Gulf & Pacific Co. v. Luckenbach*, Id.

Where a tug had a dredge and a scow in tow, and during a storm the crew of the dredge cut loose the scow, no recovery could be had against the tug therefor.—*In re Moran* (D. C.) 556; *Atlantic, Gulf & Pacific Co. v. Luckenbach*, Id.

In an action against a tug for the loss of its tow, evidence *held* to show that the breaking of a new hawser was not the result of the negligence of the crew or the master, but arose from impediments offered by the extraordinarily adverse weather.—*In re Moran* (D. C.) 556; *Atlantic, Gulf & Pacific Co. v. Luckenbach*, Id.

In an action against a tug for the loss of its dredge, evidence *held* to show that the fact that the tug abandoned the dredge and went to a point 40 miles away without necessity, where she remained without any special purpose until all chance of rescue was past, was the proximate cause of the loss of the dredge.—*In re Moran* (D. C.) 556; *Atlantic, Gulf & Pacific Co. v. Luckenbach*, Id.

Evidence *held* to show that the stranding of a schooner while being towed through a narrow and dangerous channel was due to the failure of those in charge of the tug to exercise reasonable care and skill.—*The Somers N. Smith* (D. C.) 569; *The Crescent*, Id.

A contract that a vessel shall be towed at the risk of her owners does not relieve the tug from liability for the consequences of her failure to exercise reasonable care or skill.—*The Somers N. Smith* (D. C.) 569; *The Crescent*, Id.

The reasonable care a tug is required to exercise in the performance of a towage service is relative, depending upon the dangers of the service. If the locality is more than ordinarily dangerous, she is held to a proportionately higher degree of care and skill.—*The Somers N. Smith* (D. C.) 569; *The Crescent*, Id.

## TRADE-MARKS AND TRADE-NAMES.

### § 1. Marks and names subjects of ownership.

A person engaging in the same business as another previously doing business under the same or a similar name may not dress his goods in a manner calculated to increase the confusion and enable his goods to be sold as those of his competitor.—*Chickering v. Chickering & Sons* (C. C. A.) 69.

The word "Angostura" *held* a valid trade-mark for bitters originally made in the town of Angostura, Venezuela, and continuously used as such name since 1830, although the name of the town was changed in 1846.—*A. Bauer & Co. v. Siegert* (C. C. A.) 81.

One manufacturer cannot appropriate to his exclusive use as a trade-mark for his own goods numbers or letters long used by others to indicate quality, and which had become so known to the trade.—*Vacuum Oil Co. v. Olimax Refining Co.* (C. C. A.) 254.

### § 2. Title, conveyances, and contracts.

The corporation manufacturing and selling Benedictine, which was organized by the former

proprietor, who used and registered such name as a trade-mark, and who retained a controlling interest in the corporation, *held* not required to indicate its character as assignee in connection with the use of such trade-mark; there having been no change in the place or formula of manufacture, and substantially none in proprietorship.—*A. Bauer & Co. v. La Société Anonyme De La Distillerie De La Liqueur Bénédicte De L'Abbaye De Fécamp* (C. C. A.) 74.

A manufacturer, who gives his product a name by which it becomes generally known, and places on the packages a notice that it is made under a patent, whether truthfully or not, loses the exclusive right to use such name as a trade-name on the expiration of the patent.—*Horlick's Food Co. v. Elgin Milking Co.* (C. C. A.) 264.

Evidence *held* not to sustain the claim that an author was entitled to protection as a trade-mark of a device stamped upon an edition of his works.—*Kipling v. G. P. Putnam's Sons* (C. C. A.) 631.

### § 3. Infringement and unfair competition.

A preliminary injunction *held* properly granted, restraining defendants from unfair competition by so marking and advertising their pianos as to lead the public to believe they were the same as those long known by the name of "Chickering."—*Chickering v. Chickering & Sons* (C. C. A.) 69.

Defendant *held* chargeable with infringement of complainant's trade-mark "Benedictine," as the name of the cordial well known by such name, by the use of the name "St. Benedict," and also of unfair competition in the imitation of complainant's bottle and labels.—*A. Bauer & Co. v. La Société Anonyme De La Distillerie De La Liqueur Bénédicte De L'Abbaye De Fécamp* (C. C. A.) 74.

While no manufacturer of an article has a monopoly of form of package, or of color, or of shape of letters, or of geographical names, he is yet entitled to protection against one who imitates his packages in any or all of such matters, with the intent to deceive purchasers into buying his goods as those so imitated in dress, and in such manner as to render such deceit probable.—*A. Bauer & Co. v. La Société Anonyme De La Distillerie De La Liqueur Bénédicte De L'Abbaye de Fécamp* (C. C. A.) 74.

Defendant *held* chargeable with unfair competition in imitating the packages and labels containing complainant's cordial, known as "Chartreuse."—*A. Bauer & Co. v. Order of Carthusian Monks, Convent La Grande Chartreuse* (C. C. A.) 78.

Defendant *held* chargeable with unfair competition in imitating the bottles and labels, and appropriating the name, of "Angostura Bitters," as the name and dress of bitters made and sold in Chicago.—*A. Bauer & Co. v. Siebert* (C. C. A.) 81.

Evidence examined, and *held* not to sustain a charge of unfair competition in simulating complainant's marks or brands used on barrels of

lubricating oil.—*Vacuum Oil Co. v. Climax Refining Co.* (C. C. A.) 254.

Evidence *held* insufficient to support a charge of unfair competition against defendants, because of their publication of an edition of plaintiff's works.—*Kipling v. G. P. Putnam's Sons* (C. C. A.) 631.

## TRADE UNIONS.

Restraining interference with employes, see "Injunction," § 1.

## TREATIES.

See "Extradition," § 1.

## TRESPASS.

See "False Imprisonment."

Ejection of trespasser, see "Carriers," § 3.

## TRIAL.

See "New Trial"; "Witnesses."

Authority of agent of corporation as question for jury, see "Corporations," § 4.

Construction of contract as question for jury, see "Contracts," § 2.

Harmless error in instructions, see "Appeal and Error"; "Criminal Law," § 2.

Justification of breach of contract as question for jury, see "Contracts," § 4.

### *Proceedings incident to trials.*

Entry of judgment after trial of issues, see "Judgment," §§ 1, 2.

### *Trial of particular civil actions or proceedings.*

See "Negligence," § 3.

For failure to properly deliver telegraph message, see "Telegraphs and Telephones," § 2.

For injuries by railroad fires, see "Railroads," § 3.

For personal injuries, see "Carriers," § 3; "Master and Servant," § 1; "Railroads," § 3.

On insurance policy, see "Insurance," § 4.

### *Trial of criminal prosecutions.*

For offenses against postal laws, see "Post Office," § 1.

### § 1. Notice of trial and preliminary proceedings.

The general law and practice in Massachusetts prior to the enactment of Rev. Laws Mass. c. 173, § 11, did not so definitely limit the authority of the court and parties as to forbid an extension of the time for entry of a writ beyond the term at which it was returnable by agreement of the parties and with the consent of the court.—*United States v. O'Brien* (C. C.) 446.

### § 2. Reception of evidence.

Where a complaint alleged that a certain person was defendants' agent, and that defendants through him entered into the contract sued on, both of which allegations were denied, it is immaterial which one is proved first, and the admission of evidence of the agent's authority be-



fore the introduction of the contract was not error.—*Rainey v. Potter* (C. C. A.) 651.

A defendant cannot take advantage of his own irregularity in introducing evidence in defense, on the cross-examination of complainants' witnesses, to exclude evidence taken by complainants in rebuttal.—*Cimiotti Unhairing Co. v. American Fur Refining Co.* (C. C.) 672.

### § 3. Instructions to jury.

Evidence introduced by a defendant in support of an issue tendered by his pleading held to require its submission to the jury.—*Stoll v. Loving* (C. C. A.) 805.

## TRUSTS.

See "Mortgages."

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Trust deeds, see "Chattel Mortgages."

### § 1. Execution of trust by trustee or by court.

An instrument creating a trust fund for the benefit of mortgagees and lienholders construed, and held to require the application of the fund to the several debts in the order of their priority in the original security.—*United States v. American Loan & Trust Co.* (C. C. A.) 843.

## TUGS.

See "Towage."

## UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 3.

## UNITED STATES.

See "Customs Duties"; "Post Office."

Courts, see "Courts," §§ 2-7; "Removal of Causes."

Indians, see "Indians."

Public lands, see "Public Lands," § 1.

### § 1. Government and officers.

In general, the bond of an officer of the United States charged with the receiving and safe-keeping of public moneys creates an absolute liability for such moneys.—*United States v. Smythe* (C. C.) 30.

The superintendent of a mint is liable to the United States on his bond for currency received as public moneys, which was destroyed by fire through the negligence of a subordinate.—*United States v. Smythe* (C. C.) 30.

In an action on the bond of the superintendent of a mint to recover for public moneys received by him and not accounted for, defendant cannot set up as a defense that such moneys consisted of treasury notes, which were destroyed by fire, and that therefore the government suffered no damage.—*United States v. Smythe* (C. C.) 30.

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A superintendent of a mint, sued on his bond for public moneys, consisting of currency received and not safely kept as required by law, which he claimed was destroyed by fire, is not entitled to credit for remnants of the bills which were identified by the government expert, where no claim therefor was presented to and disallowed by the accounting officers, as required by Rev. St. § 951 [U. S. Comp. St. 1901, p. 695].—*United States v. Smythe* (C. C.) 30.

### § 2. Claims against United States.

Under Army Regulations, §§ 1452, 1457, the United States held liable on an implied contract for medical attention rendered to a soldier on the request of his commanding officer, where the United States had no facilities for rendering such services at the place where the soldier was taken ill, at the time.—*Davis v. United States* (D. C.) 190.

## UNITED STATES COMMISSIONERS.

Assault on as contempt of court, see "Contempt," § 1.

## VENDOR AND PURCHASER.

See "Sales."

Specific performance of contract, see "Specific Performance."

### § 1. Rights and liabilities of parties.

The record of a deed, neither the grantors or grantees of which appear in the recorded chain of title, is no notice to a subsequent purchaser.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton*, Id.

A subsequent purchaser of lands conveyed by a warranty deed is not charged with notice under the registry statutes of unrecorded conveyances or decrees by the fact that some prior deed in the chain of title is a quitclaim deed, or conveys only the lands which the owner therein owned.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton*, Id.

That a purchaser of lands takes his deed from his agent in the purchase, who obtained his title by a prior quitclaim deed from the vendor of the lands which he owned in a certain state, does not deprive the purchaser of the benefit of the registry statutes.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton*, Id.

Under Gould's Dig. Ark. p. 637, § 35, held, that the title of an innocent purchaser of land from defendant in a decree, who appeared by the record to be the owner thereof more than a year after the decree was rendered and before it was recorded, is superior to the title of those in whose favor the decree was rendered.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton*, Id.

An innocent purchaser for value of lands owned by his grantor in a certain state, without more definite description, may avail himself of a registry statute to estop the holders of the real title under a prior unrecorded decree or deed.—*Boynton v. Haggart* (C. C. A.) 819; *Rozell v. Boynton*, Id.

**VERDICT.**

Operation and effect as curing defects in pleading, see "Indictment and Information," § 2.  
 Review on appeal or writ of error, see "Appeal and Error," § 7.

**VERIFICATION.**

Of specifications in opposition to discharge of bankrupt, see "Bankruptcy," § 8.

**WAIVER.**

See "Estoppel."  
 Of objections to irregularity in service of process, see "Process," § 1.  
 Of objections to removal of cause to federal court, see "Removal of Causes," § 1.  
 Of right to remand cause to state court, see "Removal of Causes," § 3.

**WARRANT.**

In bankruptcy, see "Bankruptcy," § 2.

**WARRANTY.**

On sale of goods, see "Sales," §§ 4, 6.

**WATERS AND WATER COURSES.**

See "Drains."

**WILLS.**

See "Executors and Administrators."

**WITNESSES.**

See "Evidence."

Experts, see "Evidence," § 6.

**§ 1. Examination.**

The permitting of leading questions is largely discretionary, and they will not be held ground for reversal, where it is clear that they were not prejudicial.—*Rainey v. Potter* (C. C. A.) 651.

**WRITS.**

See "Process."

*Particular writs.*

See "Habeas Corpus"; "Injunction."

Writ of error, see "Appeal and Error."

**YEAR.**

Estates for years, see "Landlord and Tenant."